

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

NYSE Realtime Reference Prices proposes to reduce an existing fee of the Exchange (the flat monthly fee) and to provide an alternative (the per-query fee) to the existing fee. It would not raise or rescind any existing fees. It amounts to a competitive response to the products that Nasdaq and NYSE Arca make available and that NYSE Amex has proposed 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 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-NYSE-2009-120 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-NYSE-2009-120. 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 a.m. and 3 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-NYSE-2009-120 and should be submitted on or before January 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-30080 Filed 12-17-09; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-61143; File No. SR-NYSEArca-2009-108]**

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Modifying the NYSE Arca Realtime Reference Prices Service**

December 10, 2009.

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 December 1, 2009, NYSE Arca, Inc. ("NYSE Arca" 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**

NYSE Arca proposes (1) to add data elements to its "NYSE Arca Realtime Reference Prices" service and (2) to add a usage-based fee alternative for that service. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com> at the Exchange's principal office and at the Commission's Public Reference Room.

#### **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 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**

In File No. SR-NYSEArca-2009-32 (the "NYSE Arca Realtime Reference Prices Filing"),<sup>4</sup> the Exchange established a fixed monthly fee for its NYSE Arca-only market data service that allows a vendor to redistribute on a real-time basis last sale prices of transactions that take place on the Exchange. The NYSE Arca Realtime Reference Prices service provides a low-cost service that makes real-time prices widely available to many millions of casual investors, provides vendors with a real-time substitute for delayed prices, and relieves vendors of all administrative burdens.

The service allows internet service providers, traditional market data vendors, and others ("NYSE Arca-Only Vendors") to make available NYSE Arca

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

<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.

<sup>4</sup> See Securities Exchange Act Release No. 34-60002 (May 29, 2009), 74 FR 26901 (June 4, 2009) (File No. SR-NYSEArca-2009-32) (the "Approval Order").

Realtime Reference Prices on a real-time basis.<sup>5</sup> NYSE Arca Realtime Reference Prices information includes last sale prices for all securities that are traded on the Exchange.

The Exchange proposes to make the following changes to the service and its fees:

a. Data Elements

Currently, the NYSE Arca Realtime Reference Price service includes only prices. It does not include the size of each trade and does not include bid/ask quotations. For each security, the Exchange is proposing to add the following data elements to the service:

- High price
- Low price
- Cumulative volume

The Exchange anticipates that it will update these data elements every second, though initially it will update them once per minute. A security's high (low) price will reflect the highest (lowest) price at which the security has traded on the Exchange during the trading session through the point in time at which it is disseminated.

Further, the cumulative volume will reflect a security's aggregate volume during a trading session through the point in time at which it is last disseminated. The Exchange believes that adding these data elements will make the product more attractive to the customers of NYSE Arca-Only Vendors.

b. Usage-Based Fee

The NYSE Arca Realtime Reference Price service features a flat, fixed monthly vendor fee of \$30,000 and no user-based fees. For that fee, the NYSE Arca-Only Vendor may provide unlimited NYSE Arca Realtime Reference Prices to an unlimited number of the NYSE Arca-Only Vendor's subscribers and customers 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 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 Arca-Only Vendor disseminates to its customers. The Exchange proposes to limit a NYSE Arca-Only Vendor's exposure under this alternative fee by setting \$30,000, the same amount as the fixed monthly rate, as the maximum fee that an NYSE Arca-

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 Arca-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 Arca-Only Vendors may provide delayed data services in the same manner as they do today.

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

c. Justification of Fee

The NYSE Arca Realtime Reference Prices service 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. Adding a per-query payment option will reduce the costs of the service to some of those internet service providers and traditional vendors. For the reasons explained above, the Exchange believes that this will enable NYSE Arca Realtime Reference Prices vendors to make a more appropriate contribution to the Exchange's operating costs.

In establishing the per-query fee, the Exchange took into consideration several factors, including:

(1) The fees that Nasdaq and NYSE are charging for similar services and that NYSE Amex has proposed to charge;

(2) Consultation with some of the entities that currently receive the service or that the Exchange anticipates may commence to take advantage of the 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 fees will make to meet the overall costs of the Exchange's operations;

(5) The savings in administrative and reporting costs that the NYSE Arca Realtime Reference Prices service will

provide to NYSE Arca-Only Vendors; and

(6) The fact that the proposed fee would provide an attractive alternative to existing fees under the CTA Plan and to NYSE Arca's monthly flat fee, an alternative that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

The Exchange believes that the level of the per-query fee is consistent with the approach set forth in the order by which the Commission approved ArcaBook fees for NYSE Arca.<sup>6</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>7</sup> It noted that if significant competitive forces apply to a proposal, the Commission will approve it unless a substantial countervailing basis exists.

NYSE Arca 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 Arca 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 Arca Realtime Reference Prices. The Exchange hopes that NYSE Arca Realtime Reference Prices will enable vendors to distribute NYSE Arca last sale price 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 Arca Realtime Reference Prices significantly constrain the prices at which the Exchange can market NYSE Arca Realtime Reference Prices. All national securities exchanges, the several Trade Reporting Facilities of FINRA, and ECNs that produce

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

<sup>6</sup> See Release [sic] No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR-NYSEArca-2006-21) (the "ArcaBook Approval Order").

<sup>7</sup> *Id.* at 74771.

proprietary data, as well as the core data feed, are all sources of competition for NYSE Arca Realtime Reference Prices. Currently, NYSE and Nasdaq offer similar services. (In addition, the Exchange anticipates that NYSE Amex will soon file for approval of a counterpart product.)

The information available in NYSE Arca 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 Arca 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. Amendment to Exhibit C

In providing NYSE Arca Realtime Reference Prices, the Exchange supplements the standard Network A Vendor Form with an *Exhibit C* that provides certain terms and conditions that are unique to the NYSE Arca Realtime Reference Prices service, such as the replacement of end-user agreements with a hyperlink to a notice and a labeling requirement. One of those supplemental conditions provides that the NYSE Arca-Only Vendor will only distribute last sale prices as part of the service. Because this filing proposes to expand the permissible universe of data elements that a NYSE Arca-Only Vendor may disseminate, the Exchange proposes to amend the Exhibit C. The proposed revised version of *Exhibit C* is attached to the proposed rule change as *Exhibit 4* and *Exhibit 5*. *Exhibit 4* is marked to show the proposed changes to the current version of *Exhibit C*. *Exhibit 5* is a clean, unmarked version.

#### 2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the "Act") for the proposed rule change is 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 Arca Realtime Reference Prices service. In addition, the Exchange believes that the proposed per-query fee would provide pricing flexibility to entities that determine to provide the NYSE Arca Realtime Reference Prices service.

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

NYSE Arca Realtime Reference Prices proposes to provide an alternative fee (the per-query fee) 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 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

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(A) By order approve the proposed rule change, or

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#### 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-NYSEArca-2009-108 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-NYSEArca-2009-108. 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 a.m. and 3 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-NYSEArca-2009-108 and should be submitted on or before January 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-30078 Filed 12-17-09; 8:45 am]

**BILLING CODE 8011-01-P**

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

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

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