Each private auction will be a ''sealed bid'' auction in which pre-qualified bidders selected by OCC will submit confidential bids such that no bidder will know the bid information of any of the other bidders. The pool of prequalified potential bidders in any auction would consist of all Clearing Members who are interested in participation and willing to execute the required documentation. Participation in the pre-qualified bidder pool by certain non-Clearing Members would also be solicited. Should the Corporation determine to hold a private auction, the Corporation will review the pool of pre-qualified auction bidders and would seek to invite a fixed number of bidders for the auction based on objective criteria that the Corporation believes would optimize the effectiveness of the auction process. OCC believes that fixing the size of the desired bidder group at a number that is either too large or too small could have an adverse impact on the effectiveness and competitiveness of the auction process. A group that is too small would not provide adequate competition among bidders, while setting the target size for the group of bidders at too large a number would discourage participation because of fear that the composition of the portfolios to be bid on would be leaked beyond the bidder group, allowing non-bidders to trade ahead of the auction to the disadvantage of bidders in the auction. Attempting to organize too large a group of bidders would also cause potentially costly delay in the auction process. OCC would most likely use its secure ENCORE system or telephone contact to invite selected pre-qualified bidders to submit bids in the private auction. No invited bidder would be obligated to bid in the private auction.

At the conclusion of a private auction, OCC will, in its discretion, select the best bid submitted for the auctioned portfolio based on the totality of the circumstances.[5] For example, where an auction portfolio has a negative net asset value, negative bids may be submitted which indicate how much OCC would be required to pay a bidder to assume the auction portfolio, and the lowest rather than the highest bid may therefore be the best bid. Other factors such as any condition attached to a bid may influence the choice of best bid.

Finally, in order to increase legal certainty under potentially applicable provisions of the Uniform Commercial Code, the proposed interpretations would require Clearing Members to acknowledge that the private auction process is a commercially reasonable method of liquidating a suspended Clearing Member's accounts and that notice of a private auction to a suspended Clearing Member is not required under the auction process.

[5] The Staff notes for clarity that OCC has no specific procedures to announce auctions or their results other than notices to the winning bidders and losing bidders as specified in proposed Rule 1104(e).

III. Discussion

Section 17A(b)(3)(F) of the Act requires that, among other things, the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, and, to the extent applicable, derivative agreements, contracts, and transactions.[6] The rule change sets forth the procedures that OCC will use to liquidate the open positions and margin of a defaulting member in order to meet its settlement obligations to non-defaulting members promptly and in a manner that is least disruptive to the securities markets. Section 17A(b)(3)(F) of the Act also requires that the rules of a clearing agency are, in general, designed to protect investors and the public interest and are not designed to permit unfair discrimination among participants in the use of the clearing agency.[7] The rule change sets forth the general criteria used by OCC to select bidders, invite bidders to participate in the auction, and select the best bid.

IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposal is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act[8] and the rules and regulations thereunder.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[9] that the proposed rule change (File No. SR–OCC–2012–11) be, and hereby is, approved.[10]

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[11]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–21494 Filed 8–30–12; 8:45 am]

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[6] 15 U.S.C. 78q–1(b)(3)(F).

[7] *Id.*

[8] 15 U.S.C. 78q–1.

[9] 15 U.S.C. 78s(b)(2).

[10] In approving this proposed rule change the Commission has considered the proposed rule's impact of efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[11] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–67734; File No. SR–BYX–2012–019]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Notice of Filing of Proposed Rule Change To Adopt a Retail Price Improvement Program

August 27, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on August 14, 2012, BATS Y-Exchange, Inc. (the ''Exchange'' or ''BYX'') 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

The Exchange's proposed rule change would adopt new Rule 11.24 to establish a Retail Price Improvement (''RPI'') Program (the ''Program'' or ''proposed rule change'') to attract additional retail order flow to the Exchange while also providing the potential for price improvement to such order flow.

The text of the proposed rule change is available at the Exchange's Web site at *http://www.batstrading.com,* at the principal office of the Exchange, and at the Commission's Public Reference Room. The proposed rule text can be found in Exhibit 5.

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 proposed rule change. The text of these 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.

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

[2] 17 CFR 240.19b–4.

