SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97504; File No. SR-NYSEARCA-2023-36)

May 15, 2023

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 May 1, 2023, 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 amend the fee for orders routed that remove liquidity in away markets in Round Lots and Odd Lots in Tapes A, B and C securities with a per share price below $1.00, and eliminate an incremental credit associated with the Tier 4 pricing tier under Adding Tiers. The Exchange proposes to implement the fee changes effective May 1, 2023. 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

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to amend the fee for orders routed that remove liquidity in away markets in Round Lots and Odd Lots in Tapes A, B and C securities with a per share price below $1.00 ("Sub-Dollar Securities"), and eliminate an incremental credit associated with the Tier 4 pricing tier under Adding Tiers. The Exchange proposes to implement the fee changes effective May 1, 2023.

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

[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").

recognized that "such competition can lead to the fragmentation of order flow in that stock."[4] 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 17% 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. ETP Holders can choose from any one of the 16 currently operating registered exchanges to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders that would provide and take liquidity on an exchange or that are routed to another venue for execution.

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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).

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

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/atslist.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.

Proposed Rule Change

Routing Fee

The Exchange currently charges a standard fee of 0.3% of Dollar Value for orders routed that remove liquidity in away markets in Sub-Dollar Securities across all Tapes.[9] The Exchange now proposes to increase the fee from 0.3% to 0.35% of Dollar Value for orders routed that remove liquidity in away markets in Sub-Dollar Securities across all Tapes. The purpose of the proposed rule change is for business and competitive reasons. U.S equity market volumes have been remarkably high in Sub-Dollar Securities since the beginning of 2023, driven in part by retail traders, leading to increased off-exchange (or Trade Reporting Facility (TRF)) trading volumes.[10] Without having a view of ETP Holders' activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this modest increase would result in any ETP Holder altering its trading activity in Sub-Dollar Securities. The submission of orders in Sub-Dollar Securities to the Exchange is optional for ETP Holders in that they could choose whether to submit such orders to the Exchange and, if they do, the extent of its activity in this regard.

Eliminate Unused Credit

Currently, under the Adding Tiers table in Section VII. Tier Rates—Round Lots and Odd Lots (Per Share Price $1.00 or Above), the Exchange provides multiple tiers and associated

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9 Footnote (a) under the Standard Rates - Routing table provides that the fee applies to orders of listed and Nasdaq securities routed away and executed by another market center or participant. See Fee Schedule, available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf.

10 In the first quarter of 2023, the TRF represented about 60.2% market share in Sub-Dollar Securities. See Cboe Insights, available at https://www.cboe.com/insights/posts/how-subdollar-securities-are-trading-now/.

credits for Adding liquidity on the Exchange. Specifically, under Tier 4, if an ETP Holder has Adding ADV that is equal to at least 0.20% of CADV then that ETP Holder receives a credit of $0.0025 per share for Adding in Tape A securities, $0.0022 per share for Adding in Tape B securities and $0.0025 per share for Adding in Tape C securities. Additionally, ETP Holders that qualify for Tier 4 and have Adding ADV that is equal to 0.05% of CADV above May 2019 receive an incremental credit of $0.0002 per share for Tape A and Tape C Adding. This incremental credit is currently denoted on the Fee Schedule under footnote ** and is appended to the credits applicable under Tier 4.

The Exchange proposes to eliminate the incremental credit of $0.0002 per share for Tape A and Tape C Adding and remove the credit from the Fee Schedule because the pricing incentive has been underutilized by ETP Holders. The Exchange has observed that not a single ETP Holder has qualified for the incremental credit in the last six months. Since the incremental credit has not been effective in accomplishing its intended purpose, which is to incent ETP Holders to increase their liquidity adding activity on the Exchange, the Exchange has determined to eliminate the incremental credit and remove it from the 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,[11] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[12] in

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[11] 15 U.S.C. 78f(b).

[12] 15 U.S.C. 78f(b)(4) and (5).

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.

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."[13]

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. Accordingly, competitive forces reasonably constrain exchange transaction rates that relate to orders that would add or remove liquidity on an exchange or that are routed away from an exchange. Stated otherwise, changes to exchange transaction fees and credits can have a direct effect on the ability of an exchange to compete for order flow.

