

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-91948; File No. SR-NYSE-2021-33)

May 20, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending its Price List

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on May 17, 2021, New York Stock Exchange LLC (“NYSE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III 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 its Price List to (1) introduce a new fee for orders designated with a Retail Modifier at the open and the close; (2) revise certain requirements for executions at the open and the close; (3) introduce an additional credit under the Step Up Tier 2 Adding Credit; and (4) revise certain requirements for Retail Price Improvement (“RPI”) orders in the Retail Liquidity Program. The Exchange proposes to implement the fee changes effective May 17, 2021.<sup>4</sup> The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> The Exchange originally filed to amend the Price List on May 3, 2021 (SR-NYSE-2021-30). SR-NYSE-2021-30 was subsequently withdrawn and replaced by this filing.

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.

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 Price List to (1) introduce a new fee for orders designated with a Retail Modifier at the open and the close; (2) revise certain requirements for executions at the open and the close; (3) introduce an additional credit under the Step Up Tier 2 Adding Credit; and (4) revise certain requirements for RPI orders in the Retail Liquidity Program.

The proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct liquidity-providing orders by offering further incentives for member organizations to send additional liquidity to the Exchange, including retail order flow.

The Exchange proposes to implement the fee changes effective May 17, 2021.

Background

Current Market and Competitive Environment

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.”<sup>5</sup>

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 recognized that “such competition can lead to the fragmentation of order flow in that stock.”<sup>6</sup> Indeed, equity trading is currently dispersed across 16 exchanges,<sup>7</sup> 31 alternative trading systems,<sup>8</sup> and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly available information, no single exchange has more than 20% market share.<sup>9</sup> Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange’s market share of trading in Tape A, B and C securities combined is less than 12%.

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<sup>5</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (Final Rule) (“Regulation NMS”).

<sup>6</sup> 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).

<sup>7</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/). See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexcangesstml.html>.

<sup>8</sup> 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>.

<sup>9</sup> See Cboe Global Markets U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

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, member organizations can choose from any one of the numerous currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide liquidity on an exchange.

In response to this competitive environment, the Exchange has established incentives for its member organizations who submit orders that provide liquidity on the Exchange. The proposed fee change is designed to attract additional order flow to the Exchange by incentivizing member organizations to submit additional displayed liquidity to the Exchange, including retail order flow.

#### Proposed Rule Change

#### Executions at the Open

For securities priced \$1.00 or more, the Exchange currently charges a fee of \$0.0010 per share for executions at the open and a fee of \$0.0003 per share for executions at the open by Floor brokers, subject to a monthly fee cap of \$30,000 per member organization provided the member organization executes an average daily volume (“ADV”) that adds liquidity to the Exchange during the billing month (“Adding ADV”),<sup>10</sup> excluding liquidity added by a Designated Market Maker (“DMM”), of at least five million shares.

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<sup>10</sup> The terms “ADV” and “CADV” are defined in footnote \* of the Price List.

The Exchange proposes to introduce a fee of \$0.0005 for executions at the open designated with a Retail Modifier as defined in Rule 13.<sup>11</sup> In addition, the Exchange proposes to increase the per member organization monthly fee cap for all member organization executions at the open to \$35,000. As proposed, the fee for executions at the open with a Retail Modifier as well as the current fees for executions at the open would be subject to a \$35,000 per member organization monthly fee cap.<sup>12</sup> DMMs currently are not charged for executions at the opening and would continue to not be charged.

The Exchange believes that the proposed fee for executions at the open designated with a Retail Modifier would encourage additional retail liquidity on the Exchange's opening auction by reducing the fee to execute at the open for those orders. The Exchange also believes a higher cap will encourage member organizations to increase their activity in order to qualify for the existing fees and the proposed fee for executions at the open.

