

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-59202; File No. SR-NYSE-2008-132)

January 6, 2009

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

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 December 19, 2008, 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 is proposing to introduce a fee for access to its NYSE Order Imbalance Information datafeed.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE 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 these statements may be examined at the places specified in Item IV below. NYSE has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

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

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

(a) The Service.

In June 2008, the Exchange added Order Imbalance Information to the NYSE OpenBook<sup>®</sup> package of products.<sup>3</sup> For no additional charge, the Exchange decided to make 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 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. 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.

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.

After consultation with its customers, the Exchange has determined to make the NYSE Order Imbalance Information datafeed available as a stand-alone market data product, separate and apart from NYSE OpenBook. This 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).

Many investors have not been able to access this data. However, as a result of the Commission's NYSE ArcaBook Approval Order, the Exchange may now bring the NYSE order Imbalance Information product to market. The Exchange anticipates that this will provide important information to millions of investors.

In the Exchange's view, the Commission's recent "Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data" (the "NYSE ArcaBook Approval Order")<sup>3</sup> makes this product offering possible. In the NYSE ArcaBook Approval Order, the Commission strongly supported the right of SROs to expand their market data offerings outside of the consolidated products that markets offer under joint industry plans such as the CTA Plan and the CQ Plan. It established fee-setting standards for market data

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<sup>3</sup> See Release No. 34-59039 (December 2, 2008); File No. SR-NYSEArca-2006-21.

products for those non-core offerings. Prior to the NYSE ArcaBook Approval Order, the Exchange's ability to bring the NYSE Order Imbalance Information product to market was limited distribution to NYSE OpenBook subscribers only. That order affirmed the Commission's embrace of allowing market forces to determine the fairness and reasonableness of fees for non-core products, such as NYSE Order Imbalance Information. As a result, the Exchange is now able to make this important information available to millions of investors, investors who do not desire to subscribe to NYSE OpenBook services in order to receive NYSE Order Imbalance Information.

(b) The Fee. The Exchange proposes to charge recipients of the NYSE Order Imbalance Information datafeed \$500 per month. The fee 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 without having to differentiate between professional subscribers and nonprofessional subscribers, without having to account for the extent of access to the data, without having to procure contracts with its subscribers for the benefit of the Exchange and without having to report the number of its subscribers.

By establishing the access fee at an inexpensive rate and declining to impose an end-user fee on the consumption of NYSE Order Imbalance Information, the Exchange seeks to enable all investors to gain access to information regarding opening and closing imbalances on the Exchange. 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.

In setting the level of the NYSE Order Imbalance Information fee, the Exchange took into consideration several factors, including:

- i. consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed product;
- ii. the contribution of market data revenues that the Exchange believes is appropriate for the investment community that has an interest in the receipt and use of order imbalance information; and
- iii. the fact that the proposed fee provides an alternative to the receipt of NYSE Order Imbalance Information as part of NYSE OpenBook.

In short, the Exchange believes that the proposed NYSE Order Imbalance Information fee would reflect an equitable allocation of its overall costs to users of its facilities.

(c) The Fee is Fair and Reasonable. The Exchange believes that \$500 access fee for NYSE Order Imbalance Information comports with the standard that the Commission established for determining whether market data fees relating to non-core market data products are fair and reasonable. In NYSE ArcaBook Approval Order, the Commission reiterated its position from its release approving Regulation NMS that it should "allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors."<sup>4</sup>

The Commission went on to state that:

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<sup>4</sup> See Regulation NMS Release, 70 FR at 37566-37567 (addressing differences in distribution standards between core data and non-core data).

The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system. Indeed, competition among multiple markets and market participants trading the same products is the hallmark of the national market system.<sup>5</sup>

The Commission then articulated the standard that it will apply in assessing the fairness and reasonableness of market data fees for non-core products, as follows:

With respect to non-core data, . . . the Commission has maintained a market-based approach that leaves a much fuller opportunity for competitive forces to work. This market-based approach to non-core data has two parts. The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the 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.<sup>6</sup>

The Exchange believes that the proposed access fee is fair and reasonable by this standard or any other standard. The Exchange is subject to significant competitive forces and the low level at which the Exchange proposes to establish the NYSE Order Imbalance Information

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<sup>5</sup> NYSE ArcaBook Approval Order at pp 46-47.

<sup>6</sup> Id. at pp. 48-49.

access fee represents, in part, a response to that competition. To start, the Exchange competes intensely for order flow. It competes with the other 10 national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility and Trade Reporting Facilities, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow "and the competition is fierce."<sup>7</sup>

The Exchange believes that making the NYSE Order Imbalance Information datafeed available to vendors at \$500 per month and allowing the vendors to redistribute that data to an unlimited number of their customers at no additional charge would help the Exchange to compete for order flow by making the Exchange's order imbalance information freely available to millions of investors. The Exchange hopes that some of those investors may favor the Exchange with order flow as a result of access to the imbalance information.

In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the NYSE Order Imbalance Information access fee fails to meet the requirement of the Exchange Act.

In sum, NYSE's compelling need to attract order flow impose significant competitive pressure on NYSE to act equitably, fairly, and reasonably in setting the NYSE Order Imbalance Information access fee. Making that data readily available to investors is a response to that pressure.

(d) 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

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<sup>7</sup> Id. at p 52.

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.

(e) 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.<sup>8</sup> Exhibit A to each of those agreements would need to be updated to reflect the receipt and use of NYSE Order Imbalance Information. The arrangement does not require an end-user of the information (other than a data feed recipient) to enter into any agreement.

## 2. Statutory Basis

The bases under the Securities Exchange Act of 1934 (the “1934 Act”) for the proposed rule change are the requirement under Section 6(b)(4)<sup>9</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>10</sup> that the rules of an

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<sup>8</sup> 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).

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

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. The Exchange believes that the proposal benefits investors by facilitating their prompt access to widespread, free NYSE Order Imbalance Information.

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

The Exchange has not solicited, and does not intend to solicit, comments regarding the 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-2008-132 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-2008-132. 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-2008-132 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>11</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).