

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86365; File No. SR-NYSENAT-2019-16)

July 12, 2019

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Schedule of Fees and Rebates to Reduce the Adding Average Daily Volume Required for ETP Holders to Qualify for the Adding Tier 1 Fees

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 July 1, 2019, NYSE National, Inc. (“NYSE National” or “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 its Schedule of Fees and Rebates to reduce the adding average daily volume required for ETP Holders to qualify for the Adding Tier 1 fees. The Exchange proposes to implement the rule change on July 1, 2019. 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 Schedule of Fees and Rebates (“Fee Schedule”) to reduce the amount of average daily volume (“ADV”) as a percentage of US consolidated ADV (“CADV”) that an ETP Holder must submit to the Exchange (i.e., Adding ADV) in order to qualify for the Adding Tier 1 fees. Specifically, the Exchange proposes to lower the requirement for the first of the two ways to qualify for the Adding Tier 1 credit from an adding ADV as a percentage of CADV of 0.20% or more to an adding ADV as a percentage of CADV of 0.15% or more.

The Exchange proposes to implement the rule change on July 1, 2019.

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. 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.”⁴

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

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”⁵ Indeed, equity trading is currently dispersed across 13 exchanges,⁶ 31 alternative trading systems,⁷ and numerous broker-dealer internalizers and wholesalers. Based on publicly-available information, no single exchange has more than 18% of the market share of executed volume of equity trades (whether excluding or including auction volume).⁸ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, in June 2019, the Exchange had 1.2% market share of executed volume of equity trades (excluding auction volume).⁹ 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. Accordingly, competitive forces constrain the Exchange’s transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange utilizes a “taker-maker” or inverted fee model to attract orders that provide liquidity at the most competitive prices. Under the taker-maker model, offering rebates for

⁵ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Transaction Fee Pilot for NMS Stocks Final Rule) (“Transaction Fee Pilot”).

⁶ See Cboe Global Markets, U.S. Equities Market Volume Summary (June 28, 2019), available at http://markets.cboe.com/us/equities/market_share/. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

⁷ See FINRA ATS Transparency Data (June 3, 2019), available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. Although 54 alternative trading systems were registered with the Commission as of May 31, 2019, only 31 are currently trading. 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 (June 28, 2019), available at http://markets.cboe.com/us/equities/market_share/.

⁹ See *id.*

taking liquidity increases the likelihood that market participants will send orders to the Exchange to trade with liquidity providers' orders. This increased taker order flow provides an incentive for market participants to send orders that provide liquidity. The Exchange charges fees for order flow that provides liquidity. These fees are reasonable due to the additional marketable interest (in part attracted by the exchange's rebate to remove liquidity) with which those order flow providers can trade.

The Exchange sets forth the fees it charges for adding liquidity in four Adding Tiers that establish minimum quoting or volume requirements that an ETP Holder must satisfy in order to be eligible for specific corresponding fees. These quoting and volume requirements are based on the type of liquidity (i.e., adding, taking, displayed, non-displayed, BBO setting, or MPL) and the type of security (i.e., whether it is a Tape A, B or C security). In addition, the Exchange offers two "step up" Adding Tiers that do not have quoting or minimum volume requirements but require ETP Holders to provide additional incremental liquidity, thus "stepping up" their liquidity provision, in order to qualify for better pricing based on smaller amounts of liquidity than are required to qualify for Adding Tiers 1-3. The different tiers are designed to provide an incentive for order flow providers to add liquidity on the Exchange because the fees are lower for the tiers that have higher quoting or volume requirements. ETP Holders that do not send order flow to the Exchange to qualify for the Adding Tier rates would receive the rates set forth under item A (General Rates) of the Fee Schedule.

To respond to this competitive environment, the Exchange proposes to adjust its pricing to reduce the adding ADV requirement ETP Holders must supply in order to qualify for the Adding Tier 1 fees. The Exchange's market share of intraday trading (i.e., excluding auctions)

declined from 1.3% for the month of May 2019 to 1.2% for the month of June 2019.¹⁰ The proposed fee change is designed to attract additional order flow to the Exchange by making it easier to qualify for the Adding Tier 1 rates.

Proposed Rule Change

As described in more detail below, in order to qualify for the Adding Tier 1 fees, an ETP Holder must be quoting at a price that is equal to the National Best Bid (“NBB”) and National Best Offer (“NBO,” together the “NBBO”) a specified percentage of the time, in a specific number of securities and must have an adding ADV as a percentage of CADV of 0.20% or more. The Exchange proposes to lower the ADV percentage requirement that an ETP Holder must satisfy in order to qualify for the Adding Tier 1 rates. Without having a view of ETP Holder’s activity on other markets and off-exchange venues, the Exchange believes that this reduction of the adding ADV requirement would be significant enough to incentivize market participants to increase their quoting on the Exchange to meet the new lower requirement, and thus be eligible for lower fees, and submit additional adding liquidity to the Exchange.

