

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68758; File No. SR-NYSEArca-2013-04]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Arca Options Fee Schedule To Revise Qualification Thresholds for Tiered Customer Posting Credits

January 29, 2013.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on January 15, 2013, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the

proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the NYSE Arca Options Fee Schedule ("Fee Schedule") to revise the qualification thresholds for tiered Customer posting credits for electronic executions in Penny Pilot issues. The Exchange proposes to make the fee change operative on February 1, 2013. The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included

statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places 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 revise the qualification thresholds for tiered Customer<sup>4</sup> posting credits for electronic executions in Penny Pilot issues.<sup>5</sup> The Exchange proposes to make the fee change operative on February 1, 2013.

Currently, the Exchange provides credits for posted electronic Customer executions in Penny Pilot issues for OTP Holders and OTP Firms that meet the following execution thresholds:

Tier	Qualification basis (average electronic executions per day)			Credit applied to posted electronic customer executions in Penny Pilot issues
Base .....	.....	.....	.....	(\$0.25)
Tier 1 .....	15,000 Contracts from Customer Posted Orders in Penny Pilot Issues.	.....	.....	(\$0.38)
Tier 2 .....	25,000 Contracts from Customer Posted Orders in Penny Pilot Issues, or	75,000 Contracts from Posted Orders in Penny Pilot Issues, all account types.*	.....	(\$0.40)
Tier 3 .....	50,000 Contracts from Customer Posted Orders in Penny Pilot Issues.	.....	.....	(\$0.43)
Tier 4 .....	65,000 Contracts from Customer Posted Orders in Penny Pilot Issues Plus 0.3% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market,* or	100,000 Contracts from Posted Orders in Penny Pilot Issues, all account types,* or	100,000 Contracts from Customer Posted and Removing Orders in Penny Pilot Issues.	(\$0.44)

\* Includes transaction volume from the OTP Holder's or OTP Firm's affiliates.

The Exchange proposes to revise the qualification thresholds for tiered Customer posting credits for electronic executions in Penny Pilot issues so that the qualification thresholds for tiered

Customer posting credits will be based not on a fixed number of contracts but instead on a percentage of average daily volume ("ADV") of Customer electronic equity and ETF option contracts

executed by an OTP Holder or OTP Firm on the Exchange relative to the overall Total Industry Customer equity and ETF option ADV.<sup>6</sup> The Exchange

<sup>13</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> Under NYSE Arca Options Rule 6.1(b)(29), the term "Customer" has the same definition as Rule 15c3-1(c)(6) under the Act, which excludes certain broker-dealers.

<sup>5</sup> As provided under NYSE Arca Options Rule 6.72, options on certain issues have been approved

to trade with a minimum price variation of \$0.01 as part of a pilot program that is currently scheduled to expire on March 31, 2013. See Securities Exchange Act Release No. 68426, (December 13, 2012) 77 FR 75224 (December 19, 2012) (SR-NYSEArca-2012-135).

<sup>6</sup> The OCC provides volume information in two product categories: Equity and ETF volume and index volume, and the information can be filtered to show only Customer, firm, or market maker account type. Equity and ETF Customer volume

numbers are available directly from the OCC each morning, or may be transmitted, upon request, free of charge from the Exchange. Equity and ETF Customer volume is a widely followed benchmark of industry volume and is indicative of industry market share. Total Industry Customer equity and ETF option ADV is comprised of those equity and ETF option contracts that clear in the customer account type at OCC, including Exchange-Traded Fund Shares, Trust Issued Receipts, Partnership

proposes the following qualification thresholds for tiered Customer posting

credits for electronic executions in Penny Pilot issues:

Tier	Qualification basis (average electronic executions per day)			Credit applied to posted electronic customer executions in Penny Pilot issues
Base .....				(\$0.25)
Tier 1 .....	At least 0.15% of Total Industry Customer equity and ETF option ADV from Customer Posted Orders in Penny Pilot Issues.			(\$0.38)
Tier 2 .....	At least 0.25% of Total Industry Customer equity and ETF option ADV from Customer Posted Orders in Penny Pilot Issues, or	At least 0.70% of Total Industry Customer equity and ETF option ADV from Posted Orders in Penny Pilot Issues, all account types.*		(\$0.40)
Tier 3 .....	At least 0.50% of Total Industry Customer equity and ETF option ADV from Customer Posted Orders in Penny Pilot Issues.			(\$0.43)
Tier 4 .....	At least 0.65% of Total Industry Customer equity and ETF option ADV from Customer Posted Orders in Penny Pilot Issues Plus 0.3% of U.S. Equity Market Share Posted and Executed on NYSE Arca Equity Market,* or	At least 0.95% of Total Industry Customer equity and ETF option ADV from Posted Orders in Penny Pilot Issues, all account types,* or	At least 0.95% of Total Industry Customer equity and ETF option ADV from Customer Posted and Removing Orders in Penny Pilot Issues.	(\$0.44)

\* Includes transaction volume from the OTP Holder's or OTP Firm's affiliates.

