SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96680; File No. SR-NYSEARCA-2023-01)

January 17, 2023

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) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on January 3, 2023, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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 amend the fee for Retail Orders with a time-in-force of Day that remove liquidity. 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.

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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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to amend the fee for Retail Orders[3] with a time-in-force of Day that remove liquidity. The proposed change responds to the current competitive environment where ETP Holders have a choice among both exchange and off-exchange venues of where to route marketable retail flow.

The Exchange proposes to implement the fee change effective January 3, 2023.

Background

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" 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

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3 A Retail Order is an agency order 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 to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Securities Exchange Act Release No. 67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR-NYSEArca-2012-77).

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 17% 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 10% 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. The competition for Retail Orders is even more stark, particularly as it relates to exchange versus off-exchange venues.

The Exchange thus needs to compete in the first instance with non-exchange venues for Retail Order flow, and with the 15 other exchange venues for that Retail Order flow that is not

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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.

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/atslist.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.

directed off-exchange. Accordingly, competitive forces compel the Exchange to use exchange transaction fees and credits, particularly as they relate to competing for Retail Order flow, because market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

To respond to this competitive environment, the Exchange has established a number of Retail Tiers, which are designed to provide an incentive for ETP Holders to route Retail Orders to the Exchange by providing higher credits for adding liquidity correlated to an ETP Holder's higher trading volume in Retail Orders on the Exchange. Under three of these four tiers, i.e., Retail Tier 1, Retail Tier 2, Retail Tier 3 and Retail Step-Up Tier, ETP Holders also do not pay a fee when such Retail Orders have a time-in-force of Day that remove liquidity from the Exchange. Under Retail Tier 4, ETP Holders currently pay a standard fee of $0.0030 per share for Retail Orders that that remove liquidity.[10]

Proposed Rule Change

The proposed rule change is designed to be available to all ETP Holders on the Exchange and is intended to provide ETP Holders an opportunity to not pay a fee for Retail Orders with a time-in-force of Day that remove liquidity from the Exchange. Specifically, the Exchange proposes to adopt new footnote (f) under the Retail Tiers table.[11] Proposed footnote (f) would state that "ETP Holders that increase Retail Orders with a time-in-force of Day that add and remove that is an increase over May 2022 of at least 0.05% of CADV would not pay a fee for

[10] See Fee Schedule, Section III. Standard Rates - Transactions (applicable when Tier Rates do not apply).

[11] With the proposed adoption of new footnote (f) under the Retail Tiers table, the Exchange proposes to renumber current footnote (f) under the Tape B Tiers table as footnote (g) and renumber current footnote (g) under the Tape B Tiers table as footnote (h).

Retail Removing with a time-in-force of Day."

As noted above, ETP Holders that qualify for Retail Tiers 1, 2, 3 and Retail Step-Up Tier currently do not pay a fee for Retail Orders with a time-in-force of Day that remove liquidity from the Exchange. ETP Holders that do not currently qualify for Retail Tiers 1, 2, 3 and Retail Step-Up Tier would benefit from this proposed rule change by increasing the amount of Retail Orders with a time-in-force of Day that add and remove liquidity by 0.05% over their May 2022 CADV. ETP Holders that meet the proposed lower volume requirement would qualify to not pay a fee for Retail Orders with a time-in-force of Day that remove liquidity. ETP Holders that qualify for the proposed no fee would also continue to receive the standard credit of ($0.0032) per share for Retail Orders that add liquidity.[12]

To illustrate the application of the proposed fee reduction, assume an ETP Holder's activity of Retail Orders with a time-in-force of Day in the current month is equal to 0.08% of CADV, which is less than Retail Tier 4's requirement of 0.10% of CADV. Assume further that this ETP Holder has a Step-Up of Retail Orders with a time-in-force of Day from April 2018 of 0.02% of CADV, which is less than Retail Step-Up Tier's requirement of 0.075% of CADV. Based on this activity, the ETP Holder in this example would receive the standard credit of ($0.0032) per share for adding Retail liquidity and would pay the standard fee of $0.0030 per share for removing Retail liquidity, unless the ETP Holder qualifies for better rates under other pricing tiers.

Assume further that the same ETP Holder's activity of Retail Orders with a time-in-force of Day in May 2022 was equal to 0.02% of CADV. Under the proposed rule change, this ETP Holder would qualify for the proposed no fee because it had an increase of Retail Orders with a

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[12] See supra note 10.

time-in-force of Day that add and remove liquidity over May 2022 of 0.06% (0.08% in the current month minus 0.02% in May 2022), which meets the proposed requirement that an ETP Holder's increase of Retail Orders with a time-in-force of Day that add or remove must be at least 0.05% of CADV over the ETP Holder's May 2022 CADV. Under the proposed rule change, this ETP Holder would continue to receive the standard credit of ($0.0032) per share for adding Retail liquidity and would not pay a fee for Retail Orders with a time-in-force of Day that remove liquidity.

The purpose of the proposed rule change is to encourage greater participation from ETP Holders and promote additional liquidity in Retail Orders. The Exchange believes that the proposed rule change to adopt a lower volume requirement to qualify for the proposed fee reduction would incentivize ETP Holders to direct a greater number of Retail Orders to the Exchange that add and remove liquidity. As described above, ETP Holders have a choice of where to send their Retail Orders that add and remove liquidity. The Exchange believes that the proposed rule change to reduce fees paid by ETP Holders for Retail Orders could lead to more ETP Holders choosing to route such orders for execution to the Exchange rather than to a competing exchange.

The Exchange does not know how much Retail Order flow ETP Holders choose to route to other exchanges or to off-exchange venues. Without having a view of ETP Holders' activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder sending more of its Retail Orders to the Exchange. The Exchange cannot predict with certainty how many ETP Holders would avail themselves of this opportunity, but additional liquidity of Retail Orders would benefit all market participants because it would provide greater execution opportunities on the Exchange.