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

1. Purpose

Background

The Exchange is proposing a one-year pilot program that would add new Rule 11.24 to establish an RPI Program to attract additional retail order flow to the Exchange while also providing the potential for price improvement to such order flow. Under the proposed rule change, the Exchange would create a new class of market participant called a Retail Member Organization (''RMO''), which would be eligible to submit certain retail order flow (''Retail Orders'') to the Exchange. As proposed, all Exchange Users [3] will be permitted to provide potential price improvement for Retail Orders in the form of non-displayed interest that is better than the national best bid that is a Protected Quotation (''Protected NBB'') or the national best offer that is a Protected Quotation (''Protected NBO,'' and together with the Protected NBB, the ''Protected NBBO'').[4]

Definitions

The Exchange proposes to adopt the following definitions under proposed Rule 11.24(a). First, the term ''Retail Member Organization'' would be defined as a Member [5] (or a division thereof) that has been approved by the Exchange to submit Retail Orders.

Second, the term ''Retail Order'' would be defined as an agency order that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.

Finally, the term ''Retail Price Improvement Order'' or ''RPI Order'' would be defined as non-displayed interest on the Exchange that is better than the Protected NBB or Protected NBO by at least $0.001 and that is identified as an RPI Order in a manner prescribed by the Exchange (''RPI interest'').[6] The price of an RPI Order would be determined by a User's entry of the following into the Exchange: (1) RPI buy or sell interest; (2) an offset, if any; and (3) a ceiling or floor price. The Exchange expects that RPI sell or buy interest typically would be entered to track the Protected NBBO. The offset would be a predetermined amount by which the User is willing to improve the Protected NBBO, subject to a ceiling or floor price. The ceiling or floor price would be the amount above or below which the User does not wish to trade. RPI Orders in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain non-displayed. The Exchange will also allow Users to enter RPI Orders which establish the exact limit price, which is similar to a non-displayed limit order currently accepted by the Exchange today except the Exchange will accept sub-penny limit prices on RPI Orders with three numbers after the decimal. The Exchange's System [7] will monitor whether RPI buy or sell interest, adjusted by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders.

Users and RMOs may enter odd lots, round lots or mixed lots as RPI Orders and as Retail Orders respectively. As discussed below, RPI Orders will be ranked and allocated according to price and time of entry into the System consistent with Exchange Rule 11.12 and therefore without regard to whether the size entered is an odd lot, round lot or mixed lot amount. Similarly, Retail Orders will interact with RPI Orders according to the Priority and Allocation rules of the Program and without regard to whether they are odd lots, round lots or mixed lots. Finally, Retail Orders may be designated as Type 1 or Type 2 without regard to the size of the order. In accordance with rules of the consolidated tape plans, executions less than a round lot will not print to the consolidated tape or be considered the last sale.

RPI Orders would interact with Retail Orders as follows. Assume a User enters RPI sell interest with an offset of $0.001 and a floor of $10.10 while the Protected NBO is $10.11. The RPI Order could interact with an incoming buy Retail Order at $10.109. If, however, the Protected NBO was $10.10, the RPI Order could not interact with the Retail Order because the price required to deliver the minimum $0.001 price improvement ($10.099) would violate the User's floor of $10.10. If a User otherwise enters an offset greater than the minimum required price improvement and the offset would produce a price that would violate the User's floor, the offset would be applied only to the extent that it respects the User's floor. By way of illustration, assume RPI buy interest is entered with an offset of $0.005 and a ceiling of $10.112 while the Protected NBB is at $10.11. The RPI Order could interact with an incoming sell Retail Order at $10.112, because it would produce the required price improvement without violating the User's ceiling, but it could not interact above the $10.112 ceiling. Finally, if a User enters an RPI Order without an offset (i.e., an explicitly priced limit order), the RPI Order will interact with Retail Orders at the level of the User's limit price as long as the minimum required price improvement is produced. Accordingly, if RPI sell interest is entered with a limit price of $10.098 and no offset while the Protected NBO is $10.11, the RPI Order could interact with the Retail Order at $10.098, producing $0.012 of price improvement. The System will not cancel RPI interest when it is not eligible to interact with incoming Retail Orders; such RPI interest will remain in the System and may become eligible again to interact with Retail Orders depending on the Protected NBB or Protected NBO.

