

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59898; File No. SR-NYSE-2009-37)

May 11, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Implementing a Cap on Vendors' Administrative Charges for NYSE OpenBook

I. Introduction

On March 26, 2009, the New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to introduce a cap on the monthly charges that broker-dealers and vendors are required to pay for their use of NYSE OpenBook data for the purposes of administering their provision of NYSE OpenBook product offerings. The proposed rule change was published for comment in the Federal Register on April 8, 2009.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to introduce a cap on the monthly charges that broker-dealers and vendors are required to pay for their use of NYSE OpenBook data for the purposes of administering their provision of NYSE OpenBook product offerings. A one-year pilot program to simplify and modernize market data administration (the "Unit of Count Filing") was recently approved for its NYSE OpenBook product packages.⁴ The Unit of Count Filing redefined some

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 59681 (April 1, 2009), 74 FR 16017.

⁴ See Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131).

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 proposal, the Exchange proposes to establish a maximum monthly amount of \$1500 (the “Monthly Maximum”) for entitlements consisting of unique individuals within a vendor’s organization to whom the vendor distributes NYSE OpenBook data for the sole purpose of administering the vendor’s distribution of NYSE OpenBook services externally to the vendor’s customers. The Monthly Maximum of \$1500 means that a vendor would have to pay for no more than 25 NYSE OpenBook administrative personnel.

III. Discussion and Commission Findings

After careful consideration, 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.⁵ In particular, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,⁶ which requires 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)⁷ that the rules of an 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.

⁵ In approving this proposed rule change, the Commission notes that it has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

⁶ 15 U.S.C. 78f(b)(4).

⁷ 15 U.S.C. 78f(b)(5).

The Commission also finds that the proposed rule change is consistent with the provisions of Section 6(b)(8) of the Act,⁸ 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,⁹ 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.¹⁰

This proposal would cap the fees for NYSE OpenBook when used by vendors for administrative purposes. The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.¹¹ The Commission recently found that NYSE was subject to significant competitive forces in setting fees for its depth-of-book order data in the Unit of Count Filing.¹² There are a variety of alternative sources of information that impose significant competitive pressures on the NYSE in setting the terms for distributing its depth-of-book order data. The Commission believes that the availability of those alternatives, as

⁸ 15 U.S.C. 78f(b)(8).

⁹ 17 CFR 242.603(a).

¹⁰ NYSE is an exclusive processor of NYSE depth-of-book 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.

¹¹ 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 in great detail 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.

¹² See Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131).

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.

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.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-NYSE-2009-37) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).