SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98169; File No. SR-NYSENAT-2023-17)

August 18, 2023

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.44

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 August 8, 2023, NYSE National, Inc. ("NYSE National" or the "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I.   Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 7.44 to provide for a Retail Liquidity Program. 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 the Statutory Basis for, the Proposed Rule Change

1.   Purpose

The Exchange proposes to amend Rule 7.44, which is currently designated as Reserved, to provide for a Retail Liquidity Program (the "Program"). The purpose of the Program would be to attract retail order flow to the Exchange and allow such order flow to receive potential price improvement at the midpoint or better. As described in greater detail below, the Program would allow ETP Holders to provide potential price improvement to retail investor orders in the form of a non-displayed order that is priced at the less aggressive of the midpoint of the PBBO or its limit price, called a Retail Price Improvement Order ("RPI Order").[3] When there is an RPI Order in a particular security that is eligible to trade at the midpoint of the PBBO, the Exchange would disseminate an indicator, known as the Retail Liquidity Identifier, that such interest exists.[4] Retail Member Organizations ("RMOs") would be able to submit a Retail Order to the Exchange, which interacts, to the extent possible, with available contra-side RPI Orders and may interact with other liquidity on the Exchange, depending on the Retail Order's instructions.[5] The segmentation in the Program would allow retail order flow to receive potential price improvement as a result of that order flow being deemed more desirable by liquidity providers.

The rules providing for the proposed Program are structured similarly to the Retail Liquidity Programs currently offered by its affiliated exchanges, New York Stock Exchange,

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[3]   See proposed Rule 7.44(a)(3).

[4]   See proposed Rule 7.44(e). The Exchange notes that it will seek an exemption from the provisions of Regulation NMS Rule 602, 17 CFR 242.602(d) (the "Quote Rule") with respect to its planned dissemination of a Retail Liquidity Identifier to allow it to disseminate the Retail Liquidity Identifier to indicate the presence of RPI Order interest without including such interest in the Exchange's quotation. The Exchange will not implement the proposed Program unless and until its request for exemption from the requirements of the Quote Rule has been granted.

[5]   See proposed Rules 7.44(a)(1), 7.44(a)(2), and 7.44(f).

LLC ("NYSE") and NYSE Arca, Inc. ("NYSE Arca") except for differences as further described below relating to RPI Orders and Retail Orders, and uses the same terminology as is used in the approved rules governing the NYSE and NYSE Arca Retail Liquidity Programs.[6] Accordingly, proposed Rule 7.44 is based on NYSE Rule 7.44 and NYSE Arca Rule 7.44-E, except as described in further detail below to reflect that the proposed Program would differ substantively from the NYSE and NYSE Arca Retail Liquidity Programs in that it would primarily seek to provide retail order flow with price improvement opportunities at the midpoint or better.[7] The Exchange notes that several other equities exchanges also offer retail price improvement programs, one of which offers trading opportunities at the midpoint, similar to the Program, as proposed.[8]

Definitions

The Exchange proposes to adopt the following definitions for the Program under proposed Rule 7.44(a).[9]

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[6]   See NYSE Rule 7.44; NYSE Arca Rule 7.44-E. The Exchange notes that NYSE Arca has proposed to decommission its Retail Liquidity Program in a separate rule filing. See SR-NYSEARCA-2023-55. The Exchange proposes to implement the Program in the third quarter of 2023, in tandem with the discontinuation of the NYSE Arca Retail Liquidity Program, on a date to be announced by Trader Update.

[7]   The Exchange notes that it is not seeking an exemption under Rule 612 of Regulation NMS, 17 CFR 242.612 (the "Sub-Penny Rule") because it will not accept or rank orders priced greater than $1.00 per share in an increment smaller than $0.01. The Program will thus differ from the NYSE and NYSE Arca Retail Liquidity Programs in this respect, as both of those programs operate pursuant to exemptive relief granted by the Commission from the requirements of the Sub-Penny Rule.

