

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95142; No. SR-NYSEArca-2022-36)

June 23, 2022

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Options Fee Schedule

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on June 22, 2022, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) 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 Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Arca Options Fee Schedule (the “Fee Schedule”) regarding fees for Options Trading Permits (“OTPs”) for NYSE Arca Market Makers.⁴ The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ The Exchange originally filed to amend the Fee Schedule on May 31, 2022 (SR-NYSEArca-2022-33) and withdrew such filing on June 14, 2022.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of this filing is to restructure fees relating to OTPs for Market Makers. Specifically, the Exchange proposes to modify the number of option issues a Market Maker may quote per OTP and modify the fees applicable to Market Maker OTPs.

Currently, the number of option issues a Market Maker may quote in their assignment is based on the number of OTPs the Market Maker holds per month. A Market Maker may quote up to 175 issues under its first OTP; up to 350 issues with a second OTP; up to 1,000 issues with a third OTP; and, with a fourth OTP, a Market Maker may quote in all option issues on the Exchange.⁵

The Exchange currently charges monthly fees for Market Maker OTPs as set forth in the table below, and a Market Maker currently would pay \$18,000 in monthly OTP fees to quote in all option issues on the Exchange:⁶

Monthly Fee Per OTP	Number of Option Issues Permitted in Market Maker’s Assignment
\$6,000 for 1 st OTP	Up to 175 option issues

⁵ See Fee Schedule, NYSE Arca GENERAL OPTIONS and TRADING PERMIT (OTP) FEES, available 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%20Arca%20Options%20Fee%20Schedule.pdf). A Market Maker may trade any issue on the Exchange but may only submit quotes in issues in its assignment. However, in accordance with NYSE Arca Rule 6.35-O(i), at least 75% of a Market Maker’s trading activity must be in the Market Maker’s appointment. The terms “assignment” and “appointment,” as used in this filing, have the same meaning.

⁶ See id.

\$5,000 for the 2 nd OTP	Up to 350 option issues
\$4,000 for the 3 rd OTP	Up to 1,000 option issues
\$3,000 for the 4 th OTP	All option issues traded on the Exchange
\$1,000 for the 5 th and additional OTPs	All option issues traded on the Exchange
\$175 for Reserve OTP	N/A

The Exchange proposes to modify the number of option issues “covered” by a Market Maker OTP (i.e., the number of issues in which a Market Maker may quote using a given OTP) and the monthly fee per Market Maker OTP, as set forth in the table below. The Exchange notes that its proposed fee structure is identical to the structure used by its affiliated exchange, NYSE American LLC (“NYSE American”), for its analogous Market Maker trading permit, the ATP, and the proposed modifications to the Exchange’s Market Maker OTP fees would provide consistency between the permit fees on affiliated exchanges.⁷

Number of OTPs	Monthly Fee Per OTP	Number of Issues Permitted in a Market Maker’s Quoting Assignment
1 st OTP	\$8,000	60 plus the Bottom 45%
2 nd OTP	\$6,000	150 plus the Bottom 45%
3 rd OTP	\$5,000	500 plus the Bottom 45%
4 th OTP	\$4,000	1,100 plus the Bottom 45%
5 th OTP	\$3,000	All issues
6 th to 9 th OTP	\$2,000	All issues
10 th or more OTPs	\$500	All issues
Reserve Market Maker OTP	\$175	N/A

⁷ See NYSE American Options Fee Schedule, Section III.A. Monthly ATP Fees, available at: https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.

The Exchange proposes to increase both the monthly fee per Market Maker OTP and the number of issues covered by each additional OTP because, among other reasons, the number of issues traded on the Exchange has increased significantly in recent years. At the time of the last revision to the number of issues covered by a Market Maker OTP, the Exchange was trading approximately 2,372 issues. At the beginning of 2019, the Exchange listed 2,450 issues for options trading. As of October 1, 2021, the Exchange listed 3,846 issues for options trading. Thus, a fourth OTP, which currently permits a Market Maker to quote in all issues on the Exchange, now covers over 1,400 more issues than when the Exchange instituted the current fee structure for Market Maker OTPs. Accordingly, the Exchange proposes to modify its Market Maker OTP fee structure, as described in the above table, to reflect the greater number of issues traded on the Exchange and the resulting increase in trading opportunities available to Market Makers.

