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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88930; File No. SR-NYSEArca-2020-45]

### **Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Equities Fees and Charges to institute Ratio Threshold Fees**

May 21, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on May 13, 2020, NYSE Arca, Inc. (“NYSE Arca” 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 Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Equities Fees and Charges (“Fee Schedule”) to institute Ratio Threshold Fees. The Exchange proposes to implement the fee change effective May 13, 2020. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

<sup>2</sup> 17 CFR 240.19b-4.

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 C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to institute Ratio Threshold Fees, which would be applied to orders ranked Priority 2 - Display Orders and to shares of Auction-Only Orders that have a disproportionate ratio of orders that are not executed. The Exchange proposes to implement the fee change effective May 13, 2020.<sup>3</sup>

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

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<sup>3</sup> The Exchange originally filed to amend the Fee Schedule on May 1, 2020 (SR-NYSEArca-2020-40). SR-NYSEArca-2020-40 was subsequently withdrawn and replaced by this filing.

Holders that are ingesting market data, while also negatively impacting the usefulness of market data feeds that transmit each order and subsequent cancellation.<sup>4</sup> ETP Holders with an excessive ratio of cancelled to executed orders do little to support meaningful price discovery.

The Exchange believes that market quality can be improved through the imposition of a fee on market participants that have a disproportionate ratio of orders that are not executed. The Exchange believes that the proposed rule change would promote a more efficient marketplace and enhance the trading experience of all ETP Holders 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 provide ETP Holders with order management flexibility without being subject to this 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 ETP Holders are free to manage their order and message flow as is consistent with their business models, and the vast majority of ETP Holders 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 ETP Holders by imposing a financial incentive for the small number of ETP Holders that are currently exceeding the proposed ratio thresholds. The Exchange notes that its technology and infrastructure is adequately able to handle high-volume

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<sup>4</sup> 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.”).

and high-volatility situations for ETP Holders 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.

Only a small number of ETP Holders 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 ETP Holders. These ETP Holders could avoid the proposed fee by changing their behavior. The Exchange believes the proposed fee would encourage ETP Holders that could be impacted by the proposed fee 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 ETP Holders 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 ETP Holders generally regarding the proposed fee.<sup>5</sup>

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.

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

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<sup>5</sup> See Trader Update at [https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSE\\_Arca\\_Price\\_Change\\_2020\\_May.pdf](https://www.nyse.com/publicdocs/nyse/notifications/trader-update/NYSE_Arca_Price_Change_2020_May.pdf).

For orders ranked Priority 2 - Display Orders, ETP Holders that have characteristics indicative of inefficient order entry practices would be charged an RT - Display Fee on a monthly basis.<sup>6</sup> 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 ETP Holder in a month, as adjusted by a “Weighting Factor.” The Weighted Order Total calculation excludes (i) all orders in securities in which an ETP Holder is registered as a Market Maker<sup>7</sup> or Lead Market Maker<sup>8</sup> and (ii) all orders for an ETP Holder that is registered as a Market Maker or Lead Market Maker 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

<sup>6</sup> The proposed fee focuses on displayed orders because such orders use more system resources than non-displayed orders.

<sup>7</sup> The term “Market Maker” is defined in Rule 1.1(z) to mean an ETP Holder that acts as a Market Maker pursuant to Rule 7-E.

<sup>8</sup> The term "Lead Market Maker" is defined in Rule 1.1(w) to mean a registered Market Maker that is the exclusive Designated Market Maker in listings for which the Exchange is the primary market.

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 an ETP Holder’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 one (1).<sup>9</sup>
- “Excess Weighted Orders” would be calculated by subtracting (i) the Weighted Order Total that would result in the ETP Holder having an Order Entry Ratio of 100 from (ii) the ETP Holder’s actual Weighted Order Total.

An ETP Holder with a daily average Weighted Order Total of 100,000 or more<sup>10</sup> 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.

ETP Holders that exceed the Order Entry Ratio threshold of 1,000:1 would pay a fee of \$0.01 on each order that caused the ETP Holder to surpass the threshold. ETP Holders 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 ETP Holder's ratio to exceed 100:1.

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

<sup>9</sup> In the case where no orders entered by an ETP Holder executed, this component of the ratio would be assumed to be 1, so as to avoid the impossibility of dividing by zero.

<sup>10</sup> The Exchange believes it is reasonable to exclude ETP Holders with a daily average Weighted Order Total of less than 100,000 during the month because an ETP Holder with an extremely low volume of entered orders has only a de minimis impact on Exchange systems.

