

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62187; File No. SR-NYSEAmex-2010-35)

May 27, 2010

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving Proposed Rule Change to Establish NYSE Amex Trades and NYSE Amex BBO Services and Related Fees

I. Introduction

On April 1, 2010, the NYSE Amex LLC (“NYSE Amex” 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”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish two NYSE Amex market data products, NYSE Amex Trades and NYSE Amex BBO and to establish market data fees for the same. The proposed rule change was published for comment in the Federal Register on April 22, 2010.<sup>3</sup> The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

a. Services

The NYSE Amex Trades service is a NYSE Amex-only market data service that allows a vendor to redistribute on a real-time basis the same last sale information that NYSE Amex reports under the CTA Plan and the Reporting Plan for Nasdaq/National Market System Securities Traded on an Exchange on an Unlisted or Listed Basis (the “Nasdaq/UTP Plan”) for inclusion in those Plans’ consolidated data streams and certain other related data elements (“NYSE Amex Last Sale Information”). NYSE Amex Last Sale Information would include last sale information for all securities that are traded on the Exchange and for which NYSE Amex

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

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

<sup>3</sup> See Securities Exchange Act Release No. 61936 (April 16, 2010), 75 FR 21088.

reports quotes under the CTA Plan or the Nasdaq/UTP Plan. In addition, NYSE Amex Last Sale Information will also include a unique sequence number to each trade that allows an investor to track the context of the trade through other Exchange market data products such as NYSE Amex OpenBook<sup>®</sup>. The Exchange will make NYSE Amex Trades available over a single datafeed, regardless of the markets on which the securities are listed.

NYSE Amex BBO is a NYSE Amex-only market data service that allows a vendor to redistribute on a real-time basis the same best-bid-and-offer information that NYSE Amex reports under the CQ Plan and the Nasdaq/UTP Plan for inclusion in the NYSE Amex BBO Information. NYSE Amex BBO Information would include the best bids and offers for all securities that are traded on the Exchange and for which NYSE Amex reports quotes under the CQ Plan or the Nasdaq/UTP Plan. The Exchange will make NYSE Amex BBO available over a single datafeed, regardless of the markets on which the securities are listed.

Both NYSE Amex Trades and NYSE Amex BBO (collectively, “NYSE Amex Market Data”) would allow vendors, broker-dealers, private network providers and other entities (“NYSE Amex-Only Vendors”) to make NYSE Amex Last Sale Information and NYSE Amex BBO Information available on a real-time basis. NYSE Amex-Only Vendors may distribute the NYSE Amex Trade and NYSE BBO to both professional and nonprofessional subscribers.

The Exchange would make NYSE Amex Last Sale Information available through NYSE Amex Trades no earlier than it provides last sale information to the processors under the CTA Plan and Nasdaq/UTP Plan, as appropriate. The Exchange would make NYSE Amex BBO Information available through NYSE Amex BBO no earlier than it makes that information available to the processors under the CQ Plan and the Nasdaq/UTP Plan.

b. Fees

i. Access Fee

For the receipt of access to the NYSE Amex Trades and NYSE Amex BBO, the Exchange proposes to charge \$750 per month. One \$750 monthly access fee entitles an NYSE Amex-Only Vendor to receive NYSE Amex Trades and NYSE Amex BBO. The fee applies to receipt of NYSE Amex Market Data within the NYSE Amex-Only Vendor's organization or outside of it.

ii. Professional Subscriber Fees

For the receipt and use of NYSE Amex Trades, the Exchange proposes to charge \$10 per month per professional subscriber device. Similarly, for the receipt and use of NYSE Amex BBO, the Exchange proposes to charge \$10 per month per professional subscriber device.

For both NYSE Amex Trades and NYSE Amex BBO, the Exchange proposes to offer an alternative methodology to the traditional device fee. Instead of charging \$10 per month per device, it proposes to offer NYSE Amex-Only Vendors the option of paying \$10 per month per "Subscriber Entitlement." The fee entitles the end-user to receive and use NYSE Amex Market Data relating to all securities traded on NYSE Amex, regardless of the market on which a security is listed. For the purpose of calculating Subscriber Entitlements, the Exchange proposes to adopt a unit-of-count methodology that is the same as that approved by the Commission earlier this year with respect to its NYSE OpenBook<sup>®</sup> service.<sup>4</sup>

Under a unit-of-count methodology, the Exchange would not define the Vendor-subscriber relationship based on the manner in which a datafeed recipient or subscriber receives

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<sup>4</sup> See Securities Exchange Act Release No. 62038 (May 5, 2010), 75 FR 26825 (May 12, 2010) (SR-NYSE-2010-22) (approving on a permanent basis the alternative unit-of-count methodology).

data (i.e., through controlled displays or through data feeds). Instead, the Exchange uses billing criteria that defines “Vendors,” “Subscribers,” “Subscriber Entitlements” and “Subscriber Entitlement Controls” as the basis for setting professional subscriber fees. The Exchange believes that this methodology more closely aligns with current data consumption and will reduce costs for the Exchange’s customers.

