

competitive pressure on the NYSE to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because the NYSE 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.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁶ that the proposed rule change (SR–NYSEAmex–2009–85) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61406; File No. SR–NYSE–2009–120]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Relating to Changes in NYSE Realtime Reference Prices Service

January 22, 2010.

I. Introduction

On November 27, 2009, the New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b–4 thereunder,² a proposed rule change to add data elements to its “NYSE Realtime Reference Prices” service, to reduce the fixed monthly fee that applies to that service, and to add a usage-based fee alternative for that service. The proposed rule change was published for comment in the **Federal Register** on December 18, 2009.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes several changes to the NYSE Realtime Reference Prices service. In a recent filing,⁴ the Exchange established a fixed monthly fee for its NYSE-only market data service that allows a vendor to redistribute on a real-time basis last sale prices of transactions that take place on the Exchange. The Exchange has found that the NYSE Realtime Reference Prices service provides a low-cost service that makes real-time prices widely available to many millions of casual investors, provides vendors with a real-time substitute for delayed prices, and relieves vendors of all administrative burdens. The service allows Internet service providers, traditional market data vendors, and others (“NYSE-Only Vendors”) to make available NYSE Realtime Reference Prices on a real-time basis.⁵ NYSE Realtime Reference Prices information includes last sale prices for all securities that are traded on the Exchange.

The Exchange proposes to make the following changes to the service and its fees:

a. Data Elements

Currently, the NYSE Realtime Reference Price Service includes only prices. It does not include the size of each trade and does not include bid/ask quotations. For each security, the Exchange is proposing to add the following data elements to the service:

- High price.
- Low price.
- Cumulative volume.

The Exchange states that it anticipates that it would update these data elements every second, though initially it would update them once per minute. A security’s high (low) price would reflect the highest (lowest) price at which the security has traded on the Exchange during the trading session through the point in time at which it is disseminated. Further, the cumulative volume would reflect a security’s aggregate volume during a trading session through the point in time at which it is last disseminated. The Exchange believes that adding these data elements would make the product more attractive to the customers of NYSE-Only Vendors.

b. Reduction in the Fixed Monthly Fee

Currently, the NYSE Realtime Reference Price service features a flat, fixed monthly vendor fee of \$70,000 and no user-based fees. For that fee, a NYSE-Only Vendor may provide unlimited NYSE Realtime Reference Prices to an unlimited number of the NYSE-Only Vendor’s subscribers and customers without having to differentiate between professional subscribers and nonprofessional subscribers, without having to account for the extent of access to the data, and without having to report the number of users.

The Exchange states that it has now had experience with the product and has received feedback from its customers. As a result of the comments of the Exchange’s customers, the response to the product from the vendors most likely to subscribe to the product, and the past year’s market corrections, the Exchange is now proposing to reduce the fixed monthly fee to \$60,000. In addition, in combination with the proposed usage-based fee and the proposed addition of new data elements to the product, the Exchange hopes that the fee reduction would allow the Exchange to broaden the universe of vendors that would find the product appropriate for their business models.

The Exchange believes that the proposed reduced fee would enable Internet service providers and traditional vendors that have large numbers of casual investors as subscribers and customers to contribute to the Exchange’s operating costs in a manner that is appropriate for their means of distribution. The Exchange further believes that the proposed reduction in the fixed monthly fee for the NYSE Realtime Reference Prices service would make the product more attractive to vendors and that an increase in the number of vendors that determine to provide free access to NYSE Realtime Reference prices to their Internet users would benefit the investment community. The Exchange states that the fee reduction would also respond to the price competition provided by alternative exchanges, ECNs and the market for delayed data and would better reflect the perceived value of the NYSE product and provide a more equitable allocation of the Exchange’s overall costs to users of its facilities.

c. Usage-Based Fee

The Exchange proposes to establish as an alternative to the fixed monthly fee a fee of \$.004 for each real-time reference price that a NYSE-Only

¹⁶ 15 U.S.C. 78s(b)(2).

¹⁷ 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 61145 (December 10, 2009), 74 FR 67287.

⁴ See Securities Exchange Act Release No. 60004 (May 29, 2009), 74 FR 26905 (June 4, 2009) (SR–NYSE–2009–42).

