



## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91297; File No. SR-NYSE-2021-16]

### **Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Price List**

March 11, 2021.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on March 1, 2021, New York Stock Exchange LLC (“NYSE” or the “Exchange”) 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 Price List to cap the maximum average number of shares per day for the billing month in calculating the average monthly consolidated average daily volume (“CADV”) and NYSE CADV for purposes of Step Up Adding Tier 3. The Exchange proposes to implement the fee changes effective March 1, 2021. 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 places

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Price List to cap the maximum average number of shares per day for the billing month in calculating CADV and NYSE CADV for purposes of Step Up Adding Tier 3.

The proposed changes respond to the current volatile market environment that has resulted in unprecedented average daily volumes and the temporary closure of the Trading Floor,<sup>4</sup> which are both related to the ongoing spread of the novel coronavirus (“COVID-19”), by providing a degree of certainty to member organizations adding liquidity to the Exchange.

The Exchange proposes to implement the fee changes effective March 1, 2021.

Background

Current Market and Competitive Environment

Beginning in March 2020 and continuing into 2021, markets worldwide have experienced unprecedented volatility given the ongoing spread of the novel coronavirus (“COVID-19”).

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<sup>4</sup> Beginning on March 16, 2020, in order to slow COVID-19 through social distancing measures, significant limitations were placed on large gatherings throughout the country. As a result, on March 18, 2020, the Exchange determined that beginning March 23, 2020, the physical Trading Floor facilities located at 11 Wall Street in New York City would close and that the Exchange would move, on a temporary basis, to fully electronic trading. See Press Release, dated March 18, 2020, available here: <https://ir.theice.com/press/press-releases/allcategories/2020/03-18-2020-204202110>. On May 14, 2020, the Exchange announced that on May 26, 2020 trading operations on the Trading Floor would resume on a limited basis to a subset of Floor brokers, subject to health and safety measures designed to prevent the spread of COVID-19. See Trader Update, dated May 14, 2020, available here: <https://www.nyse.com/traderupdate/history#110000251588>. The Trading Floor continues to operate with reduced headcount and additional health and safety precautions. See Trader Update, dated June 15, 2020, available here: <https://www.nyse.com/traderupdate/history#110000272018>.

Trading volumes on the Exchange have surged and remain high. For instance, between March 1 and March 30, 2020, NYSE CADV was 7.4 billion shares, 95% higher than the average NYSE CADV between 2018 and 2020. In January 2021, NYSE CADV was 5.5 billion shares, 56% higher than the average NYSE CADV for 2019.

The Exchange also 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.”<sup>5</sup>

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.”<sup>6</sup> Indeed, equity trading is currently dispersed across 16 exchanges,<sup>7</sup> 31 alternative trading systems,<sup>8</sup> and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly available information, no single exchange has more than 16% market share.<sup>9</sup> Therefore, no exchange possesses significant pricing power in the execution of equity

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<sup>5</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (Final Rule) (“Regulation NMS”).

<sup>6</sup> 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).

<sup>7</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/). See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

<sup>8</sup> 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>.

<sup>9</sup> See Cboe Global Markets U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

order flow. More specifically, the Exchange's market share of trading in Tape A, B and C securities combined is less than 10%.

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, in response to fee changes. With respect to non-marketable order flow that would provide displayed liquidity on an Exchange, member organizations 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 liquidity on an exchange.

The proposed rule change accordingly responds to these unprecedented events and the current competitive landscape where market participants can and do move order flow, or discontinue or reduce use of certain categories of products, in response to fee changes.

#### Proposed Rule Change

Under the Step Up Adding Tier 3, the Exchange provides an incremental \$0.0006 credit in Tapes A, B and C securities for all orders from a qualifying member organization market participant identifier ("MPID") or mnemonic that sets the NBBO<sup>10</sup> or a new BBO<sup>11</sup> if the MPID or mnemonic:

- has adding ADV in Tapes A, B and C Securities as a percentage of Tapes A, B and C CADV,<sup>12</sup> excluding any liquidity added by a DMM, that is at least 50% more than the MPID's or mnemonic's Adding ADV in Tapes A, B and C securities in June 2020 as a percentage of Tapes A, B and C CADV, and
- is affiliated with a Supplemental Liquidity Provider ("SLP") that has an Adding ADV in Tape A securities at least 0.10% of NYSE CADV, and

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<sup>10</sup> See Rule 1.1(q) (defining "NBBO" to mean the national best bid or offer).

<sup>11</sup> See Rule 1.1(c) (defining "BBO" to mean the best bid or offer on the Exchange).

<sup>12</sup> The terms "ADV" and "CADV" are defined in footnote \* of the Price List.

- has Adding ADV in Tape A securities as a percentage of NYSE CADV, excluding any liquidity added by a DMM, that is at least 0.20%.

The credit is in addition to the MPID's or mnemonic's current credit for adding liquidity and also does not count toward the combined limit on SLP credits of \$0.0032 per share provided for in the Incremental Credit per Share for affiliated SLPs whereby SLPs can qualify for incremental credits of \$0.0001, \$0.0002 or \$0.0003.