[3] A ''User'' is defined in BYX Rule 1.5(cc) as any member or sponsored participant of the Exchange who is authorized to obtain access to the System.

[4] The term Protected Quotation is defined in BYX Rule 1.5(t) and has the same meaning as is set forth in Regulation NMS Rule 600(b)(58). The terms Protected NBB and Protected NBO are defined in BYX Rule 1.5(s). The Protected NBB is the best-priced protected bid and the Protected NBO is the best-priced protected offer. Generally, the Protected NBB and Protected NBO and the national best bid (''NBB'') and national best offer (''NBO,'' together with the NBB, the ''NBBO'') will be the same. However, a market center is not required to route to the NBB or NBO if that market center is subject to an exception under Regulation NMS Rule 611(b)(1) or if such NBB or NBO is otherwise not available for an automatic execution. In such case, the Protected NBB or Protected NBO would be the best-priced protected bid or offer to which a market center must route interest pursuant to Regulation NMS Rule 611.

[5] A ''Member'' is defined in BYX Rule 1.5(n) as any registered broker or dealer that has been admitted to membership in the Exchange.

[6] Exchange systems would prevent Retail Orders from interacting with RPI Orders if the RPI Order is not priced at least $0.001 better than the Protected NBBO. The Exchange notes, however, that price improvement of $0.001 would be a minimum requirement and Users could enter RPI Orders that better the Protected NBBO by more than $0.001. Exchange systems will accept RPI Orders without a minimum price improvement value; however, such interest will execute at its floor or ceiling price only if such floor or ceiling price is better than the Protected NBBO by $0.001 or more. Concurrently with this filing, the Exchange has submitted a request for an exemption under Regulation NMS Rule 612 that would permit it to accept and rank the non-displayed RPI Orders. As outlined in the request, the Exchange believes that the minimum price improvement available under the Program, which would amount to $0.50 on a 500 share order, would be meaningful to the small retail investor. *See* Letter from Eric J. Swanson, Senior Vice President, General Counsel, BATS Global Markets, Inc. to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission dated August 14, 2012 (''Sub-Penny Rule Exemption Request'').

[7] The ''System'' is defined in BYX Rule 1.5(aa) as ''the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.''

RMO Qualifications and Approval Process

Under proposed Rule 11.24(b), any Member could qualify as an RMO if it conducts a retail business or handles retail orders on behalf of another broker-dealer. Any Member that wishes to obtain RMO status would be required to submit: (1) An application form; (2) an attestation, in a form prescribed by the Exchange, that any order submitted by the Member as a Retail Order would meet the qualifications for such orders under proposed Rule 11.24; and (3) supporting documentation sufficient to demonstrate the retail nature and characteristics of the applicant's order flow.[8]

An RMO would be required to have written policies and procedures reasonably designed to assure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met. Such written policies and procedures must require the Member to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of this rule, and (ii) monitor whether orders entered as Retail Orders meet the applicable requirements. If the RMO represents Retail Orders from another broker-dealer customer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from such broker-dealer customer that it designates as Retail Orders meet the definition of a Retail Order. The RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each broker-dealer customer that sends it orders to be designated as Retail Orders that entry of such orders as Retail Orders will be in compliance with the requirements of this rule, and (ii) monitor whether its broker-dealer customer's Retail Order flow continues to meet the applicable requirements.[9]

If the Exchange disapproves the application, the Exchange would provide a written notice to the Member. The disapproved applicant could appeal the disapproval by the Exchange as provided in proposed Rule 11.24(d), and/or reapply for RMO status 90 days after the disapproval notice is issued by the Exchange. An RMO also could voluntarily withdraw from such status at any time by giving written notice to the Exchange.

