

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90410; File No. SR-NYSEAMER-2020-80)

November 12, 2020

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Amend the NYSE American Options Fee Schedule regarding the Amount of Rebates for Initiating a Complex Customer Best Execution Auction

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 2, 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 the amount of rebates for initiating a Complex Customer Best Execution Auction. The Exchange proposes to implement the fee change effective November 2, 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 certain of the credits available to Initiating Participants in a Complex Customer Best Execution (“CUBE”) auctions.⁴ The Exchange proposes to implement the rule changes on November 2, 2020.

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.⁵ To encourage participants to utilize Complex CUBE Auctions, the Exchange offers rebates and credits on certain initiating Complex CUBE volume. Currently, the Exchange offers credit to the Initiating Participant for each contract in a Complex Contra Order paired with a Complex CUBE Order that does not trade with the Complex CUBE Order because it is replaced in the auction.⁶ The Exchange offers an alternative enhanced Initiating Participant credit to ATP Holders that qualify for Tier 5 of the

⁴ See generally Rule 971.2NY (regarding Complex CUBE Auctions). Unless otherwise specified, capitalized terms have the same meaning as the defined terms in Rule 971.2NY.

⁵ See Fee Schedule, Section I.G., CUBE Auction Fees & Credits.

⁶ See id., Complex CUBE Auction, note 1 (setting forth the available credit for ATP Holders that achieve one of the five ACE Tiers). The Exchange proposes to correct a typographical error in the last sentence of note 1 to the Complex CUBE Auction table to change the reference to “an alternative Initiating Participant Credits” from plural to singular, which would add clarity and transparency to the Fee Schedule. See proposed Fee Schedule, Section I.G., CUBE Auction Fees & Credits Complex CUBE Auction, note 1.

American Customer Engagement (“ACE”) Program⁷ and also execute more than 1% TCADV in monthly Initiating Complex CUBE Orders -- (\$0.45) per contract for Penny issues and (\$0.90) per contract for Non-Penny issues (the “Enhanced Initiating Credit”).⁸

The Exchange proposes to modify (reduce) the Enhanced Initiating Credit to (\$0.38) per contract for Penny issues and (\$0.80) per contract for Non-Penny issues and to amend the Fee Schedule to reflect this change.⁹ As noted above, volume executed in Electronic auction mechanisms, such as the Complex CUBE, has increased across the industry. As such, the Exchange believes that, even with the proposed reduction, the Enhanced Initiating Credit would still encourage participants to try to achieve this Credit by directing more auction-eligible Complex order flow to the Exchange.¹⁰

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 for auction participants.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.

⁷ See Fee Schedule Section I.E., American Customer Engagement (“ACE”) Program.

⁸ See Fee Schedule, Section I.G., Complex CUBE Auction, note 1. ATP Holders that achieve ACE Tier 5 but do not satisfy the monthly Initiating Complex CUBE Order volume requirement receive a (\$0.35) per contract for Penny issues and (\$0.75) per contract for Non-Penny issues. See Fee Schedule, Section I.G., Complex CUBE Auction, Initiating Participant Credit table (setting forth credit for Tier 5).

⁹ See proposed Fee Schedule, Section I.G., CUBE Auction Fees & Credits Complex CUBE Auction, note 1.

¹⁰ 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>.

¹¹ See e.g., Cboe Exchange Inc. (“Cboe”), Fee Schedule, Break-Up Credits, available here, https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf (providing per contract credits for Agency volume executed against noncustomer, non-Market Maker AIM response in Cboe’s complex price improvement auction).

To the extent that the proposed modification continues to encourage the submission of Complex CUBE Orders, all market participants stand to benefit from increased liquidity and opportunities for price improvement. Because the Enhanced Initiating Credit is tied to Customer (ACE) order flow -- in addition to initiating Complex 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 the Act,¹² in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,¹³ 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.”¹⁴

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

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.¹⁵ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.¹⁶

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.

