

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88194; File No. SR-NYSEArca-2020-12)

February 13, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Equities Fees and Charges

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February 3, 2020, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 Fees and Charges (“Fee Schedule”) to introduce an alternative requirement to qualify for the Tape B Tier 1 pricing tier. The Exchange proposes to implement the fee changes effective February 3, 2020. The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to introduce an alternative requirement to qualify for the Tape B Tier 1 pricing tier.

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 ETP Holders³ to send additional displayed liquidity to the Exchange.

The Exchange proposes to implement the fee changes effective February 3, 2020.

Background

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.”⁴

³ All references to ETP Holders in connection with this proposed fee change include Market Makers.

⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005)

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”⁵ Indeed, equity trading is currently dispersed across 13 exchanges,⁶ 31 alternative trading systems,⁷ and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 20% market share (whether including or excluding auction volume).⁸ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange currently has less than 10% market share of executed volume of equity.

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. While it is not possible to know a firm’s reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which a firm routes order flow. With respect to non-marketable order flow that would provide displayed liquidity on an Exchange against which market makers can quote, ETP Holders can choose from any one of the 13 currently operating registered exchanges to route such order flow. Accordingly, competitive

⁵ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Final Rule).

⁶ See Cboe U.S Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share. See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangeshtml.html>.

⁷ 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/atlist.htm>.

⁸ See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

forces constrain exchange transaction fees and credits that relate to orders that would provide displayed liquidity on an exchange.

Proposed Rule Change

The proposed rule change is designed to be available to all ETP Holders on the Exchange and is intended to provide ETP Holders an opportunity to receive rebates by quoting and trading more on the Exchange.

The Exchange currently provides credits to ETP Holders who submit orders that provide displayed liquidity on the Exchange. The Exchange currently has multiple levels of credits for orders that provide displayed liquidity that are based on the amount of volume of such orders that ETP Holders send to the Exchange.

As described in greater detail below, the Exchange proposes to introduce an alternative requirement to qualify for the current Tape B Tier 1 rebate for orders that provide liquidity to the Exchange in Tape B securities.

Currently, a Tape B Tier 1 credit of \$0.0030⁹ per share applies to ETP Holders that, on a daily basis, measured monthly, directly execute providing volume in Tape B securities that is equal to at least 1.50% of US Tape B CADV for the billing month. With this proposed rule change, the Exchange proposes to introduce an alternative method for ETP Holders to qualify for the Tape B Tier 1 credit. As proposed, ETP Holders could alternatively qualify for the Tape B Tier 1 credit if an ETP Holder who is affiliated with an OTP Holder or OTP Firm that provides an ADV of electronic posted executions for the account of a market maker in all issues on NYSE Arca Options (excluding mini options) of at least 0.55% of total Customer equity and ETF option ADV as reported by The Options Clearing Corporation (“OCC”) and the ETP Holder directly

⁹ Under the Basic Rate, ETP Holders receive a credit of \$0.0020 per share for Tape B orders that provide liquidity to the Book.

executes providing volume in Tape B securities during the billing month that is equal to

- at least 1.00% of US Tape B CADV for the billing month of February 2020
- at least 1.15% of US Tape B CADV for the billing month of March 2020
- at least 1.25% of US Tape B CADV for the billing month of April 2020 and each billing month thereafter.

For example, assume an ETP Holder has providing ADV of at least 15 million shares in a billing month where US Tape B CADV is 1.2 billion shares, or 1.25% of US Tape B CADV.

Currently, that ETP Holder would not qualify under the current volume requirement which requires ETP Holders to add at least 1.5% of US Tape B for the billing month. However, if that same ETP Holder was affiliated with an OTP Holder or OTP Firm that provides an ADV of electronic posted executions for the account of a market maker in all issues on NYSE Arca Options of at least 110,000 contracts in a billing month where total Customer equity and ETF option volume was 20 million contracts, or 0.55% of total Customer equity and ETF option volume, then the ETP Holder would qualify under the proposed alternative requirement and would receive a credit of \$0.0030 per share for orders that provide liquidity in Tape B Securities.

For all other fees and credits, tiered or basic rates apply based on a firm's qualifying levels.

The purpose of the proposed rule change is to encourage ETP Holders to promote price discovery and market quality for the benefit of all market participants. The Exchange believes that providing credits to ETP Holders that are affiliated with an OTP Holder or OTP Firm that add liquidity in Tape B securities to the Exchange could lead to increased trading on the Exchange's equities and options markets.¹⁰ As noted above, the Exchange operates in a

¹⁰ There are currently 55 firms that are both ETP Holders and OTP Holders.

competitive environment, particularly as it relates to attracting non-marketable orders, which add liquidity to the Exchange. Because, as proposed, the tier requires an ETP Holder increase the volume of its trades against orders that add liquidity in Tape B securities at increasing levels in February 2020, March 2020, April 2020 and thereafter at the April 2020 level, coupled with the required minimum of options volume, the Exchange believes the proposed credit would provide an incentive for ETP Holders to route additional liquidity to the Exchange in order to qualify for it.

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

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹² 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 Proposed Fee Change is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4) and (5).

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.”¹³

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”¹⁴ Indeed, equity trading is currently dispersed across 13 exchanges,¹⁵ 31 alternative trading systems,¹⁶ and numerous broker-dealer internalizers and wholesalers, all competing for order flow. As noted above, no exchange possesses significant pricing power in the execution of equity order flow.