#### Executions at the Close

Currently, for all market at-the-close ("MOC") and limit at-the-close ("LOC") orders from any member organization in the prior three billing months that do not meet the MOC/LOC Tier 1, Tier 2, or Tier 3 requirements, the Exchange currently charges member organizations \$0.0010 per share for MOC orders, \$0.0005 for MOC orders executed by a Floor broker unless a

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<sup>11</sup> The Exchange proposes the non-substantive, conforming change of replacing "designated with a Retail Modifier as defined in Rule 13" and "designated as 'retail' (i.e., orders that satisfy the Retail Modifier requirements of Rule 13" with the defined term "Retail Modifier" where the phrases appear in the Price List. In one place, "are not designated with a Retail Modifier as defined in Rule 13" would be replaced with "no Retail Modifier." As Rule 13 makes clear, orders with a "retail" modifier are separate and distinct from a "Retail Order" under Rule 107C (now Rule 7.44, see note 17, infra).

<sup>12</sup> The Exchange has not previously amended the \$30,000 cap. In 2020, the Exchange eliminated an alternative cap and corresponding requirements. See Securities Exchange Act Release Nos. 87957 (January 14, 2020), 85 FR 3440 (January 21, 2020) (SR-NYSE-2020-02).

lower tiered fee applies, and \$0.0011 for LOC Orders. The Exchange proposes to charge \$0.0008 per share for MOC and LOC Orders with a Retail Modifier, unless a lower tiered fee applies.

Similarly, the Exchange does not currently charge member organizations for the first 750,000 ADV of the aggregate of executions at the close for D Orders,<sup>13</sup> Floor broker executions swept into the close, excluding verbal interest, and executions at the close, excluding market at-the-close (“MOC”) Orders, limit at-the-close (“LOC”) Orders and Closing Offset (“CO”) Orders. After the first 750,000 ADV of the aggregate of executions at the close by a member organization, D Orders are charged fees differentiated by time of entry (or last modification). With respect to D Orders last modified in the last 3 minutes before the scheduled close of trading, the Exchange charges member organizations in MOC/LOC Tiers 1 and 2 a fee of \$0.0008 per share. The Exchange proposes to charge this fee to member organizations in MOC/LOC Tiers 1 and 2, both with an Adding ADV of at least 0.50% of Tape A CADV. The purpose of this change is to encourage additional adding liquidity on the Exchange by providing an incentive for member organizations to submit greater adding liquidity to achieve a lower fee for D Orders at the close.

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<sup>13</sup> “d-Quotes” are now called “D Orders.” See Rule 7.31(Orders and Modifiers). The Exchange proposes the non-substantive change of replacing references to “d-Quote” and “d-Quotes” with “D Order” and “D Orders,” respectively, in the Price List.

### Step Up Tier 2 Adding Credit

Under the current Step Up Tier 2 Adding Credit, a member organization that sends orders, except Mid-Point Liquidity Orders (“MPL”) and Non-Displayed Limit Orders, that add liquidity in Tape A securities receives the credit specified below if:

- the member organization quotes at least 15% of the National Best Bid or Offer (“NBBO”)<sup>14</sup> in 300 or more Tape A securities on a monthly basis, and
- the member organization’s Adding ADV in Tapes A, B and C securities as a percentage of Tapes A, B and C CADV, excluding any orders by a DMM, that
  - is at least two times more than the Member Organization’s Adding ADV in Tapes A, B and C securities in July 2019 as a percentage of Tapes A, B and C CADV, and
  - adds liquidity as an Supplemental Liquidity Provider (“SLP”) in Tape A securities of at least 0.10% of NYSE CADV, and
  - exceeds the Member Organization’s Adding ADV, excluding any liquidity added by a DMM, in Tapes A, B and C securities in July 2019 as a percentage of Tapes A, B and C CADV by at least 0.20% of Tapes A, B and C CADV.

Currently, member organizations whose Adding ADV as a percentage of US CADV represents an increase of at least 0.20% and less than 0.35% over their July 2019 Adding ADV as a percentage of US CADV receive a \$0.0029 credit. Member organizations whose Adding ADV as a percentage of US CADV represents an increase of at least 0.35% and less than 0.45% over their July 2019 Adding ADV as a percentage of US CADV receive a \$0.0030 credit.

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<sup>14</sup> See Rule 1.1(q) (defining “NBBO” to mean the national best bid or offer).

Finally, member organizations whose Adding ADV as a percentage of US CADV represents an increase of at least 0.45% or more over their July 2019 Adding ADV as a percentage of US CADV receive a \$0.0031 credit.