The following basic principles underlie this proposal.

A. Vendors

- “Vendors” are market data vendors, broker-dealers, private network providers and other entities that control Subscribers’ access to data through Subscriber Entitlement Controls.

B. Subscribers

- “Subscribers” are unique individual persons or devices to which a Vendor provides data. Any person or device that receives data from a Vendor is a Subscriber, whether the person 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.

C. 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.

D. 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:

1. each entitlement update to the Subscriber Entitlement Control;
  2. the status of the Subscriber Entitlement Control; and
  3. any other changes to the Subscriber Entitlement Control over a given period.
- Only the Vendor may have access to Subscriber Entitlement Controls.

Subject to the rules described below, the Exchange will require NYSE Amex-Only Vendors to count every Subscriber Entitlement, whether it be a person or a device. This means that the NYSE Amex-Only Vendor must include in the count every person and device that has access to the data, regardless of the purposes for which the person or device uses the data. The Exchange will require NYSE Amex-Only Vendors to report and count all entitlements in accordance with the following rules.

- A. The count shall be separate for the NYSE Amex Trades and NYSE Amex BBO services. This means that a device that is entitled to receive both NYSE Amex Last Sale Information and NYSE Amex BBO Information would count as a Subscriber Entitlement for the purposes of the NYSE Amex Trades service and as a separate Subscriber Entitlement for the purposes of the NYSE Amex BBO service.

- B. In connection with a Vendor's external distribution of either NYSE Amex Trades or NYSE Amex BBO), the NYSE Amex-Only Vendor should count as one Subscriber Entitlement each unique Subscriber that the NYSE Amex-Only Vendor has entitled to have access to that type of market data. However, where a device is dedicated specifically to a single person, the NYSE Amex-Only Vendor should count only the person and need not count the device.
- C. In connection with a NYSE Amex-Only Vendor's internal distribution of a type of NYSE Amex Market Data, the NYSE Amex-Only Vendor should count as one Subscriber Entitlement each unique person (but not devices) that the Vendor has entitled to have access to that type of market data.
- D. The NYSE Amex-Only Vendor should identify and report each unique Subscriber. If a Subscriber uses the same unique Subscriber Entitlement to receive multiple services, the NYSE Amex-Only Vendor should count that as one Subscriber Entitlement. However, if a unique Subscriber uses multiple Subscriber Entitlements to gain access to one or more services (e.g., a single Subscriber has multiple passwords and user identifications), the Vendor should report all of those Subscriber Entitlements.

- E. The NYSE Amex-Only Vendor should report each Subscriber device serving multiple users individually as well as each person who may access the device. As an example, for a single device to which the NYSE Amex-Only Vendor has granted two people access, the Vendor should report three Subscriber Entitlements. Only a single, unique device that is dedicated to a single, unique person may be counted as one Subscriber Entitlement.
- F. NYSE Amex-Only Vendors should report each unique person who receives access through multiple devices as one Subscriber Entitlement so long as each device is dedicated specifically to that person.
- G. The NYSE Amex-Only Vendor should include in the count as one Subscriber Entitlement devices serving no users.

For example, if a Subscriber's device has no users or multiple users, the NYSE Amex-Only Vendor should count that device as one Subscriber Entitlement. If a NYSE Amex-Only Vendor entitles five individuals to use one of a Subscriber's devices, the Vendor should count five individual entitlements and one device entitlement, for a total of six Subscriber Entitlements. If a NYSE Amex-Only Vendor entitles an individual to receive a type of NYSE Amex Market Data over a Subscriber device that is dedicated to that individual, the Vendor should count that as one Subscriber Entitlement, not two.