The Exchange notes that the calculations for the qualification thresholds for tiered Customer posting credits only include electronic executions. Qualified Contingent Cross ("QCC") orders are neither posted nor taken; thus QCC transactions are not included in the calculation of posted or taken execution volumes. Orders routed to another market for execution are not included in the calculation of taking volume. In addition, Customer equity and ETF option ADV will not include executions from Electronic Complex Order Executions.<sup>7</sup>

The Exchange notes that the proposed percentages are generally equivalent to the current fixed thresholds at current volume levels, but will have the advantage of fluctuating with industry volume. The Exchange does not propose to amend the credits associated with

these tiers or other requirements for the tiers.

The Exchange notes that the proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any problems that OTP Holders and OTP Firms would have in complying with the proposed change.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>9</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. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>10</sup> in

particular, because it is designed 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 mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposal to revise the qualification thresholds for tiered Customer posting credits for electronic executions in Penny Pilot issues so that they are based on the ADV of Total Industry Customer electronic equity and ETF option contracts on the Exchange is

Units, and Index-Linked Securities such as Exchange-Traded Notes (see NYSE Arca Options Rule 5.3(g)-(j)), and does not include contracts that clear in either the firm or market maker account type at OCC or contracts overlying a security other than an equity or ETF security. The Exchange notes that there is one Penny Pilot issue, Mini NDX 100 Stock Index, that does not overlie an equity or ETF security that is eligible for the Customer posing [sic] credit. This Penny Pilot issue is not included in equity and ETF option ADV; however, the Exchange expects that the effect on the calculations for the

qualification thresholds for tiered Customer posting credits to be negligible. Under the proposed rule change, Total Industry Customer equity and ETF option ADV will be that which is reported for the month by OCC in the month in which the credits may apply. For example, February 2013 Total Industry Customer equity and ETF option ADV will be used in determining what, if any, credit an OTP Holder or OTP Firm may be eligible for based on the Customer electronic equity and ETF option ADV it transacts on the Exchange in February 2013.

<sup>7</sup> The Exchange previously amended its Fee Schedule to exclude Electronic Complex Order

volume from counting toward the qualification thresholds for tiered Customer posting credits for electronic executions in Penny Pilot issues. See Securities Exchange Act Release No. 68405, (December 11, 2012) 77 FR 74719 (December 17, 2012) (SR-NYSEArca-2012-137). The Exchange proposes to amend endnote 8 to explicitly exclude Electronic Complex Order Executions from the qualification thresholds for tiered Customer posting credits.

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

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

reasonable because it is designed to attract additional Customer electronic equity and ETF option volume to the Exchange, which would benefit all participants by offering greater price discovery, increased transparency and an increased opportunity to trade on the Exchange. Additionally, the Exchange believes that the proposed credits are reasonable because they would incentivize OTP Holders and OTP Firms to submit Customer electronic equity and ETF option orders to the Exchange and would result in credits that are reasonably related to the Exchange's market quality that is associated with higher volumes.

The Exchange also believes that the proposed qualification thresholds for tiered Customer posting credits are reasonable because the Exchange has continued to provide more than one method of qualifying for certain of the tiers. For example, in addition to posting Customer orders in Penny Pilot issues, the Tier 2 credit can alternatively be reached by posting a certain volume of orders in all account types, and the Tier 4 credit can be reached by posting a certain volume of orders on the NYSE Arca Equity Market, posting a certain volume of orders in all account types, or posting or removing a certain volume of orders in Penny Pilot issues. The Exchange believes that the aspect of the proposed change related to the activity of an affiliated ETP Holder on NYSE Arca Equities is reasonable because it would encourage increased trading activity on both the NYSE Arca equity and option markets.

The Exchange believes that using a percentage based threshold rather than a fixed threshold is reasonable because it would allow the threshold to account for fluctuating industry volume. The Exchange also believes that the proposed qualification thresholds for tiered Customer posting credits are reasonable because they will reward OTP Holders and OTP Firms with a greater credit for posted electronic Customer executions in Penny Pilot issues when they bring a larger number of orders to the Exchange.

The Exchange believes that the proposed credits are equitable and not unfairly discriminatory because they will be available to all OTP Holders and OTP Firms that execute posted electronic Customer orders on the Exchange on an equal and non-discriminatory basis, in particular because they would be based on a variable rather than a fixed threshold. The Exchange believes that providing methods for achieving the credits not based solely on posted electronic Customer Executions in Penny Pilot

issues is equitable and not unfairly discriminatory because it would continue to result in more OTP Holders and OTP Firms qualifying for the credits and therefore reducing their overall transaction costs on the Exchange. The Exchange also believes that the proposed credits are not new or novel because at least one other exchange has a customer tier based on Total Industry Customer equity and ETF option volume.<sup>11</sup> The Exchange believes that the aspect of the proposed change related to the activity of an affiliated ETP Holder on NYSE Arca Equities is equitable and not unfairly discriminatory because it is designed to continue to bring additional posted order flow to NYSE Arca Equities, so as to provide additional opportunities for all ETP Holders to trade on NYSE Arca Equities.<sup>12</sup>

