NYSE to act reasonably in setting its fees for NYSE market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. Specifically with respect to trading prior to the open and close, for example, the Commission notes that exchanges other than the NYSE currently offer, or could easily offer, trading services that compete with the NYSE open and close.

In addition to the need to attract order flow, the availability of alternatives to NYSE's Order Imbalance Information significantly affect the terms on which NYSE can distribute this market data.[21] In setting the fees for its NYSE OpenBook data, NYSE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data. The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition. Accordingly, a variety of alternative sources of information impose significant competitive pressures on the NYSE in setting the terms for distributing its market 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, nor were there any comments on this filing, so no one raised any issues under this portion of the test. For example, the proposal does not unreasonably discriminate among types of users. The proposed fee entitles the datafeed recipient to make displays of the information available to an unlimited number of subscribers at no extra charge.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[22] that the proposed rule change (SR–NYSE–2008–132) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[23]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–5569 Filed 3–13–09; 8:45 am]

BILLING CODE 8011–01–P

[21] *See* Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed., 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g., FTC* v. *Whole Foods Market, Inc.,* 502 F. Supp. 2d 1 (D.D.C. 2007); *FTC* v. *Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g., Leegin Creative Leather Products* v. *PSKS, Inc.,* 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.,* 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *State Oil Co.* v. *Khan,* 522 U.S. 3 (1997); *Northern Pacific Railway Co.* v. *U.S.,* 356 U.S. 1 (1958).

[22] 15 U.S.C. 78s(b)(2).

[23] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59544; File No. SR–NYSE–2008–131]

Self-Regulatory Organizations; New York Stock Exchange, LLC; Order Approving Proposed Rule Change To Introduce a NYSE OpenBook Nonprofessional Subscriber Fee and To Revise the Unit of Count That Determines the Device Fees Payable by Data Recipients

March 9, 2009.

I. Introduction

On December 18, 2008, the New York Stock Exchange, LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to introduce a nonprofessional subscriber fee for its NYSE OpenBook product offerings and to revise the unit of count that determines the device fees payable by data recipients. The proposed rule change was published for comment in the **Federal Register** on January 12, 2009.[3] The Commission received two comment letters on the proposal.[4] NYSE responded to the comment letters on February 25, 2009.[5] This order approves the proposed rule change.

II. Description of the Proposal

A. Unit of Count

As part of a one-year pilot and a wider initiative to simplify and modernize market data administration, the Exchange proposes to redefine 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. NYSE believes the proposal is designed to be more closely aligned with current data consumption, reduce costs for the Exchange's customers, and potentially serve as a model for additional pricing efficiencies.

NYSE OpenBook is a packaged suite of data feed products. It includes: (i) NYSE OpenBook Realtime, by which the Exchange makes NYSE OpenBook Realtime available on a snapshot basis, with updates distributed in real-time at intervals of one second; and (ii) NYSE OpenBook Ultra, by which the Exchange updates NYSE OpenBook information upon receipt of each displayed limit order, or upon an event that removes limit orders from NYSE OpenBook (*i.e.*, cancellation or execution). For no additional charge, the Exchange makes available to recipients of NYSE OpenBook additional data feeds containing: (i) NYSE BestQuote,[6] which allows customers to see NYSE's best bid and offer as made available through the Consolidated Quotation System, and which may contain additional market interest that is not displayed in the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 59198 (January 5, 2009), 74 FR 1268.

[4] *See* February 2, 2009 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association (''SIFMA''), to Elizabeth M. Murphy, Secretary, Commission (''SIFMA Letter''); February 2, 2009 letter from Jeffrey T. Brown, Senior Vice President, Charles Schwab Corporation (''Schwab''), to Florence Harmon, Deputy Secretary, Commission, (''Schwab Letter'').

[5] *See* February 25, 2009 letter from Janet M. Kissane, Senior Vice President—Legal & Corporate Secretary, Office of the General Counsel, NYSE, to Elizabeth M. Murphy, Secretary, Commission (''NYSE Letter'').

[6] NYSE added NYSE BestQuote to the NYSE OpenBook Realtime package in October 2006. *See* Securities Exchange Act Release No. 54594 (October 12, 2006); 71 FR 61819 (October 19, 2006) (SR–NYSE–2006–81).

NYSE limit order book and that, therefore, is not available in NYSE OpenBook; and (ii) Order Imbalance Information, which includes information regarding order imbalances prior to the market opening and closing auctions.

