

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67806; File No. SR-NYSEArca-2012-97)

September 7, 2012

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services to Eliminate the Tape A Step Up Tier, Modify the Remaining Tape Step Up Tiers and Introduce an Alternative Method of Qualifying for Tier 1

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on August 27, 2012, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the 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 the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (“Fee Schedule”) to (i) eliminate the Tape A Step Up Tier; (ii) modify the remaining Tape Step Up Tiers to exclude ETP Holders that qualify for the Cross-Asset Tier or Investor Tier 4; and (iii) introduce an alternative method of qualifying for Tier 1. The Exchange proposes to implement the fee changes on September 1, 2012. The text of 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.

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 the Fee Schedule to (i) eliminate the Tape A Step Up Tier; (ii) modify the remaining Tape Step Up Tiers to exclude ETP Holders that qualify for the Cross-Asset Tier or Investor Tier 4; and (iii) introduce an alternative method of qualifying for Tier 1. The Exchange proposes to implement the fee changes on September 1, 2012.

The Exchange proposes to eliminate the Tape A Step Up Tier, which currently provides for a \$0.0029 per share fee for orders of qualifying ETP Holders that take liquidity from the Book in Tape A Securities.<sup>4</sup> The Exchange has determined to eliminate the Tape A Step Up Tier because it has generally not incentivized ETP Holders to submit additional liquidity in Tape A Securities.

The Exchange also proposes to specify in the Fee Schedule that ETP Holders that qualify for the Cross-Asset Tier or Investor Tier 4 would not be eligible to qualify for the Tape B and

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<sup>4</sup> Because the first instance of footnote 4 in the Fee Schedule, which describes average daily volume ("ADV"), is currently included within the Tape A Step Up Tier, the Exchange proposes to instead make the first instance of footnote 4 in the Fee Schedule appear with the proposed new footnote 4 reference in Tier 1.

Tape C Step Up Tiers and the Tape C Step Up Tier 2.<sup>5</sup> Currently, Investor Tier 1-3 ETP Holders are ineligible to qualify for the reduced fees provided under the Tape B and Tape C Step Up Tiers and the Tape C Step Up Tier 2. The Exchange believes that the credit per share of \$0.0030 is sufficient enough that an ETP Holder that qualifies for the Cross-Asset Tier or Investor Tier 4 should not also be eligible for the reduced fees applicable to the Tape B and Tape C Step Up Tiers and the Tape C Step Up Tier 2.

Finally, the Exchange proposes to introduce an alternative method of qualifying for Tier 1. Currently, an ETP Holder must provide liquidity an average daily share volume per month of 0.70% or more of the U.S. consolidated ADV (“CADV”)<sup>6</sup> to qualify for Tier 1 and the applicable rates thereunder. As proposed, an ETP Holder, including a Market Maker, could alternatively qualify for Tier 1 by (a) providing liquidity an average daily share volume per month of 0.15% or more of the U.S. CADV and (b) being affiliated with an NYSE Arca Options Trading Permit (“OTP”) Holder or OTP Firm that provides an ADV of electronic posted executions (including all account types, e.g., Firm, Customer, Broker Dealer or Market Maker) in Penny Pilot issues on NYSE Arca Options of at least 100,000 contracts during the month, of which at least 25,000 contracts must be for the account of a Market Maker.<sup>7</sup> The Exchange believes that, by providing

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<sup>5</sup> As described above, the Exchange has proposed to eliminate the Tape A Step Up Tier.

<sup>6</sup> U.S. CADV means United States Consolidated Average Daily Volume for transactions reported to the Consolidated Tape and excludes volume on days when the market closes early.

<sup>7</sup> The Exchange notes that the Fee Schedule currently includes a Cross-Asset Tier for which qualification is similarly determined based on an ETP Holder’s equity activity on the Exchange as well as the option activity of an affiliated OTP Holder or OTP Firm on NYSE Arca Options. For purposes of the proposed alternative Tier 1 qualifying method, and as is the case for the existing Cross-Asset Tier, an affiliate of an ETP Holder would be a person or firm that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the ETP Holder. *See* NYSE Arca Rule 1.1(b). Also, as provided under NYSE Arca Options Rule 6.72, options

for an additional method of qualifying for Tier 1, this proposed change will provide a greater incentive to attract additional equity and option liquidity so as to qualify for the Tier 1 rates.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>8</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>9</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.

The Exchange believes that the proposed rule change is reasonable because eliminating the Tape A Step Up Tier would remove a pricing tier from the Fee Schedule that has generally not incentivized ETP Holders to submit additional liquidity in Tape A Securities. Removal of the Tape A Step Up Tier is also equitable and not unfairly discriminatory because it would be eliminated for all ETP Holders.