Given this competitive environment, the proposal represents a reasonable attempt to attract additional order flow to the Exchange. In particular, the Exchange believes the proposed amendment to Tape B Tier 1 is reasonable because it provides ETP Holders affiliated with an OTP Holder or OTP Firm with an additional way to qualify for the Tape B Tier 1 rebate through equity and options orders. The Exchange believes that the proposed alternative to qualify for the tier utilizing a lower equity volume requirement coupled with a minimum options volume requirement is reasonable because the proposal provides firms with greater flexibility to reach volume tiers across asset classes, thereby creating an added incentive for ETP Holders to bring

¹³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁴ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Final rule).

¹⁵ See Cboe Global Markets, U.S Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share/.

¹⁶ 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/atstlist.htm>.

additional order flow to a public exchange, thereby encouraging greater participation and liquidity.

The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and not unfairly discriminatory because they are available to all ETP Holders on an equal basis. They also provide additional benefits or discounts that are reasonably related to the value of the Exchange's market quality and associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. The Exchange is one of several venues and off-exchange venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based on members achieving certain volume thresholds.

Moreover, the Exchange believes the proposed amendment to Tape B Tier 1 is a reasonable means to encourage ETP Holders to increase their liquidity on the Exchange and their participation on NYSE Arca Options. The Exchange believes amending the current pricing tier by adopting an alternative requirement may encourage those ETP Holders who could not previously achieve the pricing tier to increase their order flow on the Exchange and on NYSE Arca Options. Increased liquidity benefits all investors by deepening the Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Proposed Fee Change is an Equitable Allocation of Fees and Credits

The Exchange believes the proposed rule change to adopt an alternative way to qualify for the Tape B Tier 1 credit equitably allocates its fees and credits among market participants because it is reasonably related to the value of the Exchange's market quality associated with higher equities and options volume. Additionally, a number of ETP Holders have a reasonable opportunity to satisfy the tier's criteria.¹⁷

The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. The proposed alternative method to qualify for the Tape B Tier 1 credit would be available to all ETP Holders that are also [sic] OTP Holders or OTP Firms. There are currently 3 ETP Holders that qualify for the Tape B Tier 1 credit. And as noted above, there are 55 firms that are both ETP Holders and OTP Holders and a number of such firms could qualify for Tape B Tier 1 credits under the proposed alternative method. Without having a view of an ETP Holder's activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder affiliated with an OTP Holder or OTP Firm to increase participation in the Exchange's equities and options markets to qualify for the existing and proposed new credits. The Exchange cannot predict with certainty how many ETP Holders would avail themselves of this opportunity. The Exchange believes the proposed amended tier could provide an incentive for other ETP Holders to submit additional liquidity on the Exchange and on NYSE Arca Options to qualify for the rebate. To the extent an ETP Holder participates on the Exchange but not on NYSE Arca Options, the Exchange believes that the proposal is still reasonable, equitable and not unfairly discriminatory with respect to such ETP Holder based on the overall benefit to the Exchange

¹⁷ See supra, note 11.

resulting from the success of NYSE Arca Options. In particular, such success would allow the Exchange to continue to provide and potentially expand its existing incentive programs to the benefit of all participants on the Exchange, whether they participate on NYSE Arca Options or not.

The proposal neither targets nor will it have a disparate impact on any particular category of market participant. Rather, should an ETP Holder not meet the proposed criteria, the ETP Holder can still qualify for the same credit by meeting the current criteria which does not require it to have any affiliation with an OTP Holder or OTP Firm and conduct options trading on NYSE Arca Options. ETP Holders also have several other tiers to aim to achieve to receive rebates.

The Proposed Fee Change is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value.

The Exchange believes it is not unfairly discriminatory to provide an alternative way to qualify for per share credits, as the proposed credit would be provided on an equal basis to all ETP Holders that are affiliated with an OTP Holder or OTP Firm that add liquidity by meeting the proposed alternative requirement of Tape B Tier 1. Further, the Exchange believes the proposed alternative requirement would incentivize ETP Holders that are affiliated with an OTP Holder or OTP Firm to send their options orders to the Exchange to qualify for the pricing tier. 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 to amend the volume requirement to qualify for the Tape B Tier 1 credit neither targets nor will it have a disparate impact on any particular category of market

participant. The proposal does not permit unfair discrimination because the amended threshold would be applied to all similarly situated ETP Holders, who would all be eligible for the same credit on an equal basis. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by this allocation of fees.

Finally, the submission of orders to the Exchange is optional for ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard. 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,¹⁸ 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 ETP Holders. 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."¹⁹

¹⁸ 15 U.S.C. 78f(b)(8).

¹⁹ See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

Intramarket Competition. The proposed change is designed to attract additional equities and options order flow to the Exchange. The Exchange believes that the proposed amendment to the volume requirement under Tape B Tier 1 would continue to incentivize market participants to direct providing displayed order flow to the Exchange and greater participation on NYSE Arca Options. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages ETP Holders to send orders to the Exchange, thereby contributing to robust levels of liquidity, which benefits all market participants. The proposed volume requirement would be applicable to all similarly-situated market participants, and, as such, 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. As noted above, the Exchange's market share of intraday trading (i.e., excluding auctions) is less than 10%. 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.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution.

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)²⁰ of the Act and subparagraph (f)(2) of Rule 19b-4²¹ 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)²² 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-2020-12 on the subject line.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(2).

²² 15 U.S.C. 78s(b)(2)(B).

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-NYSEArca-2020-12. 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 offices 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-NYSEArca-2020-12, 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.²³

Jill M. Peterson
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).