Currently, an end-user of NYSE OpenBook pays (or its Vendor pays on its behalf) the monthly per-terminal NYSE OpenBook device fee of $60. In addition, a NYSE OpenBook data feed recipient pays a monthly $5,000 access fee for NYSE OpenBook, plus the per-terminal fee if the data feed recipient also displays the data. These fees currently apply regardless of whether the recipient receives NYSE OpenBook Realtime or NYSE OpenBook Ultra and whether the subscriber is a professional subscriber or a nonprofessional subscriber. The recipients receive NYSE Order Imbalance Information and NYSE BestQuote for no additional charge.

Under the proposal, the Exchange will no longer define 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 proposes to adopt more objective billing criteria. The following basic principles underlie this proposal.

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 permitting 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 permitting 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 may 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. Accordingly, the Exchange does not propose to 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.[7] The proposal does not discriminate among data recipients and users, as the new ''unit of measure'' concepts would apply equally to everyone.

Under the proposed rule change, the Exchange would require Vendors to count every Subscriber Entitlement, whether it be an individual person or a device. Thus, the Vendor would have to 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 proposal eliminates current exceptions to the device-reporting obligation in order to subject the count to a more objective process and simplify the reporting obligation for Vendors. For instance, the Exchange previously has not required Vendors to report certain programmers and other individuals who receive access to data for certain specific, non-trading purposes. These exceptions require the Exchange to monitor the manner end-users consume data, which in turn adds cost for both the Exchange and customers.

To simplify the process, the Exchange will require Vendors to report all entitlements in accordance with the following:

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

[7] In the case of derived displays, the Vendor is required to: (1) Pay the Exchange's device fees (described below); (2) include derived displays in its reports of NYSE OpenBook usage; and (3) 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.

the entitled individuals, and not the device, in the count.

B. Nonprofessional Subscriber Fee and Fee Cap

In addition to the unit of count one-year pilot program, the Exchange also proposes to establish a fee applicable to the receipt and use of NYSE OpenBook data by nonprofessional Subscribers. Currently, the Exchange does not have a separate fee for the receipt of NYSE OpenBook data by nonprofessional Subscribers. Under the present structure, NYSE OpenBook subscribers pay a device fee of $60. In the instant proposal, the Exchange would reduce the NYSE OpenBook device fee to $15 per month for investors who qualify as nonprofessional Subscribers; the fee would be imposed on the Vendor, rather than on the nonprofessional Subscriber.

In establishing a reduced rate for nonprofessional Subscribers, the Exchange proposes to apply the same criteria for qualification as a ''nonprofessional subscriber'' as the CTA and CQ Plan Participants use.[8] Individuals that qualify as nonprofessional subscribers would be eligible to enjoy the lower nonprofessional subscriber rate regardless of whether they receive the NYSE OpenBook service from a Vendor that receives the NYSE OpenBook datafeed directly from the Exchange, or from a Vendor that receives the database indirectly through an intermediary.

The Exchange proposes to introduce a monthly maximum amount (the ''Maximum Amount'') that a broker-dealer would have to pay to provide NYSE OpenBook Realtime or NYSE OpenBook Ultra to any number of nonprofessional Subscribers if such Subscriber maintains a brokerage account with the broker-dealer. The broker-dealer must be registered as a broker/dealer under the Act.

The Exchange proposes to set the Maximum Amount at $25,000 per month for each calendar year subject to an increase or decrease by the percentage increase or decrease in the annual cost-of-living adjustment (''COLA'') that the U.S. Social Security Administration applies to Supplemental Security Income for the calendar year preceding that subsequent calendar year. For example, if the COLA for calendar year 2008 is a two percent increase, then the monthly Maximum Amount for months falling in calendar year 2009 would increase by two percent to $25,500.

The Exchange believes that the maximum monthly payment will benefit broker-dealers that service a large customer base in particular. Under the proposal, these broker-dealers would have to have procedures in place that enable them to: (i) Procure readily the nonprofessional subscriber attestation from each nonprofessional customer, a requirement that is a prerequisite for qualification as a nonprofessional subscriber; and (ii) review periodically the accounts included under their nonprofessional cap to ensure their nonprofessional status. Recognizing that these broker-dealers may have a small number of account-holding customers that technically do not qualify for the nonprofessional Subscriber fee, but whom a broker-dealer may inadvertently include under the cap because of the complexities of managing thousands or even millions of accounts, the Exchange proposes guidelines under which the broker-dealer will not be penalized for using the nonprofessional Subscriber fee cap notwithstanding the inclusion of a limited number of account-holding professional Subscribers.

