



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97718; File No. SR-NYSE-2023-20]

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

June 13, 2023.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”),² and Rule 19b-4 thereunder,³ notice is hereby given that on May 30, 2023, 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 and II 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 institute Ratio Threshold Fees. The Exchange proposes to implement the fee change effective June 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 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 15 U.S.C. 78a.

³ 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 Price List to institute Ratio Threshold Fees, which would be applied to orders ranked Priority 2 - Display Orders and to shares of Auction-Only Orders⁴ that have a disproportionate ratio of orders that are not executed.

The Exchange proposes to implement the fee change effective June 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.”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

⁴ See Rule 7.31(c) and note 15, *infra*.

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's share of executed volume of equity trades in Tapes A, B and C securities is less than 12%.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, based on transaction fees and credits. Accordingly, the Exchange's fees, including the proposed Ratio Threshold Fee, are reasonably constrained by competitive alternatives and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The purpose of the proposed rule change is to encourage efficient usage of Exchange systems by member organizations, which the Exchange believes is in the best interests of all member organizations and investors who access the Exchange. Unproductive share entry and cancellation practices, such as when member organizations flood the market with displayed orders that are frequently and/or rapidly cancelled, do little to support meaningful price discovery and may create investor confusion about the extent of trading interest in a security. The Exchange further believes that the inefficient order entry practices of a small number of

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/atlist.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.*

member organizations may place excessive burdens on Exchange systems and on the systems of member organizations that ingest market data, while also negatively impacting the usefulness of market data feeds that transmit each order and subsequent cancellation.¹¹ Member organizations with an excessive ratio of cancelled to executed orders do little to support meaningful price discovery.

The Exchange also believes that market quality can be improved through the imposition of a fee on market participants that have a disproportionate ratio of unexecuted orders. The Exchange believes that the proposed rule change would promote a more efficient marketplace and enhance the trading experience of all member organizations by encouraging them to more efficiently participate in the marketplace while at the same time allowing for the provision of liquidity in volatile, high-volume markets and providing member organizations with order management flexibility without being subject to the proposed fee. Unnecessary ratios of executed orders due to cancellations can have a detrimental effect on all market participants who are potentially compelled to upgrade capacity as a result of the bandwidth usage of other participants.

All member organizations are free to manage their order and message flow consistent with their business models, and the vast majority of member organizations are able to do so without even approaching the ratio thresholds proposed for the fee, as described below. The Exchange believes that the proposed rule change would promote a more efficient marketplace, encourage liquidity provision and enhance the trading experience of all member organizations by imposing a financial incentive for the small number of member organizations that are currently

¹¹ See generally Recommendations Regarding Regulatory Responses to the Market Events of May 6, 2010, Joint CFTC-SEC Advisory Committee on Emerging Regulatory Issues, at 11 (February 18, 2011) (“The SEC and CFTC should also consider addressing the disproportionate impact that [high frequency trading] has on Exchange message traffic and market surveillance costs.... The Committee recognizes that there are valid reasons for algorithmic strategies to drive high cancellation rates, but we believe that this is an area that deserves further study. At a minimum, we believe that the participants of those strategies should properly absorb the externalized costs of their activity.”).

exceeding the proposed ratio thresholds. The Exchange notes that its technology and infrastructure is adequately able to handle high-volume and high-volatility situations for member organizations that exceed the thresholds established by the Exchange. As described below, the proposed fee would take into consideration the number of shares that are executed or trades that occur.

As noted, only a small number of member organizations are executing orders at a disproportionately low ratio to the number of orders that have been entered and, thus, the impact of the proposed fee would be narrow and limited to those member organizations. These member organizations can avoid the proposed fee by altering their behavior. The Exchange believes the proposed fee would encourage member organizations that could be impacted to modify their practices in order to avoid the fee, thereby improving the market for all participants.

