

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-90956; File No. SR-NYSEAMER-2021-03)

January 21, 2021

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the NYSE American Options Fee Schedule

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 January 13, 2021, 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 credit for certain American Customer Engagement (“ACE”) Program Simple transactions. The Exchange proposes to implement the fee change effective January 13, 2021. The proposed rule 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 purpose of this filing is to modify the Fee Schedule regarding a certain credit available to ACE Program participants who also have an affiliated or appointed Market Maker that participates in the Prepayment Program.<sup>4</sup> The Exchange proposes to implement the rule change on January 13, 2021.

Section I.E. of the Fee Schedule sets forth the per contract credits applicable to Simple and Complex executions for participants in the ACE Program. Currently, the Exchange offers a range of credits to ACE Program participants for each electronic Customer contract, including certain credits available to participants with affiliated or appointed Market Makers that prepay their Market Maker fees. The credits are tiered based on increasing levels of Customer Electronic Average Daily Volume ("ADV") or, for Tiers 3 through 5, Total Electronic ADV, of which 20% of the qualifying volume for the Tier must be Customer volume.

The Exchange proposes to modify the Fee Schedule to amend the per contract credit applicable to Tier 5 Simple executions by Order Flow Providers that have an affiliated or appointed Market Maker that prepays its Market Maker Fees (the "Credit"). Specifically, the Exchange proposes to modify the amount of the Credit from (\$0.24) per contract to (\$0.23) per

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<sup>4</sup> See Fee Schedule, Section I.D., Prepayment Program.

contract.<sup>5</sup> Because the volume of Electronic executions has increased across the industry, the Exchange believes the proposed change would still encourage more participants to try to achieve the Credit by directing more order flow to the Exchange.

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 another exchange with similar incentive programs.<sup>6</sup> Thus, ATP Holders have a choice of where they direct their order flow, including Electronic volume.

To the extent that the proposed modification to the Credit continues to encourage Customer order flow and Market Makers to prepay their fees, all market participants stand to benefit from both increased Customer order flow to achieve the Credit and continued Market Maker participation to take advantage of having pre-paid their fees. 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,<sup>7</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>8</sup> 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

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<sup>5</sup> See proposed Fee Schedule, Section I.E., American Customer Engagement ("ACE") Program Table.

<sup>6</sup> See, e.g., Cboe Exchange Inc. ("Cboe"), Fee Schedule, Volume Incentive Program, available at: [https://cdn.cboe.com/resources/membership/Cboe\\_FeeSchedule.pdf](https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf) (providing per contract credits based on volume tiers in Simple and Complex executions).

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4) and (5).

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.”<sup>9</sup>

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.<sup>10</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in November 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.<sup>11</sup>

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

<sup>10</sup> 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>.

<sup>11</sup> Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see id., the Exchange’s market share in multiply-listed equity and ETF options increased from 8.06% for the month of November 2019 to 9.09% for the month of November 2020.

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 credits can have a direct effect on the ability of an exchange to compete for order flow.

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 Credit downward, as the Credit would remain consistent with those offered by a competing options exchange for electronic participants.<sup>12</sup>

The proposed change is reasonably designed to continue to encourage ATP Holders to participate in both the ACE Program and in the Market Maker Prepayment Program and to achieve ACE Tier 5 (the highest ACE Tier) to qualify for the Credit. The Exchange believes that otherwise maintaining the qualification bases to achieve the ACE Tier credits should also continue to encourage greater use of the Exchange by all ATP Holders, which may lead to greater opportunities to trade -- and for price improvement -- for all participants. Because the ACE Program is based on the amount of Customer business transacted on the Exchange, the Exchange believes the proposed change to decrease the Credit would still continue to incent providers of Customer order flow to direct that order flow to the Exchange. In addition, ATP Holders' affiliated or appointed Market Makers will also continue to be incented to compete to

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<sup>12</sup> See, e.g., supra note 6 (regarding Cboe's VIP Program).

make markets 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 this proposed change would continue to attract more volume and liquidity to the Exchange generally, and more Customer volume 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 and enhanced opportunities for price discovery. In addition, the proposed change would continue to encourage ATP Holders to have affiliated or appointed Market Makers prepay their Market Maker fees, which in turn encourages the Market Makers to conduct business and to make competitive markets on the Exchange, to the benefit of all markets participants.

Finally, to the extent the proposed change encourages greater volume and liquidity, the Exchange believes the proposed change 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 change is 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 Credits

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 the incentives available through the ACE and Market Maker Prepayment Programs or not. The proposal is also designed to encourage ATP Holders and their affiliated or appointed parties to aggregate their executions at the Exchange as a primary execution venue. Moreover, to the extent that the proposed change continues to attract more Market Maker prepay activity 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, 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 modification would be available to all similarly-situated market participants on an equal and non-discriminatory basis.

The proposal is based on the amount and type of business transacted on the Exchange and ATP Holders are not obligated to try to qualify for the credits available to ACE or Market Maker Prepayment Program participants. Rather, the Exchange's proposed modification to the Credit is designed to continue to encourage greater use of the Market Maker Prepayment Program, which may lead to greater opportunities to trade -- and for price improvement -- for all participants, as well as 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, as a consequence, 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."<sup>13</sup>

*Intramarket Competition.* The proposed change is designed to continue to attract order flow to the Exchange by offering competitive rates and credits via the ACE Program, 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 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

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<sup>13</sup> See Reg NMS Adopting Release, supra note 9, at 37499.



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.<sup>14</sup> Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity and ETF options trades.<sup>15</sup>

The Exchange believes that the proposed rule change reflects this competitive environment because, even though the amount of the Credit is decreased, ATP Holders should still be incentivized 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.

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<sup>14</sup> See supra note 10.

<sup>15</sup> Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, supra note 11, the Exchange's market share in multiply-listed equity and ETF options increased from 8.06% for the month of November 2019 to 9.09% for the month of November 2020.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including another exchange that currently offers similar pricing incentives,<sup>16</sup> 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)<sup>17</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>18</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>19</sup> 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:

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<sup>16</sup> See, e.g., supra note 6 (regarding Cboe's VIP Program).

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> 17 CFR 240.19b-4(f)(2).

<sup>19</sup> 15 U.S.C. 78