In addition, a member organization that meets these requirements and adds liquidity, excluding liquidity added as a SLP, in Tapes B and C Securities of at least 0.20% of Tape B and Tape C CADV combined receives an additional \$0.00005 per share for adding liquidity in Tape A securities.

The Exchange proposes to modify the current requirements to qualify for the Step Up Tier 2 Adding Credit, as follows.

First, a member organization's Adding ADV in Tapes A, B and C securities as a percentage of Tapes A, B and C CADV, excluding any orders by a DMM, would need to be at least 1.75 times more than the Member Organization's Adding ADV in Tapes A, B and C securities in July 2019 as a percentage of Tapes A, B and C CADV.

Second, a member organization would need to add liquidity as an SLP in Tape A securities of at least 0.05% of NYSE CADV.

Third, a member organization's Adding ADV in Tapes A, B and C securities as a percentage of Tapes A, B and C CADV, excluding any orders by a DMM, would need to exceed the member organization's Adding ADV, excluding any liquidity added by a DMM, in Tapes A, B and C securities in July 2019 as a percentage of Tapes A, B and C CADV by at least 0.10% of Tapes A, B and C CADV.

In addition, the Exchange proposes a \$0.0025 credit for member organizations that meet the requirements for the Step Up Tier 2 Adding Credit as modified whose Adding ADV as a



percentage of US CADV represents an increase of at least 0.10% and less than 0.20% over their July 2019 Adding ADV as a percentage of US CADV.

The requirements for the current increase in Adding ADV as a percentage of US CADV over the member organization's July 2019 Adding ADV as a percentage of US CADV, of at least 0.20% and less than 0.35% for the \$0.0029 credit, of at least 0.35% and less than 0.45% for the \$0.0030 credit, and of at least 0.45% for the \$0.0031 credit, would all remain unchanged.

The purpose of the proposed change is to incentivize member organizations to increase the liquidity-providing orders they send to the Exchange, which would support the quality of price discovery on the Exchange and provide additional price improvement opportunities for incoming orders. By offering a lower credit with a lower increase in Adding ADV requirement, the Exchange believes the proposed change would encourage more member organizations to try to achieve the offered step up credits by directing more order flow that adds liquidity to the Exchange. The Exchange believes that by correlating the amount of the credit to the level of orders sent by a member organization that add liquidity, the Exchange's fee structure would incentivize member organizations to submit more orders that add liquidity to the Exchange, thereby increasing the potential for price improvement to incoming marketable orders submitted to the Exchange. As noted above, the Exchange operates in a competitive environment, particularly as it relates to attracting non-marketable orders, which add liquidity to the Exchange. Because, as proposed, the tier requires a member organization to increase the volume of its trades against orders that add liquidity, the Exchange believes that the proposed higher credits based on a commensurate increase in Adding ADV would provide an incentive for member organizations to route additional liquidity to the Exchange in order to qualify for the higher credits.

The Exchange does not know how much order flow member organizations choose to route to other exchanges or to off-exchange venues. As described above, member organizations with liquidity-providing orders have a choice of where to send those orders. The Exchange believes that offering an alternate credit and modifying the requirements for member organizations to qualify for a tiered credit, more member organizations will be able to choose to route their liquidity-providing orders to the Exchange to qualify for the credit. However, without having a view of member organization'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 member organization directing orders to the Exchange in order to qualify for the new credit.

#### RPI Orders

The Retail Liquidity Program is designed to attract additional retail order flow to the Exchange for NYSE-listed securities while also providing the potential for price improvement to such order flow.<sup>15</sup> Retail order flow is submitted through the Retail Liquidity Program as a distinct order type called a "Retail Order," which is an agency order or a riskless principal order that meets the criteria of Financial Industry Regulatory Authority, Inc. Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization ("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.<sup>16</sup> In addition to RMOs, an additional class of market participants known as Retail Liquidity Providers ("RLPs") are required to provide potential price

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<sup>15</sup> See Rule 7.44.

