SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59543; File No. SR-NYSE-2008-132)

March 9, 2009

Self-Regulatory Organizations; New York Stock Exchange, LLC; Order Approving Proposed Rule Change to Introduce a NYSE Order Imbalance Information Fee

I. Introduction

On December 19, 2008, the New York Stock Exchange, LLC ("NYSE" or the "Exchange) filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change to introduce a fee for access to its NYSE Order Imbalance Information datafeed. The proposed rule change was published for comment in the Federal Register on January 13, 2009.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to make the NYSE Order Imbalance Information datafeed available as a stand-alone market data product, separate and apart from NYSE OpenBook, and proposes to charge recipients of the NYSE Order Imbalance Information datafeed $500 per month.

Currently, NYSE makes available to recipients of NYSE OpenBook an additional datafeed containing Order Imbalance Information. NYSE Order Imbalance Information is a datafeed of real-time order imbalances that accumulate prior to the opening of trading on the Exchange and prior to the close of trading on the Exchange. These orders are subject to

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 59202 (January 6, 2009), 74 FR 1744.

execution at the market's opening or closing price, as the case may be, and represent issues that are likely to be of particular trading interest at the opening or closing. The Exchange distributes information about these imbalances in real-time at specified intervals prior to the opening and closing auctions. NYSE Order Imbalance Information also includes the imbalance information that the Exchange is required to disseminate under NYSE Rule 123C(5), as well as automated real-time streaming order imbalance information at specified intervals.

The Exchange believes that by making NYSE Order Imbalance Information datafeed available as a stand-alone market data product it would enable all investors to gain access to information regarding opening and closing imbalances on the Exchange, especially because the Exchange is not imposing end-user fees, is not requiring end-users to sign contracts and is making vendor receipt and use of the information inexpensive and very few administrative burdens (e.g., no reporting requirements and no end-user contracts). Currently, many investors have not been able to access this data because they do not subscribe to the NYSE OpenBook services. The Exchange anticipates that this will provide important information to millions of investors.

Initially, the Exchange proposes to make order imbalance information available at the following intervals.

For opening order imbalances:

- Every five minutes between 8:30 am EST and 9:00 am EST.
- Every one minute between 9:00 am EST and 9:20 am EST.
- Every 15 seconds between 9:20 am EST and the opening (or 9:35 am EST if the opening is delayed).

For closing order imbalances:

- Every fifteen seconds between 3:40 pm EST and 3:50 pm EST.

- Every five seconds between 3:50 pm EST and 4:00 pm EST.

If the Exchange were to change these intervals, it would notify NYSE Order Imbalance Information recipients in advance and/or post the changes on the Exchange's website.

The Fee.

The proposed fee of $500 per month for recipients of the NYSE Order Imbalance Information datafeed applies whether the recipient receives the datafeed directly from the Exchange or indirectly from an intermediary. The fee entitles the datafeed recipient to make displays of that information available to an unlimited number of subscribers for no extra charge. The Exchange is not proposing to impose an end-user or display device fee on those subscribers.

The fee would allow vendors to redistribute NYSE Order Imbalance Information: (i) without having to differentiate between professional subscribers and nonprofessional subscribers; (ii) without having to account for the extent of access to the data; (iii) without having to procure contracts with its subscribers for the benefit of the Exchange; and (iv) without having to report the number of its subscribers.

By establishing the access fee at what it terms as an inexpensive rate and declining to impose an end-user fee on the consumption of NYSE Order Imbalance Information, the Exchange states that it seeks to enable all investors to gain access to information regarding opening and closing imbalances on the Exchange. The Exchange believes that the fee enables the investment community that has an interest in the receipt of order imbalance information to contribute to the Exchange's operating costs in a manner that is appropriate for this market data product.

Continued Distribution Through NYSE OpenBook.

The Exchange would continue to permit NYSE OpenBook datafeed recipients to receive the NYSE Order Imbalance Information datafeed as part of the NYSE OpenBook package without having to pay the $500 fee or any other additional charge. Those NYSE OpenBook datafeed recipients may then redistribute the NYSE Order Imbalance Information to any of their subscribers, whether or not the subscriber also receives NYSE OpenBook information. The Exchange imposes no end-user charge on those subscribers.

Contracts.

The Exchange proposes to provide the NYSE Order Imbalance Information datafeed available under the same contracting arrangement that the Commission has approved for the receipt and use of market datafeeds under the CTA and CQ Plans. That arrangement contemplates that each datafeed recipient enter into the Commission-approved standard form of "Agreement for Receipt and Use of Market Data" that Network A uses for data redistributors and other parties that use the data for purposes other than interrogation.[4] Exhibit A to each of those agreements would need to be updated to reflect the receipt and use of NYSE Order Imbalance Information. The Exchange states that this arrangement would not require an end-user of the information (other than a data feed recipient) to enter into any agreement.

III. Discussion

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

[4] The Participants in the CTA and CQ Plans first submitted the Consolidated Vendor Form to the Commission for immediate effectiveness in 1990. See Release No. 34-28407 (September 6, 1990); 55 FR 37276 (September 10, 1990) (File No. 4-281). The Commission approved a revised version of it in 1996 in conjunction with the participants' restatement of the CTA and CQ Plans. See Release No. 34-37191 (May 9, 1996); 61 FR 24842 (May 16, 1996) (File No. SR-CTA/CQ-96-1).

thereunder applicable to a national securities exchange. In particular, it is consistent with Section 6(b)(4) of the Act,[5] 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,[6] 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,[7] 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,[8] 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.[9]

The Commission has reviewed the proposal using the approach set forth in the NYSE

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5 15 U.S.C. 78f(b)(4).

