

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59598; File No. SR-NYSEArca-2009-05)

March 18, 2009

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change to Establish Fees for NYSE Arca Trades

I. Introduction

On January 21, 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 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to introduce its NYSE Arca Trades service, a NYSE Arca-only market data service that allows a vendor to redistribute on a real-time basis the same last sale information that NYSE Arca reports to the Consolidated Tape Association (“CTA”) for inclusion in the CTA’s consolidated data stream and certain other related data elements (“NYSE Arca Last Sale Information”), and to establish fees for that service. The proposed rule change was published for comment in the Federal Register on February 3, 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 introduce NYSE Arca Trades, a new service pursuant to which it will allow vendors, broker-dealers, and others (“NYSE Arca-Only Vendors”) to make available NYSE Arca Last Sale Information on a real-time basis. NYSE Arca Last Sale Information would include last sale information for all securities that are traded on the Exchange.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59308 (January 28, 2009), 74 FR 5955 (February 3, 2009).

The Exchange will make NYSE Arca Last Sale Information available through its new NYSE Arca Trades service at the same time as it provides last sale information to the processor under the CTA Plan. In addition to the information that the Exchange provides to CTA, NYSE Arca Last Sale Information will also include a unique sequence number that the Exchange assigns to each trade and that allows an investor to track the context of the trade through such other Exchange market data products as ArcaBook[®].

The Exchange proposes to charge \$750 per month for access to each of the NYSE Arca Last Sale Information datafeeds that NYSE Arca makes available. The Exchange proposes to charge each subscriber to an NYSE Arca-Only Vendor's NYSE Arca Trades service: \$5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to Network A and Network B Eligible Securities (as the CTA Plan uses those terms); and \$5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to securities listed on Nasdaq.⁴ The access fee applies equally to all NYSE Arca-Only Vendors that receive the NYSE Arca Trades datafeed and the device fee applies equally to all subscribers that receive an NYSE Arca-Only Vendor's NYSE Arca Trades service. The Exchange does not propose to impose any program classification charges for the use of NYSE Arca Trades.

NYSE Arca represents that no investors or broker-dealers are required to subscribe to the product, as they can find the same NYSE Arca last sale prices either in the Exchange's NYSE Arca Realtime Reference Prices service,⁵ or integrated with the prices that other markets make available under the CTA Plan. NYSE Arca anticipates that, even though NYSE Arca Trades' Last Sale Information provides a less expensive alternative to the consolidated price information

⁴ The Exchange does not currently perceive a demand for a nonprofessional subscriber fee for NYSE Arca Trades, but will monitor customer response.

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

that investors and broker-dealers receive from CTA, the information that NYSE Arca contributes to the CTA consolidated datafeed and the low latency of the CTA datafeed will continue to satisfy the needs of the vast majority of individual and professional investors. The Exchange developed NYSE Arca Trades primarily at the request of traders who are very latency sensitive and anticipates that demand for the product will derive primarily from investors and broker-dealers who desire to use NYSE Arca Trades to power certain trading algorithms or smart order routers.⁶

The Exchange will require NYSE Arca-Only Vendors to enter into the form of “vendor” agreement into which the CTA Plan requires recipients of the Network A last sale prices information datafeeds to enter (the “Network A Vendor Form”). The Network A Vendor Form will authorize the NYSE Arca-Only Vendor to provide the NYSE Arca Trades service to its subscribers and customers. The Network A Participants drafted the Network A Vendor Form, it is sufficiently generic to accommodate NYSE Arca Trades, and it has been in use in substantially the same form since 1990.⁷ The Exchange will require professional and non-professional subscribers to NYSE Arca Trades to undertake to comply with the same contract, reporting, payment, and other administrative requirements as to which the Network A Participants subject them in respect of Network A last sale information under the CTA Plan.

⁶ The latency difference between accessing last sales through the NYSE Arca datafeed or through the CTA datafeed can be measured in tens of milliseconds.

⁷ See Securities Exchange Act Release Nos. 28407 (September 6, 1990), 55 FR 37276 (September 10, 1990); and 49185 (February 4, 2004), 69 FR 6704 (February 11, 2004).

III. Discussion

The Commission 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.⁸ In particular, it is consistent with Section 6(b)(4) of the Act,⁹ 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,¹⁰ 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,¹¹ 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,¹² 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

⁸ 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).

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ 15 U.S.C. 78f(b)(6).

¹² 17 CFR 242.603(a).

an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.¹³

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.¹⁴ 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.”¹⁵ 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.”¹⁶ 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.”¹⁷

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. Core data is the best-priced quotations

¹³ NYSE Arca is an exclusive processor of NYSE Arca Trades 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.

¹⁴ See 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 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.

¹⁵ Id. at 74771.

¹⁶ Id. at 74782.

¹⁷ Id. at 74781.

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 joint-SRO plans.¹⁸ In contrast, individual exchanges and other market participants distribute non-core data voluntarily. The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees. Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. 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 Arca'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.

In the NYSE Arca Order, the Commission discussed two broad types of competitive forces that generally apply to exchanges in their distribution of a non-core data product – the need to attract order flow and the availability of data alternatives. These forces also applied to NYSE Arca in setting the terms of this proposal for the NYSE Arca Trades data product: (i) NYSE Arca's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing NYSE Arca's data.

Table 1 below provides a recent snapshot of the state of competition in the U.S. equity markets in the month of January 2009:¹⁹

¹⁸ 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.”).

¹⁹ 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 Arca must compete vigorously for order flow to maintain its share of trading volume. The need to attract order flow imposes significant pressure on NYSE Arca to act reasonably in setting its fees for NYSE Arca market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Arca 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. Moreover, distributing data widely among investors, and thereby promoting familiarity with the exchange and its services, is an important exchange strategy for attracting order flow.²⁰

In addition to the need to attract order flow, the availability of alternatives to NYSE Arca Trades significantly affect the terms on which NYSE Arca can distribute this market data.²¹ In setting the fees for its NYSE Arca Trades, the Exchange must consider the extent to which market participants would choose one or more alternatives instead of purchasing the Exchange's data.²² Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.²³ In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.²⁴

The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data, as well as the core data feed, are all sources of

²⁰ See NYSE Arca Order at 74784 nn. 218-219 and accompanying text (noting exchange strategy of offering data for free as a means to gain visibility in the market place).

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).

²² See NYSE Arca Order at 74783.

²³ Id.

²⁴ Id.

competition in non-core data products. As Table 1 illustrates, share volume in U.S.-listed equities is widely dispersed among trading venues, and these venues are able to offer competitive data products as alternatives to NYSE Arca Trades. The Commission believes that the availability of those alternatives, as well as the 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 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. No comments were submitted on this proposal, and the Commission notes that the proposal does not unreasonably discriminate among types of users.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁵ that the proposed rule change (SR-NYSEArca-2009-05), be, and it hereby is, approved.

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

Florence E. Harmon
Deputy Secretary

²⁵ 15 U.S.C. 78s(b)(2).

²⁶ 17 CFR 200.30-3(a)(12).