<sup>16</sup> See id. at (a)(3). An RMO is as a member organization (or a division thereof) that has been approved by the Exchange under Rule 7.44 to submit Retail Orders. As noted above, under the Exchange's rules, a "Retail Order" is separate and distinct from an order with Retail Modifier.

improvement for Retail Orders in the form of “RPIs,” which are non-displayed interest that is better than the best protected bid (“PBB”) or best protected offer (“PBO”), as such terms are defined in Regulation NMS Rule 600(b)(57) (together, “PBBO”).<sup>17</sup>

A fee of \$0.0003 per share currently applies to non-RLP member organization executions of RPIs against Retail Orders, unless the non-RLP member organization executes an ADV during the month of at least 500,000 shares of RPIs, in which case a credit of \$0.0003 per share applies. The Exchange proposes to eliminate the exception for non-RLP member organizations that executes an ADV during the month of at least 500,000 shares of RPIs. As proposed, non-RLP member organizations will receive a credit of \$0.0003 per share for all RPI orders.<sup>18</sup>

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

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<sup>17</sup> See 17 CFR 242.600(b)(57). RLP is defined in Rule 7.44(a)(1) as a member organization that is approved by the Exchange to act as such and that is required to submit RPIs in accordance with Rule 7.44. RPI is defined in Rule 7.44(a)(4) and consists of non-displayed interest in NYSE-listed securities that would trade at prices better than the PBB or PBO by at least \$0.001 and that is identified as such. Member organizations other than RLPs are also permitted, but not required, to submit RPIs.

<sup>18</sup> The Exchange also proposes two non-substantive changes in this section of the Price List. First, the Exchange proposes the conforming change of deleting “a non-RLP member organization (except DMMs), unless the rate immediately below applies; and” which would be obsolete once the exception is deleted. Second, the Exchange would update the relevant rule reference from Rule 107C to Rule 7.44. The Exchange relocated the substance of Rule 107C to Rule 7.44 as part of the transition of NYSE-listed securities to the Exchange’s Pillar trading platform. See Securities Exchange Act Release No. 85930 (May 23, 2019), 84 FR 25100 (May 30, 2019) (SR-NYSE-2020-26).

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>19</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>20</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

As discussed above, the Exchange operates in a highly 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.”<sup>21</sup> 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 recognized that “such competition can lead to the fragmentation of order flow in that stock.”<sup>22</sup>

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

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<sup>19</sup> 15 U.S.C. 78f(b).

<sup>20</sup> 15 U.S.C. 78f(b)(4) & (5).

<sup>21</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (Final Rule) (“Regulation NMS”).

<sup>22</sup> 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).

## The Proposed Change is Reasonable

### Executions at the Open

The Exchange believes that the proposed fee for executions at the open designated with a Retail Modifier as defined in Rule 13 and the higher per member organization monthly fee cap for all member organization executions at the open are reasonable. The Exchange believes that the proposed fee for executions at the open with a Retail Modifier will encourage the submission of additional liquidity to a national securities exchange, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations from the substantial amounts of liquidity that are present on the Exchange during the opening. The Exchange also believes a higher cap will encourage member organizations to increase their activity in order to qualify for the higher cap, which will result in no fees for executions above the new cap for those member organizations, which will benefit all participants through greater liquidity at the open.

### Executions at the Close

The Exchange believes that the proposed fee for MOC and LOC Orders with a Retail Modifier, unless a lower tiered fee applies, and the revised requirements for the fee for D Orders last modified in the last 3 minutes before the scheduled close of trading, are reasonable. The purpose of these changes is to encourage additional liquidity on the Exchange because market participants benefit from the greater amounts of displayed liquidity present on a public exchange. The Exchange's Closing Auction is a recognized industry reference point,<sup>23</sup> and member organizations receive a substantial benefit from the Exchange in obtaining high levels of

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<sup>23</sup> For example, the pricing and valuation of certain indices, funds, and derivative products require primary market prints.

executions at the Exchange's closing price on a daily basis. Finally, the Exchange believes it's reasonable to require an Adding ADV of 0.50% for the \$0.0008 per share fee for D Orders last modified in the last 3 minutes before the scheduled close of trading for member organizations in MOC/LOC Tiers 1 and 2 as it would encourage greater adding liquidity on the Exchange, which benefits all market participants.

#### Step Up Tier 2 Adding Credit

The Exchange believes that revising the current requirements to qualify for the Step Up Tier 2 Adding Credit and introducing a \$0.0025 credit for member organizations that meet the requirements for the Step Up Tier 2 Adding Credit as modified whose Adding ADV as a percentage of US CADV represents an increase of at least 0.10% and less than 0.20% over their July 2019 Adding ADV as a percentage of US CADV is reasonable.

