

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61404; File No. SR-NYSEArca-2009-108]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change Modifying the NYSE Arca Realtime Reference Prices Service

January 22, 2010.

#### I. Introduction

On December 1, 2009, NYSE Arca, Inc. ("NYSE Arca" 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"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to add data elements to its "NYSE Arca Realtime Reference Prices" 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.<sup>3</sup> 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 Arca Realtime Reference Prices service. In a recent filing,<sup>4</sup> the Exchange established a fixed monthly fee for its NYSE Arca-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 Arca 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 Arca-Only Vendors") to make available NYSE Arca Realtime Reference Prices on a real-time basis.<sup>5</sup> NYSE Arca 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 Arca Realtime Reference Prices 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 Arca-Only Vendors.

##### b. Usage-Based Fee

Currently, the NYSE Arca Realtime Reference Prices service features a flat, fixed monthly vendor fee of \$30,000 and no user-based fees. For that fee, the NYSE Arca-Only Vendor may provide unlimited NYSE Arca Realtime Reference Prices to an unlimited number of the NYSE Arca-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 proposes to establish as an alternative to the fixed monthly fee a fee of \$.004 for each real-time reference price that a NYSE Arca-Only Vendor disseminates to its customers. The Exchange proposes to limit a NYSE Arca-Only Vendor's exposure under this alternative fee by setting \$30,000, the same amount as the proposed fixed monthly rate, as the maximum fee that a NYSE Arca-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 Arca-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 will impose the per-query fee only on the dissemination of real-time reference prices. NYSE Arca-Only Vendors may provide delayed data services in the same manner as they do today.

The per-query charge would be imposed on NYSE Arca-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 Arca-Only Vendors may elect to disseminate NYSE Arca Realtime Reference Prices pursuant to the per-query fee rather than the fixed monthly fee.

##### c. 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, 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 Arca Realtime Reference Prices vendors to make a more appropriate contribution to the Exchange's operating costs.

In establishing the per-query fee, the Exchange states that it took into consideration several factors, including:

(1) the fees that Nasdaq and NYSE 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 Arca Realtime Reference Prices service would provide to NYSE Arca-Only Vendors; and

(6) the fact that the proposed fee would provide an attractive alternative to existing fees under the CTA Plan and to NYSE Arca's monthly flat fee, an alternative that vendors would purchase

<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. 61143 (December 10, 2009), 74 FR 67290.

<sup>4</sup> See Securities Exchange Act Release No. 60002 (May 29, 2009), 74 FR 26901 (June 4, 2009) (SR-NYSEArca-2009-32).

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

only if they determine that the perceived benefits outweigh the cost.

The Exchange believes that the level of the per-query fee is consistent with the approach set forth in the order by which the Commission approved ArcaBook fees.<sup>6</sup> The Exchange represents that the NYSE Arca 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 Arca 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 Arca Realtime Reference Prices. The Exchange hopes that NYSE Arca Realtime Reference Prices will enable vendors to distribute NYSE Arca 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.<sup>7</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,<sup>8</sup> 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,<sup>9</sup> 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,<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>

Under this proposal, the Exchange would (1) add high price, low price, and cumulative volume data elements to its “NYSE Arca Realtime Reference Prices” service and (2) 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 market data fees.<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup>

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 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 the 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.

### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR–NYSEArca–2009–108) is hereby approved.

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

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

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

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

<sup>12</sup> NYSE Arca is an exclusive processor of NYSE Arca 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.

<sup>13</sup> 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.

<sup>14</sup> *Id.* at 74781.

<sup>15</sup> *Id.* at 74781–82.

<sup>16</sup> *Id.* at 74781.

<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30–3(a)(12).

<sup>6</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21) (“NYSE Arca Order”).

<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).