Accordingly, the Exchange does not expect the proposed fee to result in meaningful, if any, revenue. Prior to the submission of the proposed fee change, the Exchange engaged in discussions with member organizations that could be impacted by the proposed fee based on their prior trading behavior so that they may enhance the efficiency of their order entry practices and avoid the fee. The Exchange also provided notice to member organizations generally regarding the proposed fee.¹²

Proposed Rule Change

As proposed, the Ratio Threshold Fee would apply to orders ranked Priority 2 - Display Orders and to shares of Auction-Only Orders during the period when Auction Imbalance information is being disseminated.¹³

Ratio Threshold for Priority 2 - Display Orders (“RT - Display Fee”)

¹² See NYSE Equities Trader Update dated May 30, 2023, available at https://www.nyse.com/publicdocs/nyse/notifications/trader-update/110000564614/NYSE_Notice_Fee_Change_202306.pdf.

¹³ The Exchange proposes the non-substantive change of removing the colon following “Routing Fees” in the heading beneath which the proposed Ratio Threshold Fee would be inserted.

For orders ranked Priority 2 - Display Orders, member organizations that have characteristics indicative of inefficient order entry practices would be charged an RT - Display Fee on a monthly basis.¹⁴ For purposes of determining the RT - Display Fee:

- The “Weighted Order Total” is the total number of orders ranked Priority 2 - Display Orders entered by that member organization in a month, as adjusted by a “Weighting Factor.” The Weighted Order Total calculation excludes (i) all orders in securities in which that member organization is registered as a Designated Market Makers (“DMM”), and (ii) all orders for a member organization that is registered as a DMM, a market maker, a Supplemental Liquidity Provider (“SLP”) or as an SLP registered as an Exchange market maker (“SLMM”) in 100 or more securities.
- The “Weighting Factor” applied to each order based on its price in comparison to the national best bid or best offer (“NBBO”) at the time of order entry is:

Order’s Price versus NBBO at Entry	Weighting Factor
Less than 0.20% away	0x
0.20% to 0.99% away	1x
1.00% to 1.99% away	2x
2.00% or more away	3x

For example, an order more than 2.0% away from the NBBO would be equivalent to three orders that were 0.50% away. Due to the applicable Weighting Factor of 0x, orders entered less than 0.20% away from the NBBO would not be included in the Weighted Order Total but would be included in the “executed” orders component of the Order Entry Ratio if they execute in full or part.

- The “Order Entry Ratio” would be calculated by dividing a member organization’s Weighted Order Total by the greater of (i) the number of orders ranked Priority 2 - Display Orders that execute in full or in part or (ii) the number

¹⁴ The proposed fee focuses on displayed orders because such orders utilize more system resources than non-displayed orders.

one (1).¹⁵

- “Excess Weighted Orders” would be calculated by subtracting (i) the Weighted Order Total that would result in the member organization having an Order Entry Ratio of 100 from (ii) the member organization’s actual Weighted Order Total.

A member organization with a daily average Weighted Order Total of 100,000 or more¹⁶ during a month would be charged the RT - Display Fee, which is calculated by multiplying the Applicable Rate in the chart below by the number of Excess Weighted Orders.

Member organizations that exceed the Order Entry Ratio threshold of 1,000:1 would pay a fee of \$0.01 on each order that caused the member organization to surpass the threshold. member organizations that exceed the Order Entry Ratio threshold of 100:1 but less than 1,000:1 would pay a fee of \$0.005 on all orders that caused member organization’s ratio to exceed 100:1.

Order Entry Ratio	Applicable Rate
0 - 100	\$0.00
101 - 1,000	\$0.005
More than 1,000	\$0.01

The following example illustrates the calculation of the Order Entry Ratio and resulting RT - Display Fee:

- In a month, Member Organization A enters 35,000,000 displayed, liquidity-providing orders:
 - 20,000,000 of the orders are in securities in which Member Organization A is an DMM or registered as a DMM, a market maker, SLP, which assumes is 100 securities or more. These orders are excluded from the calculation.

¹⁵ In the case where no orders entered by a member organization executed, this component of the ratio would be assumed to be 1 so as to avoid the impossibility of dividing by zero.

¹⁶ The Exchange believes it is reasonable to exclude member organizations with a daily average Weighted Order Total of less than 100,000 during the month because member organizations with an extremely low volume of entered orders has only a de minimis impact on Exchange systems.

