SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96374; File No. SR-NYSEARCA-2022-78)

November 22, 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 Concerning the Options Regulatory Fee

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 November 14, 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 ("Fee Schedule") regarding the Options Regulatory Fee ("ORF"), effective November 14, 2022.[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 previously filed to amend the Fee Schedule on September 28, 2022 (SR-NYSEARCA-2022-65) and withdrew such filing on November 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 Exchange proposes to amend the Fee Schedule to (1) waive the ORF for the period November 1, 2022 through January 31, 2023; (2) eliminate the requirement that the Exchange may only modify the ORF semi-annually; and (3) delete outdated language relating to the ORF for August 30, 2019 (the "August 2019 ORF").

Background

As a general matter, the Exchange may only use regulatory funds such as the ORF "to fund the legal, regulatory, and surveillance operations" of the Exchange.[5] More specifically, the ORF is designed to recover a material portion, but not all, of the Exchange's costs for the supervision and regulation of OTP Holders and OTP Firms (collectively, "OTP Holders"), including the Exchange's regulatory program and legal expenses associated with options, such as the costs related to in-house staff, third-party service providers, and technology that facilitate surveillance, investigation, examinations and enforcement (collectively, the "ORF Costs"). ORF funds may also be used for indirect expenses such as human resources and other administrative costs. The Exchange monitors the amount of revenue collected from the ORF to ensure that this revenue, in combination with other regulatory fees and fines, does not exceed regulatory costs.

---

5 The Exchange considers surveillance operations part of regulatory operations. The limitation on the use of regulatory funds also provides that they shall not be distributed. See Bylaws of NYSE Arca, Inc., Art. II, Sec. 2.06.

The ORF is assessed on OTP Holders for options transactions that are cleared by the OTP Holder through the Options Clearing Corporation ("OCC") in the Customer range regardless of the exchange on which the transaction occurs.[6] All options transactions must clear via a clearing firm and such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca,[7] the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such OTP Holders. In addition, the Exchange notes that the costs relating to monitoring OTP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring OTP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating OTP Holders that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the OTP Holder's relationship with its Customers via more labor-intensive exam-based programs.[8] As a result, the costs associated with

---

6 See Fee Schedule, NYSE Arca GENERAL OPTIONS and TRADING PERMIT (OTP) FEES, Regulatory Fees, Options Regulatory Fee ("ORF"), available here, https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf.

7 See id. The Exchange uses reports from OCC when assessing and collecting the ORF. The ORF is not assessed on outbound linkage trades. An OTP Holder is not assessed the fee until it has satisfied applicable technological requirements necessary to commence operations on NYSE Arca. See id.

8 The Exchange notes that many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such as surveillance for position limit violations, manipulation, front-running and contrary exercise advice violations/expiring exercise declarations. The Exchange and other options SROs are parties to a 17d–2 agreement allocating among the SROs regulatory responsibilities relating to compliance by the common members with rules for expiring

administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., OTP Holder proprietary transactions) of its regulatory program.

ORF Collections and Monitoring of ORF

Exchange rules establish that the Exchange may only increase or decrease the ORF semi-annually, that any such fee change will be effective on the first business day of February or August, and that market participants must be notified of any such change via Trader Update at least 30 calendar days prior to the effective date of the change.[9]

Because the ORF is based on options transactions volume, the amount of ORF collected is variable. For example, if options transactions reported to OCC in a given month increase, the ORF collected from OTP Holders will likely increase as well. Similarly, if options transactions reported to OCC in a given month decrease, the ORF collected from OTP Holders will likely decrease as well. Accordingly, the Exchange monitors the amount of ORF collected to ensure that it does not exceed the ORF Costs. If the Exchange determines the amount of ORF collected exceeds costs over an extended period, the Exchange may adjust the ORF by submitting a fee change filing to the Securities and Exchange Commission (the "Commission").

Temporary ORF Waiver

Based on the Exchange's recent review of regulatory costs and ORF collections, the Exchange proposes to waive the ORF from November 1, 2022 through January 31, 2023 in order to help ensure that the amount collected from the ORF, in combination with other regulatory fees

exercise declarations, position limits, OCC trade adjustments, and Large Option Position Report reviews. See, e.g., Securities Exchange Act Release No. 85097 (February 11, 2019), 84 FR 4871 (February 19, 2019).

