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–BX–2009–007 and should be submitted on or before February 25, 2009.

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

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–2297 Filed 2–3–09; 8:45 am]

**BILLING CODE 8011–01–P**

[23] 17 CFR 200.30–3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59309; File No. SR–NYSE–2009–04]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Establish Fees for NYSE Trades

January 28, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 27, 2009, the New York Stock Exchange LLC (''NYSE'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to introduce its NYSE Trades service and to establish fees for that service. NYSE Trades is a new NYSE-only market data service that allows a vendor to redistribute on a real-time basis the same last sale information that NYSE reports to the Consolidated Tape Association (''CTA'') for inclusion in CTA's consolidated data stream and certain other related data elements (''NYSE Last Sale Information'').

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

[2] 17 CFR 240.19b–4.

### 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 these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections (A), (B) and (C) below, of the most significant aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

a. *The Service.* The Exchange proposes to introduce NYSE Trades, a new service pursuant to which it will allow vendors, broker-dealers and others (''NYSE-Only Vendors'') to make available NYSE Last Sale Information on a real-time basis.[3] NYSE Last Sale Information would include last sale information for all securities that are traded on the Exchange.

The Exchange will make NYSE Last Sale Information available through its new NYSE Trades service at the same time as it provides last sale information to the processor under the CTA Plan. In addition to the information that the Exchange provides to CTA, NYSE Last Sale Information will also include a unique sequence number that the Exchange assigns to each trade and that allows an investor to track the context of the trade through such other Exchange market data products as NYSE OpenBook® and NYSE Info Tools®.

Contemporaneously with the proposed rule change, the Exchange submitted a proposed rule change that seeks to establish a pilot program for the receipt and redistribution of the NYSE Trades datafeed(s) without charge to either the datafeed recipient or the end-user. The Exchange proposes to provide that free offering on a pilot program basis until the later of Commission approval of the proposed rule change and the end of the pilot period.

b. *The Fees.*

i. *Access Fee.* For the receipt of access to the datafeeds of NYSE Last Sale Information that the Exchange will make available, the Exchange proposes to charge $1500 per month. For that fee, the datafeed recipient will receive access to each of the NYSE Last Sale Information datafeeds that NYSE makes available. Currently, the Exchange trades only Network A securities. The Exchange does not propose to impose any program classification charges for the use of NYSE Trades.

ii. *Device Fee.* The Exchange proposes to charge each subscriber to an NYSE-Only Vendor's NYSE Trades service $15 per month per display device for the receipt and use of NYSE Last Sale Information. The Exchange does not currently perceive a demand for a nonprofessional subscriber fee for NYSE Trades, but will monitor customer response.

In a proposed rule change that the Exchange anticipates filing contemporaneously with the proposed rule change (the ''Unit-of-Count Filing''), the Exchange will propose to revise the unit of count that determines the device fees payable by NYSE OpenBook® data recipients. Upon Commission approval of that filing, the Exchange proposes to incorporate the unit of count set forth in the Unit-of-Count Filing into the NYSE Trades service.

Under the Unit-of-Count Filing, the Exchange would 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 would adopt billing criteria that are more objective. Those criteria would newly define ''Vendors,'' ''Subscribers,'' ''Subscriber Entitlements'' and ''Subscriber Entitlement Controls'' as the basis for setting device fees. The Exchange believes that these changes more closely align with current data consumption and will reduce costs for the Exchange's customers.

c. *The Fees are Non-Discriminatory.* No investors or broker-dealers are required to subscribe to the product, as they can find the same NYSE last sale prices in the Exchange's NYSE Realtime Reference Prices service.[4] Or, they can find them integrated with the prices that other markets make available under the CTA Plan. Indeed, even though NYSE Trades' Last Sale Information provides a less expensive alternative to the consolidated price information that investors and broker-dealers receive from CTA, the Exchange believes that the information that NYSE contributes to the CTA consolidated datafeed and

[3] The Exchange notes that it will make NYSE Trades available to vendors no earlier than it makes its last sale information available to the processor under the CTA Plan.