Specifically, for the first four OTPs held by a Market Maker, the Exchange proposes to allow a Market Maker to quote a certain number of option issues (as set forth in the table above) plus the “Bottom 45%.” The Exchange proposes to define the “Bottom 45%” in the Fee Schedule as the least actively traded issues on the Exchange in each calendar quarter, as ranked by industry volume reported by the OCC. Each calendar quarter, with a one-month lag, the Exchange will publish on its website a list of the Bottom 45% of issues traded. Any newly listed issues will automatically become part of the Bottom 45% until the next evaluation period, at which time such issues will be evaluated for inclusion in the Bottom 45% based on their trading volumes and resultant rank among all issues traded on the Exchange.⁸ As further proposed, with a fifth OTP (or more), a Market Maker would be permitted to quote in all issues on the Exchange. Thus, as proposed, a Market Maker that wishes to quote in all issues on the Exchange would incur monthly permit fees of \$26,000.

The Exchange believes that the proposed fee structure would better align its Market Maker OTP fees with the significantly greater number of option issues traded on the Exchange in recent years and the enhanced benefits Market Makers derive from access to those issues. The Exchange also believes that the proposal would continue to incent Market Makers to quote in a broad range of options, including less liquid and active issues, by offering Market Makers access to the Bottom 45% of issues (approximately 1,730 issues, as of the end of the third quarter of 2021) beginning with the first OTP. By promoting increased Market Maker quoting, the proposed change would, in turn, encourage more liquid markets and quote competition, which benefits all market participants.

⁸ The Exchange notes that the NYSE American Options Fee Schedule has adopted the same definition of “Bottom 45%” with respect to issues traded on NYSE American. See id.

The Exchange also proposes to charge the same fee for each of the sixth through ninth Market Maker OTPs (\$2,000) and to decrease the fee for the tenth Market Maker OTP or more from \$1,000 to \$500. Market Maker firms that sponsor multiple individual Market Makers may choose to purchase additional OTPs to allow those individual Market Makers to each quote more issues (rather than purchasing one set of OTPs to be shared across the firm).⁹ As a result, the Exchange believes that these proposed changes could incent Market Maker firms to have more individual Market Makers quoting on the Exchange if they so choose, which would in turn encourage liquidity and depth of markets (including in the less liquid issues that Market Makers would be able to quote in with the first OTP and beyond). The Exchange also believes that the proposed fees, to the extent they promote increased liquidity, could make the Exchange a more attractive venue for trading and increase trading opportunities for the benefit of all market participants.

The Exchange does not propose any changes to the monthly fee for Reserve Market Maker OTPs.

The Exchange proposes to implement this fee change on the first day of the month following the completion of its migration to the Pillar technology platform.¹⁰

⁹ For example, a Market Maker firm that has three individual Market Makers may, depending on its business preferences, choose to separate those Market Makers into three distinct trading groups. In that case, for each of those individual Market Makers to be able to submit quotes in all issues traded on the Exchange, the Market Maker firm would need to allot five OTPs to each such individual Market Maker (and would thus need to hold 15 OTPs total).

¹⁰ The Exchange has announced that it will begin migrating Exchange-listed options to the Pillar technology platform on July 11, 2022, [available here](https://www.nyse.com/trader-update/history#110000421498): <https://www.nyse.com/trader-update/history#110000421498>. See also Securities Exchange Act Release Nos. 93193 (September 29, 2021), 86 FR 55926 (October 7, 2021) (SR-NYSEArca-2021-47) (Notice of Filing of Proposed Rule Change for New Rules 6.1P-O, 6.37AP-O, 6.40P-O, 6.41P-O, 6.62P-O, 6.64P-O, 6.76P-O, and 6.76AP-O and Amendments to Rules 1.1, 6.1-O, 6.1A-O, 6.37-O, 6.65A-O and 6.96-O); 94637 (April 7,

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹¹ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹² 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 Proposed Rule Change is 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. 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.”¹³

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options

2022), 87 FR 21959 (April 13, 2022) (SR-NYSEArca-2021-68) (Notice of Filing of Amendment Nos. 1 and 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, to Adopt New Exchange Rule 6.91P-O).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(4) and (5).