Adding Tier 1

Under current Adding Tier 1, ETP Holders that add liquidity to the Exchange in securities with a per share price of \$1.00 or more and that:

- (i) quote at the NBBO¹¹ at least 5% of the time in 950 or more securities on an average daily basis, calculated monthly, and have an average daily volume (“ADV”) of adding liquidity as a percentage of US consolidated ADV (“CADV”) of 0.20% or more, or
- (ii) quote at the NBBO at least 5% of the time in 2,450 or more securities on

¹⁰ See id.

¹¹ See footnote ** in the current Fee Schedule.

an average daily basis, calculated monthly, and have an ADV of adding liquidity as a percentage of US CADV of 0.10% or more, are charged the following fees:

- \$0.0008 per share for adding displayed orders in Tape B and C securities and \$0.0011 per share in Tape A securities;
- \$0.0008 per share for orders that set a new Exchange BBO in Tape B and C securities and \$0.0011 per share in Tape A securities;
- \$0.0010 per share for adding non-displayed orders in Tape B and C securities and \$0.0013 per share in Tape A securities; and
- \$0.0005 per share for MPL orders.

The Exchange proposes to amend the adding ADV requirements for the first of the two alternative methods described in (i) above to qualify for the tier by reducing the percentage from 0.20% or more to 0.15% or more. As proposed, the first alternative would require ETP Holders to quote at least 5% of the time at the NBBO in 950 or more securities on an average daily basis, calculated monthly, and have an ADV of adding liquidity as a percentage of CADV of 0.15% or more (as opposed to 0.20% or more). The fees charged under the Adding Tier 1 would not change.

Application of Proposed Fee Change

The proposed rule change is designed to provide order flow providers with an incentive to route liquidity-providing order flow to the Exchange. As described above, ETP Holders with liquidity-providing order flow have a choice of where to send that order flow. The Exchange believes that if it reduces the requirements to qualify for tiers that have lower fees, more ETP Holders will choose to route their liquidity-providing order flow to the Exchange to qualify for

those tiers. The Exchange cannot predict with certainty how many ETP Holders would avail themselves of this opportunity, but believes that as many as 9 ETP Holders could qualify for these tiers if they so choose.¹² Additional liquidity-providing order flow benefits all market participants because it provides greater execution opportunities on the Exchange.

For example, assume an ETP Holder quotes at least 5% of the NBBO in 975 securities on an average daily basis, calculated monthly, and averages an ADV of 9 million shares of adding liquidity in a month where a billing month of US CADV is 7.2 billion, or 0.125% of CADV. Prior to the proposed change, that ETP Holder would fall short of the requirement for Tier 1, and would have instead qualified for Adding Tier 3. With this proposed change, this ETP Holder would now be eligible for Adding Tier 1 fees, which, except for MPL Adding fees, are lower than the Adding Tier 3 fees [sic]. The Exchange believes that charging lower fees would create an incentive for liquidity providers to direct order flow to the Exchange, which in turn would create additional execution opportunities for all market participants.

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

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 6(b)(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

¹² In the month of June 2019, 9 ETP Holders had an Adding ADV of at least 0.025%.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) & (5).

discriminate between customers, issuers, brokers or dealers.

The Proposed Change is Reasonable

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. 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

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”¹⁶ Indeed, equity trading is currently dispersed across 13 exchanges,¹⁷ 31 alternative trading systems,¹⁸ and numerous broker-dealer internalizers and wholesalers. Based on publicly-available information, no single exchange has more than 18% of the market share of executed volume of equity trades (whether excluding or including auction volume).¹⁹ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, in June 2019, the Exchange had 1.2% market share of

¹⁵ See Regulation NMS, 70 FR at 37499.

¹⁶ See Transaction Fee Pilot, 84 FR at 5253.

¹⁷ See Cboe Global Markets, U.S. Equities Market Volume Summary (June 28, 2019), available at http://markets.cboe.com/us/equities/market_share/. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

¹⁸ See FINRA ATS Transparency Data (June 3, 2019), available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. Although 54 alternative trading systems were registered with the Commission as of May 31, 2019, only 31 are currently trading. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

¹⁹ See Cboe Global Markets U.S. Equities Market Volume Summary (June 28, 2019), available at http://markets.cboe.com/us/equities/market_share/.

executed volume of equity trades (excluding auction volume).²⁰

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, in response to fee changes. With respect to non-marketable order flow that would provide displayed liquidity on an Exchange, ETP Holders can choose from any one of the 13 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide displayed liquidity on an exchange.

Given this competitive environment, the proposal represents a reasonable attempt to attract additional order flow to the Exchange by making it easier to qualify for the Adding Tier 1 rates. As noted, the Exchange's market share of intraday trading (i.e., excluding auctions) declined from 1.3% for the month of May 2019 to 1.2% for the month of June 2019.²¹ The Exchange believes that the proposal represents a reasonable attempt to encourage the submission of additional liquidity to a national securities exchange, thus promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders from the substantial amounts of liquidity present on the Exchange. All ETP Holders would benefit from the greater amounts of liquidity that will be present on the Exchange, which would provide greater execution opportunities.