The Exchange believes that the proposed changes are designed to incent all market participants, thereby removing impediments to and perfecting the mechanism of a free and open market system. In addition, for the reasons stated above, the proposed changes are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because it is designed to attract [sic] additional volume, in particular posted electronic Customer executions, to the Exchange, which would promote price discovery and transparency in the securities markets thereby benefitting competition in the industry. As stated above, the Exchange believes that the proposed change would impact all similarly situated OTP Holders and OTP Firms that post electronic Customer executions on the Exchange equally, and as such, the proposed change would not impose a disparate burden on competition either among or between classes of market participants. In

<sup>11</sup> See NYSE Amex Options Fee Schedule, dated December 1, 2012, available at [https://globalderivatives.nyx.com/sites/globalderivatives.nyx.com/files/nyse\\_amex\\_options\\_fee\\_schedule\\_12\\_01\\_12.pdf](https://globalderivatives.nyx.com/sites/globalderivatives.nyx.com/files/nyse_amex_options_fee_schedule_12_01_12.pdf). See also Securities Exchange Act Release No. 68036 (October 11, 2012), 77 FR 63900 (October 17, 2012) (SR-NYSEMKT-2012-50).

<sup>12</sup> The Exchange notes that this aspect of the proposed change related to the activity of an affiliated ETP Holder on NYSE Arca Equities has been previously included in an immediately effective filing. See Securities Exchange Act Release No. 67020, (May 18, 2012) 77 FR 31050 (May 24, 2012) (SR-NYSEArca-2012-41).

addition, providing an alternative qualification basis for certain tiers by including volume from affiliates allows a firm with a diverse business structure, but not a concentration on Customers orders only, to earn a higher credit for their Customers by posting order flow that improves the overall market quality, and encourages posting competitive prices, which result in better available markets for Customer orders.<sup>13</sup> The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change promotes a competitive environment.

#### *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>14</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>15</sup> thereunder, because it establishes a due, fee, or other charge imposed by the NYSE Arca.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>16</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

<sup>13</sup> The Exchange notes that the Commission has not previously determined that this aspect of the proposed change related to the activity of an affiliated ETP Holder on NYSE Arca Equities would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. See *id.*

<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(2).

<sup>16</sup> 15 U.S.C. 78s(b)(2)(B).

#### 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2013-04 on the subject line.

##### *Paper Comments*

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

All submissions should refer to File Number SR-NYSEArca-2013-04. 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 Web site (<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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2013-04, and should be submitted on or before February 25, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68762; File No. SR-NASDAQ-2013-012]

#### **Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend NASDAQ Rule 4756 and Rule 4763 Regarding Modification of Previously Entered Orders**

January 29, 2013.

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 January 18, 2013, The NASDAQ Stock Market LLC ("NASDAQ" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II 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**

NASDAQ proposes to amend NASDAQ Rule 4756 (Entry and Display of Quotes and Orders) and Rule 4763 (Short Sale Price Test Pursuant to Rule 201 of Regulation SHO) to stipulate how Participants in the NASDAQ Market Center System may modify previously entered orders and to describe how modified orders are processed. NASDAQ proposes to implement the proposed rule change 30 days after the date of the filing or shortly thereafter.

The text of the proposed rule change is below. Proposed new language is italicized; deletions are bracketed.

#### **4756. Entry and Display of Quotes and Orders**

(a) Entry of Orders—Participants can enter orders into the System, subject to the following requirements and conditions:

(1)–(2) No change.

(3) Orders can be entered into the System (or previously entered orders

cancelled or modified) from 7:00 a.m. until 8:00 p.m. Eastern Time.

*Participants may modify a previously entered order without cancelling it or affecting the priority of the order on the book solely for the purpose of modifying the marking of a sell order as long, short, or short exempt; provided, however, that if an order is redesignated as short, a Short Sale Period is in effect under Rule 4763, and the order is not priced at a Permitted Price or higher under Rule 4763(e), the order will be cancelled. In addition, a partial cancellation of an order to reduce its share size will not affect the priority of the order on the book. Except as provided in Rule 4761, all other modifications of orders will result in the replacement of the original order with a new order with a new time stamp.*

(b)–(c) No change.

\* \* \* \* \*

#### **4763. Short Sale Price Test Pursuant to Rule 201 of Regulation SHO**

(a)–(d) No change.

(e) Re-pricing of Orders during Short Sale Period. *Except as provided below, [D]uring the Short Sale Period, short sale orders that are limited to the national best bid or lower and short sale market orders will be re-priced by the System one minimum allowable price increment above the current national best bid ("Permitted Price"). To reflect declines in the national best bid, the Exchange will continue to re-price a short sale order at the lowest Permitted Price down to the order's original limit price, or if a market order, until the order is filled. Non-displayed orders between the NASDAQ bid and offer at the time of receipt will also be re-priced upward to a Permitted Price to correspond with a rise in the national best bid.*

(1)–(2) No change.

(3) *During the Short Sale Period, if an order was entered as a long sale order or a short sale exempt order but is subsequently marked pursuant to NASDAQ Rule 4756(a)(3) as a short sale order, the System will cancel the order unless it is priced at a Permitted Price or higher.*

(f)–(g) No change.

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#### **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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the

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

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

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