

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-86960; File No. SR-NYSEAMER-2019-35)

September 13, 2019

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Amending the NYSE American Options Fee Schedule by Revising the Options Regulatory Fee

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on August 30, 2019, NYSE American LLC (“NYSE American” 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 American Options Fee Schedule (“Fee Schedule”) by revising the Options Regulatory Fee (“ORF”) and notice language related to the ORF, effective August 30, 2019. The proposed change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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

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

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 revise the ORF charged solely for the August 30, 2019 trading day and to modify language regarding notice requirements for any changes to the ORF, effective August 30, 2019.

Background regarding the ORF

As a general matter, the Exchange may only use regulatory funds such as ORF “to fund the legal, regulatory, and surveillance operations” of the Exchange.<sup>4</sup> More specifically, the ORF is designed to recover a material portion, but not all, of the Exchange’s regulatory costs for the supervision and regulation of ATP Holders (the “ATP Regulatory Costs”). The majority of the ATP Regulatory Costs are direct expenses, such as the costs related to in-house staff, third-party service providers, and technology. The direct expenses support the day-to-day regulatory work relating to the ATP Holders, including surveillance, investigation, examinations and enforcement. Such direct expenses represent approximately 91% of the Exchange’s total ATP Regulatory Costs. The indirect expenses include human resources and other administrative costs.

The ORF is assessed on ATP Holders for options transactions that are cleared by the ATP Holder through the Options Clearing Corporation (“OCC”) in the Customer range regardless of

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<sup>4</sup> 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 Twelfth Amended and Restated Operating Agreement of NYSE American LLC, Article IV, Section 4.05 and Securities Exchange Act Release No. 79114 (October 18, 2016), 81 FR 73117 (October 24, 2016) (SR-NYSEMKT-2013-93).

the exchange on which the transaction occurs.<sup>5</sup> 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 ATP Holder clearing firms by the OCC on behalf of NYSE American,<sup>6</sup> the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such ATP Holders. In addition, the Exchange notes that the regulatory costs relating to monitoring ATP Holders with respect to Customer trading activity are generally higher than the regulatory costs associated with ATP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating ATP 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 ATP Holder's relationship with its Customers via more labor-intensive exam-based programs.<sup>7</sup> As a result, the costs associated with administering the customer component of the Exchange's overall

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<sup>5</sup> See Fee Schedule, Section VII, Regulatory Fees, Options Regulatory Fee ("ORF"), available [here](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf), [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf).

<sup>6</sup> See *id.* The Exchange uses reports from OCC when assessing and collecting the ORF. The ORF is not assessed on outbound linkage trades. An ATP Holder is not assessed the fee until it has satisfied applicable technological requirements necessary to commence operations on NYSE American. See *id.*

<sup>7</sup> 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 exercise declarations, position limits, OCC trade adjustments, and Large Option Position Report reviews. See, e.g., Securities Exchange Act Release No. 61588 (February 25, 2010).

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

#### ORF Revenue 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.<sup>8</sup>

Because the ORF is based on options transactions volume, ORF revenue to the Exchange is variable. For example, if options transactions reported to OCC in a given month increase, the ORF collected from ATP Holders will increase as well. Similarly, if options transactions reported to OCC in a given month decrease, the ORF collected from ATP Holders will decrease as well. Accordingly, the Exchange monitors the amount of revenue collected from the ORF to ensure that this revenue does not exceed regulatory costs. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Securities and Exchange Commission (the “Commission”).

#### OIP and Current Proposal

In July 2019, the Exchange filed to lower the ORF to \$0.0054 (from \$0.0055) per contract side for the remainder of 2019 in response to increased options transaction volumes in 2018, which reverted (in part) in the first half of 2019 (the “July ORF Filing”).<sup>9</sup> However, on August 30, 2019, the Commission issued the Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Modify the Options

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<sup>8</sup> See Fee Schedule, *supra* note 5.

<sup>9</sup> See Securities Exchange Act Release No. 86391 (July 16, 2019), 84 FR 35165 (July 22, 2019) (SR-NYSEAMER-2019-27).

Regulatory Fee (the “OIP”).<sup>10</sup> As a result of the OIP, on August 30, 2019, the last trading day of the month, the ORF reverted back to \$0.0055 (from \$0.0054).

To ensure consistency of ORF assessments for the full month of August 2019, the Exchange proposes to modify the Fee Schedule to specify that the amount of ORF that will be collected by the Exchange for the trading day of August 30, 2019 will be \$0.0054 per contract side (the “August 30<sup>th</sup> ORF Rate”).<sup>11</sup> The Exchange believes that revenue generated from the ORF, including the August 30<sup>th</sup> ORF Rate, will continue to cover a material portion, but not all, of the Exchange’s regulatory costs.

