

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94121; File No. SR-NYSEARCA-2022-07)

February 1, 2022

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Rules to Add New Subparagraph (i)(4) to Rule 7.31-E

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 27, 2022, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II 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 its rules to add new subparagraph (i)(4) to Rule 7.31-E (Orders and Modifiers) regarding orders designated with a “retail” modifier. The proposed rule change is available on the Exchange’s website at 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 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 its rules to add new subparagraph (i)(4) to Rule 7.31-E (Orders and Modifiers) regarding orders designated with a “retail” modifier.

Proposed Rule Change

Currently, the Exchange’s Fee Schedule provides specified fees and credits for agency orders that originate from a natural person and are submitted to the Exchange by an ETP Holder,⁴ 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.⁵ The Exchange’s rules concerning such orders are set out in the 2012 Filing but do not presently appear in Rule 7.31-E (Orders and Modifiers).

The Exchange now proposes to amend Rule 7.31-E to add new subparagraph (i)(4) pertaining to this “retail” modifier. The proposed rule is consistent with the existing requirements as set out in the 2012 Filing, except as set forth below, and is substantively identical to rules currently in effect on the Exchange’s affiliates New York Stock Exchange LLC (“NYSE”), NYSE American LLC (“NYSE American”), and NYSE National, Inc. (“NYSE National”).⁶

⁴ See Rules 1.1(n) (definition of ETP) & (o) (definition of ETP Holder).

⁵ See Securities Exchange Act Release No. 67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR-NYSEArca-2012-77) (the “2012 Filing”).

⁶ See Securities Exchange Act Release Nos. 93850 (December 22, 2021), 86 FR 74119 (December 29, 2021) (SR-NYSE-2021-75) (relocating “retail” order modifier from NYSE Rule 13 to NYSE

Proposed Rule 7.31-E(i)(4)(A) would specify that an order designated with a “retail” modifier is an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 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. It would also specify that an order with a “retail” modifier is separate and distinct from a “Retail Order” under Rule 7.44-E. This proposed rule is based on NYSE Rule 7.31(i)(6)(A), NYSE American Rule 7.31E(i)(4)(A), and NYSE National 7.31(i)(4)(A), without any substantive differences.⁷

Proposed Rule 7.31-E(i)(4)(B) would specify that an ETP Holder would be required to designate an order as “retail” in the form and/or manner prescribed by the Exchange. This proposed rule is based on NYSE Rule 7.31(i)(6)(B), NYSE American Rule 7.31E(i)(4)(B), and NYSE National 7.31(i)(4)(B), without any substantive differences.⁸

Rule 7.31(i)(6)); 92254 (June 24, 2021), 86 FR 34819 (June 30, 2021) (SR-NYSEAMER-2021-31) (adding “retail” order modifier at NYSE American Rule 7.31E(i)(4)); and 92446 (July 20, 2021), 86 FR 40108 (July 26, 2021) (SR-NYSENAT-2021-15) (adding “retail” order modifier at NYSE National Rule 7.31(i)(4)).

⁷ The proposed rule is identical to NYSE Rule 7.31(i)(6)(A), except that the term “member organization” in the NYSE rule would be replaced with the term “ETP Holder” in the proposed rule, and the reference to Rule 7.44 in the NYSE rule would be replaced with a reference to NYSE Arca Rule 7.44-E. The proposed rule is also identical to NYSE American Rule 7.31E(i)(4)(A) and NYSE National 7.31(i)(4)(A), except that the term “Retail Order” in the NYSE American and NYSE National rules would be replaced with the phrase “order designated with a ‘retail’ modifier” in the proposed rule.

⁸ The proposed rule is identical to NYSE Rule 7.31(i)(6)(B), except that the term “member organization” in the NYSE rule would be replaced with the term “ETP Holder” in the proposed rule. The proposed rule is also identical to NYSE American Rule 7.31E(i)(4)(B) and NYSE National 7.31(i)(4)(B), except that the phrase “designate an order as a Retail Order” in the NYSE American and NYSE National rules would be replaced with the phrase “designate an order as ‘retail’” in the proposed rule.

Proposed Rule 7.31-E(i)(4)(C) would specify that in order to submit an order with a “retail” modifier, an ETP Holder must submit an attestation, in a form prescribed by the Exchange, that substantially all orders designated as “retail” would meet the requirements set out in paragraph (A) above. This proposed rule is based on NYSE Rule 7.31(i)(6)(C), NYSE American Rule 7.31E(i)(4)(C), and NYSE National 7.31(i)(4)(C), without any substantive differences.⁹

Proposed Rule 7.31-E(i)(4)(D) would specify that an ETP Holder must have written policies and procedures reasonably designed to assure that it will only designate orders as “retail” if all requirements of Rule 7.31-E(i)(4)(A) 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 an 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 meets the applicable requirements. This proposed rule is based on

⁹ The proposed rule is identical to NYSE Rule 7.31(i)(6)(C), except that the term “member organization” in the NYSE rule would be replaced with the term “ETP Holder” in the proposed rule. The proposed rule is also identical to NYSE American Rule 7.31E(i)(4)(C) and NYSE National 7.31(i)(4)(C), except that the phrase “Retail Order” in the NYSE American and NYSE National rules would be replaced with the phrase “retail’ order” in the proposed rule.