9 See Fee Schedule, supra note 6.

and fines, does not exceed the Exchange's total regulatory costs. The Exchange proposes to resume assessing the ORF on February 1, 2023 at the current rate of $0.0055 per contract. The Exchange notified OTP Holders of the proposed change to the ORF via Trader Update on September 29, 2022 (which was at least 30 calendar days prior to the proposed operative date of the waiver, November 1, 2022) so that market participants have an opportunity to configure their systems to account for the waiver of the ORF. The Exchange's proposal to waive the ORF for the month of January 2023 would similarly provide OTP Holders with additional time in the new year to make any necessary adjustments or preparations for the resumption of the ORF effective February 1, 2023.

The proposed waiver is based on recent options volumes. The options industry has continued to experience extremely high options trading volumes and volatility, and options volume in 2022 remains high, particularly when compared to options volume in 2019 and 2020. The persisting increased options volumes have, in turn, impacted the Exchange's ORF collection.

For example, total average daily volume in 2022, to date, is 115% higher than total average daily volume in 2019, and customer average daily volume in 2022, to date, is 123% higher than customer average daily volume in 2019. Below is industry data from OCC[10] illustrating the significant increase in options volume between 2019 and 2022:

	2019	**2020**	**2021**	**2022**

10 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. The volume discussed in this filing is based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, in contract sides.

Customer ADV	15,234,198	25,598,023	34,730,276	33,939,560
Total ADV	35,083,673	55,369,993	74,339,870	75,497,647

In addition, the below industry data from OCC demonstrates the high options trading volumes (especially when compared to 2019 and 2020) and volatility that the industry has continued to experience in 2022:

	April 2022	**May 2022**	**June 2022**	**July 2022**	**August 2022**	**September 2022**
Customer ADV	33,266,801	34,202,077	31,469,858	30,506,706	33,013,156	34,149,000
Total ADV	73,140,597	76,254,734	70,628,926	68,535,963	73,487,342	77,134,470

Because of the sustained impact of the unprecedented trading volumes that have persisted through 2021 and 2022, along with the difficulty of predicting when volumes may return to more normal levels, the Exchange proposes to waive the ORF from November 1, 2022 through January 31, 2023 to help ensure that ORF collection will not exceed ORF Costs for 2022. The Exchange cannot predict whether options volume will remain at these levels going forward and projections for future regulatory costs are estimated, preliminary, and may change. However, the Exchange believes that the proposed waiver of the ORF would allow the Exchange to continue to monitor the amount collected from the ORF to help ensure that ORF collection, in combination with other regulatory fees and fines, does not exceed regulatory costs without the need to account for any ORF collection during that timeframe. The Exchange proposes to resume assessing the current ORF rate of $0.0055 per contract side as of February 1, 2023.

<u>Semi-Annual Changes to ORF</u>

As noted above, the Fee Schedule currently specifies that the Exchange may only increase or decrease the ORF semi-annually and that any such fee change will be effective on the first business day of February or August.[11] NYSE Arca proposes to eliminate this requirement to afford the Exchange increased flexibility in amending the ORF.[12] Although the Exchange proposes to eliminate the requirement to adjust the ORF only semi-annually, it would continue to submit a proposed rule change for each modification of the ORF and notify OTP Holders of any planned change to the ORF by Trader Update at least 30 calendar days prior to the effective date of such change. The Exchange believes that the prior notification to OTP Holders will provide guidance on the timing of any changes to the ORF and ensure that OTP Holders are prepared to configure their systems to properly account for the ORF. The Exchange will also issue a Trader Update informing OTP Holders of the ORF adjustment proposed in this filing, as described below, at least 30 calendar days prior to the proposed effective date.

August 2019 ORF

The Exchange proposes to delete language in the Fee Schedule pertaining to the August 2019 ORF, which was relevant only for the August 30, 2019 trading day and thus no longer reflects a fee currently assessed by the Exchange. The Exchange believes this change would improve the clarity of the Fee Schedule by removing obsolete language.

2. Statutory Basis

---

11 See Fee Schedule, supra note 6.

12 The Exchange notes that at least one other options exchange has previously removed this requirement with respect to adjusting the ORF. See, e.g., Securities Exchange Act Release No. 76950 (January 21, 2016), 81 FR 4687 (January 27, 2016) (SR-NASDAQ-2016-003) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Options Regulatory Fee).

