

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98197; File No. SR-NYSEAMER-2023-41)

August 22, 2023

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Modify Rule 928NYP

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 August 17, 2023, 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 modify Rule 928NYP (Pre-Trade and Activity-Based Risk Controls) to allow certain order types to be excluded from the Activity-Based Risk Controls. 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 modify Rule 928NYP (Pre-Trade and Activity-Based Risk Controls) to allow certain order types to be excluded from the Activity-Based Risk Controls.⁴ Specifically, the Exchange proposes to allow ATP Holders⁵ the ability to exclude orders marked as GTX⁶ from counting towards the limits established by the Activity-Based Risk Controls and to exclude GTX orders from cancellation when an Activity-Based Risk Limit is breached.⁷ The Exchange notes that a substantively similar change was recently adopted on its affiliated exchange, NYSE Arca, Inc. (“NYSE Arca”) and therefore this proposal raises no new or novel issues not previously considered by the Commission.⁸

The Exchange offers ATP Holders the option of utilizing Activity-Based Risk Controls to assist ATP Holders in managing risk related to submitting orders during periods of increased and

⁴ The Exchange notes that this proposed change modifies a Pillar rule (i.e., with a “P” modifier) that has not yet been implemented. The Exchange anticipates migrating to its Pillar trading platform beginning on October 23, 2023. As is the case with all Pillar rules, this proposed rule change (as well as the entire Rule 928NYP) will not be implemented until all other Pillar-related rule filings are approved or operative, as applicable, and the Exchange announces the migration of underlying symbols to Pillar by Trader Update.

⁵ An ATP Holder is a natural person, sole proprietorship, partnership, corporation, limited liability company or other organization, in good standing, which has been issued an ATP, and references to “member”, and “member organization” as those terms are used in the Rules of the Exchange should be deemed to be references to ATP Holders. See Rule 900.2NY. An ATP is an American Trading Permit issued by the Exchange for effecting approved securities transactions on the Exchange’s Trading Facilities. See id. The Exchange notes that an ATP may be acting as a Specialist, which market participant is subject to heightened requirements. See, e.g., Rule 925.1NYP (b), (c).

⁶ See infra note 17 (for description of orders marked as GTX).

⁷ See proposed Rules 928NYP(c)(2)(B) and (c)(2)(C)(iii).

⁸ See Securities Exchange Act Release No. 98038 (August 1, 2023), 88 FR 52231 (Augst 7, 2023) (SR-NYSEARCA-2023-49) (immediately effective rule change to allow market participants to exclude orders marked as GTX from the Activity-Based Risk Controls, per Rule 6.40P-O).

significant trading activity.⁹ ATP Holders acting as Specialist must apply one of the Activity-Based Risk Controls to all of its orders and quotes, whereas an ATP Holder not acting as a Specialist may, but is not required to, apply one of the Activity-Based Risk Controls to its orders.¹⁰ To determine when an Activity-Based Risk Control has been breached, the Exchange will maintain a Trade Counter that will be incremented every time an order (or quote) trades, including any leg of a Complex Order, and will aggregate the number of contracts traded during each such execution.¹¹ When designating one of the three Activity-Based Risk Controls, an ATP Holder must indicate the action that it would like the Exchange to take if an Activity-Based Risk Limit is exceeded.¹² Currently, the Exchange affords ATP Holders the ability to exclude certain orders from being considered by a Trade Counter.¹³ The order types that an ATP Holder may opt to exclude are orders designated as IOC or FOK, which order types are designed to cancel if not executed on arrival.¹⁴ In addition, the Exchange exempts certain orders from being cancelled or blocked -- specifically Auction-Only orders (submitted solely for the purpose of being executed in an opening auction) and GTC Orders, which by their terms are meant to eventually execute unless specifically cancelled by the order-sender.¹⁵

⁹ See Rule 928NYP(a)(3)(A)-(C) (describing the three potential Activity-Based Risk Controls: Transaction-Based Risk Limit; Volume-Based Risk Limit; and Percentage-Based Risk Limit).

