

remedy for this misconduct with the remedy provided in its by-laws. NASDAQ is proposing to incorporate all the changes made by FINRA to its expedited proceedings rules into the analogous NASDAQ Rules 9552, 9554, and 9559.

## 2. Statutory Basis

NASDAQ believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,<sup>5</sup> in general and with Section 6(b)(5) of the Act,<sup>6</sup> in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. The proposed changes will conform NASDAQ's rules to recent changes made to corresponding FINRA rules, which will promote the application of consistent regulatory standards.

### B. Self-Regulatory Organization's Statement on Burden on Competition

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)<sup>7</sup> of the Act and Rule 19b-4(f)(6) thereunder.<sup>8</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate

such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. NASDAQ has provided the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change.

NASDAQ believes that the proposed rule change does not significantly affect the protection of investors or the public interest because it merely eliminates erroneous citations that, if left in the rule text, would cause investor confusion.<sup>9</sup>

NASDAQ asks that the Commission waive the 30-day pre-operative waiting period contained in Exchange Act Rule 19b-4(f)(6)(iii).<sup>10</sup> NASDAQ requests this waiver so that these corrections can be both immediately effective and operative, thus minimizing any confusion that may be caused by the differing rule sets.

The Commission acknowledges that the proposal presents no novel issues, and that it will provide a benefit to market participants by aligning Nasdaq's rules with those of FINRA. For these reasons, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day operative delay, and hereby grants such waiver.<sup>11</sup>

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2010-057 on the subject line.

### Paper Comments

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary,

<sup>9</sup> The Commission believes that this statement is incorrect. The proposed rule change does not simply eliminate erroneous citations; instead, the proposed rule change makes specific changes to align Nasdaq's rules with that of FINRA.

<sup>10</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>11</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NASDAQ-2010-057. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for web site viewing and printing in the Commission's Public Reference Room. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NASDAQ-2010-057 and should be submitted on or before June 2, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. 2010-11255 Filed 5-11-10; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62038; File No. SR-NYSE-2010-22]

### Self-Regulatory Organizations; New York Stock Exchange, LLC; Order Approving Proposed Rule Change To Make Permanent a Unit-of-Count Metric Alternative for NYSE OpenBook Products

May 5, 2010.

## I. Introduction

On March 11, 2010, the New York Stock Exchange, LLC ("NYSE" or the "Exchange") filed with the Securities

<sup>12</sup> 17 CFR 200.30-3(a)(12).

<sup>5</sup> 15 U.S.C. 78f.

<sup>6</sup> 15 U.S.C. 78f(b)(5).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to make the unit-of-count metric a permanent alternative to the traditional device fee. The proposed rule change was published for comment in the **Federal Register** on April 1, 2010.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> This order approves the proposed rule change.

## II. Description of the Proposal

### A. Unit-of-Count

The Exchange proposes to permanently implement the “Subscriber Entitlement” unit-of-count methodology in accordance with the terms set forth in the Pilot Program.<sup>5</sup> Under the Pilot Program, instead of defining the Vendor-subscriber relationship based on how the Data Feed Recipient or subscriber receives data (*i.e.*, through controlled displays or through data feeds), the Exchange proposed to adopt a more objective billing criteria. The following basic principles underlie this proposal.

#### i. Vendors.

- “Vendors” are market data vendors, broker-dealers, private network providers and other entities that control Subscribers’ access to data through Subscriber Entitlement Controls.

#### ii. Subscribers.

- “Subscribers” are unique individual persons or devices to which a Vendor provides data. Any individual or device that receives data from a Vendor is a Subscriber, whether the individual or device works for or belongs to the Vendor, or works for or belongs to an entity other than the Vendor.

- Only a Vendor may control Subscriber access to data.

- Subscribers may not redistribute data in any manner.

#### iii. Subscriber Entitlements.

- A Subscriber Entitlement is a Vendor’s permitting a Subscriber to

receive access to data through an Exchange-approved Subscriber Entitlement Control.

- A Vendor may not provide data access to a Subscriber except through a unique Subscriber Entitlement.

- The Exchange will require each Vendor to provide a unique Subscriber Entitlement to each unique Subscriber.

- At prescribed intervals (normally monthly), the Exchange will require each Vendor to report each unique Subscriber Entitlement.

