19(b)(3)(A)(iii) of the Act [25] and Rule 19b–4(f)(4) [26] thereunder because the proposed rule change effects a change in an existing service of DTC that (i) does not adversely affect the safeguarding of securities or funds in the custody or control of DTC or for which it is responsible and (ii) does not significantly affect the respective rights of the clearing agency or persons using the service. At any time within sixty days of the filing of such 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–DTC–2008–14 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–DTC–2008–14. 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 Section, 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 filings also will be available for inspection and copying at the principal office of DTC and on DTC's Web site at *http://www.dtcc.com/legal/rule_filings/ficc/2008.php.* 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–DTC–2008–14 and should be submitted on or before January 29, 2009.

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

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–349 Filed 1–9–09; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59198; File No. SR–NYSE–2008–131]

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

January 5, 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 December 18, 2008, the New York Stock Exchange LLC (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is proposing to introduce a nonprofessional subscriber fee for its NYSE OpenBook® product offerings and to revise the unit of count that determines the device fees payable by data recipients.

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

In its filing with the Commission, NYSE 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. NYSE 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) *Background.* NYSE OpenBook responds to the desire of some market participants for depth-of-book data. It is a compilation of limit order data that the Exchange provides to market data vendors through a data feed.

NYSE OpenBook is a packaged suite of data feed products. It includes:

i. NYSE OpenBook Realtime, by which the Exchange makes NYSE OpenBook Realtime available on a snapshot basis, with updates distributed in real-time at intervals of one second; and

ii. NYSE OpenBook Ultra, by which the Exchange updates NYSE OpenBook information upon receipt of each displayed limit order, or upon an event that removes limit orders from NYSE OpenBook (*i.e.*, cancellation or execution).

For no additional charge, the Exchange makes available to recipients of NYSE OpenBook additional data feeds containing:

iii. NYSE BestQuote,[3] which allows customers to see NYSE's best bid and offer as made available through the Consolidated Quotation System, and which may contain additional market interest that is not displayed in the NYSE limit order book and that, therefore, is not available in NYSE OpenBook; and

iv. Order Imbalance Information, which includes information regarding order imbalances prior to the market opening and closing auctions.

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[25] 15 U.S.C. 78s(b)(3)(A)(iii).

[26] 26 17 CFR 240.19b–4(f)(4).

[27] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] NYSE added NYSE BestQuote to the NYSE OpenBook Realtime package in October 2006. *See* Release No. 34–54594 (October 12, 2006); 71 FR 61819 (October 19, 2006); File No. SR–NYSE–2006–81.

In June 2008, the Exchange added NYSE OpenBook Ultra and Order Imbalance Information to the NYSE OpenBook package of products.[4] In the NYSE OpenBook Ultra filing, NYSE stated that it would temporarily make NYSE OpenBook Ultra and Order Imbalance Information available at no additional fee beyond the charges that the Exchange currently imposes for the receipt and use of NYSE OpenBook Realtime and NYSE BestQuote. It also stated that the Exchange would submit any proposed new or modified fees to the Commission as proposed rule changes and would not impose any new or modified charges on data feed recipients and end-users prior to Commission approval. This proposed rule change proposes to establish a discounted fee for nonprofessional subscribers that receive and use NYSE OpenBook products.

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

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

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

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

a. To create interrogation services that they would vend to their subscribers;

b. To make the data feeds available to other parties; or

c. To use the data internally for display, analysis, portfolio valuation or other purposes other than display.

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

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

(c) *The Proposed Solution.* As part of a one-year pilot and a wider initiative to simplify and modernize market data administration, the Exchange proposes to redefine some of the basic ''units of measure'' that Vendors are required to report to the Exchange and on which the Exchange bases its fees for its NYSE OpenBook product packages. The Exchange believes that these changes more closely align with current data consumption, will reduce costs for the Exchange's customers, and, if successful, will serve as a model for additional pricing efficiencies.

