

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-73992; File No. SR-NYSEARCA-2014-142)

January 6, 2015

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Schedule of Fees and Charges for Exchange Services to Eliminate Transaction Fees for Midpoint Passive Liquidity Orders that Remove Liquidity from the Exchange and that Are Designated as “Retail” but which Are Not Executed in the Retail Liquidity Program

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 December 22, 2014, 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 its Schedule of Fees and Charges for Exchange Services (“Fee Schedule”) to eliminate transaction fees for Midpoint Passive Liquidity (“MPL”) orders that remove liquidity from the Exchange and that are designated as “retail” but which are not executed in the Retail Liquidity Program. The Exchange proposes to implement the fee change effective January 2, 2015. 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.

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 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 its Fee Schedule to eliminate transaction fees for MPL orders that remove liquidity from the Exchange and that are designated as “retail” orders, but which are not executed in the Retail Liquidity Program. The Exchange proposes to implement the fee change effective January 2, 2015.

For securities priced \$1.00 or greater, the Exchange currently charges qualifying ETP Holders and Market Makers in Tier 1⁴ and Tier 2⁵ a fee of \$0.0030 per share for MPL orders⁶ in Tape A, B and C securities that remove liquidity from the NYSE Arca Book. Similarly, the

⁴ Tier 1 are ETP Holders and Market Makers that provide liquidity an average daily volume (“ADV”) per month of 0.70% or more of the US consolidated ADV (“CADV”) or provide liquidity an average daily share volume per month of 0.15% or more of the US CADV and are affiliated with an OTP Holder or OTP Firm that provides an ADV of electronic posted executions (including all account types) in Penny Pilot issues on NYSE Arca Options (excluding mini options) of at least 100,000 contracts, of which at least 25,000 contracts must be for the account of a market maker.

⁵ Tier 2 are ETP Holders and Market Makers that provide liquidity an average daily share volume per month of 0.30% or more, but less than 0.70% of the US CADV.

⁶ MPL Order is defined in Rule 7.31(h)(5) as a Passive Liquidity Order priced at the midpoint of the PBBO. Rule 7.31(h)(4) defines a Passive Liquidity Order as an order to buy or sell a stated amount of a security at a specified, undisplayed price.

current basic rate, which is applicable when tier rates do not apply, is \$0.0030 per share for MPL orders in Tape A, B and C securities that remove liquidity from the NYSE Arca Book. The Exchange proposes to eliminate the fee for MPL orders that remove liquidity from the NYSE Arca Book that are designated as retail orders and that meet the requirements of Rule 7.44(a)(3), but which are not executed in the Retail Liquidity Program⁷ (“Retail Orders”).

To be eligible to for the proposed pricing for MPL orders, an MPL order would need to meet the requirements of Rule 7.44(a)(3). Rule 7.44(a)(3) defines a retail order as 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”),⁸ 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. An ETP Holder may designate an order a Retail Order either (1) by designating certain order entry ports at the Exchange as “Retail Order Ports” and attesting, 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; or (2) by means of a

⁷ The Retail Liquidity Program is a pilot program designed to attract additional retail order flow to the Exchange for NYSE Arca-listed securities and securities traded pursuant to unlisted trading privileges (“UTP Securities”) while also providing the potential for price improvement to such order flow. See Rule 7.44. See Securities Exchange Act Release No. 71176 (December 23, 2013), 78 FR 79524 (December 30, 2013) (SR-NYSEArca-2013-107).

⁸ “RMO” is defined in Rule 7.44(a)(2) as an ETP Holder that is approved by the Exchange to submit Retail Orders. However, an order designated as a Retail Order of an RMO for purposes of the Retail Liquidity Program is separate from the designation of an order as a Retail Order for purposes of existing pricing tiers in the Fee Schedule. See Securities Exchange Act Release No. 71722 (March 13, 2014), 78 [sic] FR 15376 (March 19, 2014) (SR-NYSEArca-2014-22) (“Arca Retail Approval Order”) [sic]. The proposed rule change solely concerns Retail Orders outside the Retail Liquidity Program.

specific tag in the order entry message.⁹

The Exchange proposes to define the term “Retail Orders” separately in the Fee Schedule to distinguish the pricing applicable to orders designated as retail that are eligible for this proposed change, the existing Retail Order Tier and the existing Retail Orders that provide liquidity to the Book from the pricing applicable to executions of orders designated as retail in the Retail Liquidity Program, which are referred to in the Fee Schedule as “RMO Retail Orders” and are covered in the section of the Fee Schedule entitled “Fees and Credits Applicable to Executions in the Retail Liquidity Program.” As noted above, the Exchange proposes to define the term “Retail Order” in an earlier point of the Fee Schedule, thereby obviating the second definition currently in the Retail Order Tier section of the Fee Schedule. Accordingly, Exchange proposes to delete the phrase “as defined in Rule 7.44(a)(3)” in the Retail Order Tier.

The Exchange proposes to retain the fees for MPL orders that remove liquidity from the Exchange but that are not designated as Retail Orders at the current rates. The proposed amended Fee Schedule would distinguish between MPL orders that remove liquidity and that are

⁹ See, e.g., Securities Exchange Act Release No. 68322 (November 29, 2012), 77 FR 72425 (December 5, 2012) (SR-NYSEArca-2012-129). ETP Holders designating orders as Retail Orders by using a tag in the order entry message will be required to 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. The 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 specified by the Exchange, and (ii) 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 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 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 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. See id.

designated Retail Orders, which would not be charged a fee, from MPL orders that remove liquidity and that are not designated Retail Orders, and which would continue to be charged the existing fee for MPL Orders that take liquidity.