#### iv. Subscriber Entitlement Controls.

- A Subscriber Entitlement Control is the Vendor’s process of permitting Subscribers’ access to data.

- Prior to using any Subscriber Entitlement Control or changing a previously approved Subscriber Entitlement Control, a Vendor must provide the Exchange with a demonstration and a detailed written description of the control or change and the Exchange must have approved it in writing.

- The Exchange will approve a Subscriber Entitlement Control if it allows only authorized, unique end-users or devices to access data or monitors access to data by each unique end-user or device.

- Vendors must design Subscriber Entitlement Controls to produce an audit report and make each audit report available to the Exchange upon request. The audit report must identify:

- A. each entitlement update to the Subscriber Entitlement Control;

- B. the status of the Subscriber Entitlement Control; and

- C. any other changes to the Subscriber Entitlement Control over a given period.

- Only the Vendor may have access to Subscriber Entitlement Controls.

The proposal does not restrict how Vendors use NYSE OpenBook data in their display services. In fact, the Exchange believes that proposal could encourage Vendors to create and promote innovative uses of NYSE OpenBook information. For instance, a Vendor may use NYSE OpenBook data to create derived information displays, such as displays that aggregate NYSE OpenBook data with data from other markets.<sup>6</sup> In addition, the proposal’s unit-of-count concepts would apply equally to all data recipients and users.

Under the proposed rule change, the Exchange would require Vendors to

count every Subscriber Entitlement, whether it be an individual person or a device. Thus, the Vendor’s count would include every person and device that accesses the data regardless of the purpose for which the individual or device uses the data. The proposal is designed to subject the count to a more objective process and simplify the reporting obligation for Vendors by eliminating current exceptions to the device-reporting obligation. For instance, the Exchange noted that Vendors were not previously required to report certain programmers and other individuals who receive access to data for certain specific, non-trading purposes but that these exceptions required the Exchange to monitor the manner end-users consume data, which adds cost for both the Exchange and customers.

To simplify the process, the Exchange proposes that Vendors would be required to report all entitlements in accordance with the following:

- i. In connection with a Vendor’s external distribution of NYSE OpenBook data, the Vendor should count as one Subscriber Entitlement each unique Subscriber that the Vendor has entitled to have access to the Exchange’s market data. However, where a device is dedicated specifically to a single individual, the Vendor should count only the individual and need not count the device.

- ii. In connection with a Vendor’s internal distribution of NYSE OpenBook data, the Vendor should count as one Subscriber Entitlement each unique individual (but not devices) that the Vendor has entitled to have access to the Exchange’s market data.

- iii. The Vendor should identify and report each unique Subscriber. If a Subscriber uses the same unique Subscriber Entitlement to gain access to multiple market data services, the Vendor should count that as one Subscriber Entitlement. However, if a unique Subscriber uses multiple Subscriber Entitlements to gain access to one or more market data services (*e.g.*, a single Subscriber has multiple passwords and user identifications), the Vendor should report all of those Subscriber Entitlements.

- iv. Vendors should report each unique individual person who receives access through multiple devices as one Subscriber Entitlement so long as each device is dedicated specifically to that individual.

- v. The Vendor should include in the count as one Subscriber Entitlement devices serving no entitled individuals. However, if the Vendor entitles one or more individuals to use the same

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 61779 (March 25, 2010), 75 FR 16537 (“Notice”).

<sup>4</sup> Letter to Elizabeth M. Murphy, Secretary, Commission, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated May 5, 2010.

<sup>5</sup> See Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131) (approving the one-year pilot program that revises the unit-of-count methodology to determine the device fees payable by data recipients (“Pilot Program”). The Commission subsequently approved an extension of the Pilot Program. See Securities Exchange Act Release No. 61780 (March 25, 2010), 75 FR 16535 (April 1, 2010) (SR-NYSE-2010-21).

<sup>6</sup> In the case of derived displays, the Vendor is required to: (1) Pay the Exchange’s device fees (described below); (2) include derived displays in its reports of NYSE OpenBook usage; and (3) use reasonable efforts to assure that any person viewing a display of derived data understands what the display represents and the manner in which it was derived.

device, the Vendor should include only the entitled individuals, and not the device, in the count.