Specifically, a broker-dealer may include professional Subscribers in the calculation of the monthly maximum amount if:

i. Nonprofessional Subscribers comprise no less than 95 percent of the pool of Subscribers that are included in the calculation;

ii. Each professional Subscriber included in the calculation maintains an active brokerage account directly with the broker-dealer (that is, with the broker-dealer rather than with a correspondent firm of the broker-dealer); and

iii. Each professional Subscriber that is included in the calculation is not affiliated with the broker-dealer or any of its affiliates.[9]

iv. All Subscribers receive access to the identical service, regardless of whether the Subscribers are professional Subscribers or nonprofessional Subscribers.

v. Upon discovery of the inclusion in the cap of an individual that does not qualify as a nonprofessional Subscriber, the broker-dealer takes reasonable action to reclassify and report that individual as a professional Subscriber during the immediately following reporting period.

Notwithstanding clauses (iii) and (v), the broker-dealer may include a professional Subscriber that is affiliated with the broker-dealer or its affiliates (subject to clauses (i) and (ii)) if he or she accesses market data on-line through his or her personal account solely for the non-business purpose of managing his or her own portfolio. Notwithstanding clause (v), professional Subscribers may constitute up to five percent of the pool of Subscribers that the broker-dealer includes in the calculation of the monthly maximum amount if those professional Subscribers can only view data derived from NYSE OpenBook Ultra through the Subscriber's online brokerage account; and in an inquiry/response per-quote display (*i.e.*, not in a streaming display).

The Exchange proposes this exception to permit broker-dealers that primarily serve non-institutional brokerage account holders to offer a consistent online client experience without undue administrative burdens but guard against potential abuses by monitoring the use of the exception closely and reserving the right to deny application of this exception if a broker-dealer is determined to be misusing it, such as by opening up retail brokerage accounts to disseminate data to institutional clients. The Exchange intends for the Maximum Amount to enable much wider distribution of NYSE OpenBook data to retail investors holding brokerage accounts and further the goal of market transparency for investors. If the $15 per-device fee would allow a broker-dealer to pay less than the Maximum Amount for any month, the broker-dealer may pay the lower amount for that month.

III. Summary of Comments and NYSE Response

The Commission received two comments on the proposed rule change. In general, the commenters supported the proposed changes to the market data fee structure. NYSE responded to the comments.

SIFMA supports several aspects of the proposed rule change. In particular, SIFMA believes that the unit of count

[8] Like the CTA and CQ Plans, classification as a nonprofessional subscriber is subject to Exchange review and requires the subscriber to attest to his or her nonprofessional subscriber status. A ''nonprofessional subscriber'' is a natural person who uses the data solely for his personal, non-business use and who is neither (i) registered or qualified with the SEC, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association, (ii) engaged as an ''investment adviser'' as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that act), nor (iii) employed by a bank or other organization exemption from registration under Federal and/or State securities laws to perform functions that would require him/her to be so registered or qualified if he/she were to perform such function for an organization not so exempt.

[9] A professional Subscriber is ''affiliated'' with a broker-dealer if he or she is an officer, partner, member, or employee of the broker dealer or an affiliate of the broker-dealer or enjoys a similar status with the broker-dealer or affiliate.

pilot holds the promise of simplified and fairer market date fee administration that would avoid duplicate counting of an individual using multiple devices.[10] In addition, SIFMA supports the nonprofessional subscriber fee and fee cap.

