

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59662; File No. SR-NYSEArca-2009-25)

March 31, 2009

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change as Modified by Amendment No. 2 Thereto to Extend the Pilot Program for NYSE Arca Realtime Reference Prices Service

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> notice is hereby given that on March 20, 2009, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. On March 27, 2009, the Exchange submitted Amendment No. 1 to the proposed rule change, which was withdrawn.<sup>3</sup> On March 30, 2009, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons, and is approving the proposal, as modified by Amendment No. 2, on an accelerated basis.

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

The Exchange proposes to extend the expiration date of its pilot program for the NYSE Arca Realtime Reference Prices service until June 30, 2009. There is no new rule text.

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

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

<sup>3</sup> On March 30, 2009, the Exchange withdrew Amendment No. 1.

<sup>4</sup> References to Amendment No. 1 in Amendment No. 2 should be read as Amendment No. 2. Telephone call between Theodore Venuti and Sarah Albertson, Division of Trading and Markets, Commission, and Bridget Spaulding, Managing Director, NYSE Market Data, March 31, 2009.

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 III 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

In File No. SR-NYSEArca-2008-96, the Exchange established a pilot program that allows the Exchange to test the viability of a new 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 ("NYSE Arca Realtime Reference Prices") and to establish a flat monthly fee for that service. The Commission approved that pilot program on August 29, 2008.<sup>5</sup>

The Exchange intends for the NYSE Arca Realtime Reference Prices service to accomplish three goals:

1. to provide a low-cost service that will make real-time prices widely available to millions of casual investors;
2. to provide vendors with a real-time substitute for delayed prices; and
3. to relieve vendors of administrative burdens.

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<sup>5</sup> See Securities Exchange Act Release No. 58444 (August 29, 2008), 73 FR 51872 (September 5, 2008) (SR-NYSEArca-2008-96).

This pilot program is similar to pilot programs that the Nasdaq Stock Market, Inc. (“Nasdaq”)<sup>6</sup> and the New York Stock Exchange, LLC (“NYSE”)<sup>7</sup> have established.

The pilot program 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>8</sup> The NYSE Arca Realtime Reference Price information includes last sale prices for all securities that trade on the Exchange. It includes only prices, and not the size of each trade and not bid/asked quotations.

It features a flat, fixed monthly vendor fee, no user-based fees, no vendor reporting requirements, and no professional or non-professional subscriber agreements.

The Exchange established November 1, 2008 as the end date for the pilot program. The Exchange then extended that end date to December 31, 2008<sup>9</sup> and then extended it to March 31, 2009.<sup>10</sup> The Exchange now seeks to extend that end date to June 30, 2009.<sup>11</sup> Prior to the end of the pilot period, the Exchange will assess its experience with the product and either will submit a proposed rule change that seeks to extend or modify the pilot program or to make it permanent,

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<sup>6</sup> See Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (SR-NASDAQ-2006-060); 57973 (June 16, 2008), 73 FR 35430 (June 23, 2008) (SR-NASDAQ-2008-050).

<sup>7</sup> See Securities Exchange Act Release No. 57966 (June 16, 2008), 73 FR 35182 (June 20, 2008) (SR-NYSE-2007-04).

<sup>8</sup> The Exchange notes that it will make the NYSE Arca Realtime Reference Prices available to vendors no earlier than it makes those prices available to the processor under the CTA Plan.

<sup>9</sup> See Securities Exchange Act Release No. 58895 (October 31, 2008), 73 FR 66956 (November 12, 2008) (SR-NYSEArca-2008-122).

<sup>10</sup> See Securities Exchange Act Release No. 59184 (December 30, 2008), 74 FR 755 (January 7, 2009) (SR-NYSEArca-2008-143).

<sup>11</sup> NYSE Arca will file a proposed rule change within thirty days of this Partial Amendment No. 2 seeking to make the NYSE Arca Realtime Reference Price service a permanent service rather than a pilot program.

or it will announce publicly that it does not seek to extend the pilot program beyond the program's termination date.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4)<sup>12</sup> 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)<sup>13</sup> that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange believes that the pilot program benefits investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the NYSE Arca Realtime Reference Prices service. Extending the pilot program will extend those benefits while the Exchange assesses the service.

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

The Exchange does not believe that this proposed rule change will result in 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

The Exchange has not received any unsolicited written comments from members or other interested parties.

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<sup>12</sup> 15 U.S.C. 78f(b)(4).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

### III. 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-NYSEArca-2009-25 on the subject line.

#### Paper Comments:

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

All submissions should refer to File Number SR-NYSEArca-2009-25. 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 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-NYSEArca-2009-25 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

The Commission finds that the proposed rule change, to extend the pilot program for three months, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>14</sup> In particular, it is consistent with Section 6(b)(4) of the Act,<sup>15</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>16</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>17</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

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<sup>14</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

<sup>17</sup> 15 U.S.C. 78f(b)(8).

603(a) of Regulation NMS,<sup>18</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>19</sup>

The Commission approved the fee for NYSE Arca Realtime Reference Prices for a pilot period which runs until March 31, 2009.<sup>20</sup> The Commission notes that the Exchange proposes to extend the pilot program for three months. The Exchange proposes no other changes to the existing pilot program. In addition, the Commission notes that it did not receive any comments on the previous extensions of the pilot program.<sup>21</sup>

On December 2, 2008, the Commission issued an approval order (“Order”) that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for “non-core” market data products, such as NYSE Arca Realtime Reference Prices.<sup>22</sup> The Commission believes that NYSE Arca’s proposal to temporarily extend the pilot program is consistent with the Act for the reasons noted in the Order.<sup>23</sup> The Commission believes that approving NYSE Arca’s proposal to temporarily extend the pilot program that imposes a fee for NYSE Arca Realtime Reference Prices for an additional three months will be beneficial to investors and in the public interest, in that it is intended to allow continued broad public

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<sup>18</sup> 17 CFR 242.603(a).

<sup>19</sup> NYSE Arca is an exclusive processor of its last sale 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 data on an exclusive basis on its own behalf.

<sup>20</sup> See supra notes 5, 9, and 10.

<sup>21</sup> See supra notes 9 and 10.

<sup>22</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data).

<sup>23</sup> See supra notes 5, 9, and 10.

dissemination of increased real-time pricing information. In addition, extending the pilot program for an additional three months will allow the public to comment on, and the Commission to analyze consistent with the Order and in light of Section 19(b) of the Act, a proposal to permanently approve the fee for NYSE Arca Realtime Reference Prices.<sup>24</sup>

The Commission finds good cause for approving the proposed rule change, as modified by Amendment No. 2, before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. Accelerating approval of this proposal is expected to benefit investors by continuing to facilitate their access to widespread, free, real-time pricing information contained in NYSE Arca Realtime Reference Prices. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>25</sup> to approve the proposed rule change, as modified by Amendment No. 2, on an accelerated basis to extend the operation of the pilot until June 30, 2009.

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<sup>24</sup> The Exchange has represented that it will file a proposed rule change within thirty days of filing Amendment No. 2 to the proposal seeking to make the NYSE Arca Realtime Reference Price service a permanent service rather than a pilot program. See supra note 11.

<sup>25</sup> 15 U.S.C. 78s(b)(2).

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSEArca-2009-25), as modified by Amendment No. 2, is hereby approved on an accelerated basis until June 30, 2009.

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

Florence E. Harmon  
Deputy Secretary

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<sup>26</sup> 17 CFR 200.30-3(a)(12).