Failure of RMO To Abide by Retail Order Requirements

Proposed Rule 11.24(c) addresses an RMO's failure to abide by Retail Order requirements. If an RMO designates orders submitted to the Exchange as Retail Orders and the Exchange determines, in its sole discretion, that those orders fail to meet any of the requirements of Retail Orders, the Exchange may disqualify a Member from its status as an RMO. When disqualification determinations are made, the Exchange would provide a written disqualification notice to the Member. A disqualified RMO could appeal the disqualification as provided in proposed Rule 11.24(d) and/or reapply for RMO status 90 days after the disqualification notice is issued by the Exchange. *http://www.bloomberglaw.com/s/legal/0d8c2a43fe620ae36f925f9dd67c2081/document/X9RVKVG5GVG0?search32=C9P6UQR5E9FN6PB1E9HMGNRKCLP6QF9849P6AT31D5M20R39E5QMIP39EHSI0S3IDTJN4OBD48KJMERJEHIMQRB5CHFN6PB1E9HMGFB6C5M76P8-fn_8*

Appeal of Disapproval or Disqualification

Proposed Rule 11.24(d) provides appeal rights to Members. If a Member disputes the Exchange's decision to disapprove it as an RMO under Rule 11.24(b) or disqualify it under Rule 11.24(c), such Member (''appellant'') may request, within five business days after notice of the decision is issued by the Exchange, that the Retail Price Improvement Program Panel (''RPI Panel'') review the decision to determine if it was correct.

The RPI Panel would consist of the Exchange's Chief Regulatory Officer (''CRO''), or a designee of the CRO, and two officers of the Exchange designated by the Chief Operating Officer (''COO''). The RPI Panel would review the facts and render a decision within the time frame prescribed by the Exchange. The RPI Panel could overturn or modify an action taken by the Exchange and all determinations by the RPI Panel would constitute final action by the Exchange on the matter at issue.

Retail Liquidity Identifier

Under proposed Rule 11.24(e), the Exchange proposes to disseminate an identifier when RPI interest priced at least $0.001 better than the Exchange's Protected Bid or Protected Offer for a particular security is available in the System (''Retail Liquidity Identifier''). The Retail Liquidity Identifier will be disseminated through consolidated data streams (i.e., pursuant to the Consolidated Tape Association Plan/Consolidated Quotation Plan, or CTA/CQ, for Tape A and Tape B securities, and the Nasdaq UTP Plan for Tape C securities) as well as through proprietary Exchange data feeds.[10] The Retail Liquidity Identifier will reflect the symbol and the side (buy or sell) of the RPI interest, but will not include the price or size of the RPI interest. In particular, CQ and UTP quoting outputs will include a field for codes related to the Retail Price Improvement Identifier. The codes will indicate RPI interest that is priced better than the Exchange's Protected Bid or Protected Offer by at least the minimum level of price improvement as required by the Program.

Retail Order Designations

Under proposed Rule 11.24(f), an RMO can designate how a Retail Order would interact with available contra-side interest as follows. As proposed, a Type 1-designated Retail Order would interact with available contra-side RPI Orders and other price improving liquidity but would not interact with other available contra-side interest in the System or route to other markets. The portion of a Type 1-designated Retail Order that does not execute against contra-side RPI Orders or other price improving liquidity would be immediately and automatically cancelled. A Type 2-designated Retail Order would interact first with available contra-side RPI Orders and other price improving liquidity and then any remaining portion of the Retail Order would be executed as an Immediate or Cancel (''IOC'') Order pursuant to Rule 11.9(b)(1). A Type 2-designated Retail Order can either be submitted as a

[8] For example, a prospective RMO could be required to provide sample marketing literature, Web site screenshots, other publicly disclosed materials describing the retail nature of their order flow, and such other documentation and information as the Exchange may require to obtain reasonable assurance that the applicant's order flow would meet the requirements of the Retail Order definition.

[9] The Exchange or another self-regulatory organization on behalf of the Exchange will review an RMO's compliance with these requirements through an exam-based review of the RMO's internal controls.

[10] The Exchange notes that the Retail Liquidity Identifier for Tape A and Tape B securities will be disseminated pursuant to the CTA/CQ Plan as soon as the Program, if approved, becomes operational. If the Program is approved and becomes operational in the near future, then the Retail Liquidity Identifier for Tape C securities will only be available through the Exchange's proprietary data feeds until approximately October 1, 2012, at which time the identifier will also be available through the consolidated public market data stream for Tape C securities. October 1, 2012 is the date that the processor for the Nasdaq UTP quotation stream anticipates offering the ability to disseminate the Retail Liquidity Identifier and analogous identifiers from other market centers that operate programs similar to the RPI Program.