Under the proposal, the Exchange will no longer define the Vendor-subscriber relationship based on the manner in which a Data Feed Recipient or subscriber receives data (*i.e.,* through controlled displays or through data feeds). Instead, the Exchange proposes to adopt billing criteria that are more objective. The following basic principles underlie this proposal.

i. *Vendors.*

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

ii. *Subscribers.*

- ''Subscribers'' are unique individual persons or devices to which a Vendor provides data. Any individual or device that receives data from a Vendor is a Subscriber, whether the individual or device works for or belongs to the Vendor, or works for or belongs to an entity other than the Vendor.
- Only a Vendor may control Subscriber access to data.
- Subscribers may not redistribute data in any manner.

iii. *Subscriber Entitlements.*

- A Subscriber Entitlement is a Vendor's permissioning of a Subscriber to receive access to data through an Exchange-approved Subscriber Entitlement Control.
- A Vendor may not provide data access to a Subscriber except through a unique Subscriber Entitlement.
- The Exchange will require each Vendor to provide a unique Subscriber Entitlement to each unique Subscriber.
- At prescribed intervals (normally monthly), the Exchange will require each Vendor to report each unique Subscriber Entitlement.

iv. *Subscriber Entitlement Controls.*

- A Subscriber Entitlement Control is the Vendor's process of permissioning Subscribers' access to data.
- Prior to using any Subscriber Entitlement Control or changing a previously approved Subscriber Entitlement Control, a Vendor must provide the Exchange with a demonstration and a detailed written description of the control or change and the Exchange must have approved it in writing.
- The Exchange will approve a Subscriber Entitlement Control if it

[4] *See* Release No. 34–57861; 73 FR 31905 (June 4, 2008); File No. SR–NYSE–2008–42.

allows only authorized, unique end-users or devices to access data or monitors access to data by each unique end-user or device.

- Vendors must design Subscriber Entitlement Controls to produce an audit report and make each audit report available to the Exchange upon request. The audit report must identify:

A. Each entitlement update to the Subscriber Entitlement Control;

B. The status of the Subscriber Entitlement Control; and

C. Any other changes to the Subscriber Entitlement Control over a given period.

- Only the Vendor may have access to Subscriber Entitlement Controls.

The Exchange recognizes that each Vendor and Subscriber will use NYSE OpenBook data differently and that the Exchange is one of many markets with whom Vendors and Subscribers may enter into arrangements for the receipt and use of data. In recognition of that, the Exchange's proposed solution does not restrict how Vendors may use NYSE OpenBook data in their display services and encourages Vendors to create and promote innovative uses of NYSE OpenBook information. For instance, a Vendor may use NYSE OpenBook data to create derived information displays, such as displays that aggregate NYSE OpenBook data with data from other markets.[5]

The proposal does not discriminate among data recipients and users, as the new ''unit of measure'' concepts would apply equally to everyone.

The Exchange intends for the pilot period to provide an opportunity for it and its customers to assess specific usage issues and to enable the Exchange to establish a leadership role in effecting change after soliciting feedback from customers and other industry participants.

(d) *Unit of Count.* Subject to the rules set forth below, the Exchange will require Vendors to count every Subscriber Entitlement, whether it be an individual person or a device. This means that the Vendor must include in the count every person and device that has access to the data, regardless of the purposes for which the individual or device uses the data. The Exchange believes that eliminating current exceptions to the device-reporting obligation will subject the count to a more objective process and will simplify the reporting obligation for Vendors. Previously, the Exchange has not required Vendors to report certain programmers and other individuals who receive access to data for certain specific, non-trading purposes. These exceptions require the Exchange to monitor the manner through which end-users consume data and adds cost for both the Exchange and customers. To simplify the process, the Exchange will require Vendors to report all entitlements in accordance with the following rules.

i. In connection with a Vendor's external distribution of NYSE OpenBook data, the Vendor should count as one Subscriber Entitlement each unique Subscriber that the Vendor has entitled to have access to the Exchange's market data. However, where a device is dedicated specifically to a single individual, the Vendor should count only the individual and need not count the device.

ii. In connection with a Vendor's internal distribution of NYSE OpenBook data, the Vendor should count as one Subscriber Entitlement each unique individual (but not devices) that the Vendor has entitled to have access to the Exchange's market data.

iii. The Vendor should identify and report each unique Subscriber. If a Subscriber uses the same unique Subscriber Entitlement to gain access to multiple market data services, the Vendor should count that as one Subscriber Entitlement. However, if a unique Subscriber uses multiple Subscriber Entitlements to gain access to one or more market data services (*e.g.*, a single Subscriber has multiple passwords and user identifications), the Vendor should report all of those Subscriber Entitlements.

iv. Vendors should report each unique individual person who receives access through multiple devices as one Subscriber Entitlement so long as each device is dedicated specifically to that individual.

v. The Vendor should include in the count as one Subscriber Entitlement devices serving no entitled individuals. However, if the Vendor entitles one or more individuals to use the same device, the Vendor should include only the entitled individuals, and not the device, in the count.

