

should refer to File Number SR-NYSE-2010-21 and should be submitted on or before April 22, 2010.

#### **IV. Commission's Findings and Order Granting Accelerated Approval of the Proposed Rule Change**

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>6</sup> In particular, it is consistent with Section 6(b)(4) of the Act,<sup>7</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>8</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>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 an NMS stock to do so on terms that are fair and reasonable and that are not unreasonably discriminatory.<sup>11</sup>

This proposal would extend the expiration date of the Unit of Count pilot program to July 30, 2010. The Commission has reviewed the proposal

<sup>6</sup> In approving this rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 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).

<sup>11</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.

using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>12</sup> The Commission recently found that NYSE was subject to significant competitive forces in setting fees for its depth-of-book order data in the Unit of Count Filing.<sup>13</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 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.

The Commission finds good cause for approving this proposal before the 30th day after the publication of notice thereof in the **Federal Register**. The Commission believes that accelerating approval of this proposal is appropriate and would ensure that the Exchange could continue to offer Unit of Count billing on their market data products under the existing pilot program.<sup>14</sup>

#### **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-2010-21), be, and it hereby is, approved on an accelerated basis.

<sup>12</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>13</sup> See Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131).

<sup>14</sup> The Commission notes that that the Exchange has also recently filed a proposed rule change seeking permanent approval of the pilot program for the Unit of Count billing methodology for NYSE OpenBook. See Securities Exchange Act Release No. 61779 (March 25, 2010) (SR-NYSE-2010-22).

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

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

**Florence E. Harmon,**  
*Deputy Secretary.*

[FR Doc. 2010-7363 Filed 3-31-10; 8:45 am]

**BILLING CODE 8011-01-P**

#### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-61779; File No. SR-NYSE-2010-22]

#### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Make Permanent a Unit-of-Count Metric Alternative for NYSE OpenBook**

March 25, 2010.

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> notice is hereby given that on March 11, 2010, the New York Stock Exchange LLC ("NYSE" 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**

Last March, the New York Stock Exchange LLC (the "Exchange") introduced as a pilot program (the "Pilot Program") a revised unit-of-count metric for determining the fees payable by data recipients.<sup>3</sup> It is now proposing to make that revised unit-of-count metric a permanent alternative to the traditional device fee. The text of the proposed rule change is available on the Exchange's Web site at <http://www.nyse.com>, on the Commission's Web site at <http://www.sec.gov>, at NYSE, 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

<sup>1</sup> 17 CFR 200.30-3(a)(12).

<sup>2</sup> 15 U.S.C. 78s(b)(1).

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

<sup>3</sup> See Release No. 34-59544 (March 9, 2009); 74 FR 11162 (March 16, 2009); File No. SR-NYSE-2008-131 (the "Pilot Program Filing").

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**

*a. Subscribers and Data Feed Recipients.*

After consultation with the Exchange's market data customers, including large and small redistributors and broker-dealers, the Exchange found that the marketplace desires a simplified fee structure for its products, especially regarding the methodology for counting the "devices" that are the subject of the device fee. As technology has made it increasingly difficult to define "device" and to control who has access to devices, the markets have struggled to make device counts uniform among their customers.

*i. The Original Model.*

The markets created the "device fee" metric in 1960, when market data vendors first made interrogation services available to their subscribers. During the 1960s, 1970s and 1980s, a vendor would typically link its servers to display devices that the vendor provided to its subscribers. The linkages allowed the subscriber to interrogate the vendor's database for vendor-prepared displays of stock prices and quotes. The subscriber could do no more than view the vendor-provided displays of prices and quotes. The vendor reported the number of display devices through which each subscriber could receive the vendor's displays and the exchanges imposed fees on the subscribers based on that number of devices.

