

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-70565; File No. SR-NYSEARCA-2013-98)

September 30, 2013

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Proposes to Amend the Definition of Retail Order in the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services and the Attestation Requirements for ETP Holders that Submit Retail Orders

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on September 20, 2013, 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 (1) the definition of “Retail Order” in the NYSE Arca Equities Schedule of Fees and Charges for Exchange Services (“Fee Schedule”) and (2) the attestation requirements for ETP Holders that submit Retail Orders. The text of the proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend (1) the definition of "Retail Order" in the Fee Schedule and (2) the attestation requirements for ETP Holders that submit Retail Orders. The Exchange proposes to implement the changes effective October 1, 2013.

Background

The Fee Schedule provides certain transaction credits for Retail Orders under two tiers, the Retail Order Tier⁴ and the Retail Cross-Asset Tier.⁵ The term "Retail Order" is defined in the Fee Schedule as an agency order that originates from a natural person and is submitted to the Exchange by an ETP Holder, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

⁴ Under this tier, an ETP Holder, including a Market Maker, that executes an average daily volume ("ADV") of Retail Orders during the month that is 0.20% or more of the U.S. consolidated ADV ("CADV") receives a credit of \$0.0033 per share for its Retail Orders that provide liquidity on the Exchange in Tape A, B and C securities. For all other fees and credits, Tiered or Basic Rates would apply based on the ETP Holder's qualifying levels.

⁵ Under this tier, an ETP Holder, including a Market Maker, that (1) executes a CADV of Retail Orders during the month that is 0.30% or more of the U.S. CADV and (2) is affiliated with an OTP Holder or OTP Firm that provides an ADV of electronic posted Customer executions in Penny Pilot issues on NYSE Arca Options (excluding mini options) of at least 0.50% of total Customer equity and ETF option ADV as reported by OCC receives a credit of \$0.0034 per share for its Retail Orders that provide liquidity on the Exchange in Tape A, B and C securities. For all other fees and credits, Tiered or Basic Rates would apply based on the ETP Holder's qualifying levels.

As part of qualifying for the Retail Order Tier, an ETP Holder is required to designate certain of its order entry ports at the Exchange as “Retail Order Ports” or designate orders as Retail Orders within the order entry message. The ETP Holder is required to attest, in a form and/or manner prescribed by the Exchange, that all orders submitted to the Exchange via such Retail Order Ports are Retail Orders. Additionally, an ETP Holder is required to have written policies and procedures reasonably designed to ensure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met.⁶ The Financial Industry Regulatory Authority, Inc. (“FINRA”), on behalf of the Exchange, reviews an ETP Holder’s compliance with these requirements through an exam-based review of the ETP Holder’s internal controls.

The Exchange notes that the Retail Order Tier and Retail Cross-Asset Tier are optional for ETP Holders. Accordingly, an ETP Holder that does not opt to identify qualified orders as Retail Orders is not required to (1) designate any of its ports as Retail Order Ports or orders as Retail Orders, (2) make an attestation to the Exchange, or (3) maintain required policies and procedures.

Proposed Change

⁶ Such written policies and procedures must require the ETP Holder to (1) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements specified by the Exchange and (2) monitor whether orders entered as Retail Orders meet the applicable requirements. If the ETP Holder represents Retail Orders from another broker-dealer customer, the ETP Holder’s supervisory procedures must be reasonably designed to ensure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The ETP Holder must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that the entry of such orders as Retail Orders will be in compliance with the requirements specified by the Exchange, and (ii) monitor whether its broker-dealer customer’s Retail Order flow continues to meet the applicable requirements.

The Exchange proposes two changes to the current requirements. First, the Exchange proposes to include in the definition of Retail Order any riskless principal order that meets the criteria of FINRA Rule 5320.03. Under FINRA Rule 5320.03, a riskless principal order is a proprietary order for the purposes of facilitating the execution, on a riskless principal basis, of an order from a customer (whether its own customer or the customer of another broker-dealer) (the “facilitated order”), provided that the member (1) submits a report, contemporaneously with the execution of the facilitated order, identifying the trade as riskless principal to FINRA (or another self-regulatory organization if not required under FINRA rules); and (2) has written policies and procedures to ensure that riskless principal transactions for which the member is relying on this exception comply with applicable FINRA rules. At a minimum these policies and procedures must require that the customer order was received prior to the offsetting principal transaction, and that the offsetting principal transaction is at the same price as the customer order exclusive of any markup or markdown, commission equivalent or other fee, and is allocated to a riskless principal or customer account in a consistent manner and within 60 seconds of execution. Members must have supervisory systems in place that produce records that enable the member and FINRA to reconstruct accurately, readily, and in a time-sequenced manner all facilitated orders for which the member relies on this exception. The Exchange proposes that the obligations that apply to FINRA members with respect to FINRA under this rule would apply to ETP Holders with respect to the Exchange for purposes of qualifying for the tiers. The Exchange notes that its affiliates, New York Stock Exchange LLC (“NYSE”) and NYSE MKT LLC (“NYSE MKT”), as well as The NASDAQ Stock Market (“NASDAQ”) include such riskless principal orders in their definitions of Retail Order for their retail liquidity programs.⁷

