

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89483; File No. SR-NYSEAMER-2020-62)

August 5, 2020

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Amend the NYSE American 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 August 3, 2020, 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”) regarding qualifications for rebates for initiating a Customer Best Execution Auction. The Exchange proposes to implement the fee change effective August 3, 2020. The proposed 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.

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 modify the Fee Schedule regarding the qualifications for a rebate for initiating a Customer Best Execution (“CUBE”) auction, whether Single-Leg or Complex (collectively, “CUBE Orders”).

In brief, the proposed changes are designed to encourage ATP Holders to increase their initiating CUBE volume while maintaining a meaningful level of Electronic volume in the “Professional” range.⁴ Specifically, the Exchange proposes to increase the qualification level to earn a rebate on initiating CUBE volume while lowering the minimum qualifying level for Professional volume.

The Exchange proposes to implement the rule changes on August 3, 2020.

Background

The Exchange has established various pricing incentives designed to encourage increased Electronic volume executed on the Exchange, including (but not limited to) the American Customer Engagement (“ACE”) Program and the Professional Step-Up Incentive Program. The Exchange also offers an ACE Initiating Participant Rebate to participants in the ACE Program that initiate Single-Leg or Complex CUBE Auctions as well as an alternative to the ACE

⁴ For purposes of this filing, “Professional” volume includes Electronic volume from the following: Professional Customer, Broker Dealer, Non-NYSE American Options Market Maker, and Firm (the “Professional volume”).

Initiating Participant Rebate -- the Alternative Initiating Participant Rebate -- that enables non-ACE Program participants to qualify for a rebate on certain initiating Single-Leg or Complex CUBE Orders provided they meet certain Professional volume requirements and increase their initiating CUBE volume.

As discussed further below, the Exchange is proposing to modify the qualification levels for the Alternative Initiating Participant Rebate to continue to encourage ATP Holders to increase their initiating CUBE Orders and to maintain a meaningful level of Professional volume. Because volume executed in Electronic auction mechanisms, such as the CUBE, has increased across the industry, the Exchange believes the proposed change would encourage more participants to try to achieve the Alternative Initiating Participant Rebate by directing more auction-eligible order flow to the Exchange.⁵ To the extent that this proposed change to the incentive results in that additional flow, the increased liquidity on the Exchange would result in enhanced market quality for all participants.

Proposed Rule Change

CUBE Auction Fees & Credits: CUBE Initiating Participant Rebates

Section I.G. of the Fee Schedule sets forth the rates for per contract fees and credits for executions associated with Single-Leg and Complex CUBE Auctions (together, “CUBE Auctions”).⁶ To encourage participants to utilize CUBE Auctions, the Exchange offers rebates on certain initiating CUBE volume, including an Alternative Initiating Participant Rebate, which applies to each of the first 5,000 contracts per Single-Leg CUBE Order or to each of the first

⁵ A daily analysis of OPRA trade codes indicates that auction volume has increased from 19.2% of all options industry volume at the end of 2019 to 23.4% at the end of June 2020. See, e.g., <https://www.nyse.com/data-insights/q2-2020-options-review>.

⁶ See Section I.G. of the Fee Schedule, CUBE Auction Fees & Credits.

1,000 contracts per leg of a Complex CUBE Order and is available to ATP Holders that do not qualify for or participate in the ACE Program.⁷ Currently, to qualify for the Alternative Initiating Participant Rebate in a Single-Leg or Complex CUBE Auction, an ATP Holder must execute a minimum of 10,000 contracts ADV in Professional volume and increase their Initiating Single-Leg CUBE Orders by the greater of 20% over their August 2019 volume or 10,000 contracts ADV.⁸ An ATP Holder that qualifies for both the ACE Initiating Participant Rebate (which is (\$0.12) for Single-Leg CUBE orders and (\$0.10) for Complex CUBE Orders) and the Alternative Initiating Participant Rebate (which is (\$0.10)) is entitled the greater of the two rebates.⁹