The markets deemed any party that received access to the price and quote data feeds to constitute something other than a subscriber. Access to a data feed meant the receipt of prices and quotes in a manner that allowed the recipient to manipulate and re-format the data (as opposed to a subscriber's receipt of the vendor's read-only controlled displays). Such parties ("Data Feed Recipients") used their data feed access:

- A. To create interrogation services that they would vend to their subscribers;
- B. To make the data feeds available to other parties; or
- C. To use the data internally for display, analysis, portfolio valuation or other purposes other than display.

The markets imposed access fees on such parties, fees that the markets have never imposed on subscribers' receipt of controlled display services.

*ii. The Impact of Technology.*

During and after the 1980s, the markets and supporting technology evolved dramatically. Networks of personal computers replaced direct links between the vendor and each subscriber device as the standard means for distributing a vendor's interrogation service to subscribers. Vendors and subscribers applied "user id and password" entitlements to control access to the vendor's interrogation services. In time, controlled display devices became more sophisticated and enabled the subscriber to use the data for analysis and other non-display functions, functions previously reserved only for Data Feed Recipients. Vendors began to provide services in which they controlled access, but no longer provided pre-set displays of data. This evolutionary process blurred the historic distinctions between Data Feed Recipients' uses of data and subscribers' uses of data. As a result, the traditional measures for billing purposes (i.e., device fees for subscribers; access, program classification and device fees for Data Feed Recipients) became difficult to apply. This has resulted in unnecessary burdens and costs to customers and exchanges alike.

*b. The Pilot Program's Solution.*

Under the Pilot Program and a wider initiative to simplify and modernize market data administration, the Exchange provided an alternative to traditional "device" counts. Under the alternative, the Exchange redefined some of the basic "units of measure" that Vendors are required to report to the Exchange and on which the Exchange bases its fees for its NYSE OpenBook product packages.

Under the Pilot Program, the Exchange no longer defines the Vendor-subscriber relationship based on the manner in which a Data Feed Recipient or subscriber receives data (i.e., through controlled displays or through data feeds). Instead, the Exchange adopted billing criteria that are more objective. The following basic principles underlie the Pilot Program.

*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 permissioning of 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.

- 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 permissioning 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 Exchange recognizes that each Vendor and Subscriber will use NYSE OpenBook data differently and that the Exchange is one of many markets with whom Vendors and Subscribers may enter into arrangements for the receipt and use of data. In recognition of that, the Pilot Program does not restrict how Vendors may use NYSE OpenBook data in their display services and encourages 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>4</sup>

The Pilot Program does not discriminate among data recipients and users, as the new “unit of measure” concepts would apply equally to everyone.

*c. Unit-of-Count Rules.*

Subject to the rules set forth below, the Pilot Program requires Vendors to count every Subscriber Entitlement, whether it be an individual person or a device. The Vendor must include in the count every person and device that has access to the data, regardless of the purposes for which the individual or device uses the data. The Pilot Program also eliminates exceptions to the device-reporting obligation, thereby subjecting the count to a more objective process and simplifying the reporting obligation for Vendors. Previously, the Exchange required Vendors to report certain programmers and other individuals who receive access to data for certain specific, non-trading purposes. These exceptions required the Exchange to monitor the manner through which end-users consume data and added cost for both the Exchange and customers. To simplify the process, the Pilot Program requires Vendors to report all entitlements in accordance with the following rules.

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.

*d. Permanent Approval.*

The Pilot Program has provided an opportunity for the Exchange and its customers to assess specific usage issues and to enable the Exchange to solicit feedback from customers and other industry participants.

The Exchange believes that its customers have viewed the “Subscriber Entitlement” revised unit-of-count metric favorably and that the revised metric more closely aligns with current data consumption for many of them. It has reduced costs for the Exchange’s customers, and has simplified and modernized market data administration. It has subjected the count to a more objective process and simplified the reporting obligation for Vendors. The Exchange believes that the “Subscriber Entitlement” metric will serve as a model for additional pricing efficiencies.

For these reasons, the Exchange proposes to make permanent the “Subscriber Entitlement” unit-of-count methodology in accordance with the terms set forth in the Pilot Program.

