

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67540; File No. SR-NYSEArca-2012-77)

July 30, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on July 18, 2012, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (“Fee Schedule”). The text of the proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, 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 self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to amend the Fee Schedule, as described below, and implement the fee changes on August 1, 2012.

The Exchange proposes to introduce a new Tier and corresponding credit in the Fee Schedule for ETP Holders, including Market Makers that execute an average daily volume ("ADV") of "Retail Orders" during the particular month that is 0.40% or more of the U.S. Consolidated ADV ("CADV").<sup>4</sup> For purposes of this proposed new "Retail Order Tier" and credit, a Retail Order would be an agency order that originates from a natural person and is submitted to the Exchange by an ETP Holder, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. An ETP Holder that qualifies for the proposed Retail Order Tier would receive a credit of \$0.0032 per share for its Retail Orders that provide liquidity on the Exchange in Tape A, B and C securities. For all other fees and credits, Tiered or Basic Rates would apply based on the ETP Holder's qualifying levels.

The Exchange also proposes to specify in the Fee Schedule that an ETP Holder that qualifies for the Retail Order Tier will not be eligible to qualify for the Tape A, Tape B or Tape C Step Up Tier rates or the Tape C Step Up Tier 2 rate because these ETP Holders that qualify

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<sup>4</sup> U.S. CADV means United States Consolidated Average Daily Volume for transactions reported to the Consolidated Tape and excludes volume on days when the market closes early.

for the proposed Retail Order Tier would already receive a higher credit for Retail Orders that provide liquidity on the Exchange.

An ETP Holder would be required to designate certain of its order entry ports at the Exchange as “Retail Order Ports” and attest, in a form and/or manner prescribed by the Exchange, that all orders submitted to the Exchange via such Retail Order Ports are Retail Orders. An ETP Holder would be required to designate its Retail Order Ports, including adding new Retail Order Ports or removing existing Retail Order Ports that would no longer be used to submit Retail Orders, no later than the fifth trading day of the month in which the desired change is to become effective. The proposed Retail Order Tier would be optional for ETP Holders. Accordingly, an ETP Holder that does not opt to identify qualified orders as Retail Orders would choose not to (i) designate any of its ports as Retail Order Ports, (ii) make an attestation to the Exchange, or (iii) maintain the policies and procedures described below.

Additionally, an ETP Holder would be required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the ETP Holder to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements specified by the Exchange, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the ETP Holder represents Retail Orders from another broker-dealer customer, the ETP Holder’s supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The ETP Holder must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail

Orders that entry of such orders as Retail Orders will be in compliance with the requirements specified by the Exchange, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.<sup>5</sup>

The Exchange further proposes that it may disqualify an ETP Holder from qualifying for the Retail Order Tier if the Exchange determines, in its sole discretion, that an ETP Holder has failed to abide by the requirements proposed herein, including, for example, if an ETP Holder designates orders submitted to the Exchange as Retail Orders but those orders fail to meet any of the requirements of Retail Orders. Tiered or Basic Rates would apply based on the ETP Holder's qualifying levels for an ETP Holder that is disqualified from qualifying for the Retail Order Tier.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"), in general, and furthers the objectives of Section 6(b)(4) of the Act, in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that the proposed rule change is reasonable, equitable and not unfairly discriminatory because it would encourage ETP Holders to send additional Retail Orders to the Exchange for execution in order to qualify for an incrementally higher credit for such executions that add liquidity on the Exchange. In this regard, the Exchange believes that maintaining or increasing the proportion of Retail Orders in exchange-listed securities that are

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<sup>5</sup> The Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of the Exchange, will review an ETP Holder's compliance with these requirements through an exam-based review of the ETP Holder's internal controls.

executed on a registered national securities exchange (rather than relying on certain available off-exchange execution methods) would contribute to investors' confidence in the fairness of their transactions and would benefit all investors by deepening the Exchange's liquidity pool, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange believes that the rate proposed for the Retail Order Tier credit is reasonable because it is directly related to an ETP Holder's level of Retail Order executions during the month. The Exchange also believes that the proposed rate is reasonable because it is consistent with certain other credits, such as the Investor Tier 2 credit of \$0.0032, available to ETP Holders that satisfy certain criteria that is related to the ETP Holder's level of trading activity on the Exchange. In this regard, the Exchange also believes that the proposed Retail Order Tier credit is equitable and not unfairly discriminatory because it would not be the only manner of qualifying for a credit of \$0.0032 per share. Additionally, the Exchange believes that the proposed Retail Order Tier credit is equitable and not unfairly discriminatory because it would incentivize ETP Holders to submit Retail Orders to the Exchange and would result in a credit that is reasonably related to an exchange's market quality that is associated with higher volumes.

The Exchange believes that requiring an ETP Holder to submit an ADV of Retail Orders during a month of 0.40% or more of CADV is reasonable, equitable and not unfairly discriminatory because this percentage is within a range that the Exchange believes would incentivize ETP Holders to submit Retail Orders to the Exchange in order to qualify for the applicable credit of \$0.0032 per share. The Exchange notes that certain other existing pricing Tiers within the Fee Schedule make credits available to ETP Holders that are also based on the

ETP Holder's level of activity as a percentage of CADV. These existing percentage thresholds, depending on other related factors and the level of the corresponding credits, are both higher and lower than the 0.40% proposed herein.<sup>6</sup> Moreover, like existing pricing on the Exchange that is tied to ETP Holder volume levels as a percentage of CADV, the proposed Retail Order Tier credit is equitable and not unfairly discriminatory because it would be available for all ETP Holders, including Market Makers, on an equal and non-discriminatory basis. Furthermore, the Exchange notes that the proposed Retail Order Tier would be optional for ETP holders.

The Exchange believes that excluding an ETP Holder that qualifies for the Retail Order Tier from the Tape A, Tape B and Tape C Step Up Tier rates and the Tape C Step Up Tier 2 rate is reasonable, equitable and not unfairly discriminatory because such orders would already receive a higher credit for such executions that provide liquidity on the Exchange.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

**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.

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<sup>6</sup> For example, Investor Tier 1 requires, in part, that an ETP Holder provide liquidity of 0.45% or more of CADV in order to qualify for a credit of \$0.0033 per share for orders that provide liquidity on the Exchange. Similarly, Investor Tier 2 requires, in part, that an ETP Holder provide liquidity of 0.60% or more of CADV in order to qualify for a credit of \$0.0032 per share for orders that provide liquidity on the Exchange. Additionally, Investor Tier 3 requires, in part, that an ETP Holder provide liquidity of between 0.30% and 0.45% of CADV in order to qualify for a credit of \$0.0030 per share for orders that provide liquidity on the Exchange.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>7</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>8</sup> thereunder, because it establishes a due, fee, or other charge imposed by the NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2012-77 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.

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<sup>7</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

All submissions should refer to File Number SR-NYSEArca-2012-77. 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 website (<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 website 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 10:00 a.m. and 3:00 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-NYSEArca-2012-77 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>9</sup> 17 CFR 200.30-3(a)(12).