

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61144; File No. SR-NYSEAmex-2009-85)

December 10, 2009

Self-Regulatory Organizations; NYSE Amex, Inc.; Notice of Filing of Proposed Rule Change to Establish the NYSE Amex Realtime Reference Prices Service

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on November 30, 2009, the NYSE Amex, Inc. (“NYSE Amex” 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 proposes to establish the NYSE Amex Realtime Reference Prices service and to establish a flat monthly fee and a per-query fee for that service. The service allows a vendor to redistribute on a real-time basis last sale prices of transactions that take place on the Exchange (“NYSE Amex Realtime Reference Prices”). The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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

In its filing with the Commission, the self-regulatory organization 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 those statements may be examined at the

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

a. The Service

The NYSE Amex Realtime Reference Prices service will provide a low-cost service that makes real-time prices widely available to casual investors, provides vendors with a useful real-time substitute for delayed prices; and relieves vendors of administrative burdens. The product responds to the requirements for distribution of real-time last sale prices over the internet for reference purposes, rather than as a basis for making trading decisions

The NYSE Amex Realtime Reference Prices service will allow internet service providers, traditional market data vendors, and others (“NYSE Amex-Only Vendors”) to make available NYSE Amex Realtime Reference Prices on a real-time basis.<sup>4</sup> The NYSE Amex Realtime Reference Price information includes last sale prices for all securities that trade on the Exchange, updated in real-time. In addition, the product also includes open, high and low prices and cumulative volume. The Exchange anticipates that it will update these data elements every second, though initially it will update them once per minute. The product does not include bid/ask quotations or the size of each trade.

The Exchange will not permit NYSE Amex-Only Vendors to provide NYSE Amex Realtime Reference Prices in a context in which a trading or order-routing decision can be implemented unless the NYSE Amex-Only Vendor also provides consolidated displays of

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<sup>4</sup> The Exchange notes that it will make the NYSE Amex Realtime Reference Prices available to vendors no earlier than it makes those prices available to the processor under the CTA and Nasdaq/UTP Plans.

Network A last sale prices available in an equivalent manner, as Rule 603(c)(1) of Regulation NMS requires.

The service would eliminate some of the administrative burdens associated with the distribution of real-time CTA prices. The service would feature a flat, fixed monthly vendor fee, no user-based fees, no vendor reporting requirements, and no professional or non-professional subscriber agreements.

b. The Fees

The Exchange proposes to establish a \$10,000 monthly flat fee that entitles an NYSE Amex-Only Vendor to receive access to the NYSE Amex Realtime Reference Prices datafeed. For that fee, the NYSE Amex-Only Vendor may provide unlimited NYSE Amex Realtime Reference Prices to an unlimited number of the NYSE Amex-Only Vendor's subscribers and customers. The Exchange does not propose to impose any device or end-user fee for the NYSE Amex-Only Vendors' distribution of NYSE Amex Realtime Reference Prices.

In addition, the Exchange proposes to establish as an alternative to the fixed monthly fee a fee of \$.004 for each real-time reference price that a NYSE Amex-Only Vendor disseminates to its customers. The Exchange proposes to limit a NYSE Amex-Only Vendor's exposure under this alternative fee by setting \$10,000, the same amount as the proposed fixed monthly rate, as the maximum fee that an NYSE Amex-Only Vendor would have to pay for real-time reference prices that it disseminates in any calendar month pursuant to the per-query fee.

In order to take advantage of the per-query fee, a NYSE Amex-Only Vendor must document in its Exhibit A that it has the ability to measure accurately the number of queries and must have the ability to report aggregate query quantities on a monthly basis.

The Exchange will impose the per-query fee only on the dissemination of real-time reference prices. NYSE Amex-Only Vendors may provide delayed data services in the same manner as they do today.

The per-query charge is imposed on NYSE Amex-Only Vendors, not end-users, and is payable on a monthly basis. NYSE Amex-Only Vendors may elect to disseminate NYSE Amex Realtime Reference Prices pursuant to the per-query fee rather than the fixed monthly fee.

c. Justification of Fees

The proposed flat monthly fee and per-query fee for the NYSE Amex Realtime Reference Prices service enable internet service providers and traditional vendors to contribute to the Exchange's operating costs in a manner that is appropriate for the distribution of last sale price information in the form taken by the proposed service.

In setting the level of the NYSE Amex Realtime Reference Prices fee, the Exchange took into consideration several factors, including:

- (1) the fees that Nasdaq, NYSE and NYSE Arca are charging for similar services;
- (2) consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;
- (3) the contribution of market data revenues that the Exchange believes is appropriate for entities that are most likely to take advantage of the proposed service;
- (4) the contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations;
- (5) the savings in administrative and reporting costs that the NYSE Amex Realtime Reference Prices service will provide to NYSE Amex-Only Vendors; and

- (6) the fact that the proposed fees provide alternatives to existing fees under the CTA and Nasdaq/UTP Plans, alternatives that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

The Exchange believes that the levels of the fixed monthly fee and the per-query fee are consistent with the approach set forth in the order by which the Commission approved ArcaBook fees for NYSE Arca.<sup>5</sup> In the ArcaBook Approval 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>6</sup> It noted that if significant competitive forces apply to a proposal, the Commission will approve it unless a substantial countervailing basis exists.

NYSE Amex Realtime Reference Prices constitute “non-core data.” 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 the product voluntarily.

In the case of NYSE Amex Realtime Reference Prices, both of the two types of competitive forces that the Commission described in the ArcaBook Approval Order are present: The Exchange has a compelling need to attract order flow and the product competes with a number of alternative products.