[8]   See, e.g., Investors Exchange LLC ("IEX") Rule 11.232 (describing the IEX Retail Program, which is designed to provide retail order flow with price improvement opportunities at the midpoint); Cboe BYX Exchange, Inc. ("BYX") Rule 11.24 (setting forth BYX's Retail Price Improvement Program); Nasdaq BX, Inc. ("BX") Rule 4780 (setting forth BX's Retail Price Improvement Program). The Exchange further notes that Nasdaq BX, like the Exchange, utilizes a "taker-maker" or inverted fee model; accordingly, offering a retail price improvement program on an exchange that operates with such a model is not novel.

[9]   The Exchange notes that it does not propose that the Program include a role for Retail Liquidity Providers ("RLPs"), unlike the NYSE and NYSE Arca Retail Liquidity Programs. See NYSE Rules 7.44(a)(1), 7.44(a)(4)(D), 7.44(c) - (g), 7.44(i); NYSE Arca Rules 7.44-E(a)(1), 7.44-E(a)(4)(C), 7.44-E(c) - (g), 7.44-E(i). The Exchange believes that the Program can operate effectively without RLPs, including because any ETP Holder may enter RPI Orders, as proposed, and notes that other exchanges currently operate retail price improvement programs that likewise do not include an RLP function. See, e.g., IEX Rule 11.232 (describing IEX Retail Price Improvement Program); Nasdaq BX Rule 4780 (describing Nasdaq BX Retail

- Proposed Rule 7.44(a)(1) would define a Retail Member Organization or RMO as an ETP Holder that is approved by the Exchange under Rule 7.44 to submit Retail Orders. Proposed Rule 7.44(a)(1) is substantively identical[10] to NYSE Rule 7.44(a)(2) and NYSE Arca Rule 7.44-E(a)(2) and is also substantially similar to IEX Rule 11.232(a)(1).

- Proposed Rule 7.44(a)(2) would define a Retail Order as an agency order or riskless principal order that meets the criteria of FINRA Rule 5320.03, originating from a natural person, and that is submitted to the Exchange by an RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. A Retail Order would operate in accordance with proposed Rule 7.44(f) (as described below). Proposed Rule 7.44(a)(2) is substantively identical to NYSE Rule 7.44(a)(3) and NYSE Arca Rule 7.44-E(a)(3) as to the core definition of a Retail Order and the provision that the operation of a Retail Order would be outlined further in a later section of the rule.[11] Proposed Rule 7.44(a)(2) is also substantially similar to IEX Rule

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11.190(b)(15).

- Proposed Rule 7.44(a)(3) would define a Retail Price Improvement Order or RPI as an MPL Order[12] that is eligible to trade only with incoming Retail Orders submitted by an RMO. This proposed rule would also provide that an RPI may not be designated IOC, ALO, or with an MTS Modifier.[13] Proposed Rule 7.44(a)(3) further provides that an RPI remains non-displayed in its entirety and is ranked Priority 3 - Non-Display Orders.

The definition of an RPI as a non-displayed order that trades only with Retail Orders is consistent with NYSE Rule 7.44(a)(4) and NYSE Arca Rule 7.44-E(a)(4). However, proposed Rule 7.44(a)(3) differs substantively from the definition of RPI Orders under NYSE Rule 7.44(a)(4) and NYSE Arca Rule 7.44-E(a)(4) in that RPI Orders in the Program will only be MPL Orders, in accordance with the goal of the Program to provide potential price improvement to retail

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NYSE Rule 7.44(a)(3) rather than NYSE Arca Rule 7.44-E(a)(3) in this regard.