*e. Impact of Pilot Program.*

Many Vendors have taken advantage of the “Subscriber Entitlement” unit-of-count methodology under the Pilot Program. Because that methodology reduces their administrative costs and, in some cases, essentially replaces the \$5,000 monthly NYSE OpenBook fee with a \$60 monthly “Subscriber Entitlement” fee applicable to certain of their customers, they have installed the controls and procedures necessary to count Subscriber Entitlements. For other Vendors, the new methodology does not fit their business models as well and they have elected to stay with the traditional “device” counts. The Exchange believes that the extent to which Vendors have embraced “Subscriber Entitlements” underscores

the success of the Pilot Program and underlies the Exchange’s proposal to seek permanent approval of the “Subscriber Entitlement” unit-of-count methodology.

**2. Statutory Basis**

The basis under the Securities Exchange Act of 1934 (the “Act”) for this proposed rule change is the requirement under Section 6(b)(4)<sup>5</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>6</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 Exchange believes that the “Subscriber Entitlement” unit-of-count alternative benefits investors because it is more closely aligned with current data consumption, reduces costs for the Exchange’s customers, and potentially serves as a model for additional pricing efficiencies.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.

*C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others*

The Exchange has not solicited, and does not intend to solicit, comments regarding this proposed rule change. 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.

<sup>4</sup> In the case of derived displays, the Vendor is required to: (a) Pay the Exchange’s device fees (described below); (b) include derived displays in its reports of NYSE OpenBook usage; and (c) 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.

<sup>5</sup> 15 U.S.C. 78f(b)(4).

<sup>6</sup> 15 U.S.C. 78f(b)(5).

#### 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*. Please include File No. SR-NYSE-2010-22 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-2010-22. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, 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-2010-22 and should be submitted on or before April 22, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-7365 Filed 3-31-10; 8:45 am]

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61781; File No. SR-NSX-2010-02]

#### **Self-Regulatory Organizations; National Stock Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Rules on Self Trade Prevention Order Modifiers**

March 25, 2010.

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> notice is hereby given that, on March 23, 2010, National Stock Exchange, Inc. ("NSX" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the self-regulatory organization. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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 adopt a new Rule 11.11(c)(1) "Self Trade Prevention" Order Modifier that allows an ETP Holder to submit orders that may avoid trading against other orders of the same ETP Holder.

The text of the proposed rule change is available on the Exchange's Web site at <http://www.nsx.com>, on the Commission's Web site at <http://www.sec.gov>, at NSX, and at the Commission's Public Reference Room.

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

#### 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

The Exchange proposes to adopt a new Rule 11.11(c)(1) to make available to ETP Holders an order modifier that allows an ETP Holder to submit orders that may avoid trading against other orders of the same ETP Holder. The proposed changes are more fully discussed below.

###### *Background*

The proposed "Self Trade Prevention" ("STP") modifiers are instructions designed to prevent two orders with the same designated Unique Identifier (as defined below) from executing against each other. The ETP Holder elects at the time an STP modified order is submitted whether the new order, an existing order (which must also have been submitted with an STP modifier) or both orders will be cancelled (or rejected, as applicable) instead of otherwise interacting.

The Exchange proposes adding three STP modifiers that will be implemented and can be set at one of three identification levels: the market participant level (pursuant to the "MPID"), the FIX session level (pursuant to "FIX Session ID") or an ETP Holder's user level (pursuant to the "Party ID" (any such identifier, a "Unique Identifier").<sup>5</sup> The STP instruction on the incoming order controls the interaction between two orders marked with STP modifiers from the same Unique Identifier. The three new STP modifiers are discussed more thoroughly below.

<sup>5</sup> Each ETP Holder is issued a unique MPID identifier that allows the Exchange to determine the ETP Holder for each order and/or execution. The FIX Session ID is unique to each physical connection between the Exchange and an ETP Holder. The Party ID identifies a unique user of an ETP Holder.