¹³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

trades.¹⁴ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in March 2022, the Exchange had less than 14% market share of executed volume of multiply-listed equity and ETF options trades.¹⁵

Accordingly, the Exchange believes that competitive forces constrain options exchange fees, including Market Maker permit fees. Market Makers serve a unique and important function on the Exchange (and other options exchanges) given the quote-driven nature of options markets. Because options exchanges rely on actively quoting Market Makers to facilitate a robust marketplace that attracts order flow, options exchanges must attract and retain Market Makers, including by setting competitive Market Maker permit fees. Stated otherwise, changes to Market Maker permit fees can have a direct effect on the ability of an exchange to compete for order flow. The Exchange also believes that the number of options exchanges on which Market Makers can effect option transactions also ensures competition in the marketplace and constrains the ability of exchanges to charge supracompetitive fees for access to its market by Market Makers.

Accordingly, the Exchange believes the proposed fees for Market Maker OTPs are reasonably designed to enable the Exchange to remain competitive with other options exchanges because they are based on the Market Maker trading permit fees assessed by another options

¹⁴ The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: <https://www.theocc.com/Market-Data/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics>.

¹⁵ Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see id., the Exchange's market share in equity-based options was 10.16% for the month of March 2021 and 13.57% for the month of March 2022.

exchange and are significantly lower than the Market Maker trading permit fees assessed by at least one other options exchange for the ability to quote in all issues.¹⁶ As noted above, a Market Maker would pay monthly OTP fees of \$26,000 to quote in all issues under the Exchange's proposal, which is the same amount charged by NYSE American for a Market Maker on the NYSE American Options exchange to quote in all issues.¹⁷

Although the Exchange's proposed restructuring of Market Maker OTP fees would increase the monthly fee for the first through third OTPs, the Exchange believes that the increased cost to Market Makers is reasonable given that a greater number of issues would be covered by an OTP, as proposed. The Exchange also believes the proposal is reasonable in that it offers Market Makers the ability to quote issues in the Bottom 45% with just one OTP, which

¹⁶ See NYSE American Options Fee Schedule, note 7, *supra*; Cboe Exchange, Inc. ("Cboe") Options Fee Schedule, Electronic Trading Permit Fees & Market-Maker EAP Appointments Sliding Scale, available at: https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf. It is the Exchange's understanding that a Market Maker on Cboe would incur monthly fees of approximately \$128,400 to quote in all issues. Based on the Exchange's interpretation of Cboe's fee structure and rules governing Market Maker appointments, a Cboe Market Maker would be subject to a \$5,000 fee to secure a trading permit and additional fees based on the Appointment Units corresponding to the symbol(s) in which the Market Maker wishes to quote. See Cboe Rule 5.50, Market-Maker Appointments, available at: https://cdn.cboe.com/resources/regulation/rule_book/C1_Exchange_Rule_Book.pdf (providing that a Market Maker may select for each of its Trading Permits any combination of class appointments, and that all classes are placed within a specific tier according to trading volume statistics (except for the AA tier) and assigned an "appointment weight" depending upon its tier location, and setting forth the appointment weights applicable to each of its Appointment Tiers). Thus, by the Exchange's calculation based on Cboe's published Class Appointment Units effective as of February 1, 2022 (available at: https://www.cboe.com/us/options/market_statistics/class_appointment/), a Market Maker that wishes to quote in all issues on Cboe would require 39 Appointment Units, which would result in fees of \$123,400 in addition to the \$5,000 trading permit fee.

¹⁷ See NYSE American Options Fee Schedule, note 7, *supra*. The Exchange notes that NYSE American Options' ATP fees have been in effect since 2012, and, presumably, are reasonable as required by the Act. See Securities Exchange Act Release No. 67764 (August 31, 2012), 77 FR 55254 (September 7, 2012).

the Exchange believes would encourage increased quoting in those issues, thereby promoting increased quote competition and liquidity in a greater number of issues (and, in particular, less active issues).