The Exchange also proposes to add explanatory material to footnote 2 of the Fee Schedule that orders with specific rates (e.g., MPL, Tracking Orders, Passive Liquidity Orders, Retail Orders that provide liquidity to the Book, Retail Price Improvement Orders, and RMO Retail Orders) may be used to qualify for volume thresholds but are not eligible for tiered rates.

The proposed change is not otherwise intended to address any other issues, and the Exchange is not aware of any problems 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,¹⁰ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹¹ 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 removing a fee for MPL orders that remove liquidity from the Exchange and that are designated Retail Orders is reasonable because it will encourage the submission of orders that meet the requirements to be designated as “retail” to the Exchange, thus enhancing order execution opportunities for all participants, but specifically retail investors. Moreover, the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, and also believes that growth in internalization has

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4) and (5).

required differentiation of retail order flow from other order flow types. As the Exchange has previously noted, a significant percentage of the orders of individual investors are executed over-the-counter.¹² The Exchange accordingly further believes that the proposed change is reasonable because it would contribute to maintaining or increasing the proportion of retail flow in Exchange-listed securities that are executed on a registered national securities exchange, rather than executing in off-exchange venues. The Exchange further believes that defining the term “Retail Orders” separately from the term “RMO Retail Orders” would provide transparency in the Fee Schedule concerning which pricing is applicable to which orders designated as retail, and specifically, that the proposed pricing change for MPL orders is only applicable to orders designated as “retail” that are not executed as part of the Retail Liquidity Program.

Finally, the Exchange notes that while the proposed price change would treat retail order flow differently from order flow submitted by other market participants, such segmentation would not be inconsistent with Section 6(b)(5) of the Act,¹³ which requires that the rules of an exchange are not designed to permit unfair discrimination. The Commission has previously recognized that the markets generally distinguish between retail investors, whose orders are considered desirable by liquidity providers because such retail investors are presumed on average to be less informed about short-term price movements, and professional traders, whose orders are presumed on average to be more informed.¹⁴ The Commission has further recognized that,

¹² See Securities Exchange Act Release No. 71722 (March 13, 2014), 78 [sic] FR 15376 (March 19, 2014) (SR-NYSEArca-2014-22); see also Securities Exchange Act Release No. 34-73702 (Nov. 28, 2014), 79 FR 72049, 72051 (Dec. 4, 2014) (order approving NASDAQ OMX BX Retail Price Improvement Program and noting that most marketable retail order flow is executed in the over-the-counter markets, pursuant to bilateral agreements, without ever reaching a public exchange) (“BX Retail Approval Order”).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See BX Retail Approval Order at 72051.

because of this distinction, liquidity providers are generally inclined to offer price improvement to less informed retail orders than to more informed professional orders.¹⁵ The Exchange believes that the differentiation proposed herein is not designed to permit unfair discrimination, but instead is reasonably designed to attract retail flow to the Exchange, while helping to ensure that retail investors benefit from the better price that liquidity providers are willing to give their orders. The Exchange believes that the proposed increase of retail order flow to the Exchange might also create a desirable opportunity for institutional investors to interact with retail order flow that they are not able to reach currently. The Exchange therefore believes that the proposed change would further 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 the proposed rule change on an exchange market would result in better prices for retail investors.¹⁶ 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 increasing the liquidity pool and potential for price-improving executions at the Exchange.

The proposed change is also equitable and not unfairly discriminatory because the ability to designate MPL orders as Retail Orders is available equally to all similarly situated ETP

¹⁵ Id.

¹⁶ See, e.g., Arca Retail Approval Order at 79528. The Exchange notes that other markets offer separate non-tier and tiered pricing for retail orders, see NASDAQ Price List, available at <http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2>, and EDGX Exchange Fee Schedule, available at <http://www.directedge.com/trading/EDGXFeeSchedule.aspx>, as well as retail price improvement pricing for "Retail Orders" that remove displayed liquidity or mid-point peg liquidity. See BATS BYX Exchange Fee Schedule, available at http://cdn.batstrading.com/resources/regulation/rule_book/BATS-Exchanges_Fee_Schedules.pdf [sic].

Holders that submit qualifying orders and satisfy the other related, existing requirements.

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

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,¹⁷ 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, the Exchange believes that the proposed change would increase competition among execution venues and encourage additional execution opportunities on the Exchange. For the same reasons, the proposed change also would not impose any burden on competition among market participants. The Exchange believes that while it is the first to offer designated Retail Orders the ability to take at the mid-point for free through MPL orders, providing significant price improvement, the proposed change also permits the Exchange to compete with other markets, including NASDAQ, which does not charge but provides a credit for designated Retail Orders that take liquidity in Retail Liquidity Provider programs,¹⁸ as well as over-the-counter trading that offers mid-point executions at low fees.

Finally, 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 rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees and rebates to remain

¹⁷ 15 U.S.C. 78f(b)(8).

¹⁸ See Securities Exchange Act Release Nos. 70860 (November 13, 2013), 78 FR 69512 (November 19, 2013) (SR-NASDAQ-2013-138).

competitive with other exchanges and with alternative trading systems that have been exempted from compliance with the statutory standards applicable to exchanges. 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 believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As a result of all of these considerations, the Exchange does not believe that the proposed changes will impair the ability of ETP Holders or competing order execution venues to maintain their competitive standing in the financial markets.

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)¹⁹ of the Act and subparagraph (f)(2) of Rule 19b-4²⁰ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)²¹ of the Act to determine whether the proposed rule change should be approved or disapproved.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(2).

²¹ 15 U.S.C. 78s(b)(2)(B).

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-2014-142 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEARCA-2014-142. 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 Section, 100 F Street, NE, Washington, DC 20549-1090, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet website at www.nyse.com. 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-2014-142 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.²²

Brent J. Fields
Secretary

²² 17 CFR 200.30-3(a)(12).