Specifically, the Exchange believes that offering credits for increased Adding ADV of a minimum and maximum percentage over a baseline would provide an incentive for member organizations to route additional liquidity providing orders to the Exchange. As noted above, the Exchange operates in a highly competitive environment, particularly for attracting non-marketable order flow that provides liquidity on an exchange. The Exchange believes it is reasonable to provide incrementally higher credits for orders that provide additional liquidity because it would encourage additional displayed liquidity on the Exchange and because market participants benefit from the greater amounts of displayed liquidity present on the Exchange. Because the tier requires a member organization to increase the volume of its trades against orders that add liquidity, the Exchange believes that the proposed lower credit based on a commensurate increase in Adding ADV would provide an incentive for member organizations to route additional liquidity to the Exchange in order to qualify for the higher credits. The Exchange

does not know how much order flow member organizations choose to route to other exchanges or to off-exchange venues. As described above, member organizations with liquidity-providing orders have a choice of where to send those orders. The Exchange believes that offering an alternate credit and modifying the requirements for member organizations to qualify for a tiered credit, more member organizations will be able to choose to route their liquidity-providing orders to the Exchange to qualify for the credit. However, without having a view of member organization'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 member organization directing orders to the Exchange in order to qualify for the new credit.

#### RPI Orders

The Exchange believes that eliminating the exception for non-RLP member organizations that execute an ADV during the month of at least 500,000 shares of RPIs so that non-RLP member organizations would receive a credit of \$0.0003 per share for all RPI orders is reasonable because it would further incentivize submission of RPIs for interaction with Retail Orders and therefore could result in greater price improvement for Retail Orders. The proposed change is also reasonable because, with the revision of the requirements, non-RLP member organizations, and indirectly their customers, would continue to receive significant benefits in the form of price improvement by interacting with RPIs.

#### Non-Substantive Changes

Finally, the Exchange believes the proposed non-substantive clarifying and conforming changes are reasonable and would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased clarity and transparency on the Price List, thereby reducing potential confusion.

## The Proposal is an Equitable Allocation of Fees

### Executions at the Open

The Exchange believes the proposed fee for executions at the open with a Retail Modifier and to increase to the monthly fee cap are equitable because the proposal would contribute to robust levels of liquidity at the open, which benefits all market participants by attracting more liquidity to the Exchange, thereby improving market wide quality and price discovery at the open. The Exchange believes the proposed fee and increase to the monthly fee cap is reasonable as it would encourage the submission of additional retail liquidity to a national securities exchange, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations from the substantial amounts of liquidity that are present on the Exchange during the opening.

The proposal neither targets nor will it have a disparate impact on any particular category of market participant. All member organizations that provide retail liquidity at the Exchange open could be eligible to qualify for the proposed fee. The Exchange believes that offering credits for providing liquidity will continue to attract order flow and liquidity to the Exchange, thereby providing additional price improvement opportunities on the Exchange and benefiting investors generally. As to those market participants that do not presently qualify for fee for executions at the open, the proposal will not adversely impact their existing pricing or their ability to qualify for other fees provided by the Exchange. Moreover, the proposed change represents an equitable allocation of the Exchange's fees because it would apply equally to all



similarly situated member organizations. Finally, the Exchange notes that other markets have a similar cap for executions at the opening.<sup>24</sup>

#### Executions at the Close

The Exchange believes that it is equitable to modify the fees and requirements for executions at the close because the proposed changes would incentivize member organizations to send in more closing auction volume to the primary market, thereby deepening the Exchange's liquidity pool and supporting the quality of price discovery. The Exchange believes that it is equitable to charge fees to encourage member organizations to send orders to the Exchange for the closing auction because member organizations would continue to derive a substantial benefit from the higher volume of closing executions. The Exchange believes that its proposal would equitably balance these interests and continue to encourage order flow from multiple sources, which helps to maintain the quality of the Exchange's closing auctions for the benefit of all market participants.