⁵ The Exchange notes that it makes the NYSE Realtime Reference Prices available to vendors no earlier than it makes those prices available to the processor under the CTA Plan.

Vendor disseminates to its customers. The Exchange proposes to limit a NYSE-Only Vendor's exposure under this alternative fee by setting \$60,000, the same amount as the proposed fixed monthly rate, as the maximum fee that an NYSE-Only Vendor would have to pay for real-time reference prices that it disseminates in any calendar month pursuant to the per-query fee.

In order to take advantage of the per-query fee, a NYSE-Only Vendor must document in its Exhibit A that it has the ability to measure accurately the number of queries and must have the ability to report aggregate query quantities on a monthly basis.

The Exchange states that it would impose the per-query fee only on the dissemination of real-time reference prices. NYSE-Only Vendors may provide delayed data services in the same manner as they do today.

The per-query charge would be imposed on NYSE-Only Vendors, not end-users, and would be payable on a monthly basis. Because it would represent a new and additional alternative to the monthly fixed fee, NYSE-Only Vendors may elect to disseminate NYSE Realtime Reference Prices pursuant to the per-query fee rather than the fixed monthly fee.

d. Justification of Fees

The Exchange believes that the fee enables Internet service providers and traditional vendors that have large numbers of casual investors as subscribers and customers to contribute to the Exchange's operating costs in a manner that is appropriate for their means of distribution. According to the Exchange, reducing the flat monthly fee and adding a per-query payment option would reduce the costs of the service to those Internet service providers and traditional vendors. The Exchange believes that this would enable NYSE Realtime Reference Prices vendors to make a more appropriate contribution to the Exchange's operating costs.

In re-setting the level of the NYSE Realtime Reference Prices flat monthly fee and in establishing the per-query fee, the Exchange took into consideration several factors, including:

(1) The fees that Nasdaq and NYSE Arca are charging for similar services and that NYSE Amex has proposed to charge;

(2) Consultation with some of the entities that currently receive the service or that the Exchange anticipates may commence to take advantage of the service;

(3) The contribution of market data revenues that the Exchange believes is appropriate for entities that are most

likely to take advantage of the proposed service;

(4) The contribution that revenues accruing from the proposed fees would make to meet the overall costs of the Exchange's operations;

(5) The savings in administrative and reporting costs that the NYSE Realtime Reference Prices service would provide to NYSE-Only Vendors; and

(6) The fact that the proposed fees provide even more attractive alternatives to existing fees under the CTA Plan than the current flat fee, alternatives that vendors would purchase only if they determine that the perceived benefits outweigh the cost.

The Exchange believes that the levels of the fixed monthly fee and the per-query fee are consistent with the approach set forth in the order by which the Commission approved ArcaBook fees.⁶ The Exchange submits that the NYSE Realtime Reference Prices constitute "non-core data," *i.e.*, the Exchange does not require a central processor to consolidate and distribute the product to the public pursuant to joint-SRO plans. Rather, the Exchange states that it distributes the product voluntarily. In addition, the Exchange believes that both types of the competitive forces that the Commission described in the NYSE Arca Order are present in the case of NYSE Realtime Reference Prices: (i) The Exchange has a compelling need to attract order flow; and (ii) the product competes with a number of alternative products.

The Exchange states that it must compete vigorously for order flow to maintain its share of trading volume, which requires the Exchange to act reasonably in setting market data fees for non-core products such as NYSE Realtime Reference Prices. The Exchange hopes that NYSE Realtime Reference Prices will enable vendors to distribute NYSE last sale price data widely among investors, and thereby provide a means for promoting the Exchange's visibility in the marketplace.

III. Discussion and Commission Findings

The Commission has reviewed carefully the proposed rule change and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁷ In particular, the

⁶ See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) ("NYSE Arca Order").

⁷ In approving this proposed rule change, the Commission notes that it has considered the

Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,⁸ which requires that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities and Section 6(b)(5) of the Act,⁹ which requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,¹⁰ which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Finally, the Commission finds that the proposed rule change is consistent with Rule 603(a) of Regulation NMS,¹¹ adopted under Section 11A(c)(1) of the Act, which requires an exclusive processor that distributes information with respect to quotations for or transactions in an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.¹²

Under this proposal, the Exchange would (1) add high price, low price, and cumulative volume data elements to its "NYSE Realtime Reference Prices" service, (2) reduce the fixed monthly fee for the service to \$60,000, and (3) add a usage-based fee alternative of \$.004 for each real-time reference price that a vendor disseminates to its customers (capped at the monthly fee level). In order to take advantage of the usage-based fee alternative, a vendor must document in its Exhibit A that it has the ability to measure accurately the number of queries and must have the ability to report aggregate query quantities on a monthly basis.