BATS Only Order [11] or as an order eligible for routing pursuant to Rule 11.13(a)(2). Accordingly, a Type 2-designated Retail Order could interact with other interest in the System and, if designated as eligible for routing, would route to other markets in compliance with Regulation NMS.

Priority and Order Allocation

Under proposed Rule 11.24(g), the Exchange proposes that competing RPI Orders in the same security would be ranked and allocated according to price then time of entry into the System. The Exchange further proposes that executions will occur in price/time priority in accordance with Rule 11.12. Any remaining unexecuted RPI interest will remain available to interact with other incoming Retail Orders if such interest is at an eligible price. Any remaining unexecuted portion of the Retail Order will cancel or execute in accordance with proposed Rule 11.24(f). The following example illustrates this proposed method:

Protected NBBO for security ABC is $10.00–$10.05
User 1 enters an RPI Order to buy ABC at $10.015 for 500
User 2 then enters an RPI Order to buy ABC at $10.02 for 500
User 3 then enters an RPI Order to buy ABC at $10.035 for 500

An incoming Retail Order to sell ABC for 1,000 executes first against User 3's bid for 500 at $10.035, because it is the best priced bid, then against User 2's bid for 500 at $10.02, because it is the next best priced bid. User 1 is not filled because the entire size of the Retail Order to sell 1,000 is depleted. The Retail Order executes against RPI Orders in price/time priority.

However, assume the same facts above, except that User 2's RPI Order to buy ABC at $10.02 is for 100. The incoming Retail Order to sell 1,000 executes first against User 3's bid for 500 at $10.035, because it is the best priced bid, then against User 2's bid for 100 at $10.02, because it is the next best priced bid. User 1 then receives an execution for 400 of its bid for 500 at $10.015, at which point the entire size of the Retail Order to sell 1,000 is depleted.

As a final example, assume the same facts as above, except that User 3's order was not an RPI Order to buy ABC at $10.035, but rather, a non-displayed order to buy ABC at $10.03. The result would be similar to the result immediately above, in that the incoming Retail Order to sell 1,000 executes first against User 3's bid for 500 at $10.03, because it is the best priced bid, then against User 2's bid for 100 at $10.02, because it is the next best priced bid. User 1 then receives an execution for 400 of its bid for 500 at $10.015, at which point the entire size of the Retail Order to sell 1,000 is depleted.

Implementation

The Exchange proposes that all securities traded on the Exchange would be eligible for inclusion in the RPI Program.[12]

The Exchange proposes to limit the Program during the pilot period to trades occurring at prices equal to or greater than $1.00 per share. Toward that end, Exchange trade validation systems would prevent the interaction of RPI buy or sell interest (adjusted by any offset) and Retail Orders at a price below $1.00 per share.[13] For example, if there was RPI buy interest tracking the Protected NBB at $0.99 with an offset of $0.001 and a ceiling of $1.02, Exchange trade validation systems would prevent the execution of the RPI Order at $0.991 with a sell Retail Order with a limit of $0.99. However, if the Retail Order was Type 2 as defined [sic] the Program,[14] it would be able to interact at $0.99 with liquidity outside the Program in the Exchange's order book. In addition to facilitating an orderly [15] and operationally intuitive pilot, the Exchange believes that limiting the Program to trades equal to or greater than $1.00 per share during the pilot will enable it better to focus its efforts to monitor price competition and to assess any indications that data disseminated under the Program is potentially disadvantaging retail orders. As part of that review, the Exchange will produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure.

Comparison to Existing Programs

Proposed BYX Rule 11.24 is based on NYSE Rule 107C, governing NYSE's "Retail Liquidity Program," which was recently approved by the Commission and commenced operations on August 1, 2012.[16] Proposed Rule 11.24 is similar to NYSE Rule 107C with three key distinctions.[17] The first distinction is that NYSE Rule 107C includes a class of participant that is registered as a provider of liquidity and provides specific procedures and rules related to such participants and their role in the NYSE RLP. NYSE Rule 107C does permit all participants to submit RPI Orders to NYSE, but provides the specific class of registered retail liquidity providers with execution fees that are lower than fees charged to other participants in exchange for a requirement to maintain RPI Orders on NYSE at least 5% of the trading day.[18] The Exchange believes that equal treatment for all Exchange Users that enter RPI Orders will result in a higher level of competition and maximize price improvement to incoming Retail Orders. Accordingly, the Exchange has not proposed to adopt a special category of retail liquidity provider.