[12] An MPL Order is a Limit Order to buy (sell) that is not displayed and does not route, with a working price at the lower (higher) of the midpoint of the PBBO or its limit price. An MPL Order is ranked Priority 3 - Non-Display Orders and may be entered during any Exchange trading session. See Rule 7.31(d)(3). An MPL Order to buy (sell) must be designated with a limit price in the minimum price variation for the security and will be eligible to trade at its working price. See Rule 7.31(d)(3)(A). If there is no PBB or PBO, or if the PBBO is locked or crossed, an arriving or resting MPL Order will not be eligible to trade until the PBBO is not locked or crossed. See Rule 7.31(d)(3)(B). An Aggressing MPL Order to buy (sell) will trade at the working price of resting orders to sell (buy) when such resting orders have a working price at or below (above) the working price of the MPL Order. Resting MPL Orders to buy (sell) will trade against all Aggressing Orders to sell (buy) priced at or below (above) the working price of the MPL Order. See Rule 7.31(d)(3)(C). An MPL Order may be designated IOC ("MPL-IOC Order") and, subject to such IOC instructions, will follow the same trading and priority rules as an MPL Order except that an MPL-IOC Order will be rejected if there is no PBBO or the PBBO is locked or crossed. See Rule 7.31(d)(3)(D).

[13] See Rules 7.31(b)(2) (providing that an order with an IOC Modifier will be traded in whole or in part on the Exchange as soon as such order is received, with any untraded quantity cancelled); 7.31(e)(2) (providing that an ALO Order is a Non-Routable Limit Order that, unless it receives price improvement, will not remove liquidity from the Exchange Book); 7.31(i)(3) (providing that the MTS Modifier designates an order with a minimum trade size and an order with an MTS Modifier will be rejected if the MTS is less than a round lot or if the MTS is larger than the size of the order).

orders at the midpoint or better. The Exchange notes that it would not be novel for RPI Orders to function as MPL Orders to offer retail orders trading opportunities at the midpoint. NYSE Arca Rule 7.44-E(a)(4) currently provides that RPI Orders in the NYSE Arca Retail Liquidity Program may be designated as either Limit Orders or MPL Orders, and, similar to the Program, as proposed, the IEX Retail Price Improvement Program provides for Retail Liquidity Provider Orders that are non-displayed orders priced at the less aggressive of the midpoint price or the order's limit price and interact with eligible retail orders in price-time priority at the midpoint price.[14]

RMO Qualifications and Application Process

As noted above, Retail Orders may be submitted by RMOs. Under proposed Rule 7.44(b)(1), any ETP Holder could qualify as an RMO if it conducts retail business or routes retail orders on behalf of another broker-dealer. For purposes of this rule, the Exchange proposes that conducting a retail business includes carrying retail customer accounts on a fully disclosed basis. Proposed Rule 7.44(b)(2) would provide that, to become an RMO, an ETP Holder must submit: (1) an application form; (2) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow;[15] and (3) an attestation, in a form prescribed by the Exchange, that any order submitted by the ETP Holder as a Retail Order would meet the qualifications for such orders under Rule 7.44. Proposed Rule 7.44(b)(3) would provide that the

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[14]   See NYSE Arca Rule 7.44-E(a)(4)(D) ("An RPI must be designated as either a Limit Non-Displayed Order or MPL Order…."); IEX Rule 11.190(b)(14) (defining Retail Liquidity Provider Order as a Midpoint Peg order that is only eligible to execute against retail orders through the execution process described in IEX Rule 11.232(e)).

[15]   Proposed Rule 7.44(b)(2) would further provide that such supporting documentation may include sample marketing literature, Web site screenshots, other publicly disclosed materials describing the ETP Holder's retail order flow, and any other documentation and information requested by the Exchange in order to confirm that the applicant's order flow would meet the requirements of the Retail Order definition.

Exchange would notify an applicant of its decision in writing after an applicant submits the application form, supporting documentation, and attestation. Proposed Rule 7.44(b)(4) would provide that a disapproved applicant may request an appeal of such disapproval by the Exchange as provided in proposed Rule 7.44(d) (discussed further below) and/or reapply for RMO status 90 days after the disapproval notice issued by the Exchange. An RMO may also voluntarily withdraw from such status at any time by giving written notice to the Exchange, as set forth in proposed Rule 7.44(b)(5).

An RMO must have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met, pursuant to proposed Rule 7.44(b)(6). Such written policies and procedures must require the ETP Holder to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of Rule 7.44, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends its orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.

