

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98495; File No. SR-NYSENAT-2023-20)

September 25, 2023

Self-Regulatory Organizations; NYSE National, Inc.; Notice of Filing of Proposed Change to Amend the NYSE National Schedule of Fees and Rebates

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 September 12, 2023, NYSE National, Inc. (“NYSE National” or the “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 National Schedule of Fees and Rebates (“Fee Schedule”) to reflect fees and credits relating to the NYSE National Retail Liquidity Program. 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

¹ 15 U.S.C. 78s(b)(1).

² 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 the Fee Schedule to reflect fees and credits relating to the newly implemented NYSE National Retail Liquidity Program (the “RLP” or “Program”).³ The Exchange proposes to implement the fee change effective September 12, 2023.⁴

Background

The Exchange operates in a highly competitive market. The Securities and Exchange Commission (“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

³ See Securities Exchange Act Release No. 98169 (August 18, 2023), 88 FR 57508 (August 23, 2023) (SR-NYSENAT-2023-17) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Rule 7.44).

⁴ The Exchange previously filed to amend the Fee Schedule on August 28, 2023 (SR-NYSENAT-2023-19) and withdrew such filing on September 12, 2023.

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”).

recognized that “such competition can lead to the fragmentation of order flow in that stock.”⁶ Indeed, 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 18% market share.⁹ Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange’s share of executed volume of equity trades in Tapes A, B and C securities combined is less than 1%.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 a firm routes order flow. Accordingly, competitive forces constrain exchange transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange utilizes a “taker-maker” or inverted fee model to attract orders that provide liquidity at the most competitive prices. Under the taker-maker model, offering rebates for

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).

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.*

taking (or removing) liquidity increases the likelihood that market participants will send orders to the Exchange to trade with liquidity providers' orders. This increased taker order flow provides an incentive for market participants to send orders that provide liquidity. The Exchange generally charges fees for order flow that provides liquidity. These fees are reasonable due to the additional marketable interest (in part attracted by the Exchange's rebate to remove liquidity) with which those order flow providers can trade.

Proposed Rule Change

The Commission recently noticed for immediate effectiveness the Exchange's proposed rule change to introduce the RLP.¹¹ The purpose of the program is to attract retail order flow to the Exchange and allow such order flow to receive potential price improvement at the midpoint or better. The RLP allows ETP Holders to provide potential price improvement to retail investor orders in the form of a non-displayed order that is priced at the less aggressive of the midpoint of the PBBO or its limit price, called a Retail Price Improvement Order ("RPI Order").¹² When there is an RPI Order in a particular security that is eligible to trade at the midpoint of the PBBO, the Exchange disseminates an indicator, known as the Retail Liquidity Identifier, that such interest exists.¹³ Retail Member Organizations ("RMOs") would be able to submit a Retail Order to the Exchange, which interacts, to the extent possible, with available contra-side RPI Orders and may interact with other liquidity on the Exchange, depending on the Retail Order's instructions.¹⁴ The segmentation in the Program would allow retail order flow to receive potential price improvement as a result of that order flow being deemed more desirable by

¹¹ See note 4, *supra*. See also Rule 7.44.

¹² See Rule 7.44(a)(3).

¹³ See Rule 7.44(e).

¹⁴ See Rules 7.44(a)(1) (defining RMO), 7.44(a)(2) (defining Retail Order), and 7.44(f) (describing the operation and designation of Retail Orders).

liquidity providers.

In connection with the implementation of the RLP,¹⁵ the Exchange proposes to amend the Fee Schedule to provide for fees and credits for orders executed in the Program. The Exchange proposes to modify the Fee Schedule to add new Section D.3., “Fees and credits applicable to executions in the Retail Liquidity Program,” and proposes that Section D.3. would provide for the following fees and credits:

- For RPI Orders that execute against a Retail Order submitted by an RMO: no fee or credit will apply.
- For other (non-RPI Order) liquidity that executes against a Retail Order submitted by an RMO: the existing Tiered or Basic Rates set forth in the Fee Schedule, based on a firm’s qualifying levels, will apply.
- For a Retail Order submitted by an RMO that executes against an RPI Order or against other non-RPI Order interest that is priced better than the PBBO (“price-improving interest”): a (\$0.0003) credit will apply.
- For a Type 2 Retail Order submitted by an RMO that executes against non-price-improving interest: the existing Tiered or Basic Rates set forth in the Fee Schedule, based on a firm’s qualifying levels, will apply.