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core

proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78f(b)(4).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(8).

¹¹ 17 CFR 242.603(a).

¹² NYSE is an exclusive processor of NYSE depth-of-book data under Section 3(a)(22)(B) of the Act, 15 U.S.C. 78c(a)(22)(B), which defines an exclusive processor as, among other things, an exchange that distributes information with respect to quotations or transactions on an exclusive basis on its own behalf.

market data fees.¹³ In the NYSE Arca Order, the Commission stated that “when possible, reliance on competitive forces is the most appropriate and effective means to assess whether the terms for the distribution of non-core data are equitable, fair and reasonable, and not unreasonably discriminatory.”¹⁴ It noted that the “existence of significant competition provides a substantial basis for finding that the terms of an exchange’s fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory.”¹⁵ If an exchange “was subject to significant competitive forces in setting the terms of a proposal,” the Commission will approve a proposal unless it determines that “there is a substantial countervailing basis to find that the terms nevertheless fail to meet an applicable requirement of the Exchange Act or the rules thereunder.”¹⁶

There are a variety of alternative sources of information that impose significant competitive pressures on the Exchange in setting the terms for distributing its market data. The Commission believes that the availability of those alternatives, as well as the NYSE’s compelling need to attract order flow, imposed significant competitive pressure on the NYSE to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because the NYSE 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.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change (SR-NYSE-2009-120) is hereby approved.

¹³ See *supra* note 6. In the NYSE Arca Order, the Commission describes in great detail the competitive factors that apply to non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

¹⁴ *Id.* at 74781.

¹⁵ *Id.* at 74781-82.

¹⁶ *Id.* at 74781.

¹⁷ 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61402; File No. NYSEAmex-2010-05]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Postponing the Implementation Date of Information Memo 10-03, Which Provides Updated Parameters for, and Guidance on the Application of, the Exchange’s Gap Quote Policy

January 22, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 19, 2010, NYSE Amex LLC (the “Exchange” or “NYSE Amex”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to change the implementation date of Information Memo 10-03, which provides updated parameters for, and guidance on the application of, the Exchange’s Gap Quote Policy (the “Policy”). The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and <http://www.nyse.com>.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text

of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to change the implementation date of Information Memo 10-03, which provides updated parameters for, and guidance on the application of, the Policy.³

The updated Policy was adopted by the Exchange and approved by the Commission in a separate rule filing.⁴ In that filing, the Commission approved the changes to the Policy contingent on their implementation within 10 business days of the date of the Commission’s approval order, *i.e.*, by January 19, 2010. On January 7, 2010, the Exchange announced these changes to the Policy through the publication of Information Memo 10-03.

As set forth in Information Memo 10-03, the Exchange proposed to implement the changes to the Policy on January 11, 2010. However, implementation of the new requirements was delayed and did not occur on January 11, 2010, as planned. The Exchange notified the public of the implementation delay by a Trader Update Notice issued on January 11, 2010, and by Information Memo 10-06 published on January 11, 2010.

Because the Exchange will not be able to implement the changes to the Policy described in Information Memo 10-03 by January 19, 2010, the Exchange now proposes that the changes to the Policy will be implemented on or before February 15, 2010, and that the Exchange will notify the public of the specific implementation date by issuing both a Trader Update Notice and an Information Memo. In addition, should the Exchange again need to change the implementation date, it will do so by issuing a Trader Update Notice and an Information Memo.

³ The Exchange’s corporate affiliate, New York Stock Exchange LLC (“NYSE”), has submitted an identical companion filing. See SR-NYSE-2010-05. Information Memo 10-03 was issued by NYSE Regulation, Inc. on behalf of both the Exchange and NYSE.

⁴ See Securities Exchange Act Release No. 61276 (January 4, 2010), 75 FR 1439 (January 11, 2010) (SR-NYSEAmex-2009-82) (approving Information Memo 10-03).

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.