Proposed Rule 7.44(b) is substantively identical to NYSE Rule 7.44(b) and NYSE Arca Rule 7.44-E(b) and is also substantially similar to IEX Rule 11.232(b).

Failure of RMO to Abide by Retail Order Requirements

Proposed Rule 7.44(c) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designated orders submitted to the Exchange as Retail Orders and the Exchange determined, in its sole discretion, that those orders failed to meet the requirements of Retail Orders, the Exchange could disqualify an ETP Holder from its status as an RMO. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the ETP Holder. A disqualified RMO could appeal the disqualification as provided in proposed Rule 7.44(d), discussed below, and/or reapply for RMO status 90 days after the disqualification notice was issued by the Exchange.

Proposed Rule 7.44(c) is substantively identical to NYSE Rule 7.44(h) and NYSE Arca Rule 7.44-E(h) and is also substantially similar to IEX Rule 11.232(c).

Appeal of Disapproval or Disqualification

Proposed Rule 7.44(d) provides appeal rights to ETP Holders that are disapproved or disqualified as RMOs. If an ETP Holder disputes the Exchange's decision to disapprove it under proposed Rule 7.44(b) or disqualify it under proposed Rule 7.44(c), such ETP Holder could request, within five business days after notice of the decision was issued by the Exchange, the Retail Liquidity Program Panel ("RLP Panel") review the decision to determine if it was correct.

The RLP Panel would consist of the NYSE's Chief Regulatory Officer ("CRO"), or a designee of the CRO, and two qualified Exchange employees. The RLP Panel would review the facts and render a decision within the time frame prescribed by the Exchange. The RLP Panel may overturn or modify an action taken by the Exchange, and all determinations by the RLP Panel would constitute final action by the Exchange on the matter at issue.

Proposed Rule 7.44(d) is substantively identical to NYSE Rule 7.44(i) and NYSE Arca

Rule 7.44-E(i) and is also substantially similar to IEX Rule 11.232(d).

Retail Liquidity Identifier

Proposed Rule 7.44(e) would provide for the Retail Liquidity Identifier, which is an identifier disseminated by the Exchange through proprietary data feeds and through the Consolidated Quotation System or the UTP Quote Data Feed, as applicable, when RPI interest eligible to trade at the midpoint of the PBBO for a particular security is available in Exchange systems. The Retail Liquidity Identifier would reflect the symbol for the particular security and the side (buy or sell) of the RPI interest but would not include the price or size of the RPI interest.

Proposed Rule 7.44(e) is the same as NYSE Rule 7.44(j), aside from differences to reflect that the Program's Retail Liquidity Identifier would indicate when RPI interest is available at the midpoint of the PBBO, consistent with the goal of the Program to offer trading opportunities to Retail Orders at the midpoint or better.

Retail Order Designation

Proposed Rule 7.44(f) would describe the operation of Retail Orders in the Program. A Retail Order may be designated with an MTS Modifier.[16] Proposed Rule 7.44(f) provides for two types of Retail Orders, and an RMO would be able to designate how a Retail Order will trade with available contra-side interest.

Proposed Rule 7.44(f)(1) would define the Type 1 Retail Order. A Type 1 Retail Order

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[16] The Exchange notes that the availability of an MTS Modifier with retail orders is not novel, as it is currently offered on other exchanges operating retail price improvement programs. See, e.g., Investors Exchange LLC Rules 11.190(b)(9)(G), 11.190(b)(10)(G), and 11.232(a)(2) (providing that a Retail order may be a Discretionary Peg order or Midpoint Peg order, either of which may be designated with a minimum trade size). In addition, the Commission recently noticed for immediate effectiveness a proposed rule change by the NYSE to permit Retail Orders to be designated with an MTS Modifier. See Securities Exchange Act Release No. 96944 (February 16, 2023), 88 FR 11499 (February 23, 2023) (SR-NYSE-2023-11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Modify Rule 7.44 Relating to the Retail Liquidity Program).

to buy (sell) would be an MPL IOC Order with a working price at the lower (higher) of the midpoint of the PBBO or its limit price and that will trade only with available RPI Orders to sell (buy) and all other orders to sell (buy) with a working price below (above) or equal to the midpoint of the PBBO on the Exchange Book. A Type 1 Retail Order would not route, and the quantity of a Type 1 Retail Order to buy (sell) that does not trade with eligible orders to sell (buy) will be immediately and automatically cancelled. A Type 1 Retail Order would be cancelled on arrival if there is no PBBO or the PBBO is locked or crossed.

