

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97909; File No. SR-NYSE-2023-26)

July 14, 2023

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Price List

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on June 30, 2023, New York Stock Exchange LLC (“NYSE” or the “Exchange”) 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 its Price List to provide for an alternate way for member organizations to qualify for the market at-the-close (“MOC”) and limit at-the-close (“LOC”) Tier 3. 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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.

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 Price List to provide for an alternate way for member organizations to qualify for the MOC/LOC Tier 3.

The proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct closing orders in NYSE-listed securities by providing an alternate way for member organizations to send additional auction flow that will incentivize member organizations to send closing liquidity to achieve lower fees and encourage greater liquidity at the closing auction.

The Exchange proposes to implement the fee changes effective July 3, 2023.

Competitive Environment

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”⁴

While Regulation NMS has enhanced competition, it has also fostered a “fragmented”

⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7-10-04) (Final Rule) (“Regulation NMS”).

market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that “such competition can lead to the fragmentation of order flow in that stock.”⁵ Indeed, cash equity trading is currently dispersed across 16 exchanges,⁶ numerous alternative trading systems,⁷ and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 17% market share.⁸ Therefore, no exchange possesses significant pricing power in the execution of cash equity order flow. More specifically, the Exchange’s share of executed volume of equity trades in Tapes A, B and C securities is less than 12%.⁹

In addition, in light of this crowded competitive landscape for order flow, including at the close, the Exchange does not have a monopoly over where closing orders in NYSE-listed securities are executed. Indeed, competition with respect to these orders in NYSE-listed securities is fierce, not only because of the availability of the Cboe Exchange, Inc. (“Cboe”) Market Close, but also, and more relevant, because of the internalization of MOC order flow by some of the largest broker-dealers.¹⁰ In the currently highly competitive national market system,

⁵ See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

⁶ See Cboe U.S Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangeshtml.html>.

⁷ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

⁸ See Cboe Global Markets U.S. Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share/.

⁹ See *id.*

¹⁰ There are at least seven broker-dealer sponsored products competing for volume at the close, including Credit Suisse’s CLOEX; Instinet’s Market-on-Close Cross; Morgan Stanley’s Market-on-Close Aggregator (MOCHA); Bank of America’s Instinct X® and Global Conditional Cross; JP Morgan’s JPB-X; Piper Sandler’s On-Close Match Book; and Goldman Sachs’ One Delta Close Facility (ODCF).

numerous exchanges and other order execution venues compete for order flow intraday as well as at the close, and competition for closing orders is robust.

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which the firm routes order flow. With respect to closing order flow, member organizations can choose among multiple options of where to execute such orders. Accordingly, competitive forces compel the Exchange to use exchange transaction fees and credits because market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The proposed change responds to the current competitive environment where order flow providers have a choice of where to direct orders in NYSE-listed securities, including at the close, by modifying requirements in order to provide an additional way for member organizations to qualify for a MOC/LOC tier and encourage additional liquidity to the Exchange.

Proposed Rule Change

Currently, for MOC/LOC Tier 3, the Exchange charges \$0.0009 per share for MOC orders and \$0.0009 per share for LOC orders from any member organization executing in the current billing month (1) an average daily trading volume ("ADV") of MOC activity on the NYSE of at least 0.20% of NYSE consolidated ADV ("CADV"),¹¹ (2) an ADV of the member organization's total close activity (MOC/LOC and other executions at the close) on the NYSE of

¹¹ ADV and CADV are defined in footnote * of the Price List.

at least 0.30% of NYSE CADV, and (3) whose MOC activity comprised at least 35% of the member organization's total close activity (MOC/LOC and other executions at the close).

The Exchange proposes to modify the third requirement by adding an alternate way for member organizations to qualify for the MOC/LOC Tier 3. As proposed, member organizations that meet the first two requirements would be able to satisfy the third requirement and qualify for the tier if the member organization has either MOC activity comprised at least 35% of the member organization's total close activity (MOC/LOC and other executions at the close), which is the current requirement, or executes an ADV of D Order executions at the close of at least 30 million shares. The Exchange proposes no changes to the other requirements or to the fees.

