

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96322; File No. SR-NYSEARCA-2022-76)

November 15, 2022

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.31-E

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 2, 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 Rule 7.31-E regarding Discretionary Pegged Orders. 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 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 (1) amend Rule 7.31-E to delete Commentary .03 to end the temporary suspension of the Discretionary Pegged Order, and (2) amend Rule 7.31-E(h)(3) to modify the operation of the Discretionary Pegged Order.

The Discretionary Pegged Order is a non-displayed order to buy (sell) that is pegged to the same side of the PBBO and assigned a working price equal to the lower (higher) of the midpoint of the PBBO (the “Midpoint Price”) or the limit price of the order.³ A Discretionary Pegged Order will exercise the least amount of discretion necessary from its working price to its discretionary price (defined as the lower (higher) of the Midpoint Price or the limit price of the order) to trade with contra-side interest. Current Rule 7.31-E(h)(3)(C) provides that a Discretionary Pegged Order will not exercise discretion if the PBBO is determined to be unstable via a “quote instability calculation” that assesses the probability of a change to the PBB or PBO. Specifically, as set forth in current Rule 7.31-E(h)(3)(D), the Exchange uses the quote instability calculation along with real-time relative quoting activity of protected quotations to assess the probability of an imminent change to the PBBO (the “quote instability factor”). When the quoting activity meets predefined criteria described in Rule 7.31-E(h)(3)(D)(i)(A) through (C) and the quote instability factor calculated is greater than the Exchange’s quote instability threshold (defined in Rule 7.31-E(h)(3)(D)(i)(D)(2)), the Exchange treats the quote as unstable. The quote stability calculation utilizes quote stability coefficients and quote stability variables, as

³ See Rule 7.31-E(h)(3). As defined in NYSE Arca Rule 1.1, “PBBO” means the Best Protected Bid and the Best Protected Offer. Rule 1.1 also defines “PBB” as the highest Protected Bid and “PBO” as the lowest Protected Offer.

defined in Rules 7.31-E(h)(3)(D)(i)(D)(1)(a) and (b). In July 2022, the Exchange modified the quote stability calculation to incorporate updated quote stability coefficients that would allow the quote stability calculation to more accurately identify changes to the PBBO.⁴

End of Temporary Suspension

In August 2022, the Exchange added Commentary .03 to Rule 7.31-E to provide for the temporary suspension of the Discretionary Pegged Order.⁵ The Exchange determined to temporarily suspend use of the Discretionary Pegged Order to evaluate system performance impacts following the modification of the quote stability coefficients, as described above. Commentary .03 to Rule 7.31-E provides that the Exchange will submit a proposed rule filing to end the temporary suspension and will provide notice of the end of the suspension period by Trader Update.

The Exchange now proposes to end the temporary suspension period, as it has assessed system performance impact and is prepared to resume offering the Discretionary Pegged Order, as modified by this filing. The Exchange also proposes to delete Commentary .03 from 7.31-E to remove text that would no longer have application once the temporary suspension is lifted.

Modification of Discretionary Pegged Orders

The Exchange proposes to amend Rule 7.31-E(h)(3) to modify the operation of Discretionary Pegged Orders following the end of the temporary suspension period. As noted above, the temporary suspension period provided the Exchange with an opportunity to evaluate

⁴ See Securities Exchange Act Release No. 95154 (June 24, 2022), 87 FR 39134 (June 30, 2022) (SR-NYSEArca-2022-13) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Amend Rule 7.31-E(h)(3) Relating to Discretionary Pegged Orders).

⁵ See Securities Exchange Act Release No. 95584 (August 23, 2022), 87 FR 52826 (August 29, 2022) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.31-E).

the impact of the order type on system performance. Based on the Exchange's assessment of such impact, and, specifically, the system resources required to perform the quote stability calculation, the Exchange now proposes to modify Rule 7.31-E(h)(3) to provide that the Discretionary Pegged Order would not be restricted from exercising discretion during periods of quote instability, thereby eliminating the need to perform the quote stability calculation.