Schwab supports NYSE's proposal to introduce nonprofessional fees and fee cap for nonprofessional recipients of the NYSE's OpenBook product. Schwab believes that the proposal should for the first time allow retail customers to obtain affordable depth-of-book market data.[11] Schwab notes that before this proposal, NYSE OpenBook would have cost $60 million a month to distribute across the firm. The proposal would limit the charges to $25,000 per month for Schwab to distribute NYSE OpenBook to its nonprofessional clients. In addition, Schwab commented that NYSE's changes in the way users of data are counted will make the market data billing process more efficient and less burdensome.[12]

The commenters noted their objection to the Commission's approach for reviewing and evaluating market data proposals. SIFMA and Schwab objected to the application of the test set forth in the NYSE Arca Order for determining whether specific market data fee proposals are consistent with the Exchange Act.[13] SIFMA also stated that NYSE ''erroneously applies'' the competitive factors test enumerated in the NYSE Arca Order.[14]

NYSE appreciated SIFMA's and Schwab's strong support and positive feedback regarding the nonprofessional subscriber fee and the changes to the unit of count policies. In addition, the Exchange clarified that it intended to file a proposed rule change with the Commission to amend the pilot program to retroactively cap the fees payable by a vendor in respect of the use of data for administrative purposes to $1500 per month. The Exchange also clarified the terms and conditions applicable to the NYSE Open Book Ultra ''five percent'' exception. Finally, NYSE addressed SIFMA's disagreement with Commission's application of the NYSE Arca Order approach. In this regard, NYSE noted that the SIFMA letter did not provide a basis for its claim that the Exchange failed to comply with the competitive forces test set forth in the NYSE Arca Order. In addition, the Exchange noted its substantive analysis of the application of the test to this proposal. The Exchange also reasserted that it is subject to significant competitive forces and this proposal, which reduces fees, is in part a response to such competition.

IV. Discussion

The Commission has reviewed carefully the proposed rule change, the comment letters, and NYSE's response to the comment letters, 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. In particular, it is consistent with Section 6(b)(4) of the Act,[15] 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,[16] 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,[17] 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,[18] 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.[19]

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.[20] 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.''[21] 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.''[22] If an 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.''[23]

As noted in the NYSE Arca Order, the standards in Section 6 of the Act and Rule 603 of Regulation NMS do not differentiate between types of data and therefore apply to exchange proposals to distribute both core data and non-core data. Core data is the best-priced quotations and comprehensive last-sale reports of all markets that the Commission, pursuant to Rule 603(b), requires a central processor to consolidate and distribute to the public pursuant to joint-SRO plans.[24] In

[10] SIFMA Letter at 2.

[11] Schwab Letter at 1.

[12] Schwab Letter at 2.

[13] SIFMA Letter at 1 and Schwab Letter at 2. SIFMA continues to object for the reasons set forth in prior SIFMA comment letters. *See* January 17, 2007 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA to Nancy M. Morris, Secretary, Commission; August 1, 2007 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Nancy M. Morris, Secretary, Commission; August 16, 2007 letter from Marc E. Lackritz, President and CEO, SIFMA, to Nancy M. Morris, Secretary, Commission; November 7, 2007 letter from Melissa MacGregor, Vice President & Assistant General Counsel, SIFMA, to Dr. Erik R. Sirri, Director, Division of Market Regulation, Commission; February 7, 2008 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA, to Nancy M. Morris, Secretary, Commission; February 14, 2008 letter from Christopher Gilkerson and Gregory Babyak, Market Data Subcommittee Co-Chairs to Nancy M. Morris, Secretary, Commission; July 10, 2008 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA to Florence Harmon, Deputy Secretary, Commission; November 17, 2008 letter from Ira D. Hammerman, Senior Managing Director and General Counsel, SIFMA to Florence Harmon, Deputy Secretary, Commission.

[14] SIFMA Letter at 3.

[15] 15 U.S.C. 78f(b)(4).

[16] 15 U.S.C. 78f(b)(5).

[17] 15 U.S.C. 78f(b)(8).

[18] 17 CFR 242.603(a).

[19] 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.

[20] 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.

[21] *Id.* at 74771.

[22] *Id.* at 74782.

[23] *Id.* at 74781.

[24] *See* 17 CFR 242.603(b). (''Every national securities exchange on which an NMS stock is

Continued

contrast, individual exchanges and other market participants distribute non-core data voluntarily.[25] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[26] Non-core data products and their fees are, by contrast, much more sensitive to competitive forces. The Commission therefore is able to use competitive forces in its determination of whether an exchange's proposal to distribute non-core data meets the standards of Section 6 and Rule 603.[27] Because NYSE's instant proposal relates to the distribution of non-core data, the Commission will apply the market-based approach set forth in the NYSE Arca Order.