More than 1,000	\$0.01
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The following example illustrates the calculation of the Order Entry Ratio and resulting RT - Display Fee:

- In a month, ETP Holder A enters 35,000,000 displayed, liquidity-providing orders:
  - 20,000,000 of the orders are in securities in which ETP Holder A is an LMM. These orders are excluded from the calculation.
  - 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 an ETP Holder would then be determined by multiplying the Applicable Rate by the number of Excess Weighted Orders.

In the example above, because ETP Holder A had an Order Entry Ratio of 111, the Applicable Rate would be \$0.0005. 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,<sup>11</sup> ETP Holders with an average daily number of orders of 10,000 or more<sup>12</sup> would be charged an RT - Auction Fee on a monthly basis.<sup>13</sup> 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 ETP Holder at a disproportionate ratio to the average daily number of shares executed by that ETP Holder. 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

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<sup>11</sup> An Auction-Only Order is a Limit or Market Order that is to be traded only within an auction pursuant to Rule 7.35-E or routed pursuant to Rule 7.34-E. See Rule 7.31-E(c). Auction-Only Orders are orders submitted by an ETP Holder during the Early Open Auction, Core Open Auction, Closing Auction and Trading Halt Auction. See Rule 7.35-E.

<sup>12</sup> The Exchange believes it is reasonable to exclude ETP Holders with average daily orders of less than 10,000 during the month because an ETP Holder with an extremely low volume of entered orders has only a de minimis impact on Exchange systems.

<sup>13</sup> 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 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 ETP Holders. 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.

Auction is being disseminated are included in the Ratio Shares calculation.<sup>14</sup> All orders entered by an ETP Holder for securities in which it is registered as a Lead Market Maker are not included the calculation of Ratio Shares.

- The “Ratio Shares Threshold” is an ETP Holder’s Ratio Shares divided by the average daily executed shares by the ETP Holder.

The Exchange proposes to charge the RT - Auction Fee for Auction-Only Orders during the period when Auction Imbalance Information is being disseminated.<sup>15</sup>

The Exchange proposes that it would not charge the RT - Auction Fee if Auction-Only Orders have a Ratio Shares Threshold of less than 50. If the Ratio Shares Threshold is greater than or equal to 50, the fee would be as follows:

- No Charge for ETP Holders with an average of fewer than 20 million Ratio Shares per day.
- \$1.00 per million Ratio Shares for ETP Holders with an average of 20 million to 200 million Ratio Shares per day.
- \$10.00 per million Ratio Shares for ETP Holders with an average of more than 200 million Ratio Shares per day.

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<sup>14</sup> 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.

<sup>15</sup> See Rules 7.35-E(c)(1) (Core Open Auction Imbalance Information begins at 8:00 a.m. ET) and 7.35-E(d)(1) (Closing Auction Imbalance Information begins at 3:00 p.m. ET).

ETP Holders would be charged for the entirety of their Ratio Shares at a rate of \$1.00 per million Ratio Shares if the ETP Holder has an average of 20 million to 200 million Ratio Shares; and \$10.00 per million Ratio Shares if the ETP Holder has an average of more than 200 million Ratio Shares.

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

- In a month, ETP Holder B enters a daily average of 100,000 Auction-Only Orders for the Closing Auction, with an average size of 600 shares.
- Thus, ETP Holder 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 disseminated, ETP Holder B cancels a daily average of 59,000,000 shares and executes a daily average of 1,000,000 shares in the Closing Auction.
- ETP Holder 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 50 and the average daily Ratio Shares quantity is between 20 million and 200 million, ETP Holder B would be subject to the proposed fee of \$1.00 per million Ratio Share, resulting in a fee of \$1,218 assuming a 21-day month (58,000,000 / 1,000,000 x \$1.00 x 21).

As noted above, the Exchange is not proposing to implement this fee in order to create revenue, but rather to provide an incentive for a small number of ETP Holders to change their

order entry practices. Therefore, the Exchange also proposes to limit the amount an ETP Holder would pay by adopting a cap such that the combined RT - Display Fee and RT - Auction Fee for an ETP Holder would not exceed \$2,000,000 per month. Based on an analysis of the impact to ETP Holders, the Exchange does not believe that many ETP Holders would be impacted. For example, the median Order Entry Ratio across all ETP Holders in April 2020<sup>16</sup> for orders ranked Priority 2 - Display Orders is 0.32. The median Ratio Shares Threshold across all ETP Holders in April 2020<sup>17</sup> for Auction-Only Orders is approximately -0.68, which indicates that the median ETP Holder has more executed shares than Ratio Shares.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>18</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>19</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The 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

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<sup>16</sup> Through April 20, 2020.