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)[13] of the Act, in general, and Section 6(b)(4) and (5)[14] of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposal is Reasonable

The Exchange believes the proposed temporary waiver of the ORF is reasonable because it would help ensure that collections from the ORF do not exceed a material portion of the Exchange's ORF Costs. As noted above, the Exchange may only use regulatory funds such as ORF "to fund the legal, regulatory, and surveillance operations" of the Exchange.[15] In this regard, the ORF is designed to recover a material portion, but not all, of the Exchange's ORF Costs.

Although there can be no assurance that the Exchange's final costs for 2022 will not differ materially from its expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward, the Exchange believes that the amount collected based on the current ORF rate, when combined with regulatory fees and fines, may result in collections in excess of the estimated ORF Costs for the year. Particularly, as noted above, the options market has continued to experience unanticipated and elevated volumes in 2022, particularly as compared to 2019 and 2020, due in large part to the continued extreme volatility in the marketplace as a result of the COVID-19 pandemic. This

---

13 15 U.S.C. 78f(b).

14 15 U.S.C. 78f(b)(4) and (5).

15 See note 5, supra.

unprecedented spike in volatility, which has persisted through 2021 and 2022, resulted in significantly higher volume than was originally projected by the Exchange, thereby resulting in substantially higher ORF collections than projected (particularly as compared to ORF Costs, which had been projected to decrease in 2022). The Exchange therefore believes that it would be reasonable to waive ORF from November 1, 2022 through January 31, 2023 to help ensure that ORF collection does not exceed the ORF Costs for 2022.[16] Particularly, the Exchange believes that waiving the ORF from November 1, 2022 to January 31, 2023 and taking into account all of the Exchange's other regulatory fees and fines would allow the Exchange to continue covering a material portion of ORF Costs, while lessening the potential for generating excess funds that may otherwise occur using the current rate. The Exchange would resume assessing its current ORF ($0.0055 per contract) as of February 1, 2023. The Exchange also believes that resumption of the ORF at the current rate on February 1, 2023 (unless the Exchange determines it necessary to adjust the ORF rate to help ensure that ORF collections do not exceed ORF Costs) is reasonable because it would permit the Exchange to resume collecting an ORF that is designed to recover a material portion, but not all, of the Exchange's projected ORF Costs. The Exchange would continue monitoring in advance of the resumption of the ORF and when ORF collection resumes on February 1, 2023 and, if the Exchange determines that, in light of projected volumes and ORF Costs, the ORF rate should be modified to help ensure that ORF collections would not exceed ORF Costs, adjust the ORF by submitting a filing a proposed rule change and notifying OTP Holders of such change by Trader Update.

---

16 The Exchange's proposal to also waive the ORF for the month of January 2023 would provide OTP Holders with additional time in the new year to make any necessary adjustments or preparations for the resumption of the ORF effective February 1, 2023.

The Exchange believes that the proposed elimination of language specifying that the Exchange may only increase or decrease the ORF semi-annually and that any such fee change must be effective on the first business day of February or August is reasonable because it is designed to afford the Exchange increased flexibility in making necessary adjustments to the ORF, as the Exchange is required to monitor the amount collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed ORF Costs. The Exchange also believes the proposed change is reasonable because the Exchange will continue to provide market participants with 30 days advance notice of changes to the ORF, thereby providing OTP Holders with adequate time to make any necessary adjustments to accommodate the change.

The Exchange also believes that the proposed deletion of language relating to the August 2019 ORF is reasonable because it would remove obsolete language and thus improve the clarity of the Fee Schedule.

<u>The Proposal is an Equitable Allocation of Fees</u>

The Exchange believes its proposal is an equitable allocation of fees among its market participants. The Exchange believes that the proposed waiver would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion ORF Costs among such OTP Holders. In addition, the Exchange notes that the costs relating to monitoring OTP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring OTP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating OTP Holders that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the OTP Holder's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., OTP Holder proprietary transactions) of its regulatory program. Thus, the Exchange believes that a temporary waiver of the ORF is an equitable allocation of fees because it would apply equally to all OTP Holders on all their transactions that clear in the Customer range at the OCC. The Exchange also believes that recommencing the ORF on February 1, 2023 at the current rate, unless the Exchange determines it necessary to adjust the ORF to ensure that ORF collections do not exceed ORF Costs, is equitable because the Exchange would resume assessing an ORF designed to recover a material portion, but not all, of the Exchange's projected ORF Costs, and the ORF would likewise resume applying equally to all OTP Holders on options transactions in the Customer range.