iii. No Program Classification Fee

The Exchange does not propose to impose any program classification charges for the use of NYSE Amex Last Sale Information or NYSE Amex BBO information. The Exchange recognizes that each NYSE Amex-Only Vendor and Subscriber will use NYSE Amex Market 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 Exchange's proposed unit-of-count methodology does not restrict how NYSE Amex-Only Vendors may use NYSE Amex Market Data in their display services and encourages Vendors to create and promote innovative uses of NYSE Amex Market Data. For instance, a NYSE Amex-Only Vendor may use NYSE Amex BBO information to create derived information displays, such as displays that aggregate NYSE Amex BBO information with quotation information from other markets.<sup>5</sup>

iv. Nonprofessional Subscriber Fee

The Exchange proposes to charge each NYSE Amex-Only Vendor \$5.00 per month for each nonprofessional subscriber to whom it provides NYSE Amex BBO Information. The Exchange proposes to impose the charge on the NYSE Amex-Only Vendor, rather than on the nonprofessional Subscriber.<sup>6</sup> In addition, the Exchange proposes to establish as an alternative to the fixed \$5.00 monthly fee a fee of \$.005 for each response that a NYSE Amex-Only Vendor

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<sup>5</sup> In the case of derived displays, the Vendor is required to: (i) pay the Exchange's device fees; (ii) include derived displays in its reports of NYSE Amex Market Data usage; and (iii) 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>6</sup> The Exchange stated that it did not propose to establish a nonprofessional subscriber fee for NYSE Amex Last Sale Information because an alternative to that product is available. See Securities Exchange Act Release No. 61403 (January 22, 2010), 75 FR 4598 (January 28, 2010) (SR-NYSEAmex-2009-85) (approving the NYSE Amex Realtime Reference Prices service).

disseminates to a nonprofessional Subscriber's inquiry for a best bid or offer under NYSE Amex BBO. The Exchange proposes to limit a NYSE Amex-Only Vendor's exposure under this alternative fee to \$5.00 per month, the same amount as the proposed fixed monthly nonprofessional Subscriber flat fee. In order to take advantage of the per-query fee, a NYSE Amex-Only Vendor must document in its Exhibit A that it can: (1) accurately measure the number of queries from each nonprofessional Subscriber and (2) report aggregate query quantities on a monthly basis.

The Exchange will impose the per-query fee only on the dissemination of best bids and offers to nonprofessional Subscribers. The per-query charge is imposed on NYSE Amex-Only Vendors, not end-users, and is payable on a monthly basis. NYSE Amex-Only Vendors may elect to disseminate NYSE Amex BBO pursuant to the per-query fee rather than the fixed monthly fee.

In establishing a nonprofessional Subscriber fee for NYSE Amex BBO, the Exchange proposes to apply the same criteria for qualification as a "nonprofessional subscriber" as the CTA and CQ Plan Participants use. Similar to 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:

- A. registered or qualified with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association,

- B. 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
- C. 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.

The Exchange believes that the proposed monthly access fee, professional subscriber fee and nonprofessional subscriber fee for NYSE Amex Trades and NYSE Amex BBO enable NYSE Amex-Only Vendors and their subscribers to contribute to the Exchange’s operating costs in a manner that is appropriate for the distribution of NYSE Amex Market Data in the form taken by the proposed services.

In setting the level of the proposed fees, the Exchange considered several factors, including:

- (i) NYSE Amex’s expectation that NYSE Amex Trades and NYSE Amex BBO are likely to be premium services, used by investors most concerned with receiving NYSE Amex Market Data on a low latency basis;
- (ii) the fees that the CTA and CQ Plan Participants, the Nasdaq/UTP Plan Participants, Nasdaq, NYSE and NYSE Arca are charging for similar services (or that NYSE Amex anticipates they will soon propose to charge);

- (iii) consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of the proposed service;
- (iv) 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;
- (v) the contribution that revenues accruing from the proposed fee will make to meet the overall costs of the Exchange's operations;
- (vi) the savings in administrative and reporting costs that the NYSE Amex Trades and NYSE Amex BBO will provide to NYSE Amex-Only Vendors (relative to counterpart services under the CTA, CQ and Nasdaq/UTP Plans); and
- (vii) the fact that the proposed fees provide alternatives to existing fees under the CTA, CQ and Nasdaq/UTP Plans, alternatives that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

d. Administrative Requirements

The Exchange will require each NYSE Amex-Only Vendor to enter into a vendor agreement just as the CTA and CQ Plans require recipients of the Network A datafeeds to enter (the "Consolidated Vendor Form"). The agreement will authorize the NYSE Amex-Only Vendor to provide its NYSE Amex Market Data service to its customers or to distribute the data internally.