The Exchange also believes that, although the proposal would increase the fee for the fourth OTP while reducing the number of issues that a Market Maker would be permitted to quote with four OTPs, the increased fees are reasonable in the context of the proposed restructuring of OTP fees, as well as in light of the overall increase in issues listed on the Exchange as compared to when the Exchange implemented the current fee structure for OTPs. Similarly, while the proposed fees for the fifth through ninth OTPs would increase while still affording Market Makers the ability to quote in all issues on the Exchange, the Exchange believes that the increase is likewise reasonable in the context of the proposed restructuring of OTP fees and reflects the increased number of issues traded on the Exchange and corresponding enhanced opportunities for trading, as discussed above.

Thus, although the fees for certain of the monthly Market Maker OTPs would increase in relation to the number of issues “covered” by such OTP, the Exchange believes that, on balance, the proposed restructuring is reasonably and equitably designed to align its Market Maker OTP fees with the current level of activity on the Exchange, while continuing to incent Market Makers to quote in a broad range of options, thereby promoting more liquid markets and quote competition for the benefit of all market participants. Specifically, the Exchange believes that, to the extent the proposed change increases the monthly fees per Market Maker OTP, such increases reasonably reflect the significantly greater number of issues traded on the Exchange since its last revision of the Market Maker OTP fee structure and the resulting enhancement in trading opportunities for Market Makers, even with the same number of OTPs. Moreover, with

respect to the proposed increase in fees for the first through third Market Maker OTPs, the Exchange believes the proposed change is reasonable in light of the significantly increased number of issues that would be covered by those OTPs, which would allow a Market Maker to quote a greater number of issues with the same number of OTPs. The Exchange further believes that the proposed change would continue to incent Market Makers to quote in a broad range of options, including the less active issues in the Bottom 45%, thereby improving market quality for all market participants.

The Exchange also believes that the proposed fees have been reasonably designed in response to significant competitive forces in the market for order flow, which constrain the Exchange's pricing determinations, including with respect to Market Maker permit fees. Courts have long recognized that the market for order flow is competitive; for example, in NetCoalition v. SEC, the United States Court of Appeals for the D.C. Circuit noted that market participants "have a wide range of choices of where to route orders for execution" and that because "no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow...[exchanges] must compete vigorously for order flow to maintain [their] share of trading volume."¹⁸ The Commission has historically examined competitive forces to evaluate whether proposed fees are reasonable, equitable, and not unfairly discriminatory, based on the underlying belief that "the operation of competitive forces 'will work powerfully to constrain unreasonable or unfair pricing behavior, including the level of any fees.'"¹⁹

Market Makers are free to choose to access any of the other available options exchanges

¹⁸ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (internal citations omitted).

¹⁹ See U.S. Securities and Exchange Commission, "Staff Guidance on SRO Rule Filings Relating to Fees" (May 21, 2019), available at: <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

instead of, or in addition to, the Exchange. A Market Maker's decision to access an exchange or not could be based on several criteria, including, but not limited to, the level of permit fees, and Market Makers may take into consideration transaction fees and other costs and benefits associated with doing business on a given exchange when determining whether to access such market. For example, although Market Makers on the Exchange are subject to OTP fees that other market participants are not assessed, the Exchange's Fee Schedule also offers various incentives to Market Makers based on the important function they serve on the Exchange.²⁰

Competitive forces thus constrain the Exchange's ability to set Market Maker OTP fees and militate against any exchange's ability to charge supracompetitive fees for access to its market by Market Makers. Specifically, the Exchange believes that its Market Maker OTP fees are constrained by competitive considerations because unreasonable permit fees could discourage prospective Market Makers from choosing to access the Exchange or cause existing Market Makers to reevaluate their participation on the Exchange. If the Exchange were to set Market Maker OTP fees at a level that would disincentivize Market Makers from quoting and trading on the Exchange or cause Market Makers to disconnect from the Exchange altogether, such attrition would impact the Exchange's ability to compete with other options exchanges for order flow and make the Exchange a less attractive venue for trading.

As noted above, there are currently 16 registered options exchanges that trade options; one such exchange has Market Maker permit fees identical to those proposed by the Exchange, and at least one other has Market Maker permit fees much higher than those proposed by the Exchange.²¹ Furthermore, relatively low barriers to entry mean that new exchanges may rapidly

²⁰ See, e.g., Market Maker Incentive for Penny Issues; Market Maker Incentive for Non-Penny Issues; Market Maker Incentives for SPY.