Per the current Fee Schedule, the Exchange is required to notify participants via a Trader Update of any change in the amount of the fee at least 30 calendar days prior to the effective date of the change;<sup>12</sup> however, given the OIP, the Exchange proposes to modify this requirement with the following caveat: “except in the case of the August 30<sup>th</sup> ORF rate change.”<sup>13</sup>

For avoidance of doubt, the Exchange notes that the August 30<sup>th</sup> Rate applies for that day only and as a result of the OIP, the ORF effective September 3, 2019 will be \$0.0055 -- the rate in place prior to the (now suspended) July ORF Filing.

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<sup>10</sup> See Securities and Exchange Release No. 86832 (August 30, 2019) (SR-NYSEAMER-2019-27).

<sup>11</sup> See proposed Fee Schedule, Section VII, Regulatory Fees, ORF. This proposal is not intended to be responsive to the issues raised in the OIP, but to instead address the immediate issue of billing for August 30<sup>th</sup>.

<sup>12</sup> See Fee Schedule, Section VII, Regulatory Fees, ORF.

<sup>13</sup> See proposed Fee Schedule, Section VII, Regulatory Fees, ORF.

Finally, The Exchange proposes to delete obsolete language in the ORF rule text, regarding Mini Options, which was inadvertently not eliminated when the Exchange filed a “clean up” fee filing to remove all such references.<sup>14</sup>

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)<sup>15</sup> of the Act, in general, and Section 6(b)(4) and (5)<sup>16</sup> 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 August 30<sup>th</sup> ORF Rate is reasonable because it would help maintain fair and orderly markets and benefit investors and the public interest because it would ensure transparency and consistency of ORF for August 2019. Specifically, the proposal would ensure that the amount of ORF collected by the Exchange for the trading day of August 30, 2019 will be the same rate collected on every other trading day in August (i.e., \$0.0054 per contract side). The Exchange believes this will avoid disruption to its OTP Holders and OTP Firms that are subject to the ORF. As noted above, the Exchange may only use regulatory funds such as ORF “to fund the legal, regulatory, and surveillance operations” of the Exchange.<sup>17</sup>

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<sup>14</sup> See id. See also Securities Exchange Act Release No. 84603 (November 14, 2018), 83 FR 58795 (November 21, 2018) (NYSEAmer-2018-48) (filing to eliminate obsolete charges, including removing obsolete references to fees for Mini Options).

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

<sup>16</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>17</sup> See supra note 4.

The Exchange believes that the proposal deleting outdated reference to products no longer traded (i.e., Mini Options) is reasonable as it would streamline the Fee Schedule by removing superfluous language thereby making the Fee Schedule easier for market participants to navigate.<sup>18</sup>

#### The Proposal is an Equitable Allocation of Fees

The Exchange believes its proposal is an equitable allocation of fees among its market participants. The Exchange believes that the proposed August 30<sup>th</sup> ORF Rate 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 ATP Holder clearing firms by the OCC on behalf of NYSE American, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such ATP Holders. In addition, the Exchange notes that the regulatory costs relating to monitoring ATP Holders with respect to Customer trading activity are generally higher than the regulatory costs associated with ATP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating ATP 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 ATP 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-

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<sup>18</sup> See supra note 14.

customer component (e.g., ATP Holder proprietary transactions) of its regulatory program. Thus, the Exchange believes the August 30<sup>th</sup> ORF (like the rate assessed for every other trading day in August 2019) would be equitably allocated in that it is charged to all OTP Holders or OTP Firms on all their transactions that clear in the Customer range at the OCC.

The Proposed Fee is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes that the proposed August 30<sup>th</sup> ORF Rate 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 ATP Holder clearing firms by the OCC on behalf of NYSE American, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such ATP Holders. In addition, the Exchange notes that the regulatory costs relating to monitoring ATP Holders with respect to Customer trading activity are generally higher than the regulatory costs associated with ATP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating ATP 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 ATP 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., ATP Holder proprietary transactions) of its regulatory program. Thus, the Exchange believes the August 30<sup>th</sup> ORF Rate

(like the rate assessed for every other trading day in August 2019), is not unfairly discriminatory because it is charged to all OTP Holders or OTP Firms on all their transactions that clear in the Customer range at the OCC.

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. 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 fee change would not impose an undue burden on competition as it is charged to all ATP 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 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 ATP Holder clearing firms by the OCC on behalf of NYSE American, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such ATP Holders.

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 regulatory revenues do not exceed total regulatory costs.

Finally, the Exchange does not believe that the proposed deletion of obsolete references to Mini Options would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act as these changes are not intended to address any competitive issues and would instead add more specificity, clarity and transparency regarding this functionality.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>19</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>20</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>21</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

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<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f)(2).

<sup>21</sup> 15 U.S.C. 78s(b)(2)(B).

#### IV. Solicitation of Comments

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

##### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEAMER-2019-35 on the subject line.

##### Paper Comments:

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

All submissions should refer to File No. SR-NYSEAMER-2019-35. 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, D.C. 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-NYSEAMER-2019-35, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

Jill M. Peterson  
Assistant Secretary

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<sup>22</sup> 17 CFR 200.30-3(a)(12).