- 10,000,000 orders are entered at the NBBO. The Weighting Factor for these orders is 0x.
- 5,000,000 orders are entered at a price that is 1.50% away from the NBBO. The Weighting Factor for these orders is 2x.
- The Weighted Order Total is $(10,000,000 \times 0) + (5,000,000 \times 2) = 10,000,000$.
- Of the 15,000,000 orders included in the calculation, 90,000 are executed in full or in part.
- The Order Entry Ratio is $10,000,000$ (Weighted Order Total) / $90,000$ (executed orders total) = 111

In the example above, the Weighted Order Total that would result in an Order Entry Ratio of 100 is 9,000,000, since $9,000,000 / 90,000 = 100$. Accordingly, the Excess Weighted Orders would be $10,000,000 - 9,000,000 = 1,000,000$.

The RT - Display Fee charged to a member organization would then be determined by multiplying the Applicable Rate by the number of Excess Weighted Orders.

In the example above, because Member Organization A had an Order Entry Ratio of 111, the Applicable Rate would be \$0.005. Accordingly, the monthly RT - Display Fee would be $1,000,000$ (Excess Weighted Orders) x $\$0.005$ (Applicable Rate) = $\$5,000$.

Ratio Threshold for Auction-Only Orders During the Period When Auction Imbalance Information is Being Disseminated for a Core Open Auction or Closing Auction (“RT - Auction Fee”)

For Auction-Only Orders,¹⁷ member organizations with an average daily number of

¹⁷ An Auction-Only Order is a Limit or Market Order that is to be traded only within an auction pursuant to Rule 7.35 Series (for Auction-Eligible Securities) or routed pursuant to Rule 7.34 (for UTP Securities). See Rule 7.31(c). Auction-Only Orders are orders submitted by member organizations before the Core Trading Session begins (for the Core Open Auction) or during a halt or pause (for a Trading Halt Auction). See id.

orders of 10,000 or more¹⁸ would be charged an RT - Auction Fee on a monthly basis.¹⁹ For purposes of determining the RT - Auction Fee:

- The number of “Ratio Shares” is the average daily number of shares of Auction-Only Orders that are cancelled by the member organization during the Closing Auction Imbalance Freeze Time²⁰ at a disproportionate ratio to the average daily number of shares executed by that member organization. Orders ranked Priority 2 - Display Orders designated for the Core Trading Session only that are entered during the period when Auction Imbalance Information for the Core Open Auction is being disseminated are included in the Ratio Shares calculation.²¹ All orders entered by a member organization acting as a DMM are not included in the calculation of Ratio Shares.
- The “Ratio Shares Threshold” is a member organization’s Ratio Shares divided by the average daily executed shares by the member organization.

¹⁸ The Exchange believes it is reasonable to exclude member organizations with average daily orders of less than 10,000 during the month because a member organization with an extremely low volume of entered orders has only a de minimis impact on Exchange systems.

¹⁹ Similar to orders ranked Priority 2 - Display Orders, the proposed fee focuses on Auction-Only Orders because a disproportionate ratio of such orders that are not executed utilize more system resources, including updates to the Auction Imbalance Information as such orders are entered and cancelled, than other order entry and cancellation practices of member organizations. Accordingly, for Auction-Only Orders, Ratio Shares include shares of Auction-Only Orders executed in a disproportionate ratio to the quantity of shares entered during the period when Auction Imbalance Information is being disseminated for the Core Open Auction and Closing Auction.

²⁰ “Closing Auction Imbalance Freeze Time” means 10 minutes before the scheduled end of Core Trading Hours. See Rule 7.35(a)(8).

²¹ For purposes of the Ratio Threshold Fees, orders ranked Priority 2 - Display Orders designated for the Core Trading Session only that are cancelled during the period when Auction Imbalance Information for the Core Open Auction is being disseminated are included in the calculation of the proposed RT- Auction Fee. The Exchange proposes to include such orders as Auction-Only Orders for purposes of such fee because prior to the Core Open Auction, such orders would not be eligible to trade and therefore would not be included in the RT - Display Fee calculation, yet such orders would be included in the imbalance calculation for the Core Open Auction.

