

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60385; File No. SR-NYSEAmex-2009-26)

July 24, 2009

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving Proposed Rule Change to Charge a \$500 Monthly Fee to Recipients of the NYSE Amex Order Imbalance Information Datafeed

I. Introduction

On June 5, 2009, the NYSE Amex LLC (“NYSE Amex” 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”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to charge a \$500 monthly fee to recipients of the NYSE Amex Order Imbalance Information datafeed. The proposed rule change was published for comment in the Federal Register on June 24, 2009.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

The Exchange proposes to charge a \$500 monthly fee to recipients of the NYSE Amex Order Imbalance Information datafeed. NYSE Amex Order Imbalance Information provides 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. The Exchange provides this information for issues that are likely to be of particular trading interest at the opening or closing.

Currently, the Exchange provides this datafeed at no cost. The instant filing is submitted to establish a \$500 monthly fee for receipt of the NYSE Amex Order Imbalance Information

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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. 60122 (June 17, 2009), 74 FR 30184.

datafeed. This proposed \$500 monthly fee to recipients of the NYSE Amex 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 service fee on those subscribers.

The Exchange states that the \$500 monthly fee would allow vendors to redistribute NYSE Amex Order Imbalance Information: (1) without having to differentiate between professional subscribers and nonprofessional subscribers; (2) without having to account for the extent of access to data; (3) without having to procure contracts with its subscribers for the benefit of the Exchange; and (4) without having to report the number of its subscribers.

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.

In setting the level of the NYSE Amex Order Imbalance Information Product fee, the Exchange states that it took into consideration several factors, including:

- (1) the fees that other Exchanges are charging for similar services<sup>4</sup>;
- (2) consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;

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<sup>4</sup> New York Stock Exchange LLC imposes an access fee of \$500 per month for its order imbalance datafeed. Nasdaq OMX includes order imbalance information in its Nasdaq TotalView datafeed. Nasdaq OMX imposes end-user charges on both professional and nonprofessional subscribers that receive TotalView, as well as an array of monthly distribution charges that are significantly higher than the charge that NYSE Amex is proposing in this proposed rule change.

- (3) the contribution of market data revenues that the Exchange believes is appropriate for entities that provide market data to large numbers of investors, which are the entities most likely to take advantage of the proposed service; and
- (4) the contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations.

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

The Exchange believes that the level of the fee is consistent with the approach set forth in the approval order issued by the Commission related to ArcaBook fees.<sup>5</sup> The Exchange submits that the NYSE Amex Order Imbalance Information datafeed constitutes “non-core data”; i.e., the Exchange does not require a central processor to consolidate and distribute the product to the public pursuant to joint-SRO plans. Rather, the Exchange distributes this product voluntarily. In addition, the Exchange believes that both types of the competitive forces that the Commission described in the NYSE Arca Order are present: (i) the Exchange has a compelling need to attract order flow; and (ii) the product competes with a number of alternative products.

The Exchange states that it must compete vigorously for order flow to maintain its share of trading volume. This requires the Exchange to act reasonably in setting market data fees for non-core products such as the NYSE Amex Order Imbalance Information datafeed. The Exchange hopes that NYSE Amex Order Imbalance datafeed will enable vendors to distribute NYSE Amex order imbalance information widely among investors, and thereby provide a means for promoting the Exchange's visibility in the marketplace.

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<sup>5</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (“NYSE Arca Order”).

### III. Discussion and Commission Findings

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 thereunder applicable to a national securities exchange.<sup>6</sup> In particular, the Commission finds that the proposal is consistent with Section 6(b)(4) of the Act,<sup>7</sup> 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)<sup>8</sup> 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.

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

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<sup>6</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>7</sup> 15 U.S.C. 78f(b)(4).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> 15 U.S.C. 78f(b)(8).

<sup>10</sup> 17 CFR 242.603(a).

an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.<sup>11</sup>

Under this proposal, the Exchange would charge a \$500 monthly fee to recipients of the NYSE Amex Order Imbalance Information datafeed. The \$500 monthly fee would allow vendors to redistribute NYSE Amex Order Imbalance Information: (1) without having to differentiate between professional subscribers and nonprofessional subscribers; (2) without having to account for the extent of access to data; (3) without having to procure contracts with its subscribers for the benefit of the Exchange; and (4) without having to report the number of its subscribers.

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>12</sup> 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.”<sup>13</sup> 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.”<sup>14</sup> If an

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<sup>11</sup> NYSE Amex is an exclusive processor of NYSE Amex 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>12</sup> Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21). 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>13</sup> Id. at 74771.

<sup>14</sup> Id. at 74782.

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.”<sup>15</sup>

There are a variety of alternative sources of information that impose significant competitive pressures on the NYSE Amex in setting the terms for distributing its market data. The Commission believes that the availability of those alternatives, as well as the NYSE Amex’s compelling need to attract order flow, imposed significant competitive pressure on the NYSE Amex to act equitably, fairly, and reasonably in setting the terms of its proposal. In addition, the Commission recently determined that NYSE was subject to significant competitive forces in setting fees for a substantially similar non-core market data product – NYSE Order Imbalance Information datafeed.<sup>16</sup>

Because the NYSE Amex 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.

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<sup>15</sup> Id. at 74781.

<sup>16</sup> See Securities Exchange Act Release No. 59543 (March 9, 2009), 74 FR 11159 (March 16, 2009) (SR-NYSE-2008-132).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-NYSEAmex-2009-26) is hereby approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>17</sup> 15 U.S.C. 78s(b)(2).

<sup>18</sup> 17 CFR 200.30-3(a)(12).