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,[13] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[14] 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.

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."[15]

Given this competitive environment, the proposal represents a reasonable attempt to attract additional order flow to the Exchange.

As noted above, the competition for Retail Order flow is stark given the amount of retail limit orders that are routed to non-exchange venues. The Exchange believes that the ever-

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[13] 15 U.S.C. 78f(b).

[14] 15 U.S.C. 78f(b)(4) and (5).

[15] See supra note 3.

shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. ETP Holders can choose from any one of the 16 currently operating registered exchanges, and numerous off-exchange venues, to route such order flow. Accordingly, competitive forces constrain exchange transaction fees, particularly as they relate to competing for retail orders. 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 that the proposal to adopt lower volume requirement to qualify for the proposed fee reduction is reasonable because it is designed to encourage greater participation from ETP Holders and promote additional liquidity in Retail Orders. The Exchange believes it is reasonable to require ETP Holders to meet the applicable volume threshold to qualify for the proposed no fee for Retail Orders with a time-in-force of Day that remove liquidity, which the Exchange believes will encourage ETP Holders to direct more of their Retail Orders to the Exchange. Further, the proposed change is reasonable as it would allow ETP Holders that do not presently qualify for Retail Tiers 1, 2, 3 and Retail Step-Up Tier an additional opportunity to qualify and not pay a fee for Retail Orders with a time-in-force of Day that remove liquidity.

The Exchange believes that the proposal to adopt reduced fees for ETP Holders that meet the proposed volume requirement is a reasonable means to encourage additional liquidity on the Exchange because ETP Holders would benefit from the greater amounts of displayed liquidity present on a public exchange. The Exchange believes that the proposed lower volume requirement would incentivize additional liquidity to a public exchange to qualify for lower fees for Retail Orders with a time-in-force of Day that remove liquidity, thereby promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders. The proposal is thus reasonable because all ETP Holders would benefit from such increased levels of liquidity. The Exchange notes that ETP Holders are free to shift their order flow to competing venues if they believe other markets offer more favorable fees and credits.

On the backdrop 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 Proposed Fee Change is an Equitable Allocation of Fees and Credits

The Exchange believes that, for the reasons discussed above, the proposed rule change is an equitable allocation of its fees and credits. The proposed rule change is intended to provide ETP Holders an incentive to send a greater number of Retail Orders to the Exchange in order to qualify and not pay a fee for such orders when removing liquidity from the Exchange, thereby increasing the number of orders that are executed on the Exchange, 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 ETP Holders that remove liquidity. As previously noted, the Exchange operates in a competitive environment, particularly as it relates to attracting Retail Orders to the Exchange. The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. The Exchange believes that pricing is just one of the factors that ETP Holders consider when determining where to direct their order flow. Among other things, factors such as execution quality, fill rates, and volatility, are important and deterministic to ETP Holders in deciding where to send their order flow. The Exchange believes that a number of ETP Holders could qualify for the proposed no fee based on their current trading profile on the Exchange if they choose to direct more of their order flow to the Exchange. However, without having a view of an ETP Holder's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder directing Retail Orders to the Exchange in order to qualify for the proposed no fee.

The Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more Retail Orders to the Exchange, thereby improving market-wide quality and price discovery.

The Proposed Fee Change is not Unfairly Discriminatory

The Exchange believes that the proposal to adopt a lower volume requirement to qualify for the proposed fee reduction is not unfairly discriminatory. 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, the proposal neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that the proposed rule change will incentivize ETP Holders to direct a greater number of Retail Orders to a public exchange to qualify for the proposed reduced fee for removing liquidity, thereby promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders. The proposal does not permit unfair discrimination because the proposed volume requirement for removing liquidity would be applied to all similarly situated ETP Holders, who would all be eligible to not pay a fee on an equal basis. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by this allocation of fees. The Exchange believes it is not unfairly discriminatory to provide lower fees for removing liquidity as the proposed fee would be provided on an equal basis to all ETP Holders that remove liquidity by meeting the proposed volume requirement. Further, the Exchange believes the proposed reduced fee would provide an incentive for ETP Holders to execute more of their Retail Orders on the Exchange. The Exchange also believes that the proposed change is not unfairly discriminatory because it is reasonably related to the value to the Exchange's market quality associated with higher volume.

In addition, 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.

Finally, 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,[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, as discussed above, the Exchange believes that the proposed changes 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 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

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[16] 15 U.S.C. 78f(b)(8).

stocks for all types of orders, large and small."[17]

Intramarket Competition. The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to attract Retail Orders to the Exchange. The Exchange believes that the proposed change would incentivize market participants to direct retail order flow to the Exchange. Greater overall order flow, trading opportunities, and pricing transparency would benefit all market participants on the Exchange by enhancing market quality and would continue to encourage ETP Holders to send their orders to the Exchange, thereby contributing towards a robust and well-balanced market ecosystem. The proposed fee reduction would be available 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. Additionally, the proposed change would apply to all ETP Holders equally in that all ETP Holders would have a reasonable opportunity to meet the volume requirement to qualify for the proposed fee reduction and would not pay a fee for removing liquidity if such criteria is met.

Intermarket Competition. The Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchanges 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 10%. In such an environment, the Exchange must continually adjust its fees and rebates to remain

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17 See supra note 3.

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 this proposed fee change would 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 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 (http://www.sec.gov/rules/sro.shtml); or

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18 15 U.S.C. 78s(b)(3)(A).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEARCA-2023-01 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-2023-01. 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 offices 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-2023-01, 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.[19]

Sherry R. Haywood,
Assistant Secretary.

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[19] 17 CFR 200.30-3(a)(12).