

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-93850; File No. SR-NYSE-2021-75)

December 22, 2021

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Rules to Add New Subparagraph (i)(6) to Rule 7.31

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 16, 2021, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II 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 its rules to (1) add new subparagraph (i)(6) to Rule 7.31 (Orders and Modifiers) regarding orders designated with a “retail” modifier and (2) delete current Rule 13 (Retail Modifier). 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.

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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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 rules to (1) add new subparagraph (i)(6) to Rule 7.31 (Orders and Modifiers) regarding orders designated with a “retail” modifier and (2) delete current Rule 13 (Retail Modifiers).

Proposed Rule Change

Currently, the Exchange’s Rule 13 (Retail Modifiers) permits member organizations to designate an order with a “retail” modifier. Such orders, if properly designated, are eligible for “Retail Modifier” rates available for such orders on the Exchange’s Price List.<sup>3</sup>

The Exchange proposes to move the text of Rule 13 to the Exchange’s Pillar rules, and specifically, to new subparagraph (i)(6) to Rule 7.31 (Orders and Modifiers), and to make modifications to the rule text to conform it to rules currently in effect on its affiliate exchanges NYSE American LLC (“NYSE American”)<sup>4</sup> and NYSE National, Inc. (“NYSE National”).<sup>5</sup> The

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<sup>3</sup> These requirements are distinct from, but related to, the Exchange’s requirements for a “Retail Order” under its Retail Liquidity Program pursuant to Rule 7.44.

<sup>4</sup> See Securities Exchange Act Release No. 92254 (June 24, 2021), 86 FR 34819 (June 30, 2021) (SR-NYSEAMER-2021-31) (notice of filing and immediate effectiveness of proposed rule change to add the “retail” order modifier to NYSE American Rule 7.31E(i)(4)).

<sup>5</sup> See Securities Exchange Act Release No. 92446 (July 20, 2021), 86 FR 40108 (July 26, 2021) (SR-NYSESTAT-2021-15) (notice of filing and immediate effectiveness of proposed rule change to add the “retail” order modifier to NYSE National Rule 7.31(i)(4)).

Exchange does not propose any changes to the fees applicable to orders designated with a “retail” modifier.

***Proposed Rule 7.31(i)(6)***

Proposed Rule 7.31(i)(6)(A) would specify that an order designated with a “retail” modifier is an agency order or a riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a member organization, 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. It would also specify that an order with a “retail” modifier is separate and distinct from a “Retail Order” under Rule 7.44. This proposed rule is based on the Exchange’s current Rule 13(f)(2)(A) without any differences, except that the cross-reference in Rule 13 to former Rule 107C (Retail Liquidity Program) would be updated to instead cross-reference Rule 7.44 (Retail Liquidity Program).

Proposed Rule 7.31(i)(6)(B) would specify that a member organization would be required to designate an order as “retail” in the form and/or manner prescribed by the Exchange. This proposed rule is based on the Exchange’s current Rule 13(f)(2)(B) without any differences, except that the introductory language “‘Retail’ modifier designation” would be deleted.

Proposed Rule 7.31(i)(6)(C) would specify that in order to submit an order with a “retail” modifier, a member organization must submit an attestation, in a form prescribed by the Exchange, that substantially all orders designated as “retail” would meet the requirements set out in paragraph (A) above. This proposed rule is based on the Exchange’s current Rule 13(f)(2)(C) without any differences, except that the Exchange proposes to change the phrase “submitted as

‘retail’ to ‘designated as ‘retail,’ to conform the rule text to that of NYSE American Rule 7.31E(i)(4)(C) and NYSE National Rule 7.31(i)(4)(C).

Proposed Rule 7.31(i)(6)(D) would specify that a member organization must have written policies and procedures reasonably designed to assure that it will only designate orders as “retail” if all requirements of Rule 7.31(i)(6)(A) are met. Such written policies and procedures must require the member organization 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 a member organization represents “retail” orders from another broker-dealer customer, the member organization’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 member organization 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 meets the applicable requirements. This proposed rule is based on the Exchange’s current Rule 13(f)(2)(D) without any differences.