(e) *Proposed Nonprofessional Subscriber Fee.*

i. *The Fee.* In addition to the ''unit of measure'' pilot program, the Exchange also proposes to establish a fee applicable to the receipt and use of NYSE OpenBook data by nonprofessional Subscribers. Until now, the Exchange has not established a separate fee for the receipt of NYSE OpenBook data by nonprofessional Subscribers. NYSE OpenBook subscribers currently pay a device fee of $60. In previous filings, the Exchange has declared that it would consider designing a limit order data product suited for the retail, nonprofessional customer if it perceived a suitable demand for it. In the proposed rule change, the Exchange proposes to reduce the NYSE OpenBook device fee to $15 per month for those investors who qualify as nonprofessional Subscribers. The Exchange proposes to impose the charge on the Vendor, rather than on the nonprofessional Subscriber, regardless of whether the Vendor provides NYSE OpenBook Realtime or NYSE OpenBook Ultra.

ii. *Qualification as a Nonprofessional Subscriber.* In establishing a reduced rate for nonprofessional Subscribers, the Exchange proposes to apply the same criteria for qualification as a ''nonprofessional subscriber'' as the CTA and CQ Plan Participants use. As is true under 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, (''SEC''), 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.

Individuals that qualify as nonprofessional subscribers would be eligible to enjoy the lower nonprofessional subscriber rate regardless of whether they receive the NYSE OpenBook service from a Vendor that receives the NYSE OpenBook datafeed directly from the Exchange, or from a Vendor that receives the database indirectly through an intermediary.

[5] In the case of derived displays, the Vendor is required to: (i) Pay the Exchange's device fees (described below); (ii) include derived displays in its reports of NYSE OpenBook 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.

(f) *Nonprofessional Subscriber Fee Cap.* The Exchange proposes to introduce a monthly maximum amount (the ''Maximum Amount'') that a broker-dealer would have to pay to provide NYSE OpenBook Realtime or NYSE OpenBook Ultra to any number of nonprofessional Subscribers so long as each such Subscriber maintains a brokerage account with the broker-dealer. The broker-dealer must be registered as a broker/dealer under the Securities Exchange Act of 1934.

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

The Exchange anticipates that the broker-dealers that will enjoy the benefits of the maximum monthly payment are broker-dealers servicing a large customer base. As such, they have in place procedures that:

i. Enable them to procure readily the nonprofessional subscriber attestation from each nonprofessional customer, a requirement that is a prerequisite for qualification as a nonprofessional subscriber; and

ii. Enable them to review periodically the accounts included under their nonprofessional cap to ensure their nonprofessional status.

The Exchange also realizes that these broker-dealers may have a small number of account-holding customers that technically do not qualify for the nonprofessional Subscriber fee, but whom a broker-dealer may inadvertently include under the cap because of the complexities of managing thousands or even millions of accounts. As a practical response to compliance and the costs of administration, the Exchange is proposing the following guidelines under which the Exchange will not penalize a broker-dealer using the nonprofessional Subscriber fee cap if the broker-dealer includes a limited number of account-holding professional Subscribers under the cap.

A broker-dealer may include professional Subscribers in the calculation of the monthly maximum amount so long as:

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

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

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

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

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

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

Notwithstanding clauses (iii) and (v), the broker-dealer may include a professional Subscriber that is affiliated with the broker-dealer or its affiliates (subject to clauses (i) and (ii)) if he or she accesses market data on-line through his or her personal account solely for the non-business purpose of managing his or her own portfolio.

Notwithstanding clause (v), professional Subscribers may constitute up to five percent of the pool of Subscribers that the broker-dealer includes in the calculation of the monthly maximum amount if those professional Subscribers can only view data derived from NYSE OpenBook Ultra:

(i) Through the Subscriber's online brokerage account; and

(ii) In an inquiry/response per-quote display (*i.e.*, not in a streaming display).

The purpose of this exception is to permit broker-dealers that primarily serve non-institutional brokerage account holders to offer a consistent online client experience without undue administrative burdens. At the same time, the Exchange must guard against potential abuse of this exception. Therefore, the Exchange intends to monitor its use closely and reserves the right to deny application of this exception if it discovers that a broker-dealer is misusing it, such as by opening up retail brokerage accounts to disseminate data to institutional clients.