Routing Fee

The Exchange believes that the proposed change to increase the standard fee for routing orders in Sub-Dollar Securities away from the Exchange is reasonable, equitable and consistent with the Act because it represents a modest increase from the current standard fee (change from 0.3% to 0.35% of Dollar Value). The Exchange further believes that the proposal to increase the

[13] See Regulation NMS, 70 FR at 37499.

standard fee for routing orders in Sub-Dollar Securities away from the Exchange is equitably allocated and not unfairly discriminatory because it would apply to all ETP Holders in an equivalent manner.

The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because ETP Holders will continue to have the option to elect to route their orders in the same manner as they do today and will be automatically and uniformly assessed the applicable standard rates. Further, if ETP Holders do not favor the Exchange's pricing for routed orders, they can send their routable orders directly to other markets instead of utilizing routing functionality provided by the Exchange. Routing through the Exchange is optional, and the Exchange operates in a competitive environment where market participants can readily direct order flow to competing venues or providers of routing services if they believe alternatives offer them better value. The proposal is not unfairly discriminatory because it neither targets nor will it have a disparate impact on any particular category of market participant.

Finally, the submission of orders in Sub-Dollar Securities to the Exchange is optional for ETP Holders in that they could choose whether to submit such orders to the Exchange and, if they do, the extent of its activity in this regard.

Eliminate Unused Credit

The Exchange believes that the proposed rule change to eliminate the incremental credit associated with the Tier 4 pricing tier under Adding Tiers is reasonable because the pricing incentive that is the subject of this proposed rule change has been underutilized and has not incentivized ETP Holders to bring liquidity and increase trading on the Exchange as anticipated. No ETP Holder has availed itself of the incremental credit in the last six months. The Exchange also does not anticipate any ETP Holder in the near future will qualify for the pricing incentive that is the subject of this proposed rule change. The Exchange believes it is reasonable to eliminate requirements and credits, and even entire pricing tiers, when such incentives become underutilized. The Exchange believes eliminating underutilized incentive programs would also simplify the Fee Schedule. The Exchange further believes that removing reference to the incremental credit that the Exchange proposes to eliminate from the Fee Schedule would also add clarity to the Fee Schedule. The Exchange believes that eliminating requirements and credits, and even entire pricing tiers, from the Fee Schedule when such incentives become ineffective is equitable and not unfairly discriminatory because the requirements, and credits, and even entire pricing tiers, would be eliminated in their entirety and would no longer be available to any ETP Holder. All ETP Holders would continue to be subject to the same fee structure, and access to the Exchange's market would continue to be offered on fair and non-discriminatory terms. The Exchange also believes that the proposed change would protect investors and the public interest because the deletion of underutilized pricing incentives would make the Fee Schedule more accessible and transparent and facilitate market participants' understanding of the fees charged for services currently offered by the Exchange.

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

B. <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

In accordance with Section 6(b)(8) of the Act,[14] 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 Exchange believes that the proposed change to modestly increase a routing fee would continue to encourage ETP Holders to maintain their order

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[14] 15 U.S.C. 78f(b)(8).

flow on the Exchange, thereby promoting market depth, price discovery and transparency. As a result, the Exchange believes that the proposed changes further 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."[15]

Intramarket Competition. The proposed changes are designed to respond to the current competitive environment. The Exchange believes that the proposed change to modestly increase a routing fee would continue to incentivize market participants to direct order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages ETP Holders to send orders, thereby contributing to robust levels of liquidity, which benefits all market participants on the Exchange. The proposed fee 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. The Exchange's proposal to eliminate an incremental credit will not place any undue burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act given that not a single ETP Holder has qualified for the credit proposed for deletion for the last six months. To the extent the proposed rule change places a burden on competition, any such burden would be outweighed by the fact that the pricing incentive proposed for deletion has not served its intended purpose of incentivizing ETP Holders to more broadly participate on the Exchange.

As such, the Exchange believes the proposed amendment to its Fee Schedule would not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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15 See Regulation NMS, 70 FR at 37498-99.

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 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 its proposed fee change can 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 has become effective upon filing pursuant to Section 19(b)(3)(A)[16] of the Act and paragraph (f) thereunder. At any time within 60 days of the filing of the 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.

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:

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[16] 15 U.S.C. 78s(b)(3)(A).

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-2023-36 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-2023-36. 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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR-NYSEARCA-2023-36, 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]

Sherry R. Haywood

Assistant Secretary

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[17] 17 CFR 200.30-3(a)(12).