[4] *See* Release No. 34–57966; 73 **Federal Register** 35182 (June 20, 2008); File No. SR–NYSE–2007–04.

the low latency of the CTA datafeed will continue to satisfy the needs of the vast majority of individual and professional investors. Most investors and broker-dealers are not likely to substitute the NYSE Trades datafeed for the CTA datafeed for display purposes.

Rather, the Exchange developed NYSE Trades primarily at the request of traders who are very latency sensitive. The latency difference between accessing last sales through the NYSE datafeed or through the CTA datafeed can be measured in tens of milliseconds. The Exchange anticipates that demand for the product will derive primarily from investors and broker-dealers who desire to use NYSE Trades to power certain trading algorithms or smart order routers.

Regardless of an investor's reasons for subscribing to the NYSE Trades service, the access fee applies equally to all NYSE-Only Vendors that receive the NYSE Trades datafeed and the device fee applies equally to all subscribers that receive an NYSE-Only Vendor's NYSE Trades service. Section 603(a)(2) of Regulation NMS requires markets to distribute market data ''on terms that are not unreasonably discriminatory.'' The Exchange believes that both the access fee and the device fee comply with this standard.

d. *The Fees are Fair and Reasonable.* The Exchange believes that the levels at which it proposes to set the access and device fees comport with the standard that the Commission established for determining whether market data fees relating to non-core market data products are fair and reasonable. ''Non-core products'' refers to products other than the consolidated products that markets offer collectively under the joint industry plans. In its recent ''Order Setting Aside Action by Delegated Authority and Approving Proposed Rule Change Relating to NYSE Arca Data'' (the ''NYSE ArcaBook Approval Order''),[5] the Commission reiterated its position from its release approving Regulation NMS that it should ''allow market forces, rather than regulatory requirements, to determine what, if any, additional quotations outside the NBBO are displayed to investors.''[6]

The Commission went on to state that:

> The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system. Indeed, competition among multiple markets and market participants trading the same products is the hallmark of the national market system.[7]

The Commission then articulated the standard that it will apply in assessing the fairness and reasonableness of market data fees for non-core products, as follows:

> With respect to non-core data, * * * the Commission has maintained a market-based approach that leaves a much fuller opportunity for competitive forces to work. This market-based approach to non-core data has two parts. The first is to ask whether the exchange was subject to significant competitive forces in setting the terms of its proposal for non-core data, including the level of any fees. If an exchange was subject to significant competitive forces in setting the terms of a proposal, the Commission will approve the 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.[8]

The Exchange believes that by this standard or any other standard, the proposed access and device fees are fair and reasonable. NYSE and its market data products are subject to significant competitive forces and the proposed access and device fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It competes with the other 10 national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility and Trade Reporting Facilities, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow ''and the competition is fierce.''[9]

In addition, NYSE Trades would compete with a number of alternative products. NYSE Trades does not provide a complete picture of all trading activity in a security. Rather, the 12 SROs, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce last sale information products, and many currently do, including Nasdaq and NYSE Arca. In addition, investors can receive NYSE trade reports through the consolidated CTA data stream or they can receive NYSE trade reports for free by means of access to the Exchange's NYSE Realtime Reference Prices service.

In setting the level of the proposed NYSE Trades access and device fees, the Exchange took into consideration several factors, including:

(1) Consultation with some of the entities that the Exchange anticipates will be the most likely to take advantage of NYSE Trades;

(2) The contribution of market data revenues that the Exchange's Board of Directors believes is appropriate for vendors and other entities that provide market data to the investing public;

(3) The contribution that revenues accruing from the proposed fees will make to meeting the overall costs of the Exchange's operations;

(4) Projected losses to the revenues accruing from the Exchange's other market data fees, which losses are likely to result from the ability of NYSE-Only Vendors to distribute NYSE Trades to vendors, broker-dealers and investors in competition with the consolidated last sale information services that Participants provide under the CTA Plan; and

(5) Investors' and broker-dealers' access to NYSE last sale prices through NYSE Realtime Reference Prices.

(6) The fact that the proposed fees provide an alternative to existing Network A fees under the CTA Plan, an alternative that vendors will purchase only if they determine that the perceived benefits outweigh the cost.

In the aftermath of the NYSE ArcaBook Approval Order, the Exchange believes that the competition among exchanges for order flow and the competition among exchanges for market data products subject the proposed NYSE Trades access and device fees to significant competitive forces.