The Exchange also believes that the proposed change to eliminate the requirement that the Exchange modify the ORF only semi-annually in February or August is equitable because the change would impact all OTP Holders subject to the ORF uniformly, and all OTP Holders would continue to receive at least 30 days' advance notice of changes to the ORF. The proposed change to remove language relating to the August 2019 ORF is also equitable because it would eliminate language from the Fee Schedule that is no longer applicable to any OTP Holders.

The Proposed Fee is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes that the proposed waiver of the ORF would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such OTP Holders. In addition, the Exchange notes that the costs relating to monitoring OTP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring OTP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating OTP Holders that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the OTP Holder's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., OTP Holder proprietary transactions) of its regulatory program. Thus, the Exchange believes the temporary waiver of the ORF and the proposed modification of language relating to the Exchange's ability to modify the ORF are not unfairly discriminatory because the changes would apply to all OTP Holders subject to the ORF and the Exchange would provide all such OTP Holders with 30 days' advance notice of planned changes to the ORF. The Exchange also believes that recommencing the ORF on February 1, 2023 at the current rate, unless the Exchange determines it necessary to adjust the ORF to ensure that ORF collections do not exceed ORF Costs, is not unfairly discriminatory because the Exchange would resume assessing an ORF designed to recover a material portion, but not all, of the Exchange's projected ORF Costs, and the ORF would resume applying equally to all OTP Holders based on their transactions that clear in the Customer range at the OCC.

The Exchange believes that the proposed change to eliminate the semi-annual change requirement is not unfairly discriminatory because the change would apply to all OTP Holders subject to the ORF. Furthermore, all OTP Holders would continue to be notified of changes to the ORF at least 30 days prior to the effectiveness of any such change. The proposed change to remove language relating to the August 2019 ORF is also not unfairly discriminatory because it would eliminate language from the Fee Schedule describing a fee that was effective only for August 30, 2019 and thus no longer impacts any OTP Holders.

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.

Intramarket Competition. The Exchange believes the proposed change would not impose an undue burden on competition because the ORF is charged to all OTP Holders on all their transactions that clear in the Customer range at the OCC; thus, the amount of ORF imposed is based on the amount of Customer volume transacted. The Exchange believes that the proposed temporary waiver of the ORF would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. In addition, because the ORF is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such OTP Holders. The Exchange also believes recommencing the ORF on February 1, 2023 at the current rate (unless the Exchange determines it necessary at that time to adjust the ORF to ensure that ORF collections do not exceed ORF Costs) would not impose an undue burden on competition because it would permit the Exchange to resume collecting an ORF that is designed to recover a material portion, but not all, of the Exchange's projected ORF Costs and the ORF would, as currently, apply to all OTP Holders on their options transactions that clear in the Customer range at the OCC. The Exchange further believes that the proposed change to remove the semi-annual requirement would not impose any burden on competition because the change would impact all OTP Holders subject to the ORF, and the Exchange will continue to provide advance notice of changes to the ORF to all OTP Holders via Trader Update. The Exchange also believes that the proposed change to eliminate language relating to the August 2019 ORF would not impact intramarket competition because it would simply add clarity to the Fee Schedule by removing text describing a fee that is no longer effective.

Intermarket Competition. The proposed fee change is not designed to address any competitive issues. Rather, the proposed change is designed to help the Exchange adequately fund its regulatory activities while seeking to ensure that total collections from regulatory fees do not exceed total regulatory costs and to promote clarity in the Fee Schedule by deleting obsolete text.

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)[17] of the Act and subparagraph (f)(2) of Rule 19b-4[18] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[19] 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 No. SR-NYSEARCA-2022-78 on the subject line.

---

17 15 U.S.C. 78s(b)(3)(A).

18 17 CFR 240.19b-4(f)(2).

19 15 U.S.C. 78s(b)(2)(B).

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 No. SR-NYSEARCA-2022-78. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F 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 No. SR-NYSEARCA-2022-78, 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.[20]

Sherry R. Haywood

Assistant Secretary

---

[20] 17 CFR 200.30-3(a)(12).