The purpose of the proposed change is to increase the ability for order flow providers to send greater marketable and other liquidity at the closing auction. As described above, member organizations with closing orders have a choice of where to send those orders. The Exchange believes that, by offering an alternate way for member organizations to qualify for the fees, more member organizations will choose to route greater marketable and other liquidity to the Exchange at the close. Currently, a number of member organizations qualify for MOC/LOC Tier 3. The Exchange cannot predict with certainty how many member organizations would avail themselves of the opportunity offered by the proposed change but believes that at least 1-5 member organizations could choose to execute the required volume of D Orders to qualify for the tier based on the additional qualification method.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹³ 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, is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Fee Change Is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁴

In light of the competitive environment in which the Exchange currently operates, the proposed rule change is a reasonable attempt to increase liquidity on the Exchange and improve the Exchange’s market share relative to its competitors. The Exchange believes the proposed change is also reasonable because it is designed to attract higher volumes of orders transacted on the Exchange by member organizations during the closing auction. The Exchange’s closing

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ See Regulation NMS, supra note 4, 70 FR at 37499.

auction is a recognized industry benchmark,¹⁵ and member organizations receive a substantial benefit from the Exchange in obtaining high levels of executions at the Exchange's closing price on a daily basis.

The Exchange believes that the proposed additional way to qualify for MOC/LOC Tier 3 is a reasonable way to both encourage greater liquidity and achieve the proposed discounts. Higher volumes of closing orders contribute to the quality of the Exchange's closing auction by leading the price discovery process. Closing orders are also a valuable tool for market participants, as any closing order priced more aggressively than the closing auction price would be filled in the auction. In addition, as noted above, in the currently highly competitive national market system, competition for closing orders among exchanges, ATSS and other market execution venues is robust.

The Proposed Change Is an Equitable Allocation of Fees and Credits

The Exchange believes the proposal equitably allocates fees and credits among market participants because all member organizations that participate on the Exchange may qualify for the proposed alternate way to qualify for MOC/LOC Tier 3 on an equal basis. The Exchange believes its proposal equitably allocates its fees and credits among its market participants by fostering liquidity provision and stability in the marketplace.

The Exchange believes that the proposed additional qualification method is an equitable allocation of fees because the proposed change will incentivize member organizations to send additional liquidity to achieve lower fees and encourage greater marketable and other liquidity at the closing auction. Higher volumes of closing orders contribute to the quality of the Exchange's

¹⁵ For example, the pricing and valuation of certain indices, funds, and derivative products require primary market prints.

closing auction and provide market participants whose orders participate in the close with a greater opportunity for execution of orders on the Exchange, thereby promoting price discovery and transparency and enhancing order execution opportunities and improving overall liquidity on a public exchange. The Exchange also believes that the proposed change is equitable because it would apply to all similarly situated member organizations that utilize closing orders on the Exchange.

The Proposed Fee Change Is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, member organizations are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The proposed additional way to satisfy the requirements for MOC/LOC Tier 3 is not unfairly discriminatory because the proposal would be applied to all similarly situated member organizations and other market participants, who would all be subject to the same fees, requirements, and discounts on an equal basis. For the same reason, the proposal neither targets nor will it have a disparate impact on any particular category of market participant. Accordingly, no member organization already operating on the Exchange would be disadvantaged by this allocation of fees. Further, submission of orders to the Exchange is optional for member organizations in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard.

Finally, the Exchange believes that it is subject to significant competitive forces, as described above and below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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

In accordance with Section 6(b)(8) of the Act,¹⁶ 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. Instead, the Exchange believes that the proposed fee change would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery, and transparency and enhancing order execution opportunities for market participants. The Exchange believes that this could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."¹⁷

Intramarket Competition. The Exchange believes the proposed change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to attract additional orders to the Exchange. The Exchange believes that the proposed changes would encourage market participants to direct their closing orders to the Exchange. Greater overall order flow, trading opportunities, and pricing transparency benefit all market participants on the Exchange by enhancing market quality and continuing to encourage member organizations to send orders, thereby contributing towards a robust and well-balanced market ecosystem. The current and proposed fees would be available

¹⁶ 15 U.S.C. 78f(b)(8).

¹⁷ See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

to all similarly situated market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange. As noted, the proposal would apply to all similarly situated member organizations on the same and equal terms, who would benefit from the changes on the same basis. Accordingly, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

Finally, as previously noted, the Exchange operates in a highly competitive market for closing orders in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges and non-exchange trading venues that are not subject to the same transparency or statutory standards applicable to exchanges relating to setting fees. Because competitors are free to modify their own fees and credits in response, some without the requirement of making a filing with the Commission, and because market participants may readily adjust their order routing practices, the Exchange believes that any

degree to which fee changes in this market may impose any burden on competition would be extremely limited.

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 has become effective upon filing pursuant to Section 19(b)(3)(A)¹⁸ of the Act and paragraph (f) thereunder. At any time within 60 days of the filing of the 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2023-26 on the subject line.

¹⁸ 15 U.S.C. 78s(b)(3)(A).

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-NYSE-2023-26. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-NYSE-2023-26 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,

Deputy Secretary.

¹⁹ 17 CFR 200.30-3(a)(12).