The Exchange proposes to modify the qualification levels to earn the (\$0.10) per contract Alternative Initiating Participant Rebate in a Single-Leg or Complex CUBE Auction by decreasing the minimum required Professional volume from 10,000 ADV to 5,000 ADV, while increasing the required amount of Initiating Single-Leg CUBE Orders to the greater of 40% over their August 2019 volume or 15,000 ADV (from 20% over August 2019 or 10,000 ADV, respectively).¹⁰ As is the case today, an ATP Holder that qualifies for both the ACE Initiating Participant Rebate and the Alternative Initiating Participant Rebate is entitled only to one of the two rebates; however both of these Initiating Participant Rebates are available in addition to other CUBE Auction-related credits set forth in the Fee Schedule. The Exchange is not proposing to alter the amount of the rebate at this time.

⁷ See id., note 2 to each of Single-Leg and Complex CUBE table.

⁸ See id.

⁹ See id.

¹⁰ See proposed Section I.G. of the Fee Schedule, CUBE Auction Fees & Credits, Complex CUBE Auction, note 2.

The Exchange's fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those with similar incentive programs.¹¹ Thus, ATP Holders have a choice of where they direct their order flow, including auction volume which, as noted above, has increased in the last year, and Professional volume.

To the extent that the proposed modification encourages the submission of CUBE Orders, all market participants stand to benefit from increased liquidity and opportunities for price improvement. The proposed change also continues to offer ATP Holders an additional incentive to direct Professional order flow to the Exchange.¹² Because the ACE Initiating Participant Rebate and the Alternative Initiating Participant Rebate are tied to Customer (ACE) and Professional (Alternative) order flow -- in addition to initiating CUBE volume, the Exchange believes all market participants stand to benefit from increased order flow, which promotes market depth, facilitates tighter spreads and enhances price discovery.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of

¹¹ See e.g., Cboe Exchange Inc. ("Cboe"), Fee Schedule, Volume Incentive Program (VIP), available here, https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf (providing per contract credits for volume executed in Cboe's complex price improvement auction) and MIAX Options fee schedule, Section 1.a.iv, Professional Rebate Program, available here, https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_04012019.pdf (setting forth per contract credits on volume submitted for the account of Public Customers that are not Priority Customers, Non-MIAX Market Makers, Non-Member Broker Dealers, and Firms (collectively, Professional for purposes of MIAX program), provided the Member achieves certain Professional volume increase percentage thresholds (set forth in the schedule) in the month relative to the fourth quarter of 2015).

¹² See, e.g., Fee Schedule, Section I. H, Professional Step-up Incentive (offering discounted rates on monthly Professional volume for ATP Holders that increase their Professional volume by specified percentages of TCADV over their August 2019 volume -- or, for new ATP Holders that increase such volume by a specified percentages of TCADV above 10,000 contracts ADV).

the Act,¹³ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹⁴ 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.”¹⁵

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 trades.¹⁶ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in June 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4) and (5).

¹⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

¹⁶ 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/volume/default.jsp>.

trades.¹⁷

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise, changes to exchange transaction fees and rebates can have a direct effect on the ability of an exchange to compete for order flow including auction volume which, as noted above, has increased in the last year.

Given the increase in auction volume since late 2019, the Exchange believes it is reasonable to raise the required increase in initiating Single-Leg CUBE volume from 20% to 40% over that ATP Holder's 2019 volume and to likewise raise the alternative minimum "greater of" qualification basis from 10,000 to 15,000 contracts ADV.¹⁸ The Exchange believes these changes are commensurate with the overall increase in industry auction volume. At the same time, the Exchange believes it is reasonable to reduce minimum required Professional volume from 10,000 ADV to 5,000 ADV as this makes this (non-auction related) aspect of the rebate requirement easier to achieve, while still encouraging ATP Holders to direct a meaningful level of Professional volume to the Exchange, which should provide additional incentive (to the Professional Step-Up Incentive Program) to direct such order flow to the Exchange.¹⁹

¹⁷ Based on OCC data, see id., the Exchange's market share in equity and ETF-based options increased slightly from 8.20% for the month of June 2019 to 8.32% for the month of June 2020.

¹⁸ See supra note 5 (regarding an increase in auction volume from 19.2% of all options industry volume at the end of 2019 to 23.4% at the end of June 2020).