In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the fees fail to meet the requirement of the Act.

In sum, the availability of a variety of alternative sources of information impose significant competitive pressures on NYSE Trades and NYSE's compelling need to attract order flow impose significant competitive pressure on NYSE to act equitably, fairly, and reasonably in setting NYSE Trades fees. The proposed NYSE Trades access and device fees are, in part, responses to that pressure. The Exchange believes that the proposed NYSE Trades service fees would reflect an equitable allocation of its overall costs to users of its facilities.

e. *Administrative Requirements.* The Exchange will require NYSE-Only Vendors to enter into the form of ''vendor'' agreement into which the CTA Plan requires recipients of the Network A last sale prices information datafeeds to enter (the ''Network A Vendor Form''). The Network A Vendor

[5] *See* Release No. 34–59039 (December 2, 2008); File No. SR–NYSEArca–2006–21.

[6] *See* Regulation NMS Release, 70 FR at 37566–37567 (addressing differences in distribution standards between core data and non-core data).

[7] NYSE ArcaBook Approval Order at pp. 46–47.

[8] Id at pp. 48–49.

[9] Id at p 52.

Form will authorize the NYSE-Only Vendor to provide the NYSE Trades service to its subscribers and customers.

The Network A Participants drafted the Network A Vendor Form as a one-size-fits-all form to capture most categories of market data dissemination. It is sufficiently generic to accommodate NYSE Trades. The Network A Vendor Form has been in use in substantially the same form since 1990.[10]

Similarly, the Exchange will require professional and non-professional subscribers to NYSE Trades to undertake to comply with the same contract, reporting, payment, and other administrative requirements as to which the Network A Participants subject them in respect of Network A last sale information under the CTA Plan.

2. Statutory Basis

The bases under the Act for the proposed rule change are the requirement under Section 6(b)(4) that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities and the requirements under Section 6(b)(5) that the rules of an exchange be designed to promote just and equitable principles of trade and not to permit unfair discrimination between customers, issuers, brokers or dealers.

The proposed rule change would benefit investors by providing a less expensive alternative to the last sale price information than the consolidated last sale price information that they receive under the CTA Plan. In addition, for that single lower fee, vendors receive Exchange prices for all Exchange-traded securities, something that differentiates the Exchange's product from pricing under the CTA Plan.

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

In proposing and adopting Regulation NMS, the Commission rescinded the prior prohibition on SROs from disseminating their trade reports independently,[11] subjecting that distribution to the ''fair and reasonable'' and ''not unreasonably discriminatory'' standards that have historically governed the distribution of consolidated data.[12] The Commission stated, ''Given that * * * SROs will continue to transmit trades to the Networks pursuant to the Plans * * *, the Commission believe [SIC] that SROs and their members also should be free to distribute their trades independently.'' [13]

The Commission rescinded the prohibition in recognition of the fact that competition in the realm of SRO trade-report distribution would produce market forces and innovation that would benefit the investing public. The NYSE ArcaBook Approval Order enforces this finding. By means of NYSE Trades, the Exchange would provide vendors and broker-dealers with an alternative market data product and fee structure that does not exist today, without altering or rescinding any existing market data fess or products. If they believe that the proposed product and fee structure are useful and cost-effective to their business model, they will embrace them.

Given the existence of alternative products containing NYSE last sale products, the Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange has discussed the proposed rules change with those entities that the Exchange believes would be the most likely to take advantage of the proposed NYSE Last Sale Information service by becoming NYSE-Only Vendors. While those entities have not submitted formal, written comments on the proposal, the Exchange has incorporated some of their ideas into the proposal and the proposed rule change reflects their input. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(a) By order approve such proposed rule change, or

(b) Institute proceedings to determine whether the proposed rule change should be disapproved.

**IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

*Electronic Comments*

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–NYSE–2009–04 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–NYSE–2009–04. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2009–04 and should be submitted on or before February 25, 2009.

[10] *See* Release Nos. 34–28407 (September 10, 1990), and 34–49185 (February 4, 2004).

[11] *See* Rule 601 of Regulation NMS.

[12] *See* Rule 603(a) of Regulation NMS.