<sup>17</sup> Id.

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(4) and (5).

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

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. 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.”<sup>20</sup>

As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”<sup>21</sup> Indeed, equity trading is currently dispersed across 13 exchanges,<sup>22</sup> numerous alternative trading systems,<sup>23</sup> 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

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<sup>20</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (“Regulation NMS”).

<sup>21</sup> See Securities Exchange Act Release No. 51808, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Final Rule).

<sup>22</sup> See Cboe U.S Equities Market Volume Summary, available at [https://markets.cboe.com/us/equities/market\\_share](https://markets.cboe.com/us/equities/market_share). See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangeshtml.html>.

<sup>23</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

auction volume).<sup>24</sup> 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, 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 ETP Holders 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 ETP Holders, the Exchange believes assessing the proposed fee based on orders, rather than number of shares, is

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<sup>24</sup> See Cboe Global Markets U.S. Equities Market Volume Summary, available at [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

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 ETP Holders 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 an ETP Holder would be subject to the proposed fee would be independent of any determination of whether such ETP Holder is complying with Exchange and federal rules, including those governing order entry and cancellation.

The Exchange believes that the proposed combined fee cap of \$2,000,000 is reasonable as it would reduce the impact of the fee on ETP Holders. 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 ETP Holders to change their order entry and/or cancellation behavior. As a general principal, the Exchange believes that greater participation on the Exchange by ETP Holders 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”)<sup>25</sup> and by Exchange’s options market, NYSE Arca Options, to OTP Holders to disincentivize a disproportionate ratio of orders that are not executed.<sup>26</sup> With respect to the RT - Display Fee, the proposed fee is identical to the Excess Order Fee currently in place on Nasdaq and would subject ETP Holders to the fee if they exceed the Order Entry Ratio thresholds established by the Exchange, which thresholds are also identical to those on Nasdaq. Additionally, while the RT - Auction Fee is novel in that no other exchange currently assesses such a fee, the proposed 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 ETP Holders. 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 ETP Holder’s Ratio Shares, which, as defined above, is calculated net of shares that 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

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<sup>25</sup> See Securities Exchange Act Release No. 66951 (May 9, 2012), 77 FR 28647 (May 15, 2012) (SR-NASDAQ-2012-055) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Institute an Excess Order Fee).

<sup>26</sup> See Ratio Threshold Fee, at [https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE\\_Arca\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf). 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.

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 ETP Holders 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 ETP Holders may be subject to the proposed fees based on their current trading practices, any ETP Holder could determine to change their order entry practices at any time, and the proposed fees would be applied to any ETP Holder 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 ETP Holders 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 ETP Holders 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 ETP Holders 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 ETP Holders, the impact of the

proposal would be limited to those ETP Holders, and only if they do not alter their trading practices. The Exchange believes the proposal would encourage ETP Holders 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, ETP Holders 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 ETP Holders, 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 Market Makers and Lead Market Makers from the proposed RT - Display Fee in securities in which they are registered, or if they are registered in more than 100 securities. Market Makers and Lead Market Makers have independent obligations to maintain a two-sided quotation a specified percentage away from the NBBO. In order to meet this obligation, such ETP Holders 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. The Exchange similarly believes that, unlike Lead Market Makers, Market Makers do not have a similar obligation leading into an

auction, therefore it is not necessary to exclude Market Makers from the proposed RT - Auction Fee.

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

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,<sup>27</sup> the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed fee would encourage ETP Holders 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 ETP Holders to submit orders or shares into the market that are actionable. Further, the proposal would apply to all ETP Holders 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 ETP Holders to modify their order entry practices, thus

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<sup>27</sup> 15 U.S.C. 78f(b)(8).

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 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)<sup>28</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>29</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the

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<sup>28</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>29</sup> 17 CFR 240.19b-4(f)(2).

Commission shall institute proceedings under Section 19(b)(2)(B)<sup>30</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2020-45 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEArca-2020-45. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F

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<sup>30</sup> 15 U.S.C. 78s(b)(2)(B).

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-NYSEArca-2020-45, and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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<sup>31</sup> 17 CFR 200.30-3(a)(12).

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