The Exchange proposes to charge the RT - Auction Fee for Auction-Only Orders during the period when Auction Imbalance Information is being disseminated.²²

The Exchange proposes that it would not charge the RT - Auction Fee if Auction-Only Orders have a Ratio Shares Threshold of less than 25. If the Ratio Shares Threshold is greater than or equal to 25, the fee would be as follows:

- No Charge for member organizations with an average of fewer than 10 million Ratio Shares per day.
- \$5.00 per million Ratio Shares for member organizations with an average of 10 million to 100 million Ratio Shares per day.
- \$15.00 per million Ratio Shares for member organizations with an average of more than 100 million Ratio Shares per day.

Member organizations would be charged for the entirety of their Ratio Shares at a rate of \$5.00 per million Ratio Shares if the member organization has an average of 10 million to 100 million Ratio Shares; and \$15.00 per million Ratio Shares if the member organization has an average of more than 100 million Ratio Shares.

The following example illustrates the calculation of the RT - Auction Fee for Auction-Only Orders.

- In a month, Member Organization B enters a daily average of 100,000 Auction-Only Orders for the Closing Auction, with an average size of 600 shares.
- Thus, Member Organization B's daily average number of shares submitted in Auction-Only Orders for the Closing Auction is 60,000,000 shares (100,000 orders x 600 shares).
- During the period when Closing Auction Imbalance Information is being

²² See Rules 7.35A(e)(1) (Core Open Auction Imbalance Information begins at 8:00 a.m.); 7.35B(e)(1) (Closing Auction Imbalance Information begins at the Closing Auction Imbalance Freeze Time); Rule 7.35(a)(8) (Closing Auction Imbalance Freeze Time means 10 minutes before the scheduled end of Core Trading Hours).

disseminated, Member Organization B cancels a daily average of 59,000,000 shares and executes a daily average of 1,000,000 shares in the Closing Auction.

- Member Organization B has an average daily Ratio Shares quantity of 58,000,000 (59,000,000 - 1,000,000), and a Ratio Shares Threshold of 58 (58,000,000 / 1,000,000).
- Since the Ratio Shares Threshold is greater than 25 and the average daily Ratio Shares quantity is between 10 million and 100 million, Member Organization B would be subject to the proposed fee of \$5.00 per million Ratio Share, resulting in a fee of \$6,090 assuming a 21-day month (58,000,000 / 1,000,000 x \$5.00 x 21).

As noted above, the purpose of the fee is not the generation of revenue but rather to provide an incentive for a small number of member organizations to change their order entry practices. Therefore, the Exchange also proposes to limit the amount a member organization would pay by adopting a cap such that the combined RT - Display Fee and RT - Auction Fee for a member organization would not exceed \$1,000,000 per month. Based on an analysis of the impact to member organizations, the Exchange does not believe that many member organizations would be impacted. For example, the median Order Entry Ratio across all member organizations was 0.59 in April 2023 and 0.62 in May 2023²³ for orders ranked Priority 2 - Display Orders. The median Ratio Shares Threshold across all ETP Holders was -0.918 in April 2023 and -0.919 in May 2023²⁴ Auction-Only Orders. The negative Ratio Shares Threshold indicates that the median ETP Holder has more executed shares than Ratio Shares.

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.

²³ Through May 17, 2023.

²⁴ Through May 17, 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²⁵ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,²⁶ 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 Exchange believes that the proposed fee would help 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, because it is designed to reduce the numbers of orders and shares being entered and then cancelled prior to an execution.

The Proposed Changes are 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.”²⁷

As the Commission itself recognized, the market for trading services in NMS stocks has

²⁵ 15 U.S.C. 78f(b).

²⁶ 15 U.S.C. 78f(b)(4) and (5).

²⁷ See Regulation NMS, supra note 4, 70 FR at 37499.

become “more fragmented and competitive.”²⁸ Indeed, equity trading is currently dispersed across 13 exchanges,²⁹ numerous alternative trading systems,³⁰ 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 (whether including or excluding auction volume).³¹ 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 or reduce use of certain categories of products, in response to fee changes. Accordingly, the Exchange’s fees, including the proposed Ratio Threshold Fee, are reasonably constrained by competitive alternatives and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange believes that the proposed Ratio Threshold Fees are reasonable because they are designed to achieve improvements in the quality of displayed liquidity - both intraday and in advance of auctions - on the Exchange for the benefit of all market participants. In addition, the proposed fees are reasonable because market participants may readily avoid the fee by adjusting their order entry and/or cancellation practices, which would result in more orders or shares being cancelled before execution.

