

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94233; File No. SR-NYSEArca-2022-08)

February 11, 2022

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 January 31, 2022, 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 adopt an alternative requirement to qualify for the Retail Order Step-Up Tier 1 pricing tier. The Exchange proposes to implement the fee change effective February 1, 2022. 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 adopt an alternative requirement to qualify for the Retail Order Step-Up Tier 1 pricing tier. The Exchange proposes to implement the fee change effective February 1, 2022.

Background

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.”³

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.”⁴

³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7-10-04) (Final Rule) (“Regulation NMS”).

⁴ 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).

Indeed, equity trading is currently dispersed across 16 exchanges,⁵ numerous alternative trading systems,⁶ and 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.⁷ 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 equities trading.⁸

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. The competition for Retail Orders⁹ is even more stark, particularly as it relates to exchange versus off-exchange venues.

⁵ 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/divisionsmarketregmrexchangesshtml.html>.

⁶ 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>.

⁷ See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

⁸ See *id.*

⁹ A Retail Order is 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 to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See Securities Exchange Act Release No. 67540 (July 30, 2012), [77 FR 46539](https://www.federalregister.gov/documents/2012/08/03) (August 3, 2012) (SR-NYSEArca-2012-77).

The Exchange thus needs to compete in the first instance with non-exchange venues for Retail Order flow, and with the 15 other exchange venues for that Retail Order flow that is not directed off-exchange. Accordingly, competitive forces compel the Exchange to use exchange transaction fees and credits, particularly as they relate to competing for Retail Order flow, because market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

To respond to this competitive environment, the Exchange has established Retail Order Step-Up tiers,¹⁰ which are designed to provide an incentive for ETP Holders to route Retail Orders to the Exchange by providing higher credits for adding liquidity correlated to an ETP Holder's higher trading volume in Retail Orders on the Exchange. Under the Retail Order Step-Up Tiers, ETP Holders also do not pay a fee when such Retail Orders have a time-in-force of Day that add and remove liquidity from the Exchange.

Proposed Rule Change

Currently, to qualify for the Retail Order Step-Up Tier 1 credit, an ETP Holder must execute an average daily volume (ADV) per month of Retail Orders with a time-in-force of Day that add or remove liquidity that is an increase of 0.40% of CADV above its April 2018 ADV taken as a percentage of CADV, and have Adding ADV of 1.00% or more of CADV. ETP Holders that meet the Retail Order Step-Up Tier 1 requirement are eligible to earn a credit of \$0.0038 per share for Retail Orders that add liquidity in Tape A, Tape B and Tape C securities.¹¹

¹⁰ See Retail Order Tier, Retail Order Step-Up Tier 1, Retail Order Step-Up Tier 2, and Retail Order Step-Up Tier 3 under Retail Tiers on the Fee Schedule.

¹¹ Pursuant to footnote (d) under Retail Tiers, ETP Holders that qualify for Retail Order Step-Up Tier 1 are subject to the following rates in Tape C: (\$0.0035) for Adding displayed liquidity; \$0.0027 for Removing; and Additional (\$0.0002) for Adding non-displayed liquidity. See Fee Schedule.

As noted above, ETP Holders are not a charged a fee for Retail Orders with a time-in-force of Day that add and remove liquidity.¹²

The Exchange proposes to modify the requirements to qualify for Retail Order Step-Up Tier 1 by adopting an alternative qualification basis for the Retail Order Step-Up Tier 1 fees and credits. As proposed, in addition to providing an ADV of 1.00% or more of CADV, an ETP Holder would qualify for the current fees and credits by executing an ADV per month of Retail Orders with a time-in-force of Day that add or remove liquidity that is an increase of 0.40% of CADV above its April 2018 ADV taken as a percentage of CADV, or by executing an ADV per month of 55 million shares of Retail Orders with a time-in-force of Day that add or remove liquidity. The Exchange does not propose any change to the level of fees and credits under Retail Order Step-Up Tier 1.

The purpose of the proposed rule change is to encourage greater participation from ETP Holders and promote additional liquidity in Retail Orders. As described above, ETP Holders with liquidity-providing orders have a choice of where to send those orders. Given the overall decline of Retail Orders, as a percentage of total volume in the equity markets, the Exchange believes introducing alternative criteria for ETP Holders to qualify for Retail Order Step-Up Tier 1 will allow greater number of ETP Holders to potentially qualify for the tier, and will incentivize more ETP Holders to route their liquidity-providing Retail Orders to the Exchange rather than to a competing exchange.

¹² Pursuant to footnote (e) under Retail Tiers, ETP Holders that qualify for Retail Order Step-Up Tier 1, Retail Order Step-Up Tier 2 and Retail Order Step-Up Tier 3 are not charged a fee or provided a credit for Retail Orders where each side of the executed order (1) shares the same MPID and (2) is a Retail Order with a time-in-force of Day. See Fee Schedule.