If the $15 per-device fee would allow a broker-dealer to pay less than the Maximum Amount for any month, the broker-dealer may pay the lower amount for that month.

The Exchange intends for the Maximum Amount to enable much wider distribution of NYSE OpenBook data to retail investors holding brokerage accounts. This will further the goal of market transparency for investors. The low fee enabling wider retail investor access, coupled with the five percent ''de minimis'' exception for professional Subscribers in the Subscriber Pool, reduce administrative burdens and produce a fee that is fair and reasonable. Moreover, the Maximum Amount compares favorably with monthly maximums payable to Nasdaq and to the CTA Plan Participants. Nasdaq set its maximum at $25,000 per month for nonprofessional subscribers' receipt of TotalView,[6] although Nasdaq also requires the additional purchase of its Level 2 product at $9 per nonprofessional subscriber. Nasdaq's maximum does not apply to OpenView or to its Level 1 or NQDS services. For calendar year 2007, the CTA Plan Participants set the maximum at $660,000 per month for internal distribution of consolidated quotation information within a broker-dealer's organization and for the broker-dealer's distribution to nonprofessional subscribers that maintain brokerage accounts (the ''CTA Maximum Amount'').

(g) *The Fee and the Maximum Amount are Non-Discriminatory.* As a result of the fee reduction for the receipt of NYSE OpenBook data by nonprofessional Subscribers, the Exchange would apply one device fee in respect of professional Subscribers to NYSE OpenBook services and a different, lower device fee in respect of nonprofessional Subscribers. The use of a lower fee for nonprofessional Subscribers than for professional Subscribers has a long history. The Exchange played an active role in CTA's adoption of the first nonprofessional subscriber fee 25 years ago [7] and that

[6] Through TotalView, Nasdaq provides real-time information relating to the displayed quotes and orders of Nasdaq participants in UTP Plan Securities. TotalView displays quotes and orders at multiple prices.

[7] *See* the Sixth Substantive Amendment and Sixth Charges Amendment to the CTA Plan (''Non-Professional Subscribers''), File No. S7–433, Release Nos. 34–20002 (July 22, 1983), 34–20239 (September 30, 1983) and 34–20386 (November 17, 1983).

reduced fee for nonprofessional subscribers has succeeded in substantially broadening the access of individual investors to real-time market information. The Exchange believes that a nonprofessional Subscriber fee for NYSE OpenBook is likely to broaden the access of individual investors to NYSE OpenBook information and thereby to further the statutory goals expressed in section 11A(a)(1)(c) of the Securities Exchange Act of 1934 (the ''Exchange Act'').

Section 603(a)(2) of Regulation NMS requires markets to distribute market data ''on terms that are not unreasonably discriminatory.'' Given the differences in data usage between professional subscribers and nonprofessional subscribers and the industry's long acceptance of different fees for professional subscribers and nonprofessional subscribers, the Exchange believes that the proposed nonprofessional subscriber fee does not unreasonably discriminate against the professional subscriber fee.

Similarly, the establishment of the Maximum Amount mirrors other industry fee caps, such as the CTA Maximum Amount and Nasdaq's TotalView fee cap. The Maximum Amount encourages wider retail distribution by the Exchange's largest NYSE OpenBook vendors. Any vendor is entitled to take advantage of the Maximum Amount. In the Exchange's view, limiting the fee exposure of its largest vendors does not unreasonably discriminate against other vendors under section 603(a)(2) of Regulation NMS.

(h) *The Fee and the Maximum Amount Are Fair and Reasonable*. The Exchange believes that the reduction in the device fee for nonprofessional Subscribers to $15 and the Maximum Amount 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''),[8] 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.'' [9]

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.[10]

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.[11]

The Exchange believes that by this standard or any other standard, the proposed nonprofessional Subscriber fee and the Maximum Amount are fair and reasonable. NYSE OpenBook is subject to significant competitive forces and the reduction in the device fee and the establishment of a Maximum Amount represent, in part, 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.'' [12]

In addition, NYSE OpenBook is in competition with a number of alternative products. NYSE OpenBook does not provide a complete picture of the full market for a security. Rather, an investor has potentially dozens of different information sources to choose from in determining where to send an order. The 12 SROs, the several Trade Reporting Facilities of FINRA, and ECNs that produce proprietary data are all sources of competition. Each is currently permitted to produce depth-of-book products, and many currently do, including Nasdaq, NYSE Arca, and BATS. In addition, investors can probe market depth by ''pinging'' the various markets (by routing oversized marketable limit orders) to access an exchange's total liquidity available at an order's limit price or better. In addition, NYSE OpenBook faces the threat of competition from the independent distribution of order data by securities firms and data vendors.

