

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59681; File No. SR-NYSE-2009-37)

April 1, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Implementing a Cap on Vendors' Administrative Charges for NYSE OpenBook

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 March 26, 2009, the New York Stock Exchange LLC ("NYSE" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 introduce a cap on the monthly charges that broker-dealers and vendors are required to pay for their use of NYSE OpenBook data for the purposes of administering their provision of NYSE OpenBook product offerings. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

NYSE OpenBook responds to the desire of some market participants for depth-of-book data. It is a compilation of limit order data that the Exchange provides to market data vendors through a data feed.

Recently, the Commission approved the Exchange's proposed rule change to, among other things, establish a one-year pilot program to simplify and modernize market data administration (the "Unit of Count Filing").³ It proposed to do so by redefining some of the basic "units of measure" that vendors are required to report to the Exchange and on which the Exchange bases its fees for its NYSE OpenBook product packages.

Previously, the Exchange required broker-dealers and vendors to report and pay for, among other devices, all devices that they use to administer their provision of NYSE OpenBook services to their external customers. Under the Unit of Count Filing, in connection with a vendor's internal distribution of NYSE OpenBook data, the vendor would be required to count as one fee-liable entitlement each unique individual (but not devices) that the vendor has entitled to have access to the Exchange's NYSE OpenBook data. This would include vendor personnel whose sole function is to administer the vendor's market data services externally, that is, to the vendor's customers.

³ See Release No. 34-59544; 74 Federal Register 11162 (March 16, 2009); File No. SR-NYSE-2008-131.

After discussions with vendors, the Exchange seeks to simplify, limit, and clarify the vendor's payment obligation for administering NYSE OpenBook services. For that reason, the Exchange proposes to modify its policy regarding the payment of fees in respect of each unique individual that is affiliated with the vendor, and to whom the vendor distributes NYSE OpenBook data internally for administrative purposes. A person is "affiliated" with the vendor if he or she is an officer, partner, member, or employee of the vendor or an affiliate of the vendor or enjoys a similar status with the vendor or affiliate.

Thus, the Exchange proposes to continue its practice of charging user fees for internal use of data, but proposes to establish a maximum monthly amount of \$1500 (the "Monthly Maximum") for entitlements consisting of unique individuals within a vendor's organization to whom the vendor distributes NYSE OpenBook data for the sole purpose of administering the vendor's distribution of NYSE OpenBook services externally to the vendor's customers. The Monthly Maximum of \$1500 means that a vendor would have to pay for no more than 25 NYSE OpenBook administrative personnel.

For this purpose, the Exchange deems "administer" to mean monitoring and surveilling the receipt and use of NYSE OpenBook data by the vendor's customers, marketing NYSE OpenBook data to potential new customers, performing the Exchange-required reporting function and the performance of similar functions relating to the vendor's provision of NYSE OpenBook services to its external customers. It does not include, among other things, the use of OpenBook data to monitor securities, to make trading decisions, to value portfolios, in news rooms, or otherwise to use NYSE OpenBook data to perform any functions not related to the provision of NYSE OpenBook functions to the vendor's external customers.

The purpose of this exception is to permit vendors to cap their financial exposure in performing their NYSE OpenBook administrative functions and to simplify the tracking and reporting of devices used in the administrative function. The vendor need only divide its internal personnel using the data into two categories: those using the data to support the vendor's external service, and those using the data for any other purposes. Alternatively, a vendor that makes no other internal use of data other than supporting its external service can decide to pay the monthly maximum without the need to track and report any internal usage. At the same time, the Exchange must guard against potential abuse of this exception. Therefore, the Exchange reserves the rights under its contracts with vendors to monitor its use closely and to deny application of this exception if it discovers that a vendor is misusing it, such as by allowing personnel to use NYSE OpenBook for non-administrative functions.

Any vendor that distributes NYSE OpenBook data externally to customers is entitled to take advantage of the Monthly Maximum, though it anticipates that only the largest vendors devote sufficient personnel to administrative functions to take advantage of the Monthly Maximum. In the Exchange's view, limiting the fee exposure of its largest vendors does not unreasonably discriminate against other vendors under Section 603(a)(2) of Regulation NMS.

NYSE OpenBook is subject to significant competitive forces and the establishment of the Monthly Maximum represents a response to that competition. As the Exchange stated in the Unit of Count Filing, the Exchange competes intensely for order flow, competing with the other 10 national securities exchanges, with ECNs, with quotes posted in FINRA's ADF and TRFs, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow. The competition is free produce [sic] depth-of-book products, and Nasdaq, NYSE Arca, and BATS are among those who currently do.

In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the Monthly Maximum for NYSE OpenBook fails to meet the requirement of the Act.

In sum, the Exchange believes that the proposed Monthly Maximum is fair and reasonable.

2. Statutory Basis

The basis under the Act for this proposed rule change are the requirement under Section 6(b)(4)⁴ 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 the requirements under Section 6(b)(5)⁵ that the rules of an exchange be designed to promote just and equitable principles of trade and to remove impediments to, and perfect the mechanism of, a free and open market and a national market system.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

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

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which

⁴ 15 U.S.C. 78f(b)(4).

⁵ 15 U.S.C. 78f(b)(5).

the Exchange consents, the Commission will:

- (A) by order approve the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

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. Please include File No. SR-NYSE-2009-37 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2009-37. 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 inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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-NYSE-2009-37 and should be submitted on or before [insert date 21 days from the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶

Florence E. Harmon
Deputy Secretary

⁶ 17 CFR 200.30-3(a)(12).