The Program is intended to attract retail order flow to the Exchange, including by facilitating opportunities for such order flow to receive potential price improvement at the midpoint or better, and to promote competition for retail order flow among execution venues (including those that also offer retail price improvement programs), which would benefit retail investors by creating additional price improvement opportunities for marketable retail order flow

¹⁵ See <https://www.nyse.com/trader-update/history#110000643248>.

on a public exchange. ETP Holders are not required to submit Retail Orders or RPI Orders, and all ETP Holders that participate in the Program would be subject to the same fees and credits, as outlined above. The Exchange believes that the proposed credits offered to Retail Orders that execute against RPI Orders or other price-improving interest would encourage ETP Holders to direct retail order flow to the Exchange, and that the amounts of those credits are reasonable and consistent with the range of credits currently offered to non-Retail Orders that remove liquidity on the Exchange.¹⁶ The Exchange notes that this proposed credit for Retail Orders is also comparable to the credit previously offered by the Exchange’s affiliate, NYSE Arca, Inc. (“NYSE Arca”), for orders in its now-discontinued Retail Liquidity Program.¹⁷ The Exchange also believes that its proposal to not apply any fee or credit to RPI Orders that execute against Retail Orders could encourage ETP Holders to submit RPI Orders for execution against Retail Orders, thereby promoting additional trading opportunities for retail order flow on the Exchange. The Exchange notes that not applying any fee or credit to RPI Orders is also consistent with pricing in the Retail Liquidity Program offered by its affiliate, New York Stock Exchange LLC (“NYSE”).¹⁸ Finally, the Exchange believes that applying existing Tiered or Basic Rates, based on a firm’s qualifying levels, to non-RPI Order interest that executes against a Retail Order and to Type 2 Retail Orders¹⁹ that execute against non-price-improving interest is reasonable, as

¹⁶ See NYSE National Fee Schedule, Section D.2. (Rates for Removing Liquidity (Per Share)).

¹⁷ See Securities Exchange Act Release No. 98347 (September 11, 2023) (SR-NYSEARCA-2023-59) (describing fee structure for former NYSE Arca Retail Liquidity Program, in which NYSE Arca -- as a maker-taker market -- conversely offered a \$0.0003 credit to RPI Order executions against Retail Orders).

¹⁸ See NYSE Price List, Fees and Credits Applicable to Executions in the Retail Liquidity Program (no charge for a Retail Order submitted by a Retail Member Organization that executes against an RPI or MPL Order).

¹⁹ A Type 2 Retail Order trades first with available RPI Orders and all other orders with a working price below (above) the PBO (PBB) on the Exchange Book. Any remaining quantity of a Type 2 Retail Order may then trade with orders on the Exchange Book at prices equal to or above (below) the PBO (PBB). Type 2 Retail Orders differ from Type 1 Retail Orders (which trade only with available RPI Orders and all other orders with a working price below (above) or equal to the midpoint of the PBBO on the Exchange

those ETP Holders would continue to receive the rates for which they qualify under the current Fee Schedule. The Exchange notes that applying Tiered or Basic rates to non-RPI Order interest that executes against a Retail Order is consistent with pricing previously associated with the NYSE Arca Retail Liquidity Program.²⁰ With respect to Type 2 Retail Orders, because a remainder quantity of the order may execute against non-price-improving interest on the Exchange Book outside of the Program, the Exchange believes it is reasonable to apply Tiered or Basic rates to such portion of the Retail Order, consistent with the pricing currently offered to other removing orders that do not receive price improvement. The Exchange notes that this treatment of Type 2 Retail Orders is also consistent with the fee structure that was in place for the NYSE Arca Retail Liquidity Program, which offered an identical Type 2 Retail Order.²¹

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²² in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,²³ in particular, because it provides for the equitable allocation of reasonable dues, fees, and other

Book) because they would be able to trade first with all contra-side orders inside the PBBO and then would have the opportunity to trade as a Limit IOC Order, as such order is defined in Rule 7.31. See Rules 7.44(f)(1) (defining Type 1 Retail Order) and 7.44(f)(2) (defining Type 2 Retail Order). Thus, a Type 2 Retail Order may be subject to two different rates, as proposed. If, for example, 100 shares of a Type 2 Retail Order for 200 shares executes against an RPI Order, a (\$0.0003) credit would apply to that portion of the order; if the remaining 100 shares of the Type Retail Order then executes against non-price-improving interest on the Exchange Book, that portion of the order would receive the Tiered or Basic rates for which the entering firm qualifies.

²⁰ See note 18, supra (describing fee structure for NYSE Arca Retail Liquidity Program, in which non-displayed liquidity and displayable odd lot interest priced better than the PBBO (i.e., non-RPI Order interest) that executes against a Retail Order would receive Tiered or Basic Rates based on the firm's qualification for such levels).

²¹ See id. ("An RMO Retail Order that executes outside of the Retail Liquidity Program...receives pricing applicable to Tiered or Standard Rates in the Fee Schedule.")

²² 15 U.S.C. 78f(b).

²³ 15 U.S.C. 78f(b)(4) and (5).