For purposes of calculating Tapes A, B and C CADV as currently used in Step Up Adding Tier 3, the Exchange proposes to establish a monthly maximum average cap of 11.5 billion shares per day for Tapes A, B and C CADV in the billing month for MPIDs or mnemonics of qualifying member organizations that are SLPs. To effectuate this change, the Exchange would add text to the tier specifying that, in a month where Tapes A, B and C CADV equals or exceeds 11.5 billion shares per day for the billing month, Tapes A, B and C CADV for that month will be subject to a cap of 11.5 billion shares per day for the billing month.

Similarly, for purposes of calculating NYSE CADV as currently used in Step Up Adding Tier 3, the Exchange proposes to establish a monthly maximum average cap of 5.5 billion shares per day for NYSE CADV in the billing month for MPIDs or mnemonics of qualifying member organizations that are SLPs. To effectuate this change, the Exchange would add text to the tier specifying that for MPIDs or mnemonics of qualifying member organizations that are SLPs, in a month where NYSE CADV equals or exceeds 5.5 billion shares per day for the billing month, NYSE CADV for that month will be subject to a cap of 5.5 billion shares per day for the billing month.

For example, assume in the billing month that a member organization that is an SLP has an average daily adding volume of 11.5 million shares. Further assume that Tapes A, B and C CADV was 14.0 billion shares during that month. To calculate the adding ADV as a percent of Tapes A, B and C CADV, the Exchange would use the CADV cap of 11.5 billion shares, yielding an adding percent of Tapes A, B and C CADV of 0.10% rather than 0.082% if the

Exchange had used 14.0 billion shares. The example would work the same for the NYSE CADV cap of 5.5 billion shares if NYSE CADV was over 5.5 billion shares.

The Exchange does not propose to change the requirements to qualify for or the credits associated with Step Up Adding Tier 3.

The proposed changes are not otherwise intended to address 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,<sup>13</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>14</sup> 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 Change is Reasonable

As discussed above, beginning March 2020, markets worldwide have experienced unprecedented volatility because of the ongoing spread of COVID19. As a result of this volatility, the equity markets have experienced unprecedented trading volumes. Moreover, as also discussed above, the Exchange operates in a highly fragmented and competitive market. In view of these unprecedented events, and the current competitive landscape where market participants can and do move order flow, or discontinue or reduce use of certain categories of products, in response to fee changes, the Exchange believes that the proposed rule change is reasonable. Specifically, the Exchange believes that capping the monthly Tape A, B and C CADV at a maximum of 11.5 billion shares and the monthly NYSE CADV at a maximum of 5.5 billion shares when calculating CADV for Step Up Adding Tier 3 for MPIDs or mnemonics of

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<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(4) & (5).

qualifying member organizations that are SLPs is reasonable because such extraordinarily high market volumes would make it significantly harder for member organizations that are SLPs, whose adding volume is limited to proprietary adding liquidity, to meet the adding requirements for the tier. The Exchanges notes that the CADV share volumes cap levels are the same levels as the current CADV caps for SLP tiers in the fee schedule.

#### The Proposal is an Equitable Allocation of Fees

The Exchange believes the proposal equitably allocates its fees among its market participants by fostering liquidity provision and stability in the marketplace. The Exchange believes that the proposed cap for calculating CADV for Step Up Adding Tier 3 credits in a month where Tape A, B and C CADV is equal to or greater than 11.5 billion share or when NYSE CADV is equal to or greater than 5.5 billion shares constitutes an equitable allocation of fees because the proposed change would apply to all similarly situated member organizations that are SLPs, all of whom 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 nondiscriminatory terms.

#### The Proposal is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, member organizations are free to disfavor the Exchange's pricing if they believe that 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. The proposed caps for calculating monthly combined CADV for Step Up Adding Tier 3 credits for adding liquidity to the Exchange also does not permit unfair discrimination because the proposed changes would apply to all similarly situated member organizations that are SLPs, who would all benefit from use of the lower volume threshold to calculate the relevant adding tier CADV across tapes on an equal basis.

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,<sup>15</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. 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 member organizations. 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."<sup>16</sup>

*Intramarket Competition.* The proposed changes are designed to attract additional order flow to the Exchange. The Exchange believes that the proposed changes would continue to incentivize market participants to direct displayed order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange by providing more trading opportunities and encourages member organizations to send orders, thereby contributing to robust levels of liquidity, which benefits all market participants on the Exchange. The current credits would be available 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. As noted, the proposal would apply to all similarly situated member organizations on the same and equal terms, who would benefit from the changes on the same basis. Accordingly, 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

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

<sup>16</sup> Regulation NMS, 70 FR at 37498-99.

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. 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 is effective upon filing pursuant to Section 19(b)(3)(A)<sup>17</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>18</sup> 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)<sup>19</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:

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<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> 17 CFR 240.19b-4(f)(2).

<sup>19</sup> 15 U.S.C. 78s(b)(2)(B).

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-2021-16 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-2021-16. 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 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-2021-16, 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>20</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>20</sup> 17 CFR 200.30-3(a)(12).