[13] *See* Footnote 638 to Regulation NMS (Release No. 34–51808; File No. S7–10–04) (June 9, 2005).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9–2252 Filed 2–3–09; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

**[Release No. 34–59313; File No. SR–NYSE–2009–03]**

## Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Adopt Listing Fees for Securities Listed Under Section 703.21 and 703.22 and Traded on NYSE Bonds

January 28, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on January 9, 2009, New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposal from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to include a new section (proposed Section 902.10) in its Listed Company Manual (the ''Manual'') establishing fees payable in connection with the listing of securities traded on NYSE Bonds that are listed under Section 703.21 (Equity-Linked Debt Securities) and Section 703.22 (Equity Index-Linked Securities, Commodity-Linked Securities and Currency-Linked Securities). The filing also amends Section 902.09 to remove references to the securities that will be subject to the fees under proposed Section 902.10.

The text of the proposed rule change is available on the Exchange's Web site (*http://www.nyse.com*), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange 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 these 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 aspects of such statements.

*A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

1. Purpose

The Exchange proposes to include a new section (proposed Section 902.10) in the Manual establishing fees payable in connection with the listing of securities traded on NYSE Bonds that are listed under Section 703.21 and Section 703.22. The filing also amends Section 902.09 to remove references to the securities that will be subject to the fees under proposed Section 902.10.

Securities listed under Sections 703.21 and 703.22 and traded on NYSE Bonds are currently subject to the fees set forth in Section 902.09. Section 902.09 establishes a minimum initial listing fee of $5,000 (for issuances of one million securities or fewer) and a maximum initial listing fee (for issuances in excess of 15 million securities) of $45,000. The minimum annual listing fee under Section 902.09 is $10,000 (for issues with 6 million securities outstanding or fewer) and the maximum annual listing fee is $55,000 (for issues with more than 50 million securities outstanding). Under proposed Section 902.10, the initial listing fee for securities traded on NYSE Bonds and listed under Section 703.21 and 703.22 will be a flat fee of $5,000 regardless of the size of the issuance and the annual fee will be a flat fee of $5,000 regardless of the number of securities outstanding.

The Exchange notes that no issuer will pay higher initial listing fees as a result of the adoption of Section 902.10, as the proposed flat initial listing fee of $5,000 is the same as the current minimum charged under Section 902.09, and most issuers will pay less than would currently be the case under Section 902.09. All issuers will be subject to lower annual fees, as the proposed flat rate of $5,000 is less than the current minimum of $10,000 charged under Section 902.09. In order to be listed on NYSE Bonds, a security must have a $1,000 denomination. Typically, index-linked securities and equity-linked securities with $1,000 denominations are marketed to institutional investors rather than retail investors and, because these purchasers are less concerned that securities they invest in should have an exchange listing, these securities are generally not listed on a national securities exchange. Consequently, the Exchange is adopting a low level of listing fees for these securities because it believes doing so will make an exchange listing attractive in connection with offerings where listing is not crucial to a successful marketing of the securities. The Exchange notes that securities listed on NYSE Bonds do not have the benefit of a Designated Market Maker and, as such, the Exchange incurs lower regulatory and administrative costs in connection with such securities than would be the case with floor-traded securities. As such, the proposed fees are set at a level that reflects the lower costs incurred by the Exchange in connection with the trading of securities on NYSE Bonds than on the equities trading floor, while remaining attractive to issuers for whom an exchange listing is not crucial.

The Exchange recognizes that Section 902.09 was amended quite recently to add securities listed under Sections 703.21 and 703.22 and traded on NYSE Bonds to those subject to the fees set forth in that section.[3] However, since the adoption of that amendment and as of the date of submission of this filing, the Exchange has not listed any securities under Sections 703.21 and 703.22 and traded on NYSE Bonds and therefore no issuers have been charged those higher fees. For the reasons stated above, the Exchange has determined instead to apply the new fees established in this filing.

2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(4)[4] that an exchange have rules that provide for the equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. The Exchange believes that the proposed new fees for securities traded on NYSE Bonds and listed under Sections 703.21 and 703.22 do not render the allocation of its listing fees inequitable in particular because no issuer will pay

[14] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 58599 (September 19, 2008), 73 FR 55883 (September 26, 2008) (SR–NYSE–2008–56).

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