

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61779; File No. SR-NYSE-2010-22)

March 25, 2010

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Make Permanent a Unit-of-Count Metric Alternative for NYSE OpenBook

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> notice is hereby given that on March 11, 2010, 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

Last March, the New York Stock Exchange LLC (the “Exchange”) introduced as a pilot program (the “Pilot Program”) a revised unit-of-count metric for determining the fees payable by data recipients.<sup>3</sup> It is now proposing to make that revised unit-of-count metric a permanent alternative to the traditional device fee. The text of the proposed rule change is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), on the Commission’s Web site at [www.sec.gov](http://www.sec.gov), at NYSE, and at the Commission’s Public Reference Room.

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

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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> See Release No. 34-59544 (March 9, 2009); 74 Federal Register 11162 (March 16, 2009); File No. SR-NYSE-2008-131 (the “Pilot Program Filing”).

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

a. Subscribers and Data Feed Recipients.

After consultation with the Exchange’s market data customers, including large and small redistributors and broker-dealers, the Exchange found that the marketplace desires a simplified fee structure for its products, especially regarding the methodology for counting the “devices” that are the subject of the device fee. As technology has made it increasingly difficult to define “device” and to control who has access to devices, the markets have struggled to make device counts uniform among their customers.

i. The Original Model.

The markets created the “device fee” metric in 1960, when market data vendors first made interrogation services available to their subscribers. During the 1960s, 1970s and 1980s, a vendor would typically link its servers to display devices that the vendor provided to its subscribers. The linkages allowed the subscriber to interrogate the vendor’s database for vendor-prepared displays of stock prices and quotes. The subscriber could do no more than view the vendor-provided displays of prices and quotes. The vendor reported the number of display devices through which each subscriber could receive the vendor’s displays and the exchanges imposed fees on the subscribers based on that number of devices.

The markets deemed any party that received access to the price and quote data feeds to constitute something other than a subscriber. Access to a data feed meant the receipt of prices and quotes in a manner that allowed the recipient to manipulate and re-format the data (as opposed to a subscriber's receipt of the vendor's read-only controlled displays). Such parties ("Data Feed Recipients") used their data feed access:

- A. to create interrogation services that they would vend to their subscribers;
- B. to make the data feeds available to other parties; or
- C. to use the data internally for display, analysis, portfolio valuation or other purposes other than display.

The markets imposed access fees on such parties, fees that the markets have never imposed on subscribers' receipt of controlled display services.

ii. The Impact of Technology.

During and after the 1980s, the markets and supporting technology evolved dramatically. Networks of personal computers replaced direct links between the vendor and each subscriber device as the standard means for distributing a vendor's interrogation service to subscribers. Vendors and subscribers applied "user id and password" entitlements to control access to the vendor's interrogation services. In time, controlled display devices became more sophisticated and enabled the subscriber to use the data for analysis and other non-display functions, functions previously reserved only for Data Feed Recipients. Vendors began to provide services in which they controlled access, but no longer provided pre-set displays of data. This evolutionary process blurred the historic distinctions between Data Feed Recipients' uses of data and subscribers' uses of data. As a result, the traditional measures for billing purposes (i.e., device

fees for subscribers; access, program classification and device fees for Data Feed Recipients) became difficult to apply. This has resulted in unnecessary burdens and costs to customers and exchanges alike.

b. The Pilot Program's Solution.

Under the Pilot Program and a wider initiative to simplify and modernize market data administration, the Exchange provided an alternative to traditional “device” counts. Under the alternative, the Exchange redefined 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.

Under the Pilot Program, the Exchange no longer defines the Vendor-subscriber relationship based on the manner in which a Data Feed Recipient or subscriber receives data (i.e., through controlled displays or through data feeds). Instead, the Exchange adopted billing criteria that are more objective. The following basic principles underlie the Pilot Program.

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 permissioning of 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 permissioning 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 Exchange recognizes that each Vendor and Subscriber will use NYSE OpenBook data differently and that the Exchange is one of many markets with whom Vendors and Subscribers may enter into arrangements for the receipt and use of data. In recognition of that, the Pilot Program does not restrict how Vendors may use NYSE OpenBook data in their display services and encourages 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>4</sup>

The Pilot Program does not discriminate among data recipients and users, as the new “unit of measure” concepts would apply equally to everyone.

c. Unit-of-Count Rules.

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<sup>4</sup> In the case of derived displays, the Vendor is required to: (a) pay the Exchange’s device fees (described below); (b) include derived displays in its reports of NYSE OpenBook usage; and (c) 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.

Subject to the rules set forth below, the Pilot Program requires Vendors to count every Subscriber Entitlement, whether it be an individual person or a device. The Vendor must include in the count every person and device that has access to the data, regardless of the purposes for which the individual or device uses the data. The Pilot Program also eliminates exceptions to the device-reporting obligation, thereby subjecting the count to a more objective process and simplifying the reporting obligation for Vendors. Previously, the Exchange required Vendors to report certain programmers and other individuals who receive access to data for certain specific, non-trading purposes. These exceptions required the Exchange to monitor the manner through which end-users consume data and added cost for both the Exchange and customers. To simplify the process, the Pilot Program requires Vendors to report all entitlements in accordance with the following rules.

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

d. Permanent Approval.

The Pilot Program has provided an opportunity for the Exchange and its customers to assess specific usage issues and to enable the Exchange to solicit feedback from customers and other industry participants.

The Exchange believes that its customers have viewed the “Subscriber Entitlement” revised unit-of-count metric favorably and that the revised metric more closely aligns with current data consumption for many of them. It has reduced costs for the Exchange’s customers, and has simplified and modernized market data administration. It has subjected the count to a more objective process and simplified the reporting obligation for Vendors. The Exchange believes that the “Subscriber Entitlement” metric will serve as a model for additional pricing efficiencies.



For these reasons, the Exchange proposes to make permanent the “Subscriber Entitlement” unit-of-count methodology in accordance with the terms set forth in the Pilot Program.

e. Impact of Pilot Program.

Many Vendors have taken advantage of the “Subscriber Entitlement” unit-of-count methodology under the Pilot Program. Because that methodology reduces their administrative costs and, in some cases, essentially replaces the \$5,000 monthly NYSE OpenBook fee with a \$60 monthly “Subscriber Entitlement” fee applicable to certain of their customers, they have installed the controls and procedures necessary to count Subscriber Entitlements. For other Vendors, the new methodology does not fit their business models as well and they have elected to stay with the traditional “device” counts. The Exchange believes that the extent to which Vendors have embraced “Subscriber Entitlements” underscores the success of the Pilot Program and underlies the Exchange’s proposal to seek permanent approval of the “Subscriber Entitlement” unit-of-count methodology.

2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the “Act”) for this proposed rule change is the requirement under Section 6(b)(4)<sup>5</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>6</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.

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<sup>5</sup> 15 U.S.C. 78f(b)(4).

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

The Exchange believes that the “Subscriber Entitlement” unit-of-count alternative benefits investors because it is more closely aligned with current data consumption, reduces costs for the Exchange's customers, and potentially serves as a model for additional pricing efficiencies.

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 Exchange Act.

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

The Exchange has not solicited, and does not intend to solicit, comments regarding this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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 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](mailto:rule-comments@sec.gov). Please include File No. SR-NYSE-2010-22 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-2010-22. 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, 100 F Street, NE, Washington, DC 20549, 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-2010-22 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.<sup>7</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>7</sup> 17 CFR 200.30-3(a)(12).