The Exchange believes that making ETP Holders that qualify for the Cross-Asset Tier or Investor Tier 4 ineligible to qualify for the Tape B and Tape C Step Up Tiers and the Tape C Step Up Tier 2 is reasonable because the ETP Holders that qualify for the Cross-Asset Tier or Investor Tier 4 would already receive a higher credit for such executions and would therefore not require the added economic incentive of decreased execution fees in order to encourage greater amounts of liquidity. Furthermore, the Exchange believes that this is equitable and not unfairly discriminatory because all ETP Holders that qualify for the Cross-Asset Tier or Investor Tier 4

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on certain issues have been approved to trade with a minimum price variation of \$0.01 as part of a pilot program that is currently scheduled to expire on December 31, 2012.

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

<sup>9</sup> 15 U.S.C. 78f(b)(4).

would be ineligible to qualify for the Tape B and Tape C Step Up Tiers and the Tape C Step Up Tier 2.

The Exchange also believes that the proposed rule change is reasonable because the proposed new method of qualifying for Tier 1 would provide ETP Holders, including Market Makers, with an additional method of qualifying for the applicable rates thereunder. In this regard, the Exchange believes that the Tier 1 rates are reasonable because they would directly relate to the activity of an ETP Holder and an affiliated OTP Holder or OTP Firm on NYSE Arca Options, thereby encouraging increased trading activity on both the NYSE Arca equity and option markets. Additionally, the Exchange believes that the proposed change is reasonable because the opportunity to qualify for the Tier 1 rates would incentivize ETP Holders to provide liquidity on the Exchange and would result in rates that are reasonably related to an exchange's market quality that is associated with higher volumes. In this regard, the proposal is also designed to bring additional posted order flow to NYSE Arca Options, so as to provide additional opportunities for all OTP Holders and OTP Firms to trade on NYSE Arca Options. Accordingly, the Exchange believes that this may incentivize ETP Holders and their affiliates to increase the orders sent directly to the Exchange's equity and option markets and therefore provide liquidity that supports the quality of price discovery and promotes market transparency.

The Exchange also believes that the proposed thresholds for the new method of qualifying for Tier 1 are reasonable because they are designed to encourage increased trading activity on both the NYSE Arca equity and option markets. The Exchange also believes that the proposed thresholds are reasonable because they are comparable to thresholds that are already in place on the Exchange. For example, while the proposed equities threshold of 0.15% is lower than that of the Cross-Asset Tier (i.e., 0.45%), it is balanced by the proposed options threshold of

100,000 contracts, which is higher than that of the Cross-Asset Tier (i.e., 90,000 contracts). Furthermore, while the options threshold for the Cross-Asset Tier considers only Customer executions, the proposed options threshold considers executions for all account types (e.g., Firm, Customer, Broker Dealer and Market Maker). The Exchange also believes that the proposed thresholds are reasonable because they are comparable to the thresholds that are already in place on at least one other exchange. Specifically, the NASDAQ Stock Market provides a credit of \$0.0029 per share when a member adds displayed liquidity that is greater than 0.15% of U.S. CADV and greater than 100,000 total contracts (added and removed) on the NASDAQ Options Market. Additionally, requiring that at least 25,000 of the 100,000 contract threshold be for the account of a Market Maker on NYSE Arca Options is reasonable because it would reasonably ensure that an ETP Holder that qualifies for Tier 1 according to this newly proposed method is affiliated with an OTP Holder or OTP Firm that submits option volume that is not exclusively for Customers.<sup>10</sup>

The proposed new method of qualifying for Tier 1 is also equitable and not unfairly discriminatory because it would be available to all ETP Holders on an equal and non-discriminatory basis. In this regard, the Exchange notes that ETP Holders that are not affiliated with an OTP Holder or OTP Firm on NYSE Arca Options would continue to have the opportunity to qualify for Tier 1 by satisfying the existing requirements, which would not change as a result of this proposal.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange

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<sup>10</sup> The Cross-Asset Tier is designed to incentivize additional liquidity from ETP Holders that are affiliated with OTP Holders or OTP Firms that submit Customer flow on NYSE Arca Options.

must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed change reflects this competitive environment.

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.

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>11</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>12</sup> thereunder, because it establishes a due, fee, or other charge imposed by NYSE Arca.

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.

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:

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(2).

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-NYSEArca-2012-97 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2012-97. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should

submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2012-97 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>13</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>13</sup> 17 CFR 200.30-3(a)(12).