The Proposal is an Equitable Allocation of Fees

The Exchange believes its proposal equitably allocates its fees among its market participants. The Exchange is not proposing to adjust the amount of the Adding Tier 1 fees, which will remain at the current level for all market participants. Rather, the proposal would

²⁰ See id.

²¹ See id.

continue to encourage ETP Holders to send orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The Exchange believes that, for the reasons discussed above, lowering the adding ADV requirement would make it easier for current and new liquidity providers to qualify for the Adding Tier 1 fees, thereby encouraging submission of additional liquidity to the Exchange. The proposed change will thereby encourage the submission of additional liquidity to a national securities exchange, thus promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders from the substantial amounts of liquidity present on the Exchange. All ETP Holders would benefit from the greater amounts of liquidity that will be present on the Exchange, which would provide greater execution opportunities.

The Exchange notes that there are currently 2 ETP Holders qualifying for Adding Tier 1 and that, based on current participation on the Exchange, no additional firms would initially qualify with the lower requirements. Without having a view of an ETP Holder's activity on other markets and off-exchange venues, the Exchange believes the proposed lower adding ADV requirement would provide an incentive for market participants to increase the orders they send to the Exchange in order to meet the new lower requirement and submit additional adding liquidity to the Exchange. In addition, based on the profile of liquidity-providing firms generally, the Exchange believes that 9 firms could qualify for these tiers if they choose to direct order flow to, and increase quoting on, the Exchange.

The proposal neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that the proposal constitutes an equitable allocation of fees because all similarly situated ETP Holders and other market participants would be charged the same rates. Moreover, the proposed change is equitable because all qualifying

ETP Holders that add liquidity to the Exchange and quote at the NBBO in Adding Tier 1 would be eligible for the fee by satisfying the lowered threshold, and because the lower threshold would apply equally to all similarly situated ETP Holders. The Exchange further believes that the proposed changes would not permit unfair discrimination among ETP Holders because the tiered rates are available equally to all ETP Holders. As described above, in today's competitive marketplace, order flow providers have a choice of where to direct liquidity-providing order flow, and while only 2 ETP Holders have qualified to date for these rates, the Exchange believes there are additional ETP Holders that could qualify if they chose to direct their order flow to the Exchange.

The Proposal 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 proposal neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that the proposal does not permit unfair discrimination because the proposal would be applied to all similarly situated ETP Holders and other market participants would be charged the same rates.

The Exchange further believes that the proposal does not permit unfair discrimination because the Exchange will be making the Adding Tier 1 rates available to all ETP Holders on an equal basis. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by this allocation of fees. For the same reasons, the Exchange believes that the proposal would not permit unfair discrimination among ETP Holders. The Exchange believes that the proposed change is not unfairly discriminatory because all qualifying ETP Holders that

add liquidity to the Exchange and quote at the NBBO in Adding Tier 1 would be eligible for the fee by satisfying the lowered threshold, and because the lower thresholds would apply equally to all similarly situated ETP Holders.

The Exchange further believes that the proposed changes would not permit unfair discrimination among ETP Holders because the tiered rates are available equally to all ETP Holders. As described above, in today's competitive marketplace, order flow providers have a choice of where to direct liquidity-providing order flow, and while only 2 ETP Holders currently are qualified for these rates, the Exchange believes there are additional ETP Holders that could qualify if they chose to direct their order flow to the Exchange.

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,²² 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 by making it easier for liquidity providers to qualify for the Adding Tier 1 fees, thereby increasing the likelihood that market participants will send orders to the Exchange to trade with the liquidity providers' orders and thus promoting market depth, price discovery and transparency and enhancing order execution opportunities for ETP Holders. As a result, the

²² 15 U.S.C. 78f(b)(8).

Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."²³

Intramarket Competition. The proposed change is designed to attract additional order flow to the Exchange by reducing the amount of adding ADV an ETP Permit holder is required to supply for the Adding Tier 1. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages ETP Holders to send orders, thereby contributing to robust levels of liquidity, which benefits all market participants. The proposed reduced requirement 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.

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. The Exchange notes that Exchange's market share of intraday trading (excluding auctions) declined from 1.3% for the month of May 2019 to 1.2% for the month of June 2019.²⁴ 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

²³ Regulation NMS, 70 FR at 37498-99.

²⁴ See note 10, *supra*.

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)²⁵ of the Act and subparagraph (f)(2) of Rule 19b-4²⁶ 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)²⁷ 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:

²⁵ 15 U.S.C. 78s(b)(3)(A).

²⁶ 17 CFR 240.19b-4(f)(2).

²⁷ 15 U.S.C. 78s(b)(2)(B).

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-NYSENAT-2019-16 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-NYSENAT-2019-16. 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-NYSENAT-2019-16, 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.²⁸

Jill M. Peterson
Assistant Secretary

²⁸ 17 CFR 200.30-3(a)(12).