As proposed, the Discretionary Pegged Order would operate as defined in Rule 7.31-E(h)(3) and as specified in current Rules 7.31-E(h)(3)(A), (B), and (E), without any changes except that the order would continue to exercise the least amount of price discretion necessary from its working price to its discretionary price to trade with contra-side orders on the NYSE Arca Book without regard to potential quote instability. The Exchange thus proposes to delete the clause beginning with "except" in the last sentence of current Rule 7.31-E(h)(3). In addition, because the Exchange proposes to permit Discretionary Pegged Orders to exercise discretion without considering potential quote instability, the Exchange would no longer perform the quote instability calculation to assess the probability of an imminent change to the PBBO or identify periods of quote instability. To effect this change, the Exchange proposes to delete current Rules 7.31-E(h)(3)(C) and (D), including the subparagraphs thereunder. The Exchange also proposes to renumber current Rule 7.31-E(h)(3)(E) as Rule 7.31-E(h)(3)(C) to reflect those deletions.

Although the Discretionary Pegged Order, as modified, would no longer provide price protection during periods of quote instability, the Exchange believes that it would still provide ETP Holders with the flexibility and benefits of an order type that can exercise discretion to trade with contra-side interest. The Exchange notes that the Discretionary Pegged Order, as modified,

would operate similarly to order types currently offered by other equities exchanges.⁶

Because of the technology changes associated with this proposed rule change, the Exchange will announce the end of the temporary suspension and availability of the Discretionary Pegged Order, as proposed in this filing, by Trader Update. Subject to effectiveness of this rule filing, the Exchange will implement the changes described herein in the fourth quarter of 2022.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,⁷ in general, and furthers the objectives of Section 6(b)(5),⁸ 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 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.

The Exchange believes that the proposed change to end the temporary suspension of Discretionary Pegged Orders and delete Commentary .03 would promote just and equitable principles of trade and remove impediments to, and perfect the mechanism of, a free and open market and a national market system because it would permit the Exchange to resume offering the Discretionary Pegged Order to ETP Holders and remove rule text that would no longer have application following the end of the suspension period. Furthermore, as discussed above, the

⁶ See, e.g., Cboe EDGA Exchange, Inc. Rule 11.8(e) (defining the MidPoint Discretionary Order as a limit order to buy or sell that is pegged to the NBBO with discretion to execute at prices up or down to and including the midpoint of the NBBO); Cboe EDGX Exchange, Inc. Rule 11.8(g) (same).

⁷ 15 U.S.C. 78f(b).

⁸ 15 U.S.C. 78f(b)(5).

temporary suspension of the Discretionary Pegged Order allowed the Exchange an opportunity to evaluate system performance impacts. Accordingly, the Exchange believes that the proposed change to modify the operation of the Discretionary Pegged Order, further to such assessment, would remove impediments to, and perfect the mechanism of, a free and open market and a national market system, as well as protect investors and the public interest, by continuing to provide ETP Holders with the benefits of an order type that can exercise discretion to trade with contra-side interest, without a quote instability calculation that would restrict such order from exercising discretion during periods of quote instability. The Exchange also believes that the proposed modification of the Discretionary Pegged Order would remove impediments to, and perfect the mechanism of, a free and open market and a national market system by modifying the Discretionary Pegged Order to function similarly to discretionary orders currently offered by other equities exchanges.⁹

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. The Exchange believes that the proposed change would promote competition by ending the temporary suspension of the Discretionary Pegged Order and making the order type once again available to ETP Holders, as proposed. The proposed modification of the Discretionary Pegged Order would also promote competition by permitting the Exchange to offer ETP Holders an order type that can exercise discretion to trade with contra-side interest and would not be restricted from doing so by a quote stability calculation. The Exchange also believes that the proposed modification to the operation of the Discretionary Pegged Order could promote

⁹ See note 6, supra.

competition because the order type would function similarly to order types currently offered by other equities exchanges.¹⁰

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

Because the foregoing 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 for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act¹¹ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹²

A proposed rule change filed under Rule 19b-4(f)(6)¹³ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁴ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay to allow the Exchange to end the temporary suspension and modify the Discretionary Pegged Order as soon as the technology associated with those proposed

¹⁰ See id.

¹¹ 15 U.S.C. 78s(b)(3)(A)(iii).

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

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ 17 CFR 240.19b-4(f)(6)(iii).

changes is available and make the Discretionary Pegged Order available for use by interested ETP Holders. The Exchange states that the proposed changes would allow the Exchange to end the temporary suspension of an approved order type and modify the order type to operate similarly to discretionary orders currently offered by other equities exchanges. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹⁵

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 to determine whether the proposed rule should be approved or 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

¹⁵ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEARCA-2022-76 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSEARCA-2022-76. 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-2022-76 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.¹⁶

J. Matthew DeLesDernier,
Deputy Secretary.

¹⁶ 17 CFR 200.30-3(a)(12).