The Exchange proposes to modify the manner that it imposes fees for the NYSE OpenBook product packages. The proposal rule change would simplify the way the Exchange charges for NYSE OpenBook by changing the methodology for the Unit of Count. It also would introduce a nonprofessional Subscriber fee, as well as the Maximum Amount a broker-dealer would have to pay for nonprofessional Subscribers. Collectively, these changes should reduce the fees and administrative costs related to the receipt and distribution of NYSE OpenBook packages.

The proposal before the Commission relates to fees for NYSE OpenBook products which are non-core, depth of book market data products, and as in the Commission's NYSE Arca Order analysis at least two broad types of significant competitive forces applied to NYSE in setting the terms of this proposal: (i) NYSE's compelling need to attract order flow from market participants; and (ii) the availability to market participants of alternatives to purchasing NYSE's depth-of-book order data.

Attracting order flow is the core competitive concern of any equity exchange, including NYSE. Attracting order flow is an essential part of an NYSE's competitive success. If NYSE cannot attract order flow to its market, it will not be able to execute transactions. If NYSE cannot execute transactions on its market, it will not generate transaction revenue. If NYSE cannot attract orders or execute transactions on its market, it will not have market data to distribute, for a fee or otherwise, and will not earn market data revenue and thus not be competitive with other exchanges that have this ability. Table 1 below provides a useful recent snapshot of the state of competition in the U.S. equity markets in the month of January 2009:[28]

TABLE 1—REPORTED SHARE VOLUME IN U.S-LISTED EQUITIES DURING JANUARY 2009

[%]

Trading venue	All stocks	NYSE-listed	NASDAQ-listed
NASDAQ	27.1	20.5	39.9
All Non-Exchange	26.7	26.2	31.0
NYSE Arca	17.9	15.7	15.8
NYSE	14.8	26.2	0.0
BATS	10.7	9.0	10.8
International Stock Exchange	1.3	1.4	1.4
National Stock Exchange	0.6	0.7	0.7
Chicago Stock Exchange	0.4	0.4	0.3
CBOE Stock Exchange	0.2	0.0	0.1
NYSE Alternext	0.1	0.0	0.0
NASDAQ OMX BX	0.0	0.0	0.0

The market share percentages in Table 1 strongly indicate that NYSE must compete vigorously for order flow to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on NYSE to act reasonably in setting its fees for NYSE market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE must attract order flow. These market participants particularly include the large broker-dealer firms that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one trading venue to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.[29]

In addition to the need to attract order flow, the availability of alternatives to NYSE's OpenBook data significantly affect the terms on which NYSE can distribute this market data.[30] In setting the fees for its NYSE OpenBook data, NYSE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.[31] Of course, the most basic source of information generally available at an exchange is the complete record of an exchange's transactions that is provided in the core data feeds.[32] In this respect, the core data feeds that include an exchange's own transaction information

traded and national securities association shall act jointly pursuant to one or more effective national market system plans to disseminate consolidated information, including a national best bid and national best offer, on quotations for and transactions in NMS stocks. Such plan or plans shall provide for the dissemination of all consolidated information for an individual NMS stock through a single plan processor.'').

[25] *See* NYSE Arca Order at 74779.

[26] *Id.*

[27] *Id.*

[28] *Source:* ArcaVision (available at *http://www.arcavision.com*).

[29] *See* NYSE Arca Order at 74783.

[30] *See* Richard Posner, *Economic Analysis of Law* § 9.1 (5th ed. 1998) (discussing the theory of monopolies and pricing). *See also* U.S. Dep't of Justice & Fed'l Trade Comm'n, Horizontal Merger Guidelines § 1.11 (1992), as revised (1997) (explaining the importance of alternatives to the presence of competition and the definition of markets and market power). Courts frequently refer to the Department of Justice and Federal Trade Commission merger guidelines to define product markets and evaluate market power. *See, e.g., FTC* v. *Whole Foods Market, Inc.,* 502 F. Supp. 2d 1 (D.D.C. 2007); FTC v. *Arch Coal, Inc.,* 329 F. Supp. 2d 109 (D.D.C. 2004). In considering antitrust issues, courts have recognized the value of competition in producing lower prices. *See, e.g., Leegin Creative Leather Products* v. *PSKS, Inc.,* 127 S. Ct. 2705 (2007); *Atlanta Richfield Co.* v. *United States Petroleum Co.,* 495 U.S. 328 (1990); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.,* 475 U.S. 574 (1986); *State Oil Co.* v. *Khan,* 522 U.S. 3 (1997); *Northern Pacific Railway Co.* v. *U.S.,* 356 U.S. 1 (1958).