In addition, the Exchange will require each professional end-user that receives NYSE Amex Market Data from a vendor or broker-dealer to enter into the form of professional

subscriber agreement into which the CTA and CQ Plans require end users of Network A data to enter. It will also require NYSE Amex-Only Vendors to subject nonprofessional subscribers to the same contract requirements as the CTA and CQ Plan Participants require of Network A nonprofessional subscribers.

### III. Discussion

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>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 has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.<sup>13</sup> 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.”<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup>

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

<sup>12</sup> NYSE Amex is an exclusive processor of NYSE Amex Trades and NYSE Amex BBO services 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.

<sup>13</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>14</sup> Id. at 74771.

<sup>15</sup> Id. at 74782.

<sup>16</sup> Id. at 74781.

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.<sup>17</sup> In contrast, individual exchanges and other market participants distribute non-core data voluntarily.<sup>18</sup> The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.<sup>19</sup> 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.<sup>20</sup> Because NYSE Amex'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 establish: (i) a service that would allow a vendor to redistribute last sale information for which NYSE Amex reports under the CTA Plan and the Nasdaq/UTP Plan; and (ii) a service that would allow a vendor to redistribute best bids and offers for all securities that are traded on the Exchange and for which NYSE Amex reports quotes

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<sup>17</sup> See 17 CFR 242.603(b). (“Every national securities exchange on which an NMS stock is 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.”).

<sup>18</sup> See NYSE Arca Order at 74779.

<sup>19</sup> Id.

<sup>20</sup> Id.

under the CQ Plan. The Exchange proposes to establish a monthly vendor fee and an alternative fee rate that uses the unit-of-count methodology.

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

Attracting order flow is the core competitive concern of any equity exchange, including NYSE Amex. Attracting order flow is an essential part of NYSE Amex's competitive success. If NYSE Amex cannot attract order flow to its market, it will not be able to execute transactions. If NYSE Amex cannot execute transactions on its market, it will not generate transaction revenue. If NYSE Amex 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 September 2009:<sup>21</sup>

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<sup>21</sup> The Commission recently published estimated trading percentages in NMS Stocks in its Concept Release on Equity Market Structure. See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3597 n. 21 (January 21, 2010) (File No. S7-02-10).



<b>Table 1</b>		
Trading Centers and Estimated % of Share Volume in NMS Stocks September 2009		
<b>Trading Venue</b>		<b>Share Volume in NMS Stocks</b>
Registered Exchanges		
	NASDAQ	19.4%
	NYSE	14.7%
	NYSE Arca	13.2%
	BATS	9.5%
	NASDAQ OMX BX	3.3%
	Other Registered Exchanges	3.7%
ECNs	5 ECNS	10.8%
Dark Pools	32 Dark Pools (Estimated)	7.9%
Broker-Dealer Internalization	200+ Broker-Dealers (Estimated)	17.5%

The market share percentages in Table 1 strongly indicate that NYSE Amex 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 Amex to act reasonably in setting its fees for NYSE Amex market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Amex 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 seeks to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival.<sup>22</sup>

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<sup>22</sup> See NYSE Arca Order at 74783.

In addition to the need to attract order flow, the availability of alternatives to NYSE Amex Market Data significantly affect the terms on which NYSE Amex can distribute this market data.<sup>23</sup> In setting the fees for NYSE Amex Market Data, NYSE Amex must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.<sup>24</sup> 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.<sup>25</sup> In this respect, the core data feeds that include an exchange's own transaction information are a significant alternative to the exchange's market data product.<sup>26</sup> The various self-regulatory organizations, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition.

In sum, there are a variety of alternative sources of information that impose significant competitive pressures on NYSE Amex in setting the terms for distributing its NYSE Amex Market Data. The Commission believes that the availability of those alternatives, as well as

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<sup>23</sup> See Richard Posner, Economic Analysis of Law § 9.1 (5<sup>th</sup> 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).

<sup>24</sup> See NYSE Arca Order at 74783.

<sup>25</sup> Id.

<sup>26</sup> Id.

NYSE Amex's compelling need to attract order flow, imposed significant competitive pressure on NYSE Amex to act equitably, fairly, and reasonably in setting the terms of its proposal.

Because NYSE Amex 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.

V. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>27</sup> that the proposed rule change (SR-NYSEAmex-2010-35) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>27</sup> 15 U.S.C. 78s(b)(2).

<sup>28</sup> 17 CFR 200.30-3(a)(12).