

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58444; File No. SR-NYSEArca-2008-96)

August 29, 2008

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change to Establish NYSE Arca Realtime Reference Prices Service

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 August 28, 2008, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II 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, and is approving the proposal on an accelerated basis.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to establish a pilot test NYSE Arca Realtime Reference Prices service. This new NYSE Arca-only market data service allows a vendor to redistribute on a real-time basis last sale prices of transactions that take place on the Exchange (“NYSE Arca Realtime Reference Prices”) and to establish a flat monthly fee for that service. There is no new rule text.

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> 17 CFR 240.19b-4.

places specified in Item III 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

i. The Service. The Exchange proposes to conduct a pilot program that will allow the Exchange to test the viability of NYSE Arca Realtime Reference Prices. The Exchange intends for the NYSE Arca Realtime Reference Prices service to accomplish three goals:

1. to provide a low-cost service that will make real-time prices widely available to millions of casual investors;
2. to provide vendors with a real-time substitute for delayed prices; and
3. to relieve vendors of administrative burdens.

This pilot program is similar to pilot programs that the Nasdaq Stock Market, Inc. (“Nasdaq”)<sup>3</sup> and the New York Stock Exchange LLC (“NYSE”)<sup>4</sup> recently established.

During the pilot program, the NYSE Arca Realtime Reference Prices service would allow internet service providers, traditional market data vendors, and others (“NYSE Arca-Only Vendors”) to make available NYSE Arca Realtime Reference Prices on a real-time basis.<sup>5</sup> The NYSE Arca Realtime Reference Price information would include last sale prices for all securities

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<sup>3</sup> See Securities Exchange Act Release Nos. 57965 (June 16, 2008), 73 FR 35178 (June 20, 2008) (File No. SR-NASDAQ-2006-060); and 57973 (June 16, 2008), 73 FR 35430 (June 23, 2008) (File No. SR-NASDAQ-2008-050).

<sup>4</sup> See Securities Exchange Act Release No. 57966 (June 16, 2008), 73 FR 35182 (June 20, 2008) (File No. SR-NYSE-2007-04).

<sup>5</sup> The Exchange notes that it will make the NYSE Arca Realtime Reference Prices available to vendors no earlier than it makes those prices available to the processor under the CTA Plan.

that trade on the Exchange. It would include only prices. It would not include the size of each trade and would not include bid/asked quotations.

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 Exchange contemplates that internet service providers with a substantial customer base and traditional vendors with large numbers of less active investors are potential subscribers to NYSE Arca Realtime Reference Prices.

During the pilot period, the Exchange will not permit NYSE Arca-Only Vendors to provide NYSE Arca Realtime Reference Prices in a context in which a trading or order-routing decision can be implemented unless the NYSE Arca-Only Vendor also provides consolidated displays of Network A last sale prices available in an equivalent manner, as Rule 603(c)(1) of Regulation NMS requires.

The service eliminates some of the administrative burdens associated with the current distribution of real-time CTA prices. It features a flat, fixed monthly vendor fee, no user-based fees, no vendor reporting requirements, and no professional or non-professional subscriber agreements. It will make NYSE Arca Realtime Reference Prices widely available and without charge to an unlimited number of casual investors.

ii. The Fees. For the duration of the pilot program, the Exchange proposes to establish a monthly flat fee that will entitle an NYSE Arca-Only Vendor to receive access to the NYSE Arca Realtime Reference Prices datafeed. The NYSE Arca-Only Vendor may use that access to provide unlimited NYSE Arca Realtime Reference Prices to an unlimited number of the NYSE Arca-Only Vendor's subscribers and customers. The Exchange is not proposing to

impose any device or end-user fee for the NYSE Arca-Only Vendors' distribution of NYSE Arca Realtime Reference Prices.

The Exchange proposes to set the flat fee at \$30,000 per month. The NYSE Arca-Only Vendor would agree to identify the NYSE Arca trade price by placing the text "NYSE Arca Data" in close proximity to the display of each NYSE Arca Realtime Reference Price or series of NYSE Arca Realtime Reference Prices, or by complying with such other identification requirement as to which NYSE may agree.

The NYSE Arca-Only Vendor may make NYSE Arca 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.

The flat fee enables internet service providers and traditional vendors that have large numbers of casual investors as subscribers and customers to contribute to the Exchange's operating costs in a manner that is appropriate for their means of distribution.

In setting the level of the NYSE Arca Realtime Reference Prices pilot program fees, the Exchange took into consideration several factors, including:

- (1) the fees that Nasdaq and NYSE are charging for similar services during their pilot periods;
- (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 provide market data to large numbers of investors, which are the entities most likely to take advantage of the proposed service;

- (4) the contribution that revenues accruing from the proposed fees will make to meeting the overall costs of the Exchange's operations;
- (5) projected losses to the Exchange's other sources of market data revenues (e.g., from its share of revenues derived from Network A nonprofessional subscriber fees) as a result of the NYSE Arca Realtime Reference Prices service competing with those services;
- (6) the savings in administrative and reporting costs that the NYSE Arca Realtime Reference Prices service will provide to NYSE Arca-Only Vendors; and
- (7) the fact that the proposed fees provide an alternative to existing Network A fees under the CTA Plan, an alternative that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

In short, the Exchange believes that the proposed NYSE Arca Realtime Reference Prices pilot program fees would reflect an equitable allocation of its overall costs to users of its facilities.

iii. Contracts. As with the Nasdaq and NYSE pilot programs, NYSE Arca proposes to allow NYSE Arca-Only Vendors to provide NYSE Arca Realtime Reference Prices without requiring the end-users to enter into contracts for the benefit of the Exchange.