Proposed Rule 7.44(f)(1) is similar to NYSE Rule 7.44(k) and NYSE Arca Rule 7.44-E(k)(1) except that the Type 1 Retail Order, as proposed, would differ from the NYSE Retail Order and the NYSE Arca Type 1 Retail Order in that it would be an MPL Order (rather than a Limit Order), to reflect the intent of the Program to provide potential price improvement opportunities for retail order flow at the midpoint or better. The Type 1 Retail Order, as an order eligible to trade at the midpoint or better, accordingly also shares characteristics with the existing MPL Order type available on the Exchange and is similar to the retail order in IEX's Retail Price Improvement Program.[17]

Proposed Rule 7.44(f)(2) would define the Type 2 Retail Order. A Type 2 Retail Order to buy (sell) would be a Limit IOC Order that trades first with available RPI Orders to sell (buy) (which, as noted above, are orders with a working price at the lower (higher) of the midpoint of the PBBO or their limit price) and with all other orders to sell (buy) with a working price below (above) the PBO (PBB) on the Exchange Book. Any remaining quantity of a Type 2 Retail Order would then trade with orders to sell (buy) on the Exchange Book at prices equal to or

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[17]   See note 13, supra (describing the MPL Order); IEX Rule 11.232(a)(2) (providing that a retail order must be a Discretionary Peg order or Midpoint Peg order with a Time-in-Force of IOC or FOK that is only eligible to trade at a price between the NBB and the Midpoint Price (for bids) or between the NBO and the Midpoint Price (for offers)).

above (below) the PBO (PBB) as a Limit IOC Order and would not route. Any untraded quantity would be immediately and automatically cancelled. Retail Orders designated by the submitting RMO as Type 2 thus differ from Type 1 Retail Orders because they would be able to trade with all contra-side orders inside the PBBO and then would have the opportunity to trade as a Limit IOC Order, as such order is defined in Rule 7.31.

Proposed Rule 7.44(f)(2) is identical to NYSE Arca Rule 7.44-E(k)(2)(A) except that proposed Rule 7.44(f)(2) references the Exchange Book rather than the NYSE Arca Book.

Priority and Order Allocation

Proposed Rule 7.44(g) would set forth priority and allocation rules for the Program. RPI Orders in the same security would be ranked together with all other interest ranked as Priority 3 - Non-Display Orders, and odd lot orders ranked as Priority 2 - Display Orders would have priority over orders ranked Priority 3 - Non-Display Orders at each price. Any remaining unexecuted RPI interest would remain available to trade with other incoming Retail Orders. Any remaining unfilled quantity of the Retail Order would cancel in accordance with proposed Rule 7.44(f), as described above.

Proposed Rule 7.44(g) would also include the following examples to illustrate priority and allocation of orders in the Program.

Examples of priority and order allocation are as follows:

PBBO for security ABC is $10.00 - $10.10

User 1 enters a Retail Price Improvement Order to buy ABC at $10.06 for 500

User 2 then enters a Retail Price Improvement Order to buy ABC at $10.09 for 400

User 3 then enters a Retail Price Improvement Order to buy ABC at $10.04 for 500

An incoming Type 1 Retail Order to sell ABC for 1,000 at $10.00 would trade first

with User 1's bid for 500 at $10.05. The Retail Order would then trade with User 2's bid for 400 at $10.05, because User 2's bid is ranked at the same price as User 1's but arrived later. User 3 would not be filled because the limit price of its order is not priced to execute at or above the current midpoint price of $10.05, and the remaining 100 shares of the Retail Order would be cancelled back to the Retail Member Organization. The Retail Order trades with RPI Orders in price/time priority, as illustrated by this example.