The Exchange believes it is also reasonable to charge a Ratio Threshold Fee on the basis of the number of orders ranked Priority 2 - Display Orders and to charge a Ratio Threshold Fee that is based on the number of shares of Auction-Only Orders because, as a general matter,

²⁸ See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Final Rule).

²⁹ 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>.

³⁰ 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>.

³¹ See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

displayed orders entered on the Exchange have fewer shares associated with each order whereas, the share quantity of an Auction-Only Order typically is much larger. The Exchange believes that applying the Ratio Threshold Fee to orders ranked Priority 2 - Display Orders based on the number of shares of each order would not promote efficient order entry practice by member organizations in a meaningful way because, as noted above, the average size of each displayed order is relatively small in terms of shares. Therefore, to properly incentivize member organizations, the Exchange believes assessing the proposed fee based on orders, rather than number of shares, is more appropriate. The Exchange further believes that it is reasonable to apply the proposed fee to Auction-Only Orders only during the period when Auction Imbalance Information is being disseminated, because such orders are not displayed prior to such information being disseminated. By contrast, cancelling shares of Auction-Only Orders during the period when Auction Imbalance Information is being disseminated could result in excessive and unnecessary changes to imbalance information.

Although only a small number of member organizations could be subject to the proposed fee, the Exchange believes that the proposed fee is necessary because of the negative externalities that such behavior imposes on others through order entry practices resulting in a disproportionate ratio of executed orders or shares to those that are not executed. Accordingly, the Exchange believes that it is fair to impose the fee on these market participants in order to incentivize them to modify their practices and thereby benefit the market. Importantly, whether a member organization would be subject to the proposed fee would be independent of any determination of whether such member organization is complying with Exchange and federal rules, including those governing order entry and cancellation.

The Exchange believes that the proposed combined fee cap of \$1,000,000 is reasonable as it would reduce the impact of the fee on member organizations. As noted above, the purpose of the proposed fee is not to generate revenue for the Exchange, but rather to provide an incentive for a small number of member organizations to change their order entry and/or

cancellation behavior. As a general principal, the Exchange believes that greater participation on the Exchange by member organizations improves market quality for all market participants. Thus, in adopting the proposed fee, and the cap, the Exchange balanced the desire to improve market quality against the need to discourage inefficient order entry and/or cancellation practices.

The Exchange believes the proposed rule change is designed to promote just and equitable principles of trade by adopting a fee that is comparable to a fee charged by the NASDAQ Stock Market LLC (“Nasdaq”)³² and by both the options and equities markets of the Exchange’s affiliate NYSE Arca, Inc. (“NYSE Arca”).³³

With respect to the RT - Display Fee, the proposed fee is substantially the same as the display fee charged on NYSE Arca’s equities market and the Excess Order Fee on Nasdaq, and would subject member organizations to the fee if they exceed the Order Entry Ratio thresholds established by the Exchange, which thresholds are also substantially the same as those on NYSE Arca and Nasdaq. Additionally, the proposed RT - Auction Fee, similar to the RT - Display fee, is intended to disincentivize a disproportionate ratio of orders that are not executed. Therefore, the RT - Auction Fee focuses on Auction-Only Orders because a disproportionate ratio of such orders that are not executed uses more system resources, including updates to the Auction Imbalance Information as such orders are entered and cancelled, than other order entry and cancellation practices of member organizations. Finally, the RT - Auction Fee, unlike the RT - Display Fee which would be assessed on a tiered basis, would be applied on the entirety of each member organization’s Ratio Shares, which, as defined above, is calculated net of shares that

³² See Nasdaq Stock Market LLC Equity Rule 7, Section 118(m).

