

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94575; File No. SR-NYSEArca-2022-15)

April 1, 2022

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Equities Fees and Charges

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 March 21, 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, II, and III below, which Items have been prepared by the Exchange. 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 the NYSE Arca Equities Fees and Charges (“Fee Schedule”) to introduce a new credit that would apply to transactions executed on the Exchange using Discretionary Pegged Orders. The Exchange proposes to implement the fee change effective March 21, 2022. 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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.

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 the Fee Schedule to introduce a new credit that would apply to transactions executed on the Exchange using Discretionary Pegged Orders.

The Exchange proposes to implement the fee change effective March 21, 2022.

Background

The Exchange operates in a highly competitive market. The Securities and Exchange Commission (“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” 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

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”).

recognized that “such competition can lead to the fragmentation of order flow in that stock.”⁵ Indeed, 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 18% market share.⁸ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange currently has less than 9% market share of executed volume of equities trading.⁹

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 a firm routes order flow. With respect to non-marketable order flow that would provide liquidity on an Exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order

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 http://markets.cboe.com/us/equities/market_share/.

⁹ See *id.*

flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

Proposed Rule Change

Pursuant to Commission approval, the Exchange adopted a new order type known as a Discretionary Pegged Order (“DPO order”).¹⁰ A DPO order is a Pegged Order¹¹ to buy (sell) that upon entry is assigned a working price¹² equal to the lower (higher) of the midpoint of the PBBO¹³ (“Midpoint Price”) or the limit price of the order. In order to trade with contra-side orders on the NYSE Arca Book, a DPO order to buy (sell) will exercise the least amount of price discretion necessary from its working price to its discretionary price (defined as the lower (higher) of the Midpoint Price or the DPO order’s limit price), except during periods of quote instability. DPO orders are not displayed, must be designated Day¹⁴ and are eligible to be designated for the Core Trading Session¹⁵ only.

¹⁰ See NYSE Arca Rule 7.31-E(h)(3). See also Securities Exchange Act Release No. 78181 (June 28, 2016), 81 FR 43297 (July 1, 2016) (SR-NYSEArca-2016-44) (Notice of Filing of Amendment No. 1, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Add a New Discretionary Pegged Order).

¹¹ A “Pegged Order” is defined in Rule 7.31-E(h) as a Limit Order that does not route with a working price that is pegged to a dynamic reference price. If the designated reference price is higher (lower) than the limit price of a Pegged Order to buy (sell), the working price will be the limit price of the order.

¹² The term “working price” is defined in Rule 7.36-E(a)(3) as the price at which an order is eligible to trade at any given time, which may be different from the limit price or display price of the order. The term “limit price” is defined in Rule 7.36-E(a)(2) as the highest (lowest) specified price at which a Limit Order to buy (sell) is eligible to trade.

¹³ The term “PBBO” is defined in Rule 1.1(dd) as the highest Protected Bid and the lowest Protected Offer.

¹⁴ Pursuant to NYSE Arca Rule 7.31-E(b)(1), any order to buy or sell designated Day, if not traded, expires at the end of the designated session on the day on which it was entered.

¹⁵ The Core Trading Session for each security begins at 9:30 am Eastern Time and ends at the conclusion of Core Trading Hours. See NYSE Arca Rule 7.34-E(a)(2). The term “Core Trading Hours” means the hours of 9:30 am Eastern Time through 4:00 pm

In anticipation of the scheduled implementation of the DPO order functionality,¹⁶ the Exchange proposes to introduce a new credit to the Fee Schedule, effective March 21, 2022. Specifically, the Exchange proposes to introduce a credit of \$0.0005 per share for DPO orders that add liquidity. To reflect the new credit, the Exchange proposes to amend Section IV of the Fee Schedule titled “Other Standard Rates for Securities with a Per Share Price \$1.00 or Above” by adopting a new bullet that would state “(\$0.0005) credit for Discretionary Pegged Orders that add liquidity.”

The Exchange believes the proposed rule change to adopt a new credit for DPO orders that add liquidity will incentivize ETP Holders to use the DPO order functionality and direct liquidity-providing orders to the Exchange, which would provide additional liquidity for incoming orders and offer additional opportunities for midpoint execution.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁷ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹⁸ 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 and does not unfairly discriminate between customers, issuers, brokers or dealers.

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over

Eastern Time or such other hours as may be determined by the Exchange from time to time. See NYSE Arca Rule 1.1.

¹⁶ See <https://www.nyse.com/trader-update/history#110000415898>.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(4) and (5).