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.”²⁴

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, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

In particular, the Exchange believes the proposed rule change is a reasonable means to encourage ETP Holders to participate in the RLP. The Program is offered by the Exchange on a voluntary basis; no rule or regulation requires that the Exchange offer it, and nor does any rule or regulation require market participants to participate in it. Instead, the Program is intended to encourage opportunities for retail order flow to receive price improvement at the midpoint or better, including by offering credits to Retail Orders submitted by RMOs for execution in the Program (and consistent with the Exchange’s taker-maker model, in which offering rebates for taking (or removing) liquidity increases the likelihood that market participants will direct order

²⁴ See note 6, supra.

flow to the Exchange). The Exchange further believes that its proposal to apply Tiered or Basic rates to the portion of Type 2 Retail Orders that execute against non-price-improving interest is reasonable, as it would apply standard pricing to the portion of the order that executes outside of the Retail Liquidity Program (and is consistent with the Exchange's current pricing for liquidity removing orders that do not receive price improvement). The Exchange also believes the amounts of the credits offered are reasonable and consistent with the Exchange's existing fee structure, and are in line with credits currently offered by the Exchange to other non-retail liquidity removing orders.²⁵ The Exchange also believes that the proposed fees and credits that would apply to RPI Orders and other (non-RPI Order) price-improving interest that executes against Retail Orders are reasonable and designed to encourage ETP Holders to direct orders to the Exchange to interact with retail order flow. Finally, as noted above, the Exchange's proposed fees and credits are consistent with the fee structures associated with the Retail Liquidity Programs currently or previously offered by its affiliated exchanges.²⁶

The Exchange believes its proposal equitably allocates its fees among its market participants. The Exchange believes that the proposal represents an equitable allocation of fees because it would apply uniformly to all ETP Holders, in that all ETP Holders that participate in the RLP would be subject to the same fees and credits. While the Exchange has no way of knowing whether this proposed rule change would encourage ETP Holders to participate in the Program, the Exchange believes that the fees and credits associated with the Program are designed to incentivize ETP Holders to direct both Retail Orders and RPI Orders to the Program by offering credits to Retail Orders that execute against RPI Orders or other price-improving

²⁵ See note 17, supra.

²⁶ See also notes 18, 19, 21 & 22, supra.

interest, applying the Tiered or Basic Rates for which an ETP Holder qualifies to non-RPI Order executions against Retail Orders and Type 2 Retail Order executions against non-price-improving interest, and not applying any fee or credit to RPI Orders that execute against Retail Orders. The Exchange further notes that, as discussed above, the proposed fee structure for the Program is consistent with the fees and credits associated with the Retail Liquidity Programs currently or previously offered by its affiliated exchanges.²⁷

The Exchange believes that the proposal is not unfairly discriminatory, as the proposed fees and credits would apply to all similarly situated ETP Holders. Moreover, this proposed rule change neither targets nor will it have a disparate impact on any particular category of market participant. Instead, the proposed changes are designed to encourage ETP Holders to participate in the Program, which could promote additional price improvements for retail order flow as well as competition between the Exchange and other execution venues. The Exchange believes that this proposal does not permit unfair discrimination because the changes described in this proposal would be applied to all ETP Holders that participate in the Program. Accordingly, no ETP Holder already operating on the Exchange would be disadvantaged by the proposed allocation of fees, and any ETP Holder's participation in the Program is voluntary. The Exchange further believes that the proposed rule change would not permit unfair discrimination among ETP Holders because the Program would be available to all ETP Holders on an equal basis. The Exchange believes that the fees and credits associated with the Program are designed to incentivize ETP Holders to participate in the Program by offering credits to Retail Orders that execute against RPI Orders or other price-improving interest and not applying any fee or credit to RPI Orders that execute against Retail Orders. The Exchange also believes it is not unfairly

²⁷ See also id.

discriminatory to apply Tiered or Basic rates to non-RPI Order executions against Retail Orders and to the portion of Type 2 Retail Orders that execute against non-price-improving interest outside of the Program, as those ETP Holders would receive existing pricing for which they qualify. The Exchange also notes that the proposed fees and credits for the Program are, as discussed above, consistent with the fees and credits associated with the Retail Liquidity Programs currently or previously offered by the Exchange's affiliates.²⁸

Finally, the submission of orders to the Exchange is optional for ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, the extent of its 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,²⁹ 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 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."³⁰

Intramarket Competition. The Exchange believes the proposed amendment to its Fee Schedule would not impose any burden on competition that is not necessary or appropriate in

²⁸ See also note 27, *supra*.

²⁹ 15 U.S.C. 78f(b)(8).

³⁰ See note 6, *supra*.

furtherance of the purposes of the Act. The Exchange believes the proposed rule change is a reasonable means to encourage ETP Holders to participate in the RLP. All ETP Holders that qualify as RMOs may send Retail Orders to the Exchange, and all ETP Holders may direct RPI Orders or other interest to the Exchange. The Program is offered by the Exchange on a voluntary basis, and no rule or regulation requires that the Exchange offer it. Likewise, ETP Holders have the choice whether or not to participate in the Program and those that choose not to participate will not be impacted by the proposed rule change. The Exchange also does not believe the proposed rule change would impact intramarket competition, as the proposed rule change would apply equally to all ETP Holders that choose to direct order flow to the Program, and therefore 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 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 is currently less than 1%. 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. In addition, as noted above, the Exchange believes that the Program could promote competition between the Exchange and other execution venues.

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)³¹ 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:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEAT-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-NYSEAT-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>).

³¹ 15 U.S.C. 78s(b)(3)(A).

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-NYSENAT-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.³²

Sherry R. Haywood,
Assistant Secretary.

³² 17 CFR 200.30-3(a)(12).