The result would be the same as the above if User 1's order was instead either an MPL Order to buy ABC at $10.06 for 500 or a non-displayed order to buy ABC at $10.05 for 500. The incoming Retail Order would trade first with User 1 for 500 at $10.05, then with User 2 for 400 at $10.05. User 3 would not be filled because the limit price of its order is not priced to execute at or above the current midpoint price of $10.05, and the remaining 100 shares of the Retail Order would be cancelled back to the Retail Member Organization.

As a final example, assume the original facts, except that User 3's order was not an RPI Order, but rather, a non-displayed order to buy ABC at $10.09 for 400 and User 4 enters a displayed odd lot limit order to buy ABC at $10.05 for 60. The incoming Retail Order to sell for 1,000 would trade first with User 3's bid for 400 at $10.09, because it is the best-priced bid, then with User 4's bid for 60 at $10.05 because it is the next best-priced bid and is ranked Priority 2 - Display Orders and has priority over same-priced non-displayed orders (RPIs and non-displayed limit orders). The incoming Retail Order would then trade with User 1's bid for 500 at $10.05 and, finally, with User 2 for 40 at $10.05, at which point the entire size of the Retail Order

to sell 1,000 would be depleted. The balance of User 2's bid would remain on the Exchange Book and be eligible to trade with the next incoming Retail Order to sell.

To demonstrate how a Type 2 Retail Order would trade with available Exchange interest, assume the following facts:

PBBO for security DEF is $19.99 - $20.03

User 1 enters a Limit Order to buy DEF at $20.00 for 100 (*updated PBBO 20.00 x 20.03*)

User 2 then enters a Retail Price Improvement Order to buy DEF at $20.03 for 100

User 3 then enters an MPL Order to buy DEF at $21.00 for 100

User 4 then enters a Non-Displayed Order to buy DEF at $20.01 for 100

User 5 then enters a Non-Displayed Order to buy DEF at $20.02 for 100

An incoming Type 2 Retail Order to sell DEF for 1,000 at $20.00 would trade first with User 5's bid for 100 at $20.02, because it is the best-priced bid. The incoming Retail Order would then trade with User 2's bid for 100 at $20.015, because it is the next best-priced bid, then with User 3's bid for 100 at $20.015, because User 3's bid is ranked at the same price as User 2's but arrived later. The incoming Retail Order would then trade with User 4's bid for 100 at $20.01 because it is the next best-priced bid. Finally, the Retail Order would trade with User 1's bid for 100 at $20.00. The remaining 500 shares of the Retail Order would be cancelled back to the Retail Member Organization.

Finally, proposed Rule 7.44(g) would limit the Program to trades occurring at prices equal to or greater than $1.00 per share and provide that Exchange systems will reject Retail Orders and RPI Orders priced below $1.00. The Program will operate only during the Core

Trading Session and Retail Orders will be accepted during Core Trading Hours only.

Proposed Rule 7.44(g) is substantially the same as NYSE Arca Rule 7.44-E(l) except that it provides that remaining unfilled quantities of Retail Orders would cancel only (because all Retail Orders in the Program, as proposed, would be IOC Orders) and is also substantially the same as NYSE Rule 7.44(l) except to the extent the NYSE rule refers to the allocation of Retail Orders pursuant to NYSE Rule 7.37(b). The examples of priority and allocation provided in proposed Rule 7.44(g) are structured similarly to those that appear in NYSE Arca Rule 7.44-E(l), with differences to reflect that RPI Orders and Type 1 Retail Orders in the Program would function as MPL Orders.

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Subject to effectiveness of this proposed rule change, the Exchange will implement this change no later than in the third quarter of 2023 and announce the implementation date by Trader Update.

2.   Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,[18] in general, and furthers the objectives of Section 6(b)(5),[19] in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove 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 the proposed change would promote just and equitable principles

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[18]   15 U.S.C. 78f(b).