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.”¹⁹

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to non-marketable orders which provide liquidity on an Exchange, ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

In particular, the Exchange believes the proposed rule change is reasonable because it is designed to enhance the Exchange’s market quality by encouraging ETP Holders to add more liquidity on the Exchange, which would benefit all market participants by deepening the Exchange’s liquidity pool. The Exchange believes it is reasonable to introduce a fee incentive for the use of DPO orders, which is designed to exercise discretion in order to provide price improvement to contra-side orders. As noted above, a DPO order is designed to be a non-displayed order that could execute at the midpoint of the PBBO, and thus would enhance order execution opportunities at the Exchange. The Exchange believes the proposed credit will

¹⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

therefore incentivize ETP Holders to utilize the new functionality.

The Exchange believes it is reasonable to provide the proposed credit as an incentive to ETP Holders when they use the DPO order to provide liquidity to the Exchange, which would benefit all market participants. The Exchange believes the proposed change to adopt a new credit is reasonable as it would provide an incentive to ETP Holders to use the order type to provide meaningful added levels of liquidity, thereby contributing to market quality on the Exchange.

As noted above, the Exchange operates in a highly competitive environment, particularly for attracting non-displayed and midpoint order flow. Additionally, many of the Exchange's competitors for this order flow are alternative trading systems (ATSs) which are not registered national securities exchanges and therefore operate with far more regulatory freedom. For example, ATSs can segregate and/or eliminate undesirable order flow based on client demand, a function that is not available to the Exchange.

Additionally, the Exchange is one of many venues and off-exchange venues to which market participants may direct their order flow, and it represents a small percentage of the overall market.

The Exchange believes its proposal equitably allocates its fees among its market participants.

The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because it would apply uniformly to all ETP Holders, in that all ETP Holders will be eligible for the proposed new credit and will have the opportunity to utilize the DPO order and receive the applicable credit when such orders add liquidity on the Exchange. The proposed credit would apply automatically and uniformly to all ETP Holders that use the

new functionality. The proposed credit is designed as an incentive to all liquidity providers to submit liquidity providing orders by using the DPO order type and each will receive the associated credit when such orders add liquidity on the Exchange. While the Exchange has no way of knowing whether this proposed rule change would serve as an incentive to utilize the new order type, the Exchange anticipates a number of ETP Holders will benefit from the proposed rule change when they utilize the new functionality. As stated, the proposed new credit is designed to provide an incentive for ETP Holders to submit additional liquidity across all Tapes by using the DPO order type.

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes it is not unfairly discriminatory to provide the proposed credit as the credit would be provided on an equal basis to all ETP Holders that use the DPO order type to add liquidity in all securities. As noted above, the proposed credit is designed to serve as an incentive to all ETP Holders to utilize the DPO order type to add liquidity on the Exchange and each would receive the corresponding new credit. The Exchange also notes that the proposed rule change will not adversely impact any ETP Holder's pricing or their ability to qualify for other fees and credits on the Exchange. Rather, should an ETP Holder not use the new functionality, the ETP Holder will merely not receive the corresponding rebate.

In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Moreover, this proposed rule change neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that this proposal does not permit unfair discrimination because the changes described in this proposal would be applied to all similarly situated ETP Holders. Accordingly, no ETP Holder already operating on the Exchange would be

disadvantaged by the proposed allocation of fees. The Exchange further believes that the proposed rule change would not permit unfair discrimination among ETP Holders because the DPO order type functionality would be available to all ETP Holders and each such ETP Holder would receive the proposed new credit when adding liquidity on the Exchange through the use of the new order type.

Finally, the submission of orders to the Exchange is optional for ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard. The Exchange believes that it is subject to significant competitive forces, as described 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,²⁰ 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, as discussed above, the Exchange believes that the proposed rule change would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth and enhancing order execution opportunities for ETP Holders. 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."²¹

²⁰ 15 U.S.C. 78f(b)(8).

²¹ See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

Intramarket Competition. The Exchange believes the proposed amendment to its Fee Schedule would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed change represents a significant departure from previous pricing offered by the Exchange or its competitors. The proposed change is designed to attract additional liquidity to the Exchange in all securities through the use of a new order type. The Exchange believes that the proposed adoption of a new credit would incentivize market participants to direct liquidity adding order flow to the Exchange, bringing with it additional execution opportunities for market participants. Greater overall order flow and more trading opportunities at multiple price points benefits all market participants on the Exchange by enhancing market quality and continuing to encourage ETP Holders to send orders to the Exchange, thereby contributing towards a robust and well-balanced market ecosystem.

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. As noted above, the Exchange's market share of intraday trading (i.e., excluding auctions) is currently less than 9%. 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.

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 foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)²² of the Act and subparagraph (f)(2) of Rule 19b-4²³ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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)²⁴ of the Act to determine whether the proposed rule change 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

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(2).

²⁴ 15 U.S.C. 78s(b)(2)(B).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2022-15 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-2022-15. 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-2022-15, 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.²⁵

J. Matthew DeLesDernier
Assistant Secretary

²⁵ 17 CFR 200.30-3(a)(12).