#### Step Up Tier 2 Adding Credit

The Exchange believes that the proposal to provide an additional incremental credit and lower the requirement for member organizations to qualify for the Step Up Tier 2 Adding Credit is equitable because it would encourage additional displayed liquidity on the Exchange and because market participants benefit from the greater amounts of displayed liquidity present on the Exchange. The Exchange believes that the magnitude of the additional credit is not unreasonably high compared to the current credits for Step Up Tier 2 and also relative to the

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<sup>24</sup> For instance, on Nasdaq, each firm's Opening Cross charges for Market-On-Open (MOO) and Limit-On-Open (LOO) orders are capped at \$35,000 per month, provided that the firm adds one million shares of liquidity, on average, during the month. See Nasdaq Price List, at <http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2>.

other adding tier credits, which range from \$0.0015 to \$0.0031, in comparison to the credits paid by other exchanges for orders that provide additional step up liquidity.<sup>25</sup>

The Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more liquidity to the Exchange, thereby improving market-wide quality and price discovery. Since the proposed credit would be new, no member organization currently qualifies for it. The Exchange does not know how much order flow member organizations choose to route to other exchanges or to off-exchange venues. As described above, member organizations with liquidity-providing orders have a choice of where to send those orders. The Exchange believes that offering an alternate credit and modifying the requirements for member organizations to qualify for a tiered credit, more member organizations will be able to choose to route their liquidity-providing orders to the Exchange to qualify for the credit. However, without having a view of member organization'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 member organization directing orders to the Exchange in order to qualify for the new credit.

The Exchange believes the proposed credit is reasonable as it would provide an additional incentive for member organizations to direct their order flow to the Exchange and provide meaningful added levels of liquidity in order to qualify for the higher credit, thereby contributing to depth and market quality on the Exchange. The proposal neither targets nor will it have a disparate impact on any particular category of market participant. All member organizations would be eligible to qualify for the proposed credit if they increase their Adding

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<sup>25</sup> See Cboe BZX Fee Schedule, which has adding credits ranging from \$0.0025 to \$0.0032, at [https://markets.cboe.com/us/equities/membership/fee\\_schedule/bzx/](https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/).

ADV over their own baseline of order flow accordingly. The Exchange believes that offering step up credits for providing liquidity if the step up requirements for Tape A securities are met, will continue to attract order flow and liquidity to the Exchange, thereby providing additional price improvement opportunities on the Exchange and benefiting investors generally. As to those market participants that do not presently qualify for the adding liquidity credits, the proposal would provide a lower entry point and revised requirements that could allow those member organizations to qualify for a credit. The proposal will also not adversely impact their ability to qualify for other credits provided by the Exchange.

#### RPI Orders

The proposal to enable non-RLP member organizations to receive a credit of \$0.0003 per share for all RPI orders would contribute to robust amounts of RPI liquidity submitted by non-RLPs being available for interaction with the Retail Orders. The Exchange believes that, because Retail Orders are likely to reflect long-term investment intentions, they promote price discovery and dampen volatility. The Exchange believes that an increase in the amount of RPI liquidity interacting with Retail Orders would contribute to the quality of the Exchange's market and to the Exchange's status as a premier destination for liquidity and order execution. Accordingly, the Exchange believes that an increase in the amount of RPI liquidity on the Exchange has the potential to benefit all market participants. For these reasons, the Exchange believes that the proposed pricing is equitable and would continue to encourage greater retail participation on the Exchange.

## The Proposal is Not Unfairly Discriminatory

### Executions at the Open

The Exchange believes it is not unfairly discriminatory to introduce a fee for executions at the open designated with a Retail Modifier and to increase the monthly fee cap because the proposed fee would be provided on an equal basis to all member organizations that add additional retail liquidity on the Exchange's opening auction and the monthly cap would apply to all member organizations equally. As noted, the Exchange believes that the proposed fee and higher monthly cap would provide an incentive for member organizations to increase their activity and provide additional liquidity at the open. The proposal will encourage the submission of additional retail liquidity to a national securities exchange, thereby promoting price discovery and transparency and enhancing order execution opportunities for member organizations from the substantial amounts of liquidity that are present on the Exchange during the opening. Accordingly, the Exchange believes the proposed change is not unfairly discriminatory because it would continue to encourage member organizations to send orders to the Exchange for execution at the open, thereby contributing to robust levels of liquidity on the Exchange, which benefits all market participants. Finally, the submission of orders to the Exchange is optional for member organizations in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard.

