III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change: (i) Does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act [10] and Rule 19b–4(f)(6) thereunder.[11]

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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 Number SR–NYSEAmex–2010–44 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSEAmex–2010–44. 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–NYSEAmex–2010–44 and should be submitted on or before June 24, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13339 Filed 6–2–10; 8:45 am]

BILLING CODE 8010–01–P

[10] 15 U.S.C. 78s(b)(3)(A).

[11] 17 CFR 240.19b–4(f)(6). In addition, Rule 19b–4(f)(6)(iii) requires the self-regulatory organization to submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[12] 17 CFR 200.30–3(a)(12) and 200.30–3(a)(44).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62188; File No. SR–NYSEArca–2010–23]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Approving Proposed Rule Change To Modify the Fees for NYSE Arca Trades, To Establish the NYSE Arca BBO Service and Related Fees, and To Provide an Alternative Unit-of-Count Methodology for Those Services

May 27, 2010.

I. Introduction

On April 1, 2010, the NYSE Arca, Inc. ("NYSE Arca" 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 modify fees for NYSE Arca Trades and to establish the NYSE Arca BBO service and related fees. The proposed rule change was published for comment in the **Federal Register** on April 23, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NYSE Arca proposes: (i) To establish NYSE Arca BBO, a service that will make available the Exchange's best bids and offers; (ii) to establish fees for NYSE Arca BBO; (iii) to modify the professional subscriber fees for NYSE Arca Trades; and (iv) to provide an alternative unit-of-count methodology to the traditional device fee for NYSE Arca Trades and NYSE Arca BBO.

a. Service

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

NYSE Arca BBO would allow vendors, broker-dealers, private network providers and other entities ("NYSE Arca-Only Vendors") to make available NYSE Arca BBO Information on a real-time basis. NYSE Arca-Only Vendors may distribute the NYSE Arca BBO to both professional and nonprofessional subscribers. The Exchange would make NYSE Arca BBO Information available through NYSE Arca BBO Service no earlier than it makes that information available to the processor under the CQ Plan or the Nasdaq/UTP Plan, as applicable.

b. Fees

i. Access Fee

NYSE Arca currently charges $750 for access to the NYSE Arca Trades. The Exchange proposes to charge $750 per month for the receipt and use of NYSE Arca BBO and NYSE Acra Trades. One $750 monthly access fee entitles an NYSE Arca-Only Vendor to receive NYSE Arca BBO and NYSE Arca Trades (collectively, "NYSE Arca Market Data").

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61937 (April 16, 2010), 75 FR 21378.

The fee applies to receipt of NYSE Arca Market Data within the NYSE Arca-Only Vendor's organization or outside of it.

ii. Professional Subscriber Fee

The Exchange currently charges two professional subscriber fees for the NYSE Arca Trades Service: (i) A $5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to Network A and Network B Eligible Securities; and (ii) $5 per month per display device for the receipt and use of NYSE Arca Last Sale Information relating to securities listed on Nasdaq. The Exchange proposes to set the professional subscriber fee for the NYSE Arca Trades at $10.00. This fee would entitle professional subscribers to receive NYSE Arca Last Sale Information relating to all securities for which last sale information is reported under the CTA Plan and the Nasdaq/UTP Plan. For the receipt and use of NYSE Arca BBO, the Exchange proposes to charge $10 per month per professional subscriber device.

For both NYSE Arca Trades and NYSE Arca 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 Arca-Only Vendors the option of paying $10 per month per "Subscriber Entitlement." The fee entitles the end-user to receive and use NYSE Arca Market Data relating to all securities traded on NYSE Arca, 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 the NYSE OpenBook® service.[4]

Under the 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 data (*i.e.,* through controlled displays or through data feeds). Instead, the Exchange would use billing criteria that define "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.

[4] *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).

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 Arca-Only Vendors to count every Subscriber Entitlement, whether it be a person or a device. This means that the NYSE Arca-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 Arca-Only Vendors to report and count all entitlements in accordance with the following rules.

A. The count shall be separate for the NYSE Arca Trades and NYSE Arca BBO services. This means that a device that is entitled to receive both NYSE Arca Last Sale Information and NYSE Arca 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 Arca Trades or NYSE Arca BBO, the NYSE Arca-Only Vendor should count as one Subscriber Entitlement each unique Subscriber that the NYSE Arca-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 Arca-Only Vendor should count only the person and need not count the device.

C. In connection with a NYSE Arca-Only Vendor's internal distribution of a type of NYSE Arca Market Data, the NYSE Arca-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 Arca-Only Vendor should identify and report each unique Subscriber. If a Subscriber uses the same unique Subscriber Entitlement to receive multiple services, the NYSE Arca-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 Arca-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 Arca-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 Arca-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 Arca-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 Arca-Only Vendor should count that device as one Subscriber Entitlement. If a NYSE Arca-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 Arca-Only Vendor entitles an individual to receive a type of NYSE Arca Market Data over a Subscriber device that is dedicated to that individual, the Vendor should count that as one Subscriber Entitlement, not two.

iii. Nonprofessional Subscriber Fee

The Exchange proposes to charge each NYSE Arca-Only Vendor $5.00 per month for each nonprofessional subscriber to whom it provides NYSE Arca BBO Information. The Exchange proposes to impose the charge on the NYSE Arca-Only Vendor, rather than on the nonprofessional Subscriber.[5] 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 Arca-Only Vendor disseminates to a nonprofessional Subscriber's inquiry for a best bid or offer under NYSE Arca BBO. The Exchange proposes to limit a NYSE Arca-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 Arca-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 Arca-Only Vendors, not end-users, and is payable on a monthly basis. NYSE Arca-Only Vendors may elect to disseminate NYSE Arca BBO pursuant to the per-query fee rather than the fixed monthly fee.

