

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62038; File No. SR-NYSE-2010-22)

May 5, 2010

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

I. Introduction

On March 11, 2010, 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to make the unit-of-count metric a permanent alternative to the traditional device fee. The proposed rule change was published for comment in the Federal Register on April 1, 2010.<sup>3</sup> The Commission received one comment letter on the proposal.<sup>4</sup> This order approves the proposed rule change.

II. Description of the Proposal

A. Unit-of-Count

The Exchange proposes to permanently implement the “Subscriber Entitlement” unit-of-count methodology in accordance with the terms set forth in the Pilot Program.<sup>5</sup> Under the Pilot

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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 Securities Exchange Act Release No. 61779 (March 25, 2010), 75 FR 16537 (“Notice”).

<sup>4</sup> Letter to Elizabeth M. Murphy, Secretary, Commission, from Melissa MacGregor, Managing Director and Associate General Counsel, SIFMA, dated May 5, 2010.

<sup>5</sup> See Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131) (approving the one year pilot program that revises the unit-of-count methodology to determine the device fees payable by data recipients (“Pilot Program”)). The Commission subsequently approved an extension of the Pilot Program.

Program, instead of defining the Vendor-subscriber relationship based on how the Data Feed Recipient or subscriber receives data (i.e., through controlled displays or through data feeds), the Exchange proposed to adopt a more objective billing criteria. The following basic principles underlie this proposal.

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 permitting 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.

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See Securities Exchange Act Release No. 61780 (March 25, 2010), 75 FR 16535 (April 1, 2010) (SR-NYSE-2010-21).

- 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 permitting 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 proposal does not restrict how Vendors use NYSE OpenBook data in their display services. In fact, the Exchange believes that proposal could encourage 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>6</sup> In addition, the proposal's unit-of-count concepts would apply equally to all data recipients and users.

Under the proposed rule change, the Exchange would require Vendors to count every Subscriber Entitlement, whether it be an individual person or a device. Thus, the Vendor's count would include every person and device that accesses the data regardless of the purpose for which the individual or device uses the data. The proposal is designed to subject the count to a more objective process and simplify the reporting obligation for Vendors by eliminating current exceptions to the device-reporting obligation. For instance, the Exchange noted that Vendors were not previously required to report certain programmers and other individuals who receive access to data for certain specific, non-trading purposes but that these exceptions required the Exchange to monitor the manner end-users consume data, which adds cost for both the Exchange and customers.

To simplify the process, the Exchange proposes that Vendors would be required to report all entitlements in accordance with the following:

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<sup>6</sup> In the case of derived displays, the Vendor is required to: (1) pay the Exchange's device fees (described below); (2) include derived displays in its reports of NYSE OpenBook usage; and (3) 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.

- 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.

### III. Discussion

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.<sup>7</sup> In particular, it is consistent with Section 6(b)(4) of the Act,<sup>8</sup> 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,<sup>9</sup> 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,<sup>10</sup> 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,<sup>11</sup> adopted under Section 11A(c)(1) of the Act, which requires an

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<sup>7</sup> 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).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78f(b)(8).

<sup>11</sup> 17 CFR 242.603(a).

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.<sup>12</sup>

The Exchange proposes to permanently implement the Subscriber Entitlement unit-of-count methodology in accordance with the terms set forth in the Pilot Program. According to the Exchange, the proposed rule change would simplify the way it charges for NYSE OpenBook by changing the methodology for the unit-of-count, and this change should reduce the fees and administrative costs related to the receipt and distribution of NYSE OpenBook packages. The Exchange has indicated that its experience with the Pilot Program has been successful. The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>13</sup> The Commission has previously found that NYSE was subject to significant competitive forces in setting fees for its depth-of-book order data in the proposed rule changes that established and extended the Pilot Program's revised unit-of-count methodology.<sup>14</sup> 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 well as the NYSE's

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<sup>12</sup> 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.

<sup>13</sup> 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.

<sup>14</sup> See note 5, supra.

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.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>15</sup> that the proposed rule change (SR-NYSE-2010-22) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>15</sup> 15 U.S.C. 78s(b)(2).

<sup>16</sup> 17 CFR 200.30-3(a)(12).