²¹ See note 16, supra.

and inexpensively enter the market and offer additional substitute platforms that would also compete with the Exchange for Market Maker order flow. For example, four exchanges have been added in the U.S. options markets in the last five years (Cboe EDGX, Inc.; Nasdaq MRX, LLC; MIAX Pearl, LLC; and MIAX Emerald, LLC). Based on publicly available information, no single options exchange currently has more than 16% of the market share. The Exchange is also not aware of any evidence that has been offered or demonstrated that a market share of less than 14% provides the Exchange with anti-competitive pricing power. Moreover, the Exchange believes that the fact that its market share changes from month to month demonstrates that the competitive forces to which it is subject. As noted above, while the Exchange's market share as of March 2022 was 13.57%, its market share was 10.16% in March 2021 and fluctuated between 9.07% and 13.99% in the intervening period.²²

The Exchange further believes that its ability to set Market Maker permit fees is constrained by competitive forces based on the fact that Market Makers can, and have, chosen to terminate their status as a Market Maker if they deem Market Maker permit fees to be unreasonable or excessive. Specifically, the Exchange notes that a BOX participant modified its access to BOX in connection with the implementation of a proposed change to BOX's Market Maker permit fees.²³ The Exchange has also observed that another options exchange group

²² See note 15, *supra*.

²³ According to BOX, a Market Maker on BOX terminated its status as a Market Maker in response to BOX's proposed modification of Market Maker trading permit fees. See Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC Facility to Adopt Electronic Market Maker Trading Permit Fees). BOX noted, and the Exchange agrees, that this Market Maker's decision demonstrates that Market Makers can, and do, alter their membership status if they deem permit fees at an exchange to be unsuitable for their business needs, thus demonstrating the competitive environment for Market Maker permit fees and the constraints on options exchanges when setting Market Maker permit

experienced decreases in market share following its proposed modifications of its access fees (including Market Maker trading permit fees), suggesting that market participants (including Market Makers) are sensitive to changes in exchanges' access fees and may respond by shifting their order flow elsewhere if they deem the fees to be unreasonable or excessive.²⁴

There is no requirement, regulatory or otherwise, that any Market Maker connect to and access any (or all of) the available options exchanges.²⁵ The Exchange also is not aware of any reason why a Market Maker could not cease being a permit holder in response to unreasonable price increases. The Exchange does not assess any termination fee for a Market Maker to drop its OTP, nor is the Exchange aware of any other costs that would be incurred by a Market Maker to do so.

For the reasons described above, the Exchange believes that its ability to modify Market Maker OTP fees is constrained by competitive forces and that its proposed modifications to the Market Maker OTP fee structure are reasonably designed in consideration of the competitive

fees.

²⁴ The Exchange observed that exchanges in the MIAX Group introduced multiple access fee increases in July and August 2021. In June 2021, prior to these fee increases, the aggregate MIAX Group share of multi-list options volume was 15.45%. In the months after the introduction of higher access fees, MIAX Group's market share declined: by September 2021, the aggregate MIAX Group market share was 14.50%, and as of March 2022, market share was 13.75%.

²⁵ The Exchange notes that, according to BOX, of the 62 market making firms that are registered as Market Makers across Cboe, Miami International Securities Exchange, LLC, and BOX, 42 firms access only one of the three exchanges. See Securities Exchange Act Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). The Exchange believes that BOX's observation demonstrates that market making firms can, and do, select which exchanges they wish to access, and, accordingly, options exchanges must take competitive considerations into account when setting fees for such access.

environment in which the Exchange operates, by balancing the value of the enhanced benefits available to Market Makers due to the current level of activity on the Exchange with a fee structure that will continue to incent Market Makers to support increased liquidity, quote competition, and trading opportunities on the Exchange, for the benefit of all market participants.