Instead, the Exchange will require NYSE Arca-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 Arca-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

Arca-Only Vendor to provide the NYSE Arca 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 Arca Realtime Reference Prices. The Commission has approved the Network A Vendor Form.<sup>6</sup>

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 Arca Realtime Reference Prices service. The proposed Exhibit C is substantially similar to the Exhibit C that NYSE uses for its counterpart service and is attached to this 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;
- the NYSE Arca Data labeling requirement;
- the fact that the vendor's authorization to provide the service will terminate at the expiration date of the pilot program unless the Exchange submits a proposed rule change to extend the program or to make it permanent and the Commission approves that proposed rule change; and

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

- because of the experimental nature of the program, the requirements that the vendor (a) share with the Exchange any research it may conduct regarding the pilot program or the results of its experience with the program and (b) consult with the Exchange regarding its views of NYSE Arca Realtime Reference Prices.

iv. Duration of Pilot Program. The Exchange proposes to commence the pilot program upon the Commission's grant of accelerated effectiveness.

Both the Nasdaq and NYSE pilot programs are currently scheduled to end on November 1, 2008. NYSE Arca proposes to establish that same date as the end date for its pilot program. Prior to the end of the pilot period, the Exchange will assess its experience with the product. It either will submit a proposed rule change that seeks to extend or modify the pilot program or to make it permanent, or will announce publicly that it does not seek to extend the pilot program beyond the program's termination date.

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4) 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) 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 Arca 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 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 and NYSE are charging for similar services during their pilot periods. Because the proposed fee is substantially lower than those of Nasdaq and NYSE, 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 and NYSE. In addition, for that lower fee, vendors receive Exchange prices for securities of Networks A, B and C, something that differentiates the Exchange's product from the NYSE product.

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

The pilot program 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 and NYSE have commenced to make available. For those reasons, the Exchange does not believe that this 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 this proposed rules change with those entities that the Exchange believes would be the most likely to take advantage of the proposed NYSE Arca Realtime Reference Prices service by becoming NYSE Arca-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 this proposed rule change reflects their input. The Exchange has not received any unsolicited written comments from members or other interested parties.

### III. 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 Number SR-NYSEArca-2008-96 on the subject line.

#### Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2008-96. 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 the 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-NYSEArca-2008-96 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

IV. Commission's Findings and Order Granting Accelerated Approval of a Proposed Rule Change

The Commission finds that the proposed rule change, to be implemented on a pilot basis, 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

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<sup>7</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 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).

603(a) of Regulation NMS,<sup>11</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 an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.<sup>12</sup>

The Commission notes that the flat monthly fee of \$30,000 for the new market data product, NYSE Arca Realtime Reference Prices, would be imposed on a pilot basis until October 31, 2008. On June 4, 2008, the Commission approved for public comment a draft approval order that sets forth a market-based approach for analyzing proposals by self-regulatory organizations to impose fees for “non-core” market data products that would encompass the NYSE Arca Realtime Reference Prices.<sup>13</sup> The Commission believes that NYSE Arca’s proposal is consistent with the Act for the reasons noted preliminarily in the Draft Approval Order. In addition, the Commission notes that it recently approved similar NYSE and Nasdaq proposals to provide last sale prices to market data vendors for a fee on a pilot basis until October 31, 2008.<sup>14</sup> Pending review by the Commission of comments received on the Draft Approval Order, and final Commission action thereon, the Commission believes that approving NYSE Arca’s proposal on a pilot basis would be beneficial to investors and in the public interest, in that it should result in broad public dissemination of additional real-time pricing information. Therefore, the Commission is approving NYSE Arca’s proposed fees for a pilot period until October 31, 2008.

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

<sup>12</sup> NYSE Arca is an exclusive processor of its last sale 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 data on an exclusive basis on its own behalf.

<sup>13</sup> See Securities Exchange Act Release No. 57917 (June 4, 2008), 73 FR 32751 (June 10, 2008) (Notice of Proposed Order Approving Proposal by NYSE Arca, Inc. to Establish Fees for Certain Market Data and Request for Comment) (“Draft Approval Order”).

<sup>14</sup> See supra notes 3 and 4.

The broader approach ultimately taken by the Commission with respect to non-core market data fees will necessarily guide Commission action regarding fees for the NYSE Arca Realtime Reference Prices beyond the pilot period.

The Commission finds good cause for approving the proposed rule change before the thirtieth day after the date of publication of notice of filing thereof in the Federal Register. Accelerating approval of this proposal should benefit investors by facilitating their prompt access to widespread, free, real-time pricing information contained in the NYSE Arca Realtime Reference Prices. In addition, the Commission notes that the proposal is approved for a pilot period to expire on October 31, 2008, while the Commission analyzes comments on the Draft Approval Order. Therefore, the Commission finds good cause, consistent with Section 19(b)(2) of the Act,<sup>15</sup> to approve the proposed rule change on an accelerated basis.

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

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-NYSEArca-2008-96) is hereby approved on an accelerated basis until October 31, 2008.

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

Florence E. Harmon  
Acting Secretary

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