[19]   15 U.S.C. 78f(b)(5).

of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and protect investors and the public interest because proposed Rule 7.44 is based on NYSE Rule 7.44 and NYSE Arca Rule 7.44-E providing for the NYSE and NYSE Arca Retail Liquidity Programs, respectively, and is also substantially similar to rules providing for the IEX Retail Price Improvement Program. Proposed Rule 7.44 sets forth definitions, order types, processes for RMO application, qualification, disapproval and disqualification for the Program, and the operation, priority, and allocation of orders in the Program that are based on rules previously approved by the Commission for retail price improvement programs currently offered by equities exchanges. Accordingly, the Exchange also believes the proposed change would promote just and equitable principles of trade, remove impediments to, and perfect the mechanism of, a free and open market and a national market system, and protect investors and the public interest by promoting consistency among exchange rules setting forth retail price improvement programs, which could encourage retail investors to direct order flow to the Program to seek out price improvement opportunities.

The Exchange also believes that the proposed change would promote just and equitable principles of trade and remove impediments to, and perfect the mechanism of, a free and open market and a national market system because it is intended to attract retail order flow to the Exchange, including by facilitating opportunities for such order flow to receive potential price improvement at the midpoint or better. The proposed change would also promote competition for retail order flow among execution venues, which would benefit retail investors by creating additional price improvement opportunities for marketable retail order flow on a public exchange. In particular, the Exchange believes that providing for RPI Orders and Retail Orders that function as MPL Orders could provide more deterministic price improvement opportunities

for Retail Orders, thereby attracting additional retail order flow to the Exchange. In addition, the Exchange believes that also offering a Retail Order to buy (sell) that could trade with orders to sell (buy) on the Exchange Book at prices equal to or above (below) the PBO (PBB) (after trading with RPI Orders and interest on the Exchange Book with a working price below (above) the PBO (PBB)) could provide for additional trading opportunities for Retail Orders designated as Type 2 by the RMO. The Exchange notes that this type of Retail Order is currently offered in the NYSE Arca Retail Liquidity Program. The Exchange also believes that the proposed change would allow it to compete with other exchanges that similarly promote additional trading opportunities for retail order flow at the midpoint.[20]

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 believes that the proposed change could encourage competition by promoting additional trading opportunities at the midpoint and supporting price improvement opportunities at the midpoint of the PBBO or better for retail investors. The Exchange further believes that the proposed change could promote competition between the Exchange and other exchanges that offer retail price improvement programs, including an exchange that operates a retail price improvement program intended to provide additional trading opportunities at the midpoint.[21]

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.

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[20]   See note 9, supra.

[21]   See note 9, supra.

III.   Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[22] and Rule 19b-4(f)(6) thereunder.[23] Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act[24] and Rule 19b-4(f)(6)(iii) thereunder.[25]

A proposed rule change filed under Rule 19b-4(f)(6)[26] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[27] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange stated that it anticipates that it will be technologically ready to implement the Program within 30 days of the date of filing, and a waiver of the 30-day operative delay would allow the Exchange to provide beneficial price improvement opportunities to retail investors as soon as practicable. Further, the Exchange stated that waiver of the operative delay

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[22]   15 U.S.C. 78s(b)(3)(A)(iii).

[23]   17 CFR 240.19b-4(f)(6).

[24]   15 U.S.C. 78s(b)(3)(A).

[25]   17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

[26]   17 CFR 240.19b-4(f)(6).

[27]   17 CFR 240.19b-4(f)(6)(iii).

would encourage competition for retail order flow among execution venues. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because it would allow the Exchange to implement its Program to provide retail investors with price improvement opportunities and compete with other execution venues for retail order flow. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.[28]

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)[29] 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 (https://www.sec.gov/rules/sro.shtml); or

- Send an email to rule-comments@sec.gov. Please include file number SR-NYSENAT-2023-17 on the subject line.

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[28]   For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

[29]   15 U.S.C. 78s(b)(2)(B).

<u>Paper Comments</u>:

- 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-2023-17. 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-NYSENAT-2023-17 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.[30]

Sherry R. Haywood,

Assistant Secretary.

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[30]   17 CFR 200.30-3(a)(12).