¹⁰ See Rule 928NYP(c)(2)(A).

¹¹ See Rule 928NYP(c)(2)(B).

¹² See Rule 928NYP(c)(2)(C) (describing the potential automated breach actions of Notification Only, Block Only, and Cancel and Block).

¹³ See Rule 928NYP(c)(2)(B).

¹⁴ See id. See also Rule 900.3NYP(b)(2) (IOC) and (3) (FOK).

¹⁵ See Rule 928NYP(c)(2)(C)(iii).

The Exchange proposes to modify Rule 928NYP(c)(2)(B) to add GTX to the order types that may be excluded by Trade Counters in tracking Activity-Based Risk Controls.¹⁶ In addition, for ATP Holders that select the automated breach action of “Cancel and Block,” the Exchange proposes to modify Rule 928NYP(c)(2)(C)(iii) to provide ATP Holders the option of instructing the Exchange not to cancel unexecuted GTX orders in the event of a breach.¹⁷

An order marked GTX, such as a GTX order submitted in response to a CUBE Order (“CUBE GTX”) or a COA GTX Order submitted in response to a Complex Order Auction (or COA), will cancel after executing to the extent possible with a CUBE Order, or a COA Order in a Complex Order Auction, as applicable (collectively, “GTX orders”).¹⁸ As such, GTX orders are never ranked (as resting interest) in the Consolidated Book. Because GTX orders are submitted for the sole purposes of executing (to the extent possible) with either a CUBE Order or a COA Order before cancelling, the Exchange believes providing ATP Holders the option of exempting these orders from the Activity-Based Risk Controls would enable these ATP Holders to exclude GTX orders from being counted and avoid potentially triggering their risk settings (prematurely), resulting in the cancellation of open orders. Likewise, the Exchange believes that allowing ATP Holders to instruct the Exchange not to cancel any unexecuted GTX orders if their

¹⁶ See proposed Rule 928NYP(c)(2)(B) (providing, in relevant part, that an ATP Holder “may opt to exclude any orders designated IOC, FOK, or GTX from being considered by a Trade Counter.”)

¹⁷ See proposed Rule 928NYP(c)(2)(C)(iii) (providing, in relevant part, that an ATP Holder “may opt to exclude orders designated as GTX from being cancelled.”).

¹⁸ Per Rule 971.1NYP regarding Single-Leg CUBE Auctions, an ATP Holder may respond to a CUBE Auction (“Auction”) with an order marked as GTX, which order is not displayed and which must be entered during the Response Time Interval of the Auction and may include an AuctionID to specify the CUBE Order with which it would like to trade. See Rule 971.1NYP(c)(1)(C)(i). A CUBE GTX Order will cancel after executing with the CUBE Order to the extent possible. Similarly, per Rule 980NYP(b)(2), an ATP Holder may designate an Electronic Complex Order (or ECO) as GTX. A “COA GTX Order” is an order sent in response to a Complex Order Auction (or COA), which order is not displayed and which must be entered during the Response Time Interval of a COA. The COA GTX Order will cancel after executing with the COA Order to the extent possible. See Rule 980NYP(b)(2)(C). The Exchange notes that NYSE Arca does not offer the CUBE Auction or CUBE GTX Orders.

risk setting is breached would likewise afford such ATP Holders additional flexibility. This proposed handling of GTX orders is consistent with how the Exchange currently handles GTX orders per (pre-Pillar) Commentary .01 to Rule 928NY (Risk Limitation Mechanism).¹⁹

The Exchange believes that providing ATP Holders this additional flexibility may encourage more ATP Holders to utilize the risk settings, which benefits all market participants. The Exchange also believes that the proposed change would result in risk settings that may be better calibrated to suit the needs of certain ATP Holders (i.e., those that routinely utilize GTX orders) and should encourage ATP Holders to direct additional order flow and liquidity to the Exchange.