The second distinction between proposed BYX Rule 11.24 and NYSE Rule 107C is that the Exchange proposes to in all cases execute incoming Retail Orders against resting RPI Orders *and* other resting non-displayed liquidity to

[11] A BATS Only Order is defined in BYX Rule 11.9(c)(4) and includes orders that are not eligible for routing to other trading centers.

[12] The Exchange offers trading of all NMS stocks pursuant to unlisted trading privileges, consistent with Section 12(f) of the Act and Rule 12f–5 thereunder. Accordingly, the Exchange offers trading of securities listed on BATS Exchange, Inc., the New York Stock Exchange LLC, NYSE Arca, Inc., NYSE MKT LLC (formerly the American Stock Exchange), and The NASDAQ Stock Market LLC.

[13] As discussed above, the price of an RPI would be determined by a User's entry of buy or sell interest, an offset (if any) and a ceiling or floor price. The Exchange expects that RPI sell or buy interest typically would track the Protected NBBO.

[14] Type 2 Retail Orders are treated as IOC orders that execute against displayed and non-displayed liquidity in the Exchange's order book where there is no available liquidity in the Program. Type 2 Retail Orders can either be designated as eligible for routing or as BATS Only Orders, and thus non-routable, as described above.

[15] Given the proposed limitation, the pilot Program would have no impact on the minimum pricing increment for orders priced less than $1.00 and therefore no effect on the potential of markets executing those orders to lock or cross. In addition, the non-displayed nature of the liquidity in the Program simply has no potential to disrupt displayed, protected quotes. In any event, the Program would do nothing to change the obligation of exchanges to avoid and reconcile locked and crossed markets under NMS Rule 610(d).

[16] Securities Exchange Act Release No. 67347 (July 3, 2012), 77 FR 40673 (July 10, 2012) (SR–NYSE–2011–55; SR–NYSEAmex–2011–84) (the "RLP Approval Order"). In conjunction with the approval of the NYSE Retail Liquidity Program, a nearly identical program was proposed and approved to operate on NYSE MKT LLC (formerly, the American Stock Exchange). For ease of reference, the comparisons made in this section only refer to NYSE Rule 107C, but apply equally to NYSE MKT Rule 107C.

[17] The Exchange has proposed to accept RPIs in a manner similar to the explicitly accepted method at NYSE and NYSE MKT, specifically, with an offset as well as a ceiling or a floor (i.e., the entry of an RPI bid with an offset of $0.015 and a ceiling of $10.04; when the NBBO is $10.02 by $10.04, an incoming sell order would execute against such RPI at $10.035). The Exchange notes that like NYSE and NYSE MKT, Users will be able to submit retail price improving orders with an explicit sub-penny floor or ceiling and no offset, effectively creating a static sub-penny limit order, and the Exchange has proposed rule text to make this ability clear.

[18] NYSE Rule 107C(f).

maximize the price improvement available to the incoming Retail Order. As proposed, the Exchange will maintain its strict price/time priority model and will provide all available price improvement to incoming Retail Orders, whether such price improvement is submitted pursuant to the Program or as an order type currently accepted by the Exchange, such as non-displayed orders. In contrast, pursuant to NYSE Rule 107C(k)(1), a Type 1-designated Retail Order, ''will interact only with available contra-side Retail Price Improvement Orders and will not interact with other available contra-side interest in Exchange systems.'' [19] Accordingly, other non-displayed orders offering price improvement at prices better than resting RPI interest do not have an opportunity to interact with incoming Retail Orders pursuant to the NYSE RLP. The Exchange is proposing in all cases to provide the maximum price improvement available to incoming Retail Orders. Accordingly, Retail Orders under the Exchange's Program will always interact with available contra-side RPI Orders and any other price improving contra-side interest, in price/time priority consistent with the Exchange's Rule 11.12. Such ''other'' price improving contra-side interest will of course remain available to all participants, as it is today, while RPI Orders will only be available to RMOs, as described above.