### Executions at the Close

The Exchange believes that it is not unfairly discriminatory to modify the fees and requirements for executions at the close because the proposed changes would be provided on an equal basis to all member organizations that add liquidity to the Exchange's closing auction and would equally encourage all member organizations to provide additional liquidity 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. The proposal does not permit unfair discrimination because the qualification criteria would be applied to all similarly situated member organizations, who would all be eligible for the same fees on an equal basis. As noted, the Exchange believes that the proposed credits would provide an incentive for member organizations to send additional retail liquidity to the Exchange, to the benefit of all market participants. Finally, the submission of orders to the Exchange is optional for member organizations in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard.

#### Step Up Tier 2 Adding Credit

The Exchange believes it is not unfairly discriminatory to provide an additional incremental credit and lower the requirement for member organizations to qualify for the Step Up Tier 2 Adding Credit as the proposed credit would be provided on an equal basis to all member organizations that add liquidity by meeting the new proposed Step Up Tier 2 requirements. For the same reason, the Exchange believes it is not unfairly discriminatory to provide additional incremental credits to member organizations that satisfy the Step Up Tier 2 requirements and add liquidity in Tape A, B and C securities. Further, the Exchange believes the proposed Step Up Tier 2 credit would incentivize member organizations that meet the new lower tiered requirements to send more orders to the Exchange. Since the proposed \$0.0025 credit would be new, no member organization currently qualifies for it. As noted, without a view of member organization activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any member organization qualifying for the tier. The Exchange believes the proposed credit is reasonable as it would

provide an incentive for member organizations to direct their order flow to the Exchange and provide meaningful added levels of liquidity in order to qualify for the credits, thereby contributing to depth and market quality on the Exchange. The proposal neither targets nor will it have a disparate impact on any particular category of market participant. All member organizations that provide liquidity could be eligible to qualify for the proposed credit if meet the proposed adding liquidity requirements. The Exchange believes that offering credits for providing liquidity will continue to attract order flow and liquidity to the Exchange, thereby providing additional price improvement opportunities on the Exchange and benefiting investors generally. As to those market participants that do not presently qualify for the adding liquidity credits, the proposal will not adversely impact their existing pricing or their ability to qualify for other credits provided by the Exchange.

#### RPI Orders

The proposal to enable non-RLP member organizations to receive a credit for all RPI executions, like the Retail Liquidity Program itself, is not designed to permit unfair discrimination, but instead to promote a competitive process around retail executions such that retail investors would receive better prices than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the Retail Liquidity Program on an exchange market, and the pricing related thereto, would result in better prices for retail investors. The proposed change is also equitable and not unfairly discriminatory because it would contribute to investors' confidence in the fairness of their transactions and because it would benefit all investors by deepening the Exchange's liquidity pool, supporting the quality of price discovery, promoting market transparency and improving investor protection. The proposal neither targets nor will it have a

disparate impact on any particular category of market participant. All member organizations that are not RLPs and provide liquidity could be eligible to qualify for the proposed credit.

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,<sup>26</sup> 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 member organizations. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>27</sup>

Intramarket Competition. The proposed changes are designed to attract additional retail order flow to the Exchange. The Exchange believes that the proposed changes would continue to incentivize market participants to direct displayed and non-displayed order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages member organizations to send orders, thereby contributing to robust levels of liquidity, which benefits all market participants on the Exchange. The current fees and credits would be available to all similarly situated market participants, and, as such, the

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<sup>26</sup> 15 U.S.C. 78f(b)(8).

<sup>27</sup> Regulation NMS, 70 FR at 37498-99.

proposed change would not impose a disparate burden on competition among market participants on the Exchange. As noted, the proposal would apply to all similarly situated member organizations on the same and equal terms, who would benefit from the changes on the same basis. Accordingly, 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. 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.

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)<sup>28</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>29</sup> 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

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<sup>28</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>29</sup> 17 CFR 240.19b-4(f)(2).



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)<sup>30</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2021-33 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-NYSE-2021-33. 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

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<sup>30</sup> 15 U.S.C. 78s(b)(2)(B).

withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2021-33 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.<sup>31</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>31</sup> 17 CFR 200.30-3(a)(12).