Proposed Rule 7.31(i)(6)(E) would specify that a member organization that fails to abide by the requirements specified in paragraphs (i)(6)(A) - (D) of Rule 7.31 would not be eligible for the “Retail Modifier” rates for orders it designates as “retail” orders. This proposed rule is based on NYSE American Rule 7.31E(i)(4)(E) and NYSE National Rule 7.31(i)(4)(E) with the following non-substantive differences: the proposed rule (i) would use the term “member organization” instead of “ETP Holder,” and, (ii) because the Exchange operates a Retail

Liquidity Provider Program (“RLP”) pursuant to Rule 7.44 that separately defines the term “Retail Order,” the proposed rule would use the terms “order designated as ‘retail’” or “Retail Modifier” instead of the term “Retail Order.”<sup>6</sup>

### ***Deletion of Rule 13***

Because the Exchange is relocating current Rule 13 to proposed Rule 7.31(i)(6) and such subsection would define the term “Retail Modifier” and corresponding requirements, the Exchange proposes to delete Rule 13 in its entirety.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Sections 6(b)(5) of the Act,<sup>8</sup> in particular, because it is 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 because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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<sup>6</sup> The Exchange does not propose to copy text from Rule 13(f)(2)(E) or (F) into the Rule 7.31(i)(6) definition of “Retail Modifier.” Those sections provide that a member organization that fails to abide by the requirements pertaining to orders designated as “retail” will be “disqualified” from submitting “retail” orders, which disqualification the member organization may appeal. The Exchange believes that the appropriate consequence for incorrectly designating an order with a “retail” modifier would be that such orders would be ineligible for preferential “retail” fees, as proposed Rule 7.31(i)(6)(E) would provide. Such orders would still be eligible to trade pursuant to the non-“retail” fees in the Exchange’s Price List.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

The Exchange believes that moving the text described above from Rule 13 to new subparagraph (i)(6) of Rule 7.31 would remove impediments to and perfect the mechanism of a free and open market and a national market system by bringing the Exchange's rule for "retail" modifiers into Rule 7.31, the Exchange's Pillar rule regarding Orders and Modifiers. Relocating the rule text regarding "retail" modifiers into Rule 7.31 and deleting Rule 13 would eliminate any potential confusion among market participants regarding the availability of the "retail" modifier for orders on the Exchange's Pillar trading system.

The Exchange believes that the requirements specified in proposed Rule 7.31(i)(6) regarding the proposed designation of "retail" orders, along with the requirements for member organization attestations and written policies and procedures, would remove impediments to and perfect the mechanism of a free and open market and a national market system because they are substantively identical to the requirements for designating orders as "retail" on NYSE American and NYSE National, and therefore would harmonize the requirements for designating orders as "retail" across the three affiliated exchanges. Such uniformity will enhance market participants' understanding of the process for designating orders as "retail" across the exchanges, and will minimize any potential confusion that could result from having slightly different programs on each exchange.

The Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system to omit text from Rule 13(f)(2)(E) and (F) from proposed Rule 7.31(i)(6). The Exchange believes that the proposed change providing that orders that fail to meet the "retail" modifier requirements would be ineligible for such preferential fees would remove impediments to and perfect the mechanism of a free and open market system, because orders failing to meet the requirements of "retail" orders would not

receive the corresponding pricing benefits. Orders failing to meet the requirements of “retail” orders would still be eligible to trade pursuant to the non-“retail” prices in the Exchange’s Price List.

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

In accordance with Section 6(b)(8) of the Act,<sup>9</sup> 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. The proposed rule change is not intended to address competition at all, but merely moves, with minor changes, the Exchange’s existing rule for designating orders as “retail” into the Exchange’s Pillar rule regarding Orders and Modifiers.

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

Because the proposed rule change (i) does not significantly affect the protection of investors or the public interest; (ii) does not impose any significant burden on competition; and (iii) does not become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6)<sup>11</sup> thereunder.

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<sup>9</sup> 15 U.S.C. 78f(b)(8).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least give business days prior to the date of filing of the propose rule change, or such short time as designated by the Commission. The Exchange has satisfied this requirement.

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)<sup>12</sup> 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2021-75 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-NYSE-2021-75. 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

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<sup>12</sup> 15 U.S.C. 78s(b)(2)(B).



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. 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-NYSE-2021-75, 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>

J. Matthew DeLesDernier  
Assistant Secretary

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