³³ See NYSE Arca Equities Fees and Charges, Ratio Threshold Fee, at available at https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf, and NYSE Arca Options Fees and Charges, Ratio Threshold Fee, at https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf. On the NYSE Arca options marketplace, the Ratio Threshold Fee is charged to OTP Holders based on the number of orders entered compared to the number of executions received in a calendar month.

have been executed, and therefore, the fee would be applied only to those shares that remain unexecuted. The Exchange believes it would be appropriate to assess the fee in a non-tiered manner because Auction-Only Orders generally have a larger number of shares associated with each order than orders ranked Priority 2 - Display Orders and therefore, the number of shares that could be impacted could increase significantly in a short period of time since the auction imbalance period only lasts for one hour. Additionally, the submission, and subsequent cancellation, of Auction-Only Orders during the imbalance dissemination period could lead to disruption in trading as each order, which could contain a large number of shares, would require the Exchange to update and disseminate the new order information on its market data feed. Accordingly, the Exchange believes assessing the fee on a share basis is appropriate because it would more effectively disincentivize member organizations from submitting a disproportionate ratio of shares that are not executed.

The Proposal is an Equitable Allocation of Fees

For the reasons noted above, the Exchange believes the proposed fees are also equitably allocated among its market participants. Although only a small number of member organizations may be subject to the proposed fees based on their current trading practices, any member organization could determine to change their order entry practices at any time, and the proposed fees would be applied to any member organization that determined to engage in such inefficient order entry practices. The proposed fee is therefore designed to encourage better displayed order entry practices by all member organizations for the benefit of all market participants. Moreover, the purpose of the proposal is not to generate revenue for the Exchange, but rather to provide an incentive for a small number of member organizations to change their order entry and/or cancellation behavior.

The Exchange believes that the proposal constitutes an equitable allocation of fees because all similarly situated member organizations would be subject to the proposed fees. As noted above, the Exchange believes that because having a disproportionate ratio of unexecuted

orders is a problem associated with a relatively small number of member organizations, the impact of the proposal would be limited to those member organizations, and only if they do not alter their trading practices. The Exchange believes the proposal would encourage member organizations that could be impacted to modify their practices in order to avoid the fee, thereby improving the market for all participants.

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, and are free to transact on competitor markets to avoid being subject to the proposed fees. The Exchange believes that the proposed fees neither target nor will they have a disparate impact on any particular category of market participant. The Exchange believes that the proposal change does not permit unfair discrimination because it would be applied to all similarly situated member organizations, who would all be subject to the proposed fee on an equal basis.

The Exchange further believes that it is not unfairly discriminatory to exclude DMMs from the proposed RT - Display Fee in securities in which they are registered, or DMMs, non-DMM market makers, SLPs or SLMMs if they are registered in more than 100 securities. Each of these market participants have independent obligations to maintain a two-sided quotation in their registered securities. In order to meet this obligation, these member organizations are more likely to need to cancel their resting orders so that they can update their quotes. The Exchange believes that such independent obligation to maintain a fair and orderly market outweighs any impact such cancellations would have on Exchange systems.

Finally, the submission of orders to the Exchange is optional for member organizations in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its activity in this regard.

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,³⁴ 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 would encourage member organizations to modify their order entry and/or cancellation practices so that fewer orders or shares are cancelled without resulting in an execution, thereby promoting price discovery and transparency and enhancing order execution opportunities on the Exchange.

Intramarket Competition. The Exchange believes the proposed Ratio Threshold Fees would not place any undue burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees are designed to encourage member organizations to submit orders or shares into the market that are actionable. Further, the proposal would apply to all member organizations on an equal basis, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange. To the extent that these purposes are achieved, the Exchange believes that the proposal would serve as an incentive for member organizations to modify their order entry practices, thus enhancing the quality of the market and increase the volume of orders or shares directed to, and executed on, the Exchange. In turn, all the Exchange's market participants would benefit from the improved market liquidity.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor other exchange and off-exchange venues. In such an environment, the Exchange must continually review, and consider adjusting its services along

³⁴ 15 U.S.C. 78f(b)(8).

with its fees and rebates, to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own services, and their fees and credits in response, the Exchange does not believe the 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)³⁵ of the Act and subparagraph (f)(2) of Rule 19b-4³⁶ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)³⁷ 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 (<https://www.sec.gov/rules/sro.shtml>);

or

³⁵ 15 U.S.C. 78s(b)(3)(A).

³⁶ 17 CFR 240.19b-4(f)(2).

³⁷ 15 U.S.C. 78s(b)(2)(B).

- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2023-20 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-2023-20. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office 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-NYSE-2023-20 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

³⁸ 17 CFR 200.30-3(a)(12).

Sherry R. Haywood,

Assistant Secretary.

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