Finally, as proposed the Exchange will provide applicable price improvement to incoming Retail Orders at potentially multiple price levels. In contrast, pursuant to NYSE Rule 107C an incoming Retail Order to NYSE will execute at the single clearing price level at which the incoming order will be fully executed. To illustrate, assume the same facts set forth in the second example above, where User 2's RPI Order to buy ABC at $10.02 was for 100 shares. Pursuant to NYSE Rule 107C, an incoming Retail Order to sell 1,000 shares would execute first against User 3's bid for 500 shares, because it is the best priced bid, then against User 2's bid for 100 shares, because it is the next best priced bid, then against 400 of the 500 shares bid by User 1. However, rather than executing at each of these price levels for the number of shares available (i.e., 500 shares at $10.035, 100 shares at $10.02 and 400 shares at $10.015), as it would under proposed BYX Rule 11.24, the Retail Order submitted to NYSE pursuant to NYSE Rule 107C executes at the single clearing price that completes the order's execution, which is $10.015 to complete the entire order to sell 1,000 shares. The Exchange intends to provide all of the price improvement in these examples to the incoming Retail Order, and thus has proposed to execute orders under the Program consistent with its existing price/time market model.

Fee Structure of Program

The Exchange will submit a separate proposal to amend its fee schedule in connection with the proposed RPI Program. Under that proposal, the Exchange expects to charge Users a fee for executions of their RPI Orders against Retail Orders and in turn would provide a credit or free executions to RMOs for executions of their Retail Orders against RPI Orders. The fees and credits for liquidity providers and RMOs will be determined based on experience with the Program in the first several months.

As explained above, the Exchange proposes to execute incoming Retail Orders against all available contra-side interest that will provide price improvement to the Retail Order, including non-displayed orders other than RPI Orders. In the event non-displayed interest other than an RPI Order interacts with a Retail Order, the Exchange anticipates proposing to charge the User that entered such non-displayed interest the same fee as is imposed for an RPI Order execution. In such cases, the fee charged to the User that entered the non-displayed interest will likely be greater than the fee charged that same User for an execution against a non-Retail Order.

2. Statutory Basis

The Exchange believes that its proposal is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange, and, in particular, with the requirements of Section 6(b) of the Act.[20] In particular, the Exchange believes the proposed change furthers the objectives of Section 6(b)(5) of the Act,[21] in that 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 facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional liquidity, and offer the potential for price improvement to retail investors. The Exchange notes that a significant percentage of the orders of individual investors are executed over-the-counter.[22] The Exchange believes that it is appropriate to create a financial incentive to bring more retail order flow to a public market. The Exchange also notes that the Commission recently approved a similar proposal by NYSE and NYSE MKT.[23] Accordingly, the proposal generally encourages competition between exchange venues. In this connection, the Exchange believes that the proposed distinctions between the Exchange's proposal and the approved programs for NYSE and NYSE MKT will both enhance competition amongst market participants and encourage competition amongst exchange venues.

The Exchange understands that Section 6(b)(5) of the Act [24] prohibits an exchange from establishing rules that treat market participants in an unfairly discriminatory manner. However, Section 6(b)(5) of the Act does not prohibit exchange members or other broker-dealers from discriminating, so long as their activities are otherwise consistent with the federal securities laws. Nor does Section 6(b)(5) of the Act require exchanges to preclude discrimination by broker-dealers. Broker-dealers commonly differentiate between customers based on the nature and profitability of their business.

While the Exchange believes that markets and price discovery optimally function through the interactions of diverse flow types, it also believes that growth in internalization has required differentiation of retail order flow from

[19] Moreover, although pursuant to NYSE Rules 107C(k)(2) and 107C(k)(3), a Type 2-designated Retail Order and a Type 3-designated Retail Order can interact with other non-RPI interest in the NYSE systems, such interaction only occurs *after* a Retail Order first executes against RPI Orders. As such, non-displayed orders in NYSE systems offering prices better than resting RPI Orders interact with Retail Orders only after all RPI interest is exhausted.

[20] 15 U.S.C. 78f(b).

[21] 15 U.S.C. 78f(b)(5).