The Proposed Rule Change is an Equitable Allocation of Credits and Fees and is not Unfairly Discriminatory

The proposed change is equitable and not unfairly discriminatory because it applies to all Market Makers, all of whom are required to have at least one OTP to correlate to the options issues in their assignments. The Exchange further believes that the proposed change is not unfairly discriminatory to Market Makers because only Market Makers are required to submit quotes as part of their obligations to operate on the Exchange. The Exchange also believes that, to the extent the proposal increases fees that only apply to Market Makers, the proposed change is equitable and not unfairly discriminatory given both the benefits to Market Makers derived from the increased number of issues on the Exchange and the function that Market Makers fulfill on the Exchange (which requires the Exchange to allocate more supporting bandwidth and resources, particularly in light of the greater number of issues in which Market Makers can quote).²⁶

The Exchange also believes that the proposed change is equitable and not unfairly discriminatory because it is designed to encourage Market Makers to quote additional issues, including less active issues, which would promote more liquid markets and quote competition, to the benefit all market participants. The Exchange further believes that, to the extent the proposed change results in increased monthly fees, such increases represent an equitable allocation of fees

²⁶ The Exchange also notes that the Fee Schedule provides for various incentives to Market Makers (that are not available to other market participants). See note 20, supra.

in the context of the proposed restructuring of Market Maker OTP fees, as well as in consideration of the increased number of issues traded on the Exchange since its last revision of the Market Maker OTP fee structure, which in turn has increased trading opportunities for Market Makers on the Exchange.

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,²⁷ 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. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."²⁸

Intramarket Competition. The Exchange does not believe that the proposed rule change would impose an undue burden on competition because it impacts all Market Makers, all of whom require at least one OTP to satisfy their quoting obligations on the Exchange. The Exchange also does not believe that the proposed change would impose any burden on competition that is not necessary or appropriate, as Market Makers fulfill a unique role on the

²⁷ 15 U.S.C. 78f(b)(8).

²⁸ See Reg NMS Adopting Release, supra note 13, at 37499.

Exchange; only Market Makers are required to submit quotes as part of their obligations to operate on the Exchange, and, in light of that role, are eligible for certain incentives that are not offered to other market participants.²⁹ While the proposed change generally increases fees for Market Maker OTPs, the Exchange does not believe that it imposes any burden on competition that is not necessary or appropriate because it would align Market Maker OTP fees with the current level of activity and benefits available to Market Makers on the Exchange and, by continuing to incent Market Makers to quote in a broad range of options, would promote quote competition and trading opportunities on the Exchange. In addition, the Exchange believes that the proposed change, to the extent it expands the number of covered issues per Market Maker OTP, would encourage increased liquidity, quote competition, and trading opportunities on the Exchange, which in turn would benefit all market participants.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing options exchanges if they deem fee levels at a particular venue to be excessive. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades. Therefore, the Exchange believes that no exchange currently possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. The Exchange also believes that the number of options exchanges on which a Market Maker can transact also ensures competition in the marketplace and constrains the ability of exchanges to charge supracompetitive fees to Market Makers for access to its market. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges.

²⁹ See note 20, supra.

The Exchange does not believe the proposed rule change would impose any undue burden on intermarket competition and instead believes that the proposal would promote competition among options exchanges. Specifically, the Exchange believes that its proposed fee structure for Market Maker OTPs would promote competition because, as discussed above, it would be identical to the Market Maker permit fees assessed by another options exchange and remains significantly lower than the Market Maker permit fees assessed by another options exchange for the ability to quote in all issues.³⁰ Thus, the Exchange believes that the proposed change would not discourage Market Makers from continuing to quote in a broad range of options, thereby supporting increased liquidity, quote competition, and trading opportunities on the Exchange, which in turn could make the Exchange a more attractive venue for market participants.

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)³¹ of the Act and subparagraph (f)(2) of Rule 19b-4³² 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

³⁰ See note 16, *supra*.

³¹ 15 U.S.C. 78s(b)(3)(A).

³² 17 CFR 240.19b-4(f)(2).

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)³³ 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. Please include File Number SR-NYSEArca-2022-36 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-2022-36. 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

³³ 15 U.S.C. 78s(b)(2)(B).

website viewing and printing in the Commission’s Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 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-2022-36, 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.³⁴

J. Matthew DeLesDernier,
Assistant Secretary.

³⁴ 17 CFR 200.30-3(a)(12).