In establishing a nonprofessional Subscriber fee for NYSE Arca 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 Arca Trades and NYSE Arca BBO enable NYSE Arca-Only Vendors and their subscribers to contribute to the Exchange's operating costs in a manner that is appropriate for the distribution of NYSE Arca 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 Arca's expectation that NYSE Arca Trades and NYSE Arca BBO are likely to be premium services, used by investors most concerned with receiving NYSE Arca 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 Amex are charging for similar services (or that NYSE Arca 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 Arca Trades and NYSE Arca BBO will provide to NYSE Arca-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 Arca-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 Arca 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 Arca 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.[6] In particular, it is consistent with Section

[5] The Exchange stated that it did not propose to establish a nonprofessional subscriber fee for NYSE Arca Last Sale Information because an alternative to that product is available. *See* Securities Exchange Act Release No. 61404 (January 22, 2010), 75 FR 5363 (February 2, 2010) (SR–NYSEArca–2009–108) (approving the NYSE Arca Realtime Reference Prices service).

[6] 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).

6(b)(4) of the Act,[7] 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,[8] 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,[9] 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,[10] 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.[11]

The Commission has reviewed the proposal using the approach set forth in the NYSE Arca Order for non-core market data fees.[12] 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."[13] 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."[14] 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."[15]

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.[16] In contrast, individual exchanges and other market participants distribute non-core data voluntarily.[17] The mandatory nature of the core data disclosure regime leaves little room for competitive forces to determine products and fees.[18] 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.[19] Because NYSE Arca'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 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 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. In addition, the Exchange proposes to modify the professional subscriber fees and to establish an alternative fee rate that uses the unit-of-count methodology for NYSE Arca Trades.

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 Arca. Attracting order flow is an essential part of NYSE Arca's competitive success. If NYSE Arca cannot attract order flow to its market, it will not be able to execute transactions. If NYSE Arca cannot execute transactions on its market, it will not generate transaction revenue. If NYSE Arca 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:[20]

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHARE VOLUME IN NMS STOCKS SEPTEMBER 2009

Trading venue	Share volume in NMS stocks (percent)
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:	

[7] 15 U.S.C. 78f(b)(4).

[8] 15 U.S.C. 78f(b)(5).

[9] 15 U.S.C. 78f(b)(8).

[10] 17 CFR 242.603(a).

[11] NYSE Arca is an exclusive processor of the NYSE Arca Trades and NYSE Arca 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.

[12] 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.

[13] *Id.* at 74771.

[14] *Id.* at 74782.

[15] *Id.* at 74781.

[16] *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.").

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

[18] *Id.*

[19] *Id.*

[20] 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).

TABLE 1—TRADING CENTERS AND ESTIMATED % OF SHARE VOLUME IN NMS STOCKS SEPTEMBER 2009—Continued

Trading venue	Share volume in NMS stocks (percent)
200+ Broker-Dealers (Estimated)	17.5

The market share percentages in Table 1 strongly indicate that NYSE Arca 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 Arca to act reasonably in setting its fees for NYSE Arca market data, particularly given that the market participants that must pay such fees often will be the same market participants from whom NYSE Arca 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.[21]

In addition to the need to attract order flow, the availability of alternatives to NYSE Arca Market Data significantly affect the terms on which NYSE Arca can distribute this market data.[22] In setting the fees for NYSE Arca Market Data, NYSE Arca must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange's data.[23] 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.[24] 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.[25] 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 Arca in setting the terms for distributing its NYSE Arca Market Data. The Commission believes that the availability of those alternatives, as well as 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 Arca 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.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[26] that the proposed rule change (SR–NYSEArca–2010–23) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. 2010–13334 Filed 6–2–10; 8:45 am]

BILLING CODE 8010–01–P

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

[22] *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).

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

[24] *Id.*

[25] *Id.*

[26] 15 U.S.C. 78s(b)(2).

[27] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–62181; File No. SR–NYSE–2010–30]

Self-Regulatory Organizations; New York Stock Exchange, LLC; Order Approving Proposed Rule Change To Establish the NYSE BBO Service

May 26, 2010.

I. Introduction

On April 1, 2010, 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 establish the NYSE BBO Service, a service that will make available the Exchange's best bids and offers and to establish fees for that service. The proposed rule change was published for comment in the **Federal Register** on April 22, 2010.[3] The Commission received no comment letters on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

a. Subscribers and Data Feed Recipients

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

The NYSE BBO Service would allow vendors, broker-dealers, private network providers and other entities ("NYSE-Only Vendors") to make NYSE BBO Information available on a real-time basis. NYSE-Only Vendors may distribute the NYSE BBO Service to both professional and nonprofessional subscribers.

The Exchange would make NYSE BBO Information available through its new NYSE BBO Service no earlier than

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 61914 (April 15, 2010), 75 FR 21077.