Moreover, the Exchange believes that the great majority of investors do not believe that it is necessary to purchase a depth-of-book product from the Exchange, given other sources of information on market depth in Exchange-listed stocks. The Exchange has a substantial trading share in Exchange-listed stocks, yet less than 10 percent of professional users that purchase core data in Exchange-listed stocks through CTA also purchase NYSE OpenBook. As the Commission said in the NYSE ArcaBook Approval Order, ''the fact that 95% of the professional users of [Nasdaq] core data choose not to purchase the depth-of-book order data of a major exchange strongly suggests that no exchange has monopoly pricing power for its depth-of-book order data.'' [13]

In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the nonprofessional fee for NYSE OpenBook fails to meet the requirement of the Exchange Act.

In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on NYSE OpenBook and NYSE's compelling need to attract order flow imposes significant competitive pressure on NYSE to act equitably, fairly, and reasonably in setting NYSE OpenBook fees. The significant reduction in the NYSE OpenBook device fee, from $60 to $15, for investors who qualify as nonprofessional Subscribers and the establishment of the Maximum Amount are, in part, responses to that pressure.

(i) *Impact of Changes*. The Exchange anticipates that switching from the ''per-device'' metric to the ''Subscriber'' metric will enable the Exchange to reclassify as Subscribers certain of its customers that the Exchange currently classifies as Vendors. The reclassified customers would no longer be subject to

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

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

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

[11] *Id.* at pp. 48–49.

[12] *Id.* at p. 52.

[13] *Id.* at p. 64.

access fees. This will essentially lower their fees from $5,000 per month to $60 per month per individual and device. In addition, the ''Subscriber'' metric should reduce administrative costs, as it should simplify the processes of counting customer entitlements and reporting.

The introduction of the proposed nonprofessional Subscriber Fee, subject to the monthly Maximum Amount payable, will respond to the growing demand from broker-dealers to provide depth-of-book information to their account-holding customers. It will lower the fees payable for NYSE OpenBook data in respect of nonprofessional Subscribers from $60 per month per individual and device to $15 per month per individual and device.

The Exchange believes that the nonprofessional Subscriber Fee reflects an equitable allocation of its overall costs to users of its facilities. The Exchange believes that the proposed fee and the Maximum Amount are fair and reasonable and that it is fair and reasonable to charge nonprofessional subscribers lower rates than their professional subscriber counterparts.

(j) *Contracts*. The Exchange will require each nonprofessional Subscriber that receives NYSE OpenBook Realtime or NYSE OpenBook Ultra from a vendor, broker-dealer or other entity to enter into the Network A nonprofessional subscriber agreement or an agreement that incorporates the essential terms of the nonprofessional subscriber agreement.[14]

2. Statutory Basis

The bases under the Securities Exchange Act of 1934 (the ''1934 Act'') for the proposed rule change are the requirement under section 6(b)(4) [15] 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) [16] that the rules of an 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.

[14] The Network A nonprofessional subscriber agreement has been in effect since the CTA and CQ Plan Participants first filed it with the Commission in 1983. *See* Release No. 34–20385 (November 17, 1983).

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

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

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

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

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

The Exchange has not solicited, and does not intend to solicit, comments regarding the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

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

(A) By order approve the proposed rule change, or

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

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov*. Please include File No. SR–NYSE–2008–131 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–NYSE–2008–131. 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2008–131 and should be submitted on or before February 2, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[17]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–348 Filed 1–9–09; 8:45 am]

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[17] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF STATE

[Public Notice 6480]

In the Matter of the Review of the Designation of Mujahedin-e Khalq Organization (MEK), and All Designated Aliases, as a Foreign Terrorist Organization Upon Petition Filed Pursuant to Section 219 of the Immigration and Nationality Act, as Amended

The MEK filed a petition for revocation of its designation as a foreign terrorist organization (the ''Petition''). Based upon a review of the Administrative Record assembled in this matter, including the Petition and associated filings by the MEK, pursuant to Section 219(a)(4)(B) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(B)) (''INA''), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2003 re-designation of the aforementioned organization as a