¹⁹ See supra note 12 (regarding discounted rates offered via the Professional Step-up Incentive).

This proposed change is designed to encourage ATP Holders to participate in the CUBE Auctions and to further increase their initiating Single-Leg CUBE Orders or minimum ADV to qualify for the rebate. The Exchange believes that modifying the qualification bases to achieve the CUBE Alternative Initiating Participant Rebate may encourage greater use of the CUBE Auctions by all ATP Holders, which may lead to greater opportunities to trade -- and for price improvement -- for all participants. And, for ATP Holders that already execute some Professional Volume, the initial qualification as modified, should be easier to achieve, thus encouraging the ATP Holder to increase the amount of auction volume directed to the Exchange.

The Exchange notes that all market participants stand to benefit from increased transaction volume, as such increase promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants that do not participate in (or qualify for) the Professional Step-Up Incentive (or the ACE) program.

Finally, to the extent the proposed changes attract greater volume and liquidity, the Exchange believes the proposed changes would improve the Exchange's overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the Exchange operates, the proposed rule changes are a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors. The proposed rule change is designed to continue to incent ATP Holders to direct liquidity to the Exchange in Electronic executions, similar to other exchange programs with competitive pricing programs, thereby promoting market depth, price discovery and improvement and enhancing order execution opportunities for market participants.²⁰

²⁰ See, e.g., supra note 11 (Cboe VIP program and regarding MIAX Professional Rebate

The Proposed Rule Change is an Equitable Allocation of Fees and Rebates

The Exchange believes the proposed rule change is an equitable allocation of its fees and rebates. The proposal is based on the amount and type of business transacted on the Exchange and ATP Holders can opt to avail themselves of these incentives or not. Moreover, the proposal is designed to continue to encourage ATP Holders to aggregate their executions at the Exchange as a primary execution venue. To the extent that the proposed change attracts more CUBE volume to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

The Proposed Rule Change is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory because the proposed modifications would be available to all similarly-situated market participants on an equal and non-discriminatory basis. The Exchange's proposed modification to qualify for the CUBE Alternative Initiating Participant Rebate is designed to encourage greater use of the CUBE Auctions, which may lead to greater opportunities to trade -- and for price improvement -- for all participants.

The proposals are based on the amount and type of business transacted on the Exchange and ATP Holders are not obligated to try to achieve the incentive pricing option. Rather, the proposals are designed to encourage participants to utilize the Exchange as a primary trading venue (if they have not done so previously) or increase Electronic volume sent to the Exchange.

Program).

To the extent that the proposed change attracts more executions to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

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

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would 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 changes further 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."²¹

²¹ See Reg NMS Adopting Release, supra note 15, at 37499.

Intramarket Competition. The proposed change is designed to continue to attract order flow to the Exchange by offering competitive rates and rebates (via the CUBE Alternative Initiating Participant Rebate) based on increased volumes on the Exchange, which would enhance the quality of quoting and may increase the volumes of contracts traded on the Exchange. To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

Intermarket Competition. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.²² Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in June 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.²³

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees and rebates in a manner designed to encourage ATP Holders to direct trading interest to the Exchange, to provide liquidity and to

²² See supra note 15.

²³ Based on OCC data, supra note 17, the Exchange's market share in equity-based options was 8.20% for the month of June 2019 and 8.32% for the month of June 2020.

attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange believes that the proposed changes could promote competition between the Exchange and other execution venues, including those that currently offer similar pricing incentives, by encouraging additional orders to be sent to the Exchange for execution.

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)²⁴ of the Act and subparagraph (f)(2) of Rule 19b-4²⁵ 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)²⁶ 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

²⁴ 15 U.S.C. 78s(b)(3)(A).

²⁵ 17 CFR 240.19b-4(f)(2).

²⁶ 15 U.S.C. 78s(b)(2)(B).

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-NYSEAMER-2020-62 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-NYSEAMER-2020-62. 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 Number SR-NYSEAMER-2020-62 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.²⁷

J. Matthew DeLesDernier
Assistant Secretary

²⁷ 17 CFR 200.30-3(a)(12).