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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-92153; File No. SR-NYSEAMER-2021-29)

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Amending the NYSE American Equities Price List and Fee Schedule to Establish Pricing for Orders Designated as Retail Orders

June 11, 2021.

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 ("Act")[2] and Rule 19b-4 thereunder,[3] notice is hereby given that, on June 1, 2021, NYSE American LLC ("NYSE American" or "Exchange") filed with the Securities and Exchange Commission ("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 the NYSE American Equities Price List and Fee Schedule ("Price List") to establish pricing for orders designated as "Retail Orders." The Exchange proposes to implement the fee changes effective June 1, 2021. The proposed 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 specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and

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

2 15 U.S.C. 78a.

3 17 CFR 240.19b-4.

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 the Price List to establish pricing for orders designated as "Retail Orders," as defined below.

The proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct Retail Orders by offering further incentives for ETP Holders[4] to send such orders to the Exchange.

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

Competitive Environment

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."[5]

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."[6]

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4 See Rules 1.1E(m) (definition of ETP) & (n) (definition of ETP Holder).

5 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").

6 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, cash equity trading is currently dispersed across 16 exchanges,[7] numerous alternative trading systems,[8] 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.[9] Therefore, no exchange possesses significant pricing power in the execution of cash equity order flow. More specifically, the Exchange currently has less than 1% market share of executed volume of cash equities trading.[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. 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 the firm routes order flow. The competition for Retail Orders is even more stark, particularly as it relates to exchange versus off-exchange venues.

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 the portion of 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.

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7 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.

8 *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.

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

10 See id.

Proposed Rule Change

In response to this competitive environment, the Exchange proposes to amend its Price List to establish pricing for orders designated as "Retail Orders."

Proposed Definition of Retail Orders

To define Retail Orders, the Exchange proposes to amend the "General" section of the Fee Schedule and add a new subheading "III. Retail Orders" to establish requirements for Retail Orders on the Exchange that are based on the requirements to enter orders with "retail" modifiers for purposes of rates available for such orders on the Exchange's affiliates, New York Stock Exchange, LLC ("NYSE") and NYSE Arca, Inc. ("NYSE Arca").[11]

Proposed paragraph (a) would define "Retail Order" as 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 an ETP Holder, 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.

Proposed paragraph (b) would specify that in order for an ETP Holder to access the proposed Retail Order pricing, the ETP Holder would be required to designate an order as a Retail Order in the form and/or manner prescribed by the Exchange.

Proposed paragraph (c) would specify that in order to submit a Retail Order, an ETP Holder must submit an attestation, in a form prescribed by the Exchange, that substantially all orders designated as "Retail Orders" will meet the requirements set out in the definition above.

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[11] See NYSE Rule 13 regarding Retail Modifiers and the NYSE Arca procedures for designating orders with a retail modifier for purposes of fee rates. See Securities Exchange Act Release No. 67540 (July 30, 2012), 77 FR 46539 (August 3, 2012) (SR-NYSEArca-2012-77). These requirements are distinct from, but related to, the requirements for a "Retail Order" on the Retail Liquidity Programs available on NYSE and NYSE Arca. See NYSE Rule 7.44 and NYSE Arca Rule 7.44-E. The Exchange does not offer a "Retail Liquidity Program."

Proposed paragraph (d) would specify that an ETP Holder must have written policies and procedures reasonably designed to assure that it will only designate orders as "Retail Orders" if all requirements of a Retail Order are met. Such written policies and procedures must require the ETP Holder 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 an ETP Holder represents Retail Orders from another broker-dealer customer, the ETP Holder'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 ETP Holder 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 continues to meet the applicable requirements.

Proposed paragraph (e) would specify that an ETP Holder that fails to abide by the requirements specified in paragraphs (a) - (d) would not be eligible for the Retail Order rates for orders it designates as "Retail Orders."

Proposed Rates for Retail Orders

The Exchange proposes that the rates for Retail Orders would be available only for transactions in securities priced at or above $1.00. To effect this change, the Exchange proposes to amend the Price List for transactions in securities priced at or above $1.00, other than transactions by Electronic Designated Market Makers in assigned securities, to specify that the current fees are "Standard Rates" and to add new "Retail Order Rates." Specifically, the Exchange proposes to delete the column labeled "Category" from the existing table and to insert subheadings "1. Securities at or above $1" and "a. Standard Rates" above the existing table. The Exchange does not propose to make any changes to the rates in the table.

Below the first row of the existing table, the Exchange proposes to add subheading "b. Retail Order Rates*," below which the Exchange proposes to specify the rates that orders designated by an ETP Holder as "Retail Orders" would be eligible for. As proposed, orders designated by an ETP Holder as "Retail Orders" may qualify for the following fees and credits:

- A credit of $0.0030 per displayed share for orders designated as Retail Orders that add liquidity. This credit is higher than the Exchange's standard credit that ranges between $0.0024 per share to $0.0027 per share for displayed and MPL orders adding liquidity, depending on Adding ADV.[12]
- A fee of $0.0010 per share for MPL orders designated as Retail Orders that remove liquidity. This fee is lower than the Exchange's standard fee of either $0.0026 per share or $0.0030 per share for orders that remove liquidity, depending on Adding ADV.
- A fee of $0.0005 per share for orders designated as Retail Orders executed in an opening auction, unless a more favorable rate applies. This fee is equivalent to the Exchange's standard fee for orders executed in an opening auction.