⁷ See NYSE Rule 107C(a)(3), NYSE MKT Rule 107C(a)(3) - Equities, and NASDAQ

Second, the Exchange proposes to change the required attestation so that the ETP Holder must attest that *substantially all*, rather than *all*, orders submitted to the Exchange via such Retail Order Ports are Retail Orders. This is the same standard that NYSE, NYSE MKT, and NASDAQ apply with respect to their retail liquidity programs.⁸ The Exchange believes that the categorical nature of the current attestation language may be preventing certain ETP Holders from qualifying for the Retail Order Tier and Retail Cross-Asset Tier. In particular, the Exchange understands that some ETP Holders represent both “Retail Orders,” as proposed to be defined in the Fee Schedule, as well as other agency flow that may not meet the strict definition of “Retail Order.” The Exchange further understands that limitations in order management systems and routing networks used by such ETP Holders may make it infeasible for them to isolate 100% of Retail Orders from other agency, non-Retail Order flow that they would direct to the Exchange. Unable to make the categorical attestation required by the Exchange, some ETP Holders may not attempt to qualify for the Retail Order Tier and Retail Cross-Asset Tier, notwithstanding that they have substantial order flow from Retail Orders.

For example, some ETP Holders have explained that their order flow is routed in aggregate for retail execution purposes and that a de minimis amount of such flow may have been generated electronically, thus not meeting the strict Retail Order definition. These ETP Holders have chosen not to direct any of their shares of retail order flow to the Exchange because the cost of complying with the current “any order” standard, such as implementing any necessary systems changes, is too high. These ETP Holders have indicated their willingness to comply

Rule 4780(a)(3)[sic].

⁸ See NYSE Rule 107C(b)(2)(C), NYSE MKT Rule 107C(b)(2)(C) - Equities, and NASDAQ Rule 4780(b)(2)(C).

with the proposed “substantially all” standard, as well as their ability to implement the proposed standard on their systems with confidence.

Accordingly, the Exchange is proposing a de minimis relaxation of the attestation requirement in order to accommodate these system limitations. Specifically, an ETP Holder would be permitted to send de minimis quantities of agency orders to the Exchange as Retail Orders that cannot be explicitly attested to under the existing definition in the Fee Schedule. The Exchange will issue a Trader Notice to make clear that the “substantially all” language is meant to permit the presence of only isolated and de minimis quantities of agency orders that do not qualify as Retail Orders and cannot be segregated from Retail Orders due to systems limitations. In this regard, an ETP Holder would need to retain, in its books and records, adequate substantiation that substantially all orders sent to the Exchange as Retail Orders met the strict definition and that those orders not meeting the strict definition are agency orders that cannot be segregated from Retail Orders due to system limitations, and are de minimis in terms of the overall number of Retail Orders sent to the Exchange.

The Exchange notes that it may disqualify an ETP Holder from qualifying for the Retail Order Tier or Retail Cross-Asset Tier if the Exchange determines, in its sole discretion, that the ETP Holder has failed to abide by applicable requirements. Tiered or Basic Rates would apply based on the ETP Holder’s qualifying levels for an ETP Holder that is disqualified from qualifying for the Retail Order Tier or Retail Cross-Asset Tier.

The Exchange also proposes a technical correction to remove a duplicative definition of Retail Order. Consistent with its conventions in the rest of the Fee Schedule, the term needs to be defined only once. The Exchange also proposes to correct a typographical error in the Retail Order Cross-Asset Tier.

The Exchange is not proposing to change the level of credits available under the Retail Order Tier or the Retail Cross-Asset Tier. The proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems that ETP Holders would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹⁰ 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 also believes that the proposed rule change furthers the objectives of Section 6(b)(5) of the Act,¹¹ which requires, among other things, that the rules of a national securities exchange be 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 regulating, clearing, settling, processing information with respect to, and 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; and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange believes that the proposed inclusion of riskless principal orders in the definition of Retail Order is reasonable because at least three other exchanges include such

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ 15 U.S.C. 78f(b)(5).

riskless principal orders in their definitions of Retail Order for their retail liquidity programs.¹²

The Exchange further believes that the proposed change is equitable and not unfairly discriminatory because the opportunity to submit riskless principal orders will be available to all ETP Holders.

The Exchange believes that the proposed change with respect to required attestations is designed to prevent fraudulent and manipulative acts and practices because, while it represents a relaxation of the attestation requirements, the change is a de minimis relaxation that still requires the ETP Holder to attest that “substantially all” of its orders will qualify as Retail Orders. The slight relaxation will allow enough flexibility to accommodate system limitations while still ensuring that only a fractional amount of orders submitted to the Exchange would not qualify as Retail Orders.

The Exchange believes that the proposed rule change promotes just and equitable principles of trade because it will ensure that similarly situated member organizations who have only slight differences in the capability of their systems will be able to equally benefit from tiers that provide credits for Retail Orders.

The Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because it will allow an ETP Holder that is concerned that its system limitations would not allow 100% certification that submitted orders are Retail Orders to still send order flow to the Exchange to qualify for the credits available under the Retail Order Tier and Retail Cross-Asset Tier.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange’s statement regarding the burden on competition.

¹² See supra note 7.

For these 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,¹³ 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. Instead, the Exchange believes that the proposed change would increase the level of competition among ETP Holders and among exchanges for retail order flow such that retail investors would have the potential to receive better prices than they currently do. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive or credits to be inadequate. In such an environment, the Exchange 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 rule change reflects this competitive environment.

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)¹⁴ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁵ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

¹³ 15 U.S.C. 78f(b)(8).

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f)(2).

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)¹⁶ 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. Please include File Number SR-NYSEARCA-2013-98 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-2013-98. 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

¹⁶ 15 U.S.C. 78s(b)(2)(B).

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-2013-98 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.¹⁷

Kevin M. O'Neill
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).