The Exchange 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 NYSE Amex Realtime Reference Prices. The Exchange hopes that NYSE Amex Realtime Reference Prices will enable vendors to distribute NYSE Amex last sale price

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<sup>5</sup> See Release [sic] No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (the “ArcaBook Approval Order”).

<sup>6</sup> Id. at 74771.

data widely among investors, and thereby provide a means for promoting the Exchange's visibility in the marketplace.

In addition to the need to attract order flow, the availability of alternatives to NYSE Amex Realtime Reference Prices significantly constrain the prices at which the Exchange can market NYSE Amex Realtime Reference Prices. All national securities exchanges, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data, as well as the core data feed, are all sources of competition for NYSE Amex Realtime Reference Prices. Currently, the New York Stock Exchange, NYSE Arca and the Nasdaq Stock Market offer similar services.

The information available in NYSE Amex Realtime Reference is included in the CTA core data feed, which also includes the size of trades, as well as last sale information from other markets. Even though NYSE Amex Realtime Reference Prices omits size and provides prices that are not consolidated with those of other markets, investors may select it as a less expensive alternative to the CTA Plan's consolidated last sale price services for certain purposes. (Rule 603(c) of Regulation NMS requires vendors to make the core data feeds available to customers when trading and order-routing decisions can be implemented.)

d. Administrative Requirements

The Exchange proposes to require the NYSE Amex-Only Vendor to identify the NYSE Amex trade price by placing the text "NYSE Amex Data" in close proximity to the display of each NYSE Amex Realtime Reference Price or series of NYSE Amex Realtime Reference Prices, or by complying with such other identification requirement as to which NYSE Amex may agree.

The NYSE Amex-Only Vendor may make NYSE Amex Realtime Reference Prices available without having to differentiate between professional subscribers and nonprofessional subscribers, without having to account for the extent of access to the data, and without having to report the number of users.

e. Contracts

NYSE Amex proposes to allow NYSE Amex-Only Vendors to provide NYSE Amex Realtime Reference Prices without requiring the end-users to enter into contracts for the benefit of the Exchange.

Instead, the Exchange proposes to require NYSE Amex-Only Vendors to provide a readily visible hyperlink that will send the end-user to a warning notice about the end-user's receipt and use of market data. The notice would be similar to the notice that vendors provide today when providing CTA delayed data services.

The Exchange will require NYSE Amex-Only Vendors to enter into the form of "vendor" agreement into which the CTA and CQ Plans require recipients of the Network A datafeeds to enter (the "Network A Vendor Form"). The Network A Vendor Form will authorize the NYSE Amex-Only Vendor to provide the NYSE Amex Realtime Reference Prices service to its subscribers and customers.

The Network A Participants drafted the Network A Vendor Form as a one-size-fits-all form to capture most categories of market data dissemination. It is sufficiently generic to accommodate NYSE Amex Realtime Reference Prices. The Commission has approved the Network A Vendor Form.<sup>7</sup>

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<sup>7</sup> See Securities Exchange Act Release Nos. 28407 (September 6, 1990), 55 FR 37276 (September 10, 1990) (File No. 4-281); 49185 (February 4, 2004), 69 FR 6704 (February 11, 2004) (SR-CTA/CQ-2003-01).

The Exchange will supplement the Network A Vendor Form with an Exhibit C that will provide above-described terms and conditions that are unique to the NYSE Amex Realtime Reference Prices service. The proposed Exhibit C is attached to the proposed rule change as Exhibit 5. The supplemental Exhibit C terms and conditions would govern:

- the restriction against providing the service in the context of a trading or order routing service;
- the replacement of end-user agreements with a hyperlink to a notice;
- the substance of the notice; and
- the “NYSE Amex Data” labeling requirement.

2. Statutory Basis

The bases under the Securities Exchange Act of 1934 (the “Act”) for the proposed rule change are the requirement under Section 6(b)(4)<sup>8</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>9</sup> that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

The proposed rule change would benefit investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the NYSE Amex Realtime Reference Prices service. In addition, the Exchange believes that the proposed fee would allow entities that provide market data to large numbers of investors, which are the entities most likely

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

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

to take advantage of the proposed service, to make an appropriate contribution towards meeting the overall costs of the Exchange's operations.

The Exchange notes that its proposed fee compares favorably with the fees that Nasdaq, NYSE and NYSE Arca are charging for similar services. Because the proposed fee is substantially lower than those of Nasdaq, NYSE and NYSE Arca, it offers any vendor that wishes to provide its customers with a single market's data (as opposed to a more expensive consolidated data service) a less expensive alternative to Nasdaq, NYSE and NYSE Arca.

B. Self-Regulatory Organization's Statement on Burden on Competition

NYSE Amex Realtime Reference Prices proposes to provide an alternative to existing fees and does not alter or rescind any existing fees. In addition, it amounts to a competitive response to the products that Nasdaq, NYSE and NYSE Arca have commenced to make available. For those reasons, the Exchange does not believe that the proposed rule change will result in 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 discussed the proposed rules change with those entities that the Exchange believes would be the most likely to take advantage of the proposed NYSE Amex Realtime Reference Prices service by becoming NYSE Amex-Only Vendors. While those entities have not submitted formal, written comments on the proposal, the Exchange has incorporated some of their ideas into the proposal and the proposed rule change reflects their input. 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-NYSEAmex-2009-85 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-NYSEAmex-2009-85. 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-NYSEAmex-2009-85 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>10</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).