Implementation

This proposed change modifies a Pillar rule (i.e., with a “P” modifier). As is the case with all Pillar rules, this proposed rule change (as well as the entire Rule 928NYP) will not be implemented until all other Pillar-related rule filings are approved or operative, as applicable, and the Exchange announces the migration of underlying symbols to Pillar by Trader Update.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),²⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,²¹ in particular, in that 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

¹⁹ See (pre-Pillar) Rule 928NY, Commentary .01 (providing, in relevant part, that upon the triggering of an established risk limit, the Exchange would cancel all open orders and quotes in the affected series but would exclude from such cancellation any “orders entered in response to an electronic auction that are valid only for the duration of the auction (‘GTX’), which includes CUBE GTX Orders and COA GTX Orders).

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(5).

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 rule change removes impediments to and perfects the mechanism of a free and open market by providing ATP Holders greater control and flexibility over setting their risk tolerance, which may enhance the efficacy of the risk settings. Orders marked GTX, including CUBE GTX Orders and COA GTX Orders, will cancel after executing to the extent possible with a COA Order as part of a Complex Order Auction. As such, GTX orders are never ranked (as resting interest) in the Consolidated Book. The Exchange believes that certain market participants utilize GTX orders to access liquidity on the Exchange. Thus, the proposed change is designed to accommodate participants that utilize GTX orders in this manner by enabling them to exclude GTX orders from being counted and avoid potentially triggering their risk settings (prematurely), resulting in the cancellation of open orders. In addition, allowing ATP Holders the option to exclude unexecuted GTX orders from being cancelled in the event of a breach would allow ATP Holders to utilize this order type without fear of such orders being cancelled before having the opportunity to trade in a Complex Order Auction. As noted herein, this proposed handling of GTX orders (i.e., excluding such orders from cancellation upon triggering of a risk setting) is consistent with how the Exchange currently handles GTX orders per (pre-Pillar) Commentary .01 to Rule 928NY (Risk Limitation Mechanism).

The Exchange believes that providing ATP Holders this additional flexibility may encourage more ATP Holders to utilize the risk settings, which benefits all market participants. Further, the proposed change would promote just and equitable principles of trade because it would result in risk settings that may be better calibrated to suit the needs of certain ATP Holders (i.e., those that routinely utilize GTX orders) and should encourage ATP Holders to direct additional order flow and liquidity to the Exchange. To the extent additional order flow is submitted to the

Exchange as a result of the proposed change, all market participants stand to benefit from increased trading. The Exchange notes that an ATP Holder has the option of utilizing risk settings for all orders submitted to the Exchange and, as proposed, would have the additional option of excluding from these risk settings any GTX orders in a given options class submitted to the Exchange.

This proposed change, which was specifically requested by some ATP Holders, would foster cooperation and coordination with persons engaged in regulating, clearing, settling, and processing information with respect to, and facilitating transactions in, securities as it will be available to all ATP Holders and may encourage more ATP Holders to utilize this enhanced functionality to the benefit of all market participants.

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 is proposing a market enhancement that would provide ATP Holders with greater control and flexibility over setting their risk tolerance and, potentially, more protection over risk exposure. The proposal is structured to offer the same enhancement to all ATP Holders and would not impose a competitive burden on any participant. The Exchange does not believe that the proposed enhancement to the existing Activity-Based Risk Controls would impose a burden on competing options exchanges. Rather, the availability of these controls may foster more competition. Specifically, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. When an exchange offers enhanced functionality that distinguishes it from the competition and participants find it useful, it has been the Exchange's experience that competing exchanges will move to adopt similar functionality. Thus, the Exchange believes that this type of competition amongst exchanges is

beneficial to the marketplace as a whole as it can result in enhanced processes, functionality, and technologies.

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 Act²² and subparagraph (f)(6) of Rule 19b-4 thereunder.²³

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 (<https://www.sec.gov/rules/sro.shtml>); or

²² 15 U.S.C. 78s(b)(3)(A)(iii).

²³ 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.

- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEAMER-2023-41 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-2023-41. 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-NYSEAMER-2023-41 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.²⁴

Sherry R. Haywood,

Assistant Secretary.

²⁴ 17 CFR 200.30-3(a)(12).