

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92254; File No. SR-NYSEAMER-2021-31)

June 24, 2021

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.31E to Add a Retail Order Modifier and the NYSE American Equities Price List and Fee Schedule to Cross Reference the Retail Order Modifier

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 21, 2021, NYSE American LLC (“NYSE American” or “Exchange”) filed with the Securities and Exchange Commission (“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 7.31E and amend the NYSE American Equities Price List and Fee Schedule. 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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.

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 7.31E (Orders and Modifiers) to add a description of a Retail Order modifier and to amend the Price List to add a cross-reference to Rule 7.31E(i)(4).

Proposed Rule Change

The Exchange proposes to amend Rule 7.31E to add new subparagraph (i)(4) to provide for ETP Holders⁴ to designate an order with a retail modifier (“Retail Order”). An order designated as a “Retail Order” pursuant to proposed Rule 7.31E(i)(4) would be eligible for the Retail Order Rates specified on the Exchange’s Price List.

Proposed Modifier for “Retail Orders”

To define “Retail Orders,” the Exchange proposes to amend Rule 7.31E (Orders and Modifiers) to add a new subsection (i)(4), titled “Retail Modifier” to establish requirements for Retail Orders on the Exchange. These requirements are based on the requirements to enter orders with “retail” modifiers for purposes of rates available for such orders on the Exchange’s affiliates, New York Stock Exchange, LLC (“NYSE”) and NYSE Arca, Inc. (“NYSE Arca”).⁵

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

⁵ See NYSE Rule 13 regarding Retail Modifiers and the NYSE Arca procedures for designating orders with a retail modifier for purposes of fee rates. See Securities Exchange Act Release No. 67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR-NYSEArca-2012-77). These requirements are distinct from, but related to, the requirements for a “Retail Order” on the Retail Liquidity Programs available on NYSE

Proposed Rule 7.31E(i)(4)(A) would define “Retail Order” as 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.

Proposed Rule 7.31E(i)(4)(B) would specify that in order for an ETP Holder to access the proposed Retail Order pricing, the ETP Holder would be required to designate an order as a Retail Order in the form and/or manner prescribed by the Exchange.

Proposed Rule 7.31E(i)(4)(C) would specify that in order to submit a Retail Order, an ETP Holder must submit an attestation, in a form prescribed by the Exchange, that substantially all orders designated as “Retail Orders” would meet the requirements set out in the definition above.

Proposed Rule 7.31E(i)(4)(D) would specify that an ETP Holder must have written policies and procedures reasonably designed to assure that it would 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 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

and NYSE Arca. See NYSE Rule 7.44 and NYSE Arca Rule 7.44-E. The Exchange does not offer a “Retail Liquidity Program.”

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 would 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. Proposed Rule 7.31E(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 7.31E would not be eligible for the Retail Order rates for orders it designates as "Retail Orders."

Proposed Cross-Reference in the Price List to Rule 7.31E(i)(4)

The Price List currently contains a subheading "b. Retail Order Rates*," with text at the asterisk as follows: "See section III under 'General' at the end of this Price List for information on designating orders as 'Retail Orders.'" The Exchange proposes to amend that text to also include a reference to Rule 7.31E(i)(4).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Sections 6(b)(5) of the Act,⁷ 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

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b) (5).

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 7.31E(i) to add a Retail Modifier 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” on NYSE and NYSE Arca for purposes of fees and credits on those exchanges, 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 NYSE and NYSE Arca, and therefore are not novel.⁸ The Exchange believes that the proposed requirements to submit attestations and to maintain written policies and procedures are not unfairly discriminatory, because they apply equally to all ETP Holders that wish to receive the Retail Order Rates. The Exchange further believes that the proposed addition of a cross-reference to proposed Rule 7.31E(i)(4) in the Price List would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would enhance the clarity and transparency of the Price List and reduce any potential customer confusion.

The proposed retail modifier for purposes of providing different rates for “Retail Orders” is also based in part on the availability of such modifiers on the Nasdaq Stock Market LLC

⁸ As noted above (see supra note 11[sic]), the proposed changes are based not on the Retail Liquidity Programs available on NYSE and NYSE Arca, but on the availability of retail fees on those exchanges for orders properly designated as “retail” orders. See NYSE Rule 13; Securities Exchange Act Release No. 72253 (May 27, 2014), 79 FR 31353 (June 2, 2014) (SR-NYSE-2014-26) (approving the addition of “retail” order modifier at NYSE Rule 13(f)); and Securities Exchange Act Release No. 67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR-NYSEArca-2012-77) (approving the addition of “retail” order modifier on NYSE Arca).

(“Nasdaq”) and Cboe EDGX Exchange, Inc. (“EDGX”), which both offer pricing for orders designated as “retail” under their respective rules, even in the absence of a retail price improvement program. For example, Nasdaq defines the term “Designated Retail Order” on its Price List as:

[A]n agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 and that originates from a natural person and is submitted to Nasdaq by a member that designates it pursuant to this section, 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 order from a "natural person" can include orders on behalf of accounts that are held in a corporate legal form - such as an Individual Retirement Account, Corporation, or a Limited Liability Company - that has been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual. Members must submit a signed written attestation, in a form prescribed by Nasdaq, that they have implemented policies and procedures that are reasonably designed to ensure that substantially all orders designated by the member as “Designated Retail Orders” comply with these requirements. Orders may be designated on an order by-order basis, or by designating all orders on a particular order entry port as Designated Retail Orders.⁹

Nasdaq does not have a corresponding definition of “Designated Retail Order” in its trading rules.

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

In accordance with Section 6(b)(8) of the Act,¹⁰ 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 rule change would promote competition because it is based on the availability of similar “retail” modifiers on NYSE, NYSE Arca, Nasdaq, and EDGX. More specifically, multiple other cash

⁹ Nasdaq Equity 7, section 118; see also Cboe EDGX Rule 11.21 (defining “Retail Order” and establishing attestation requirement to access preferential pricing for such orders).

¹⁰ 15 U.S.C. 78f(b)(8).

equity exchanges offer pricing for orders designated as “retail” orders, even in the absence of a retail price improvement program on those exchanges.¹¹ The Exchange believes that the proposed change 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.

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 Act¹² and Rule 19b-4(f)(6) thereunder.¹³ Because the proposed rule change: (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not 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.¹⁴

¹¹ See supra note 17 [sic].

¹² 15 U.S.C. 78s(b)(3)(A)(iii).

¹³ 17 CFR 240.19b-4(f)(6).

¹⁴ In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange’s 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.

A proposed rule change filed under Rule 19b-4(f)(6)¹⁵ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁶ 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 so that the proposal may become operative immediately upon filing. The Commission notes that the proposal is based on the rules of other national securities exchanges and finds that the proposal presents no legal or novel regulatory questions.¹⁷ For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission waives the 30-day operative delay and designates the proposed rule change operative upon filing.¹⁸

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)¹⁹ of the Act to determine whether the proposed rule change should be approved or disapproved.

¹⁵ 17 CFR 240.19b-4(f)(6).

¹⁶ 17 CFR 240.19b-4(f)(6)(iii).

¹⁷ See supra note 5.

¹⁸ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁹ 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-NYSEAMER-2021-31 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-NYSEAMER-2021-31. 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-NYSEAMER-2021-31 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.²⁰

J. Matthew DeLesDernier
Assistant Secretary

²⁰ 17 CFR 200.30-3(a)(12).