6 15 U.S.C. 78f(b)(5).

7 15 U.S.C. 78f(b)(8).

8 17 CFR 242.603(a).

9 NYSE is an exclusive processor of NYSE 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.

Arca Order for non-core market data fees.[10] 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."[11] 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."[12] 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."[13]

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data.[14] Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to

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10 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 a variety of competitive factors that apply to exchanges when distributing non-core market data products. The Commission hereby incorporates by reference the data and analysis from the NYSE Arca Order into this order.

11 Id. at 74771.

12 Id. at 74782.

13 Id. at 74781.

14 Id. at 74779.

joint-SRO plans.[15] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[16] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[17] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces.[18] The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603. Because NYSE's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

The proposed rule change should benefit investors by facilitating wider availability of NYSE Order Imbalance Information. The proposal would allow market participants that are currently not subscribers to the NYSE OpenBook market data product to receive NYSE Order Imbalance Information as a stand-alone product. Vendors would be allowed to redistribute the Order Imbalance Information to an unlimited number of subscribers for no extra charge. The Commission notes that under the proposal even though NYSE Order Imbalance Information would be sold as a stand-alone product, that NYSE OpenBook datafeed recipients would continue to receive the Order Imbalance datafeed without having to pay any additional charge. In addition, the Commission notes that those NYSE OpenBook datafeed recipients would then be

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15 Id. See 17 CFR 242.603(b). ("Every national securities exchange on which an NMS stock is traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.").

16 NYSE Arca Order, supra note 10, at 74779.

17 Id.

18 Id.

able to redistribute without charge the NYSE Order Imbalance Information to any of their subscribers, whether or not the subscriber also receives NYSE OpenBook information.

The NYSE Open Imbalance Information product that is before the Commission is a non-core data product and, as in the Commission's NYSE Arca Order analysis, at least two broad types of significant competitive forces applied to NYSE in setting the terms of this proposal: (i) NYSE's compelling need to attract order flow from market participants;[19] and (ii) the availability to market participants of alternatives to purchasing NYSE's data.

Attracting order flow is the core competitive concern of any equity exchange, including NYSE. Attracting order flow is an essential part of an NYSE's competitive success. If NYSE cannot attract order flow to its market, it will not be able to execute transactions. If NYSE cannot execute transactions on its market, it will not generate transaction revenue. If NYSE cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability.

Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of January 2009:[20]

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19 Id. at 74782. ("Attracting order flow is the core competitive concern of any equity exchange—it is the "without which, not" of an exchange's competitive success. If an exchange cannot attract orders, it will not be able to execute transactions. If it cannot execute transactions, it will not generate transaction revenue. If an exchange cannot attract orders or execute transactions, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue.").

20 Source: ArcaVision (available at www.arcavision.com).

Table 1 Reported Share Volume in U.S-Listed Equities during January 2009 (%)			
Trading Venue	**All Stocks**	**NYSE-Listed**	**NASDAQ-Listed**
NASDAQ	27.1	20.5	39.9
All Non-Exchange	26.7	26.2	31.0
NYSE Arca	17.9	15.7	15.8
NYSE	14.8	26.2	0.0
BATS	10.7	9.0	10.8
International Stock Exchange	1.3	1.4	1.4
National Stock Exchange	0.6	0.7	0.7
Chicago Stock Exchange	0.4	0.4	0.3
CBOE Stock Exchange	0.2	0.0	0.1
NYSE Alternext	0.1	0.0	0.0
NASDAQ OMX BX	0.0	0.0	0.0

The market share percentages in Table 1 strongly indicate that NYSE must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE to act reasonably in setting its fees for NYSE market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. Specifically with respect to trading prior to the open and close, for example, the Commission notes that exchanges other than the NYSE currently offer, or could easily offer, trading services that compete with the NYSE open and close.

In addition to the need to attract order flow, the availability of alternatives to NYSE's Order Imbalance Information significantly affect the terms on which NYSE can distribute this market data.[21] In setting the fees for its NYSE OpenBook data, NYSE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data. The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition. Accordingly, a variety of alternative sources of information impose significant competitive pressures on the NYSE in setting the terms for distributing its market 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.

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[21] See Richard Posner, Economic Analysis of Law § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). See also U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. See, e.g., FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007); FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. See, e.g., Leegin Creative Leather Products v. PSKS, Inc., 127 S. Ct. 2705 (2007); Atlanta Richfield Co. v. United States Petroleum Co., 495 U.S. 328 (1990); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); State Oil Co. v. Khan, 522 U.S. 3 (1997); Northern Pacific Railway Co. v. U.S., 356 U.S. 1 (1958).

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, nor were there any comments on this filing, so no one raised any issues under this portion of the test.

For example, the proposal does not unreasonably discriminate among types of users. The proposed fee entitles the datafeed recipient to make displays of the information available to an unlimited number of subscribers at no extra charge.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR-NYSE-2008-132) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon
Deputy Secretary

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22 15 U.S.C. 78s(b)(2).

23 17 CFR 200.30-3(a)(12).