[31] *See* NYSE Arca Order at 74783.

[32] *Id.*

are a significant alternative to the exchange's market data product.[33]

For more specific information concerning depth, market participants can choose among products offered by the various exchanges and ECNs.[34] The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition. In addition, market participants can assess depth with tools other than market data, such as ''pinging'' orders that search out both displayed and nondisplayed size at all price points within an order's limit price.[35]

In sum, 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. Neither commenter raised concerns with regard to a substantial countervailing basis that the terms of the proposal failed to meet the requirements of the Act or the rules thereunder. Further, an analysis of the proposal does not provide such a basis.

The Exchange proposes to switch from a per-device fee to a Subscriber Entitlement fee. The Exchange is also proposing to introduce a nonprofessional Subscriber Fee that is subject to a monthly maximum amount. This change will lower the fees payable for NYSE OpenBook data for nonprofessional Subscribers from $60 per month to $15 per month per individual and device. The commenters supported NYSE's changes to its market data fee structure. SIFMA believes that the unit of count pilot holds the promise of simplified and fairer market date fee administration that would avoid duplicate counting of an individual using multiple devices.[36] Schwab stated that the changes in how users are of data are counted will make the market data billing process more efficient and reduce administrative burdens.[37] Schwab stated that the proposal would for the first-time allow retail customers obtain affordable depth-of-book market data.[38] The Commission believes that this proposed rule change will provide vendors with the flexibility to manage NYSE market data in a manner that they determine is most useful and efficient to their business operations.[39] In addition, the overall reduction in costs for NYSE OpenBook could lead to a wider distribution of the market data and greater market transparency.[40]

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[41] that the proposed rule change (SR–NYSE–2008–131) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[42]

Florence E. Harmon,

Deputy Secretary.

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[33] *Id.*

[34] *See* NYSE Arca Order at 74784.

[35] *Id.*

[36] SIFMA Letter at 2.

[37] Schwab Letter at 2.

[38] Schwab Letter at 1.

[39] *See* Schwab Letter at 2 (''[T]he proposal will allow [Vendors] to manipulate the data as we choose and to aggregate this data with data from other exchanges to offer innovative market data displays to our customers.'').

[40] *See* SIFMA Letter at 3 (''SIFMA has long advocated a nonprofessional fee for depth-of-book data to promote market transparency and investor protection'').

[41] 15 U.S.C. 78s(b)(2).

[42] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59542; File No. SR–NYSEArca–2009–14]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change Relating to the Leverage Factor Applicable to the MacroShares Major Metro Housing Trusts

March 9, 2008.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the ''Act'')[2] and Rule 19b–4 thereunder,[3] notice is hereby given that, on March 3, 2009, NYSE Arca, Inc. (''NYSE Arca'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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

Pursuant to the provisions of Section 19(b)(1) of the Act,[4] the Exchange, through its wholly-owned subsidiary NYSE Arca Equities, Inc. (''NYSE Arca Equities'' or the ''Corporation'') proposes to modify the representation made in SR–NYSEArca–2008–92 regarding the leverage factor applicable to the MacroShares Major Metro Housing Up Trust (''Up Trust'') and the MacroShares Major Metro Housing Down Trust (''Down Trust'') (collectively, the ''Trusts''), and, specifically, to indicate that the leverage factor to be applied will be 3 rather than 2. The shares of the Up Trust are referred to as the Up MacroShares, and the shares of the Down Trust are referred to as the Down MacroShares (collectively, the ''Shares''). The text of the proposed rule change is available on the Exchange's Web site at *http://www.nyse.com,* at the Exchange's principal office and at the Public Reference Room of the Commission.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Commission has approved pursuant to Section 19(b)(2) of the Act the Exchange's proposal to list and trade the Up MacroShares and the Down MacroShares under NYSE Arca Equities Rule 8.400.[5] As described in the Approval Order and Notice, the Up

[1] 15 U.S.C. 78s(b)(1).

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

[4] 15 U.S.C. 78s(b)(1).

[5] *See* Securities Exchange Act Release Nos. 58704 (October 1, 2008), 73 FR 59026 (October 8, 2008) (order approving listing and trading on the Exchange of the Trusts (''Approval Order'')); 58469

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