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. In particular, the Exchange believes it is reasonable to adjust the Enhanced Initiating Credit for Complex

¹⁵ 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>.

¹⁶ Based on OCC data, *see id.*, the Exchange's market share in equity and ETF-based options increased from 7.73% for the month of August 2019 to 8.18% for the month of August 2020.

CUBE orders downward as such credits remain consistent with credits offered by competing options exchanges for initiating auction participants and account for the increase in auction volume since late 2019.¹⁷

The proposed change is reasonably designed to continue to encourage ATP Holders to participate in the Complex CUBE Auctions and to further increase their initiating Complex CUBE Orders or maintain their ACE Tier level (i.e., Tier 5) to qualify for the Credit. The Exchange believes that maintaining the qualification bases to achieve the Complex CUBE Enhanced Initiating Credit should continue to 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. In addition, ATP Holders that qualify for the proposed Enhanced Initiating Credit must achieve ACE Tier 5 - the highest ACE Tier. Because the ACE Program is based on the amount of Customer business transacted on the Exchange, the Exchange believes the proposed change would continue to incentivize providers of Customer order flow to direct that order flow to the Exchange to receive greater Complex CUBE credits in a manner that enables the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants.

Further, the Exchange believes that even with the proposed reduction, the Credit would continue to attract more volume and liquidity to the Exchange generally, and to Complex CUBE Auctions specifically, and would therefore benefit all market participants (including those that do not participate in the ACE Program) through increased opportunities to trade at potentially improved prices as well as enhancing price discovery. In addition, the proposed change would

¹⁷ See, e.g., supra notes 10 and 11 (regarding increase in industry-wide auction volumes and Cboe's Break-Up Credits, respectively).

continue to encourage ATP Holders to direct Complex Order volume to the Exchange, specifically via the Complex CUBE mechanism, which benefits all markets participants, particularly those that receive price improvement on their Complex Orders.

Finally, to the extent the proposed changes maintain greater volume and liquidity, the Exchange believes the proposed changes would continue to 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 maintain its market share relative to its competitors.

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 credits. 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 encourage ATP Holders to aggregate their executions at the Exchange as a primary execution venue. To the extent that the proposed change continues to attract more Complex CUBE (and Customer) 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, therefore, continue to 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 the Enhanced

Initiating Credit is designed to continue to encourage greater use of the Complex CUBE Auctions, which may lead to greater opportunities to trade -- and for price improvement -- for all participants.

The proposal is 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 proposal is designed to continue 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. To the extent that the proposed change continues to attract 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 continue to improve market quality for all market participants on the Exchange and, therefore, attract more order flow to the Exchange thereby improving market-wide quality and price discovery. The resulting volume and liquidity would continue to 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 continue to 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.”¹⁸

Intramarket Competition. The proposed change is designed to continue to attract order flow to the Exchange by offering competitive rates and credits (via the Complex CUBE Enhanced Initiating Credit) 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 Exchange market participants should benefit from the continued market liquidity. Enhanced market quality and increased transaction volume that results from the 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 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.¹⁹ Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August

¹⁸ See Reg NMS Adopting Release, supra note 14, at 37499.

¹⁹ See supra note 15.

2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.²⁰

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 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.²¹

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)²² of the Act and subparagraph (f)(2) of Rule 19b-4²³ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

²⁰ Based on OCC data, supra note 16, the Exchange's market share in equity-based options increased from 7.73% for the month of August 2019 to 8.18% for the month of August 2020.

²¹ See, e.g., supra note 11 (regarding Cboe's Break-Up Credits).

²² 15 U.S.C. 78s(b)(3)(A).

²³ 17 CFR 240.19b-4(f)(2).

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)²⁴ 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-NYSEAMER-2020-80 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-2020-80. 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

²⁴ 15 U.S.C. 78s(b)(2)(B).

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 Number SR-NYSEAMER-2020-80, 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.²⁵

J. Matthew DeLesDernier
Assistant Secretary

²⁵ 17 CFR 200.30-3(a)(12).