### III. Discussion

After careful consideration, the Commission 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.<sup>7</sup> In particular, it is consistent with Section 6(b)(4) of the Act,<sup>8</sup> which requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other parties using its facilities, and Section 6(b)(5) of the Act,<sup>9</sup> which requires, among other things, that the rules of a national securities 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,<sup>10</sup> 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,<sup>11</sup> 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.<sup>12</sup>

The Exchange proposes to permanently implement the Subscriber Entitlement unit-of-count methodology in accordance with the terms set forth in the Pilot Program. According to the Exchange, the proposed rule change

would simplify the way it charges for NYSE OpenBook by changing the methodology for the unit-of-count, and this change should reduce the fees and administrative costs related to the receipt and distribution of NYSE OpenBook packages. The Exchange has indicated that its experience with the Pilot Program has been successful. The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>13</sup> The Commission has previously found that NYSE was subject to significant competitive forces in setting fees for its depth-of-book order data in the proposed rule changes that established and extended the Pilot Program's revised unit-of-count methodology.<sup>14</sup> There are a variety of alternative sources of information that impose significant competitive pressures on the NYSE in setting the terms for distributing its depth-of-book order 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,<sup>15</sup> that the proposed rule change (SR-NYSE-2010-22) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. 2010-11258 Filed 5-11-10; 8:45 am]

**BILLING CODE 8010-01-P**

<sup>13</sup> Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) ("NYSE Arca Order"). 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.

<sup>14</sup> See note 5, *supra*.

<sup>15</sup> 15 U.S.C. 78s(b)(2).

<sup>16</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62037; File No. 4-595]

### Self-Regulatory Organizations; Order Approving Minor Rule Violation Plan for EDGA Exchange, Inc.

May 5, 2010.

On March 19, 2010, EDGA Exchange, Inc. ("EDGA Exchange" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") a proposed minor rule violation plan ("MRVP") pursuant to Section 19(d)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19d-1(c)(2) thereunder.<sup>2</sup> The proposed MRVP was published for public comment on March 29, 2010.<sup>3</sup> The Commission received no comments on the proposal. This order approves EDGA Exchange's proposed MRVP.

EDGA Exchange's MRVP specifies those uncontested minor rule violations with sanctions not exceeding \$2,500 which would not be subject to the provisions of Rule 19d-1(c)(1) under the Act<sup>4</sup> requiring that a self-regulatory organization promptly file notice with the Commission of any final disciplinary action taken with respect to any person or organization.<sup>5</sup> In accordance with Rule 19d-1(c)(2), the Exchange proposed to designate certain rule violations as minor rule violations, and requested that it be relieved of the reporting requirements regarding such violations, provided it gives notice of such violations to the Commission on a quarterly basis. EDGA Exchange included in its proposed MRVP the policies and procedures currently included in EDGA Exchange Rule 8.15 ("Imposition of Fines for Minor Violation(s) of Rules") and the rule violations included in EDGA Exchange Rule 8.15.01.<sup>6</sup>

<sup>1</sup> 15 U.S.C. 78s(d)(1).

<sup>2</sup> 17 CFR 240.19d-1(c)(2).

<sup>3</sup> See Securities Exchange Act Release No. 61753 (March 22, 2010), 75 FR 15471.

<sup>4</sup> 17 CFR 240.19d-1(c)(1).

<sup>5</sup> The Commission adopted amendments to paragraph (c) of Rule 19d-1 to allow self-regulatory organizations ("SROs") to submit for Commission approval plans for the abbreviated reporting of minor disciplinary infractions. See Securities Exchange Act Release No. 21013 (June 1, 1984), 49 FR 23828 (June 8, 1984). Any disciplinary action taken by an SRO against any person for violation of a rule of the SRO which has been designated as a minor rule violation pursuant to such a plan shall not be considered "final" for purposes of Section 19(d)(1) of the Act if the sanction imposed consists of a fine not exceeding \$2,500 and the sanctioned person has not sought an adjudication, including a hearing, or otherwise exhausted his or her administrative remedies.

<sup>6</sup> On March 12, 2010, the Commission approved EDGA Exchange's application for registration as a

Continued

<sup>7</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78f(b)(8).

<sup>11</sup> 17 CFR 242.603(a).

<sup>12</sup> 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.