NYSE Rule 7.31(i)(6)(D), NYSE American Rule 7.31E(i)(4)(D), and NYSE National 7.31(i)(4)(D), without any substantive differences.¹⁰

Proposed Rule 7.31-E(i)(4)(E) would specify that an ETP Holder that fails to abide by the requirements specified in paragraphs (i)(4)(A) - (D) of Rule 7.31-E would not be eligible for the “retail” rates for orders it designates as “retail” orders. This proposed rule is based on NYSE Rule 7.31(i)(6)(E), NYSE American Rule 7.31E(i)(4)(E), and NYSE National 7.31(i)(4)(E), without any substantive differences.¹¹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of

¹⁰ The proposed rule is identical to NYSE Rule 7.31(i)(6)(D), except that the term “member organization” in the NYSE rule would be replaced with the term “ETP Holder” in the proposed rule. The proposed rule is also identical to NYSE American Rule 7.31E(i)(4)(D) and NYSE National 7.31(i)(4)(D), except that the term “Retail Order” in the NYSE American and NYSE National rules would be replaced with the term “‘retail’ order” in the proposed rule.

¹¹ The proposed rule is identical to NYSE Rule 7.31(i)(6)(E), except that the term “member organization” in the NYSE rule would be replaced with the term “ETP Holder” in the proposed rule, and the reference to paragraphs (i)(6)(A)-(D) in the NYSE rule would be replaced with a reference to paragraphs (i)(4)(A)-(D) in the proposed rule. The proposed rule is also identical to NYSE American Rule 7.31E(i)(4)(E) and NYSE National 7.31(i)(4)(E), except that the term “Retail Order” in the NYSE American and NYSE National rules would be replaced with the term “‘retail’ order” in the proposed rule. Note that orders that do not meet the requirements specified in paragraphs (i)(4)(A) - (D) of Rule 7.31-E would still be eligible to trade pursuant to the non-“retail” fees in the NYSE Arca Equities Schedule of Fees and Charges (“Fee Schedule”).

The Exchange does not propose to add to the proposed rule the provision of the 2012 Filing requiring an ETP Holder to designate certain of its order entry ports at the Exchange as “Retail Order Ports.” Under the Exchange’s current Pillar trading system, there is no need for ETP Holders to use designated ports to submit orders eligible for “retail” pricing, since Pillar identifies such orders by coded tags, not by the port through which they were submitted. As such, the requirement in the 2012 Filing that ETP Holders use “Retail Order Ports” to submit “retail” orders is now obsolete. Under the proposal, all orders that meet the requirements of the proposed rule would be eligible for preferential “retail” order pricing as set out in the Exchange’s Fee Schedule, regardless of which order entry port the ETP Holder uses.

the Act,¹² in general, and furthers the objectives of Sections 6(b)(5) of the Act,¹³ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed amendment to Rule 7.31-E(i)(4) would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed requirements are based on existing requirements for orders designated as “retail” for purposes of fees and credits on the Exchange (in the 2012 Filing), NYSE, NYSE American, and NYSE National, and therefore are not novel. In addition, the proposed designation, attestation, and written policies and procedures are also based on existing procedures for similarly-defined orders on the Exchange (in the 2012 Filing), NYSE, NYSE American, and NYSE National, and therefore are not novel. The Exchange believes that the proposed requirements to submit attestations and to maintain written policies and procedures are not unfairly discriminatory, because they would apply equally to all ETP Holders that seek to enter orders designated with a “retail” modifier.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b) (5).

substantively identical to the requirements for designating orders with a “retail” modifier that are currently in place on NYSE, NYSE American, and NYSE National, and therefore would harmonize the requirements for designating orders as “retail” across the four affiliated exchanges. Such uniformity will enhance market participants’ understanding of the process for designating orders as “retail” across the exchanges, and will minimize any potential confusion that could result from having different programs on each exchange.

The Exchange believes that omitting the provision of the 2012 Filing requiring an ETP Holder to designate certain of its order entry ports at the Exchange as “Retail Order Ports” would remove impediments to and perfect the mechanism of a free and open market and a national market system because such requirement is obsolete under the Exchange’s current Pillar trading system, which identifies “retail” orders by coded tag and not by the port through which they were submitted. As such, there is no longer any reason to require ETP Holders to submit “retail” orders through designated ports. Under the proposal, all orders that meet the requirements of proposed Rule 7.31-E(i)(4)(A)-(D) would be eligible for preferential “retail” order pricing as set out in the Exchange’s Fee Schedule, regardless of the order entry port used.

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

In accordance with Section 6(b)(8) of the Act,¹⁴ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competition at all, but merely moves the Exchange’s existing requirements for orders designated as “retail” into Rule 7.31-E and conforms those requirements to those currently in place on the

¹⁴ 15 U.S.C. 78f(b)(8).

Exchange's affiliate exchanges NYSE, NYSE American, and NYSE National.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹⁵ and Rule 19b-4(f)(6) thereunder.¹⁶ Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 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, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)¹⁷ of the Act to determine whether the proposed rule change should be approved or disapproved.

¹⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

¹⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

¹⁷ 15 U.S.C. 78s(b)(2)(B).

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-NYSEARCA-2022-07 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Vanessa Countryman, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2022-07. 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.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEARCA-2022-07 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.¹⁸

J. Matthew DeLesDernier
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).