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,¹³ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹⁴ 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 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.”¹⁵

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. With respect to Retail

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

¹⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

Orders, ETP Holders can choose from any one of the 16 currently operating registered exchanges, and numerous off-exchange venues, to route such order flow. Accordingly, competitive forces reasonably constrain exchange transaction fees that relate to Retail Orders on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

In particular, the Exchange believes that the proposed new alternative threshold to qualify for Retail Order Step-Up Tier 1 is reasonable because it is designed to encourage greater participation from ETP Holders and promote additional liquidity in Retail Orders. The Exchange believes it is reasonable to require ETP Holders to meet the applicable volume threshold to qualify for the Retail Order Step-Up Tier 1 credit. Further, the proposed change is reasonable as it would allow ETP Holders an additional method to qualify for the credit payable under the pricing tier if ETP Holders are unable to meet the existing requirement, particularly when there has been an overall decline of Retail Orders as a percentage of total volume in the equity markets, and yet sustained high consolidated daily volumes. The Exchange believes that the proposal represents a reasonable effort to promote price improvement and enhanced order execution opportunities for ETP Holders. All ETP Holders would benefit from the greater amounts of liquidity on the Exchange, which would represent a wider range of execution opportunities. The Exchange notes that market participants are free to shift their order flow to competing venues if they believe other markets offer more favorable fees and credits.

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

The Exchange believes the proposed rule change to introduce alternative criteria for ETP Holders to qualify for Retail Order Step-Up Tier 1 equitably allocates its fees among its market participants. The Exchange believes the Retail Order Step-Up Tier 1 pricing tier is equitable

because it would apply to all similarly situated ETP Holders on an equal basis and provides an alternative path to qualify for a per share credit that is reasonably related to the value of an exchange's market quality associated with higher volumes. The Exchange believes it is equitable to require ETP Holders to meet the applicable volume thresholds to qualify for the Retail Order Step-Up Tier 1 credit. Further, the proposed change is also equitable as it would allow ETP Holders an alternative method to qualify for the credit payable under the pricing tier if ETP Holders are unable to meet the current requirement.

The Exchange believes that modifying Retail Order Step-Up Tier 1 would encourage the submission of additional liquidity to the Exchange, thus enhancing order execution opportunities for ETP Holders from the substantial amounts of liquidity present on the Exchange. All ETP Holders would benefit from the greater amounts of liquidity that would be present on the Exchange, which would provide greater execution opportunities.

The Exchange does not know how much Retail Order flow ETP Holders choose to route to other exchanges or to off-exchange venues. Without having a view of ETP Holders' activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in ETP Holders sending more of their Retail Orders to the Exchange to qualify for the Retail Order Step-Up Tier 1 credit of \$0.0038 per share, which is among the highest credits offered by the Exchange. The Exchange believes that its fee structure for Retail Orders, in particular the Retail Order Step-Up Tier 1 pricing tier, should incentivize ETP Holders to send such orders to the Exchange. The Exchange cannot predict with certainty how many ETP Holders would avail themselves of this opportunity but additional Retail Orders would benefit all market participants because it would provide greater execution opportunities on the Exchange.

The Exchange believes that the proposed rule change is equitable because maintaining the proportion of Retail Orders in exchange-listed securities that are executed on a registered national securities exchange (rather than relying on certain available off-exchange execution methods) would contribute to investors' confidence in the fairness of their transactions and 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 Proposed Fee Change is not Unfairly Discriminatory

The Exchange believes that the proposed rule change to introduce alternative criteria for ETP Holders to qualify for Retail Order Step-Up Tier 1 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. Moreover, the proposal neither targets nor will it have a disparate impact on any particular category of market participant. The Exchange believes that the proposal does not permit unfair discrimination because the proposal would be applied to all similarly situated ETP Holders and all ETP Holders would be subject to the same modified Retail Order Step-Up Tier 1. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by the proposed allocation of fees. The Exchange further believes that the proposed changes would not permit unfair discrimination among ETP Holders because the general and tiered rates are available equally to all ETP Holders.

As described above, in today's competitive marketplace, order flow providers have a choice of where to direct liquidity-providing order flow, and the Exchange believes there are additional ETP Holders that could qualify for Retail Order Step-Up Tier 1 if they chose to direct their order flow to the Exchange. Lastly, the submission of Retail Orders is optional for ETP Holders in that they could choose whether to submit Retail Orders 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,¹⁶ 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 the proposed change 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 all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."¹⁷

Intramarket Competition. The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed change represents a significant departure from previous pricing offered by the Exchange or its competitors. The proposed change is designed to attract Retail Orders to the Exchange. The Exchange believes that amending criteria of established tiers would incentivize market participants to direct liquidity adding order flow to the Exchange, bringing with it additional execution opportunities

¹⁶ 15 U.S.C. 78f(b)(8).

¹⁷ See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange by enhancing market quality and continuing to encourage ETP Holders to send orders, thereby contributing towards a robust and well-balanced market ecosystem.

Intermarket Competition. The Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchanges 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 currently 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 this proposed fee change would 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)¹⁸ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁹ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

¹⁸ 15 U.S.C. 78s(b)(3)(A).

¹⁹ 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)²⁰ 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-2022-08 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-NYSEArca-2022-08. 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

²⁰ 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 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-2022-08, 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.²¹

J. Matthew DeLesDernier
Assistant Secretary

²¹ 17 CFR 200.30-3(a)(12).