[22] *See* Concept Release on Equity Market Structure, Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594 (January 21, 2010) (noting that dark pools and internalizing broker-dealers executed approximately 25.4% of share volume in September 2009). *See also* Mary L. Schapiro, Strengthening Our Equity Market Structure (Speech at the Economic Club of New York, Sept. 7, 2010) (available on the Commission's Web site). In her speech, Chairman Schapiro noted that nearly 30 percent of volume in U.S.-listed equities was executed in venues that do not display their liquidity or make it generally available to the public and the percentage was increasing nearly every month.

[23] *See* RLP Approval Order, *supra* note 16.

[24] 15 U.S.C. 78f(b)(5).

other order flow types. The differentiation proposed herein by the Exchange is not designed to permit unfair discrimination, but instead to promote a competitive process around retail executions such that retail investors would receive better prices than they currently do through bilateral internalization arrangements. The Exchange believes that the transparency and competitiveness of operating a program such as the RPI Program on an exchange market would result in better prices for retail investors. The Exchange recognizes that sub-penny trading and pricing could potentially result in undesirable market behavior. The Exchange will monitor the Program in an effort to identify and address any such behavior.

The Exchange will separately propose fees applicable to the Program, including fees for non-displayed orders offering price improvement other than RPI Orders that interact with Retail Orders. The Exchange believes any such proposal to treat such non-displayed orders differently depending on the parties with whom they interact is consistent with Section 6(b)(5) of the Act,[25] which requires that the rules of an exchange are not designed to permit unfair discrimination. The Exchange believes that such a differential pricing structure for non-displayed orders is not unfairly discriminatory. As stated in the NYSE RLP Approval Order, the ''Commission has previously recognized that the markets generally distinguish between individual retail investors, whose orders are considered desirable by liquidity providers because such retail investors are presumed on average to be less informed about short-term price movements, and professional traders, whose orders are presumed on average to be more informed.'' [26] The Exchange's proposed differential pricing structure for non-displayed orders raises substantively identical policy considerations as the rules approved by the Commission in the NYSE RLP Approval Order, which account for the difference of assumed information and sophistication level between different trading participants by providing Retail Orders access to better execution prices as well as more favorable access fees.

Finally, the Exchange proposes that the Commission approve the proposed rule for a pilot period of twelve months from the date of implementation, which shall occur no later than 90 days after Commission approval of Rule 11.24. The Program shall expire on [Date will be determined upon adoption of Rule 11.24]. The Exchange believes that this pilot period is of sufficient length to permit both the Exchange and the Commission to assess the impact of the rule change described herein.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Changes and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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*. Please include File No. SR–BYX–2012–019 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 No. SR–BYX–2012–019. 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 changes 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 a.m. and 3 p.m. Copies of such filing will also 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 No. SR–BYX–2012–019 and should be submitted on or before September 21, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[27]

Kevin M. O'Neill,

Deputy Secretary.

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[25] 15 U.S.C. 78f(b)(5).

[26] *See* RLP Approval Order, *supra* note 16, at 40679–40680 (citing Concept Release on Equity Market Structure and approval of an options exchange program related to price improvement for retail orders). Certain options exchanges deploy this same rationale today through pricing structures that vary for a trading participant based on the capacity of the contra-side trading participant. *See, e.g.,* Securities Exchange Act Release No. 63632 (January 3, 2011), 76 FR 1205 (January 7, 2011) (SR–BATS–2010–038) (notice of filing and immediate effectiveness of proposal to modify fees for BATS Options, including liquidity rebates that are variable depending on the capacity of the contra-party to the transaction; *see also* Securities Exchange Act Release No. 67171 (June 8, 2012), 77 FR 35732 (June 14, 2012) (SR–NASDAQ–2012–068) (notice of filing and immediate effectiveness of proposal to modify fees for the NASDAQ Options Market, including certain fees and rebates that are variable depending on the capacity of the contra-party to the transaction).

[27] 17 CFR 200.30–3(a)(12).

SMALL BUSINESS ADMINISTRATION

[Disaster Declaration #13241 and #13242]

Oklahoma Disaster #OK–00063

AGENCY: U.S. Small Business Administration.

ACTION: Notice.