Below the proposed new Retail Order Rates subsection, the Exchange proposes to insert a new heading "2. Securities Below $1," followed by the second row of the existing table. The Exchange proposes to delete the "Category" column of the table and to add the "Adding Liquidity," "Removing Liquidity," and "Executions at Open and Close" column headings that appear in the existing table. The Exchange does not propose to make any changes to the rates for transactions in securities below $1.

As noted above, the proposed new subheading "b. Retail Order Rates*" would include an asterisk. The Exchange proposes to add the following text regarding the asterisk: "* See

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[12] As defined in the Fee Schedule, Adding ADV means an ETP Holder's average daily volume of shares executed on the Exchange that provided liquidity.

section III under 'General' at the end of this Price List for information on designating orders as 'Retail Orders.'"

The proposed pricing available for Retail Orders would be optional for ETP Holders. Accordingly, an ETP Holder that does not opt to identify qualified orders as Retail Orders would choose not to (i) make an attestation to the Exchange, or (ii) maintain the policies and procedures described above.

This proposed change is intended to encourage greater participation from ETP Holders and to promote additional liquidity in Retail Orders. As described above, ETP Holders have a choice of where to send such orders. The Exchange believes that the proposed lower fees could lead to more ETP Holders choosing to route their Retail Orders to the Exchange for execution rather than to a competing exchange.

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 any ETP Holders sending more of their Retail 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 proposed rule change is designed to be available to all ETP Holders on the Exchange and is intended to provide ETP Holders a greater incentive to direct more of their Retail Orders to the Exchange.

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, is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, 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 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 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.

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13 15 U.S.C. 78f(b).

14 15 U.S.C. 78f(b)(4) and (5).

15 See Regulation NMS, supra note 5, 70 FR at 37499.

Given this competitive environment, the Exchange believes that this proposal to establish pricing for orders designated as Retail Orders represents a reasonable attempt to attract additional Retail Orders to the Exchange. The Exchange believes the proposed change is also reasonable because it is designed to attract higher volumes of Retail Orders transacted on the Exchange by ETP Holders, which would benefit all market participants by offering greater price discovery and an increased opportunity to trade on the Exchange.

The Exchange believes that proposed General sub-section III is reasonable because it would define "Retail Order" based on existing requirements for orders designated as "retail" on NYSE and NYSE Arca, and therefore is not novel. The Exchange further believes that the designation, attestation, and written policies and procedures required by proposed sub-section III are reasonable because they are also based on existing procedures for similarly-defined orders on NYSE and NYSE Arca, and therefore are not novel.

In light of the competitive environment in which the Exchange currently operates, the proposed rule change is a reasonable attempt to increase liquidity on the Exchange and improve the Exchange's market share relative to its competitors.

<u>The Proposed Fee Change Is an Equitable Allocation of Fees and Credits</u>

The Exchange believes its proposal to establish pricing for orders designated as Retail Orders equitably allocates its fees among its market participants because all ETP Holders that participate on the Exchange may qualify for the proposed credits and fees if they elect to send their Retail Orders to the Exchange and properly designate them as Retail Orders. 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 any ETP Holder sending more of their Retail 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 anticipates that multiple ETP Holders that engage

in retail trading activity would endeavor to send more of their Retail Orders for execution on the Exchange, thereby earning the proposed higher credits and paying the proposed lower fees.

The Exchange further believes that the proposed change is equitable because it is reasonably related to the value to the Exchange's market quality associated with higher volume in Retail Orders. The Exchange believes that establishing pricing for orders designated as Retail Orders would attract order flow and liquidity to the Exchange, thereby contributing to price discovery on the Exchange and benefiting investors generally.

The Exchange believes that the proposed rule change is equitable because maintaining or increasing 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 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 that the proposed change is not unfairly discriminatory because it would apply to all ETP Holders on an equal and non-discriminatory basis. The Exchange believes that the proposed rule change is not unfairly discriminatory because maintaining or increasing 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. This aspect of the proposed rule change also is consistent with the Act because all similarly-

situated ETP Holders would earn the same credits and pay the same fees for Retail Orders executed on the Exchange.

Finally, the submission of Retail Orders is optional for ETP Holders in that they could choose whether to submit Retail Orders to the Exchange and, if they do, they can choose the extent of their 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 that the proposed fee 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 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."[17]

Intramarket Competition. The Exchange believes the proposed change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to attract additional Retail Orders to the Exchange. The Exchange believes that the proposed higher credits and lower fees would incentivize market participants to direct their Retail Orders to the Exchange. Greater overall order flow, trading

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16 15 U.S.C. 78f(b)(8).

17 See Regulation NMS, supra note 4, 70 FR at 37498-99.

opportunities, and pricing transparency benefit 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 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 currently has less than 1% market share of executed volume of equities trading. In such an environment, the Exchange must continually adjust its fees and credits 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)[18] of the Act and subparagraph (f)(2) of Rule 19b-4[19] 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

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[18] 15 U.S.C. 78s(b)(3)(A).

[19] 17 CFR 240.19b-4(f)(2).

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-NYSEAMER-2021-29 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-NYSEAMER-2021-29. 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

[20] 15 U.S.C. 78s(b)(2)(B).

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-NYSEAMER-2021-29 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]

Jill M. Peterson,
Assistant Secretary.

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[21] 17 CFR 200.30–3(a)(12).