

TABLE 1
[Reported Share Volume in U.S.-Listed Equities during January 2009 (%)]

Trading venue	All stocks	NYSE-listed	NASDAQ-listed
NASDAQ	27.1	20.5	39.9
All Non-Exchange	26.7	26.2	31.0
NYSE Arca	17.9	15.7	15.8
NYSE	14.8	26.2	0.0
BATS	10.7	9.0	10.8
International Stock Exchange	1.3	1.4	1.4
National Stock Exchange	0.6	0.7	0.7
Chicago Stock Exchange	0.4	0.4	0.3
CBOE Stock Exchange	0.2	0.0	0.1
NYSE Alternext	0.1	0.0	0.0
NASDAQ OMX BX	0.0	0.0	0.0

The market share percentages in Table 1 strongly indicate that NYSE Arca must compete vigorously for order flow to maintain its share of trading volume. The need to attract order flow imposes significant pressure on NYSE Arca to act reasonably in setting its fees for NYSE Arca market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Arca must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. Moreover, distributing data widely among investors, and thereby promoting familiarity with the exchange and its services, is an important exchange strategy for attracting order flow.²⁰

In addition to the need to attract order flow, the availability of alternatives to NYSE Arca Trades significantly affect the terms on which NYSE Arca can distribute this market data.²¹ In setting

²⁰ See NYSE Arca Order at 74784 nn. 218–219 and accompanying text (noting exchange strategy of offering data for free as a means to gain visibility in the marketplace).

²¹ See Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). See also U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. See, e.g., *FTC v. Whole Foods Market, Inc.*, 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. See, e.g., *Leegin Creative Leather Products v. PSKS, Inc.*, 127 S. Ct. 2705 (2007); *Atlanta Richfield Co. v. United*

the fees for its NYSE Arca Trades, the Exchange must consider the extent to which market participants would choose one or more alternatives instead of purchasing the Exchange's data.²² Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.²³ In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.²⁴

The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data, as well as the core data feed, are all sources of competition in non-core data products. As Table 1 illustrates, share volume in U.S.-listed equities is widely dispersed among trading venues, and these venues are able to offer competitive data products as alternatives to NYSE Arca Trades. The Commission believes that the availability of those alternatives, as well as the NYSE Arca's compelling need to attract order flow, imposed significant competitive pressure on the NYSE Arca to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because NYSE Arca was subject to significant competitive forces in setting the terms of the proposal, the Commission will approve the proposal in the absence of a substantial countervailing basis to find that its terms nevertheless fail to meet an applicable requirement of the Act or the rules thereunder. An analysis of the proposal does not provide such a basis.

States Petroleum Co., 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Northern Pacific Railway Co. v. U.S.*, 356 U.S. 1 (1958).

²² See NYSE Arca Order at 74783.

²³ *Id.*

²⁴ *Id.*

No comments were submitted on this proposal, and the Commission notes that the proposal does not unreasonably discriminate among types of users.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,²⁵ that the proposed rule change (SR–NYSEArca–2009–05), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁶

Florence E. Harmon,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59468; File No. SR–NYSEALTR–2009–16]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by NYSE Alternext US LLC Amending Rule 300.10T—NYSE Alternext Equities To Provide a Grace Period Under That Rule for Member Organizations That Have Applied for a Trading License To Comply With Certain Exchange Rules

Correction

In notice document E9–4678 beginning on page 9651 in the issue of Thursday, March 5, 2009, make the following correction:

On page 9654, in the first column, in the first paragraph, in the second line from the bottom, “March 25, 2009” should read “March 26, 2009”.

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²⁵ 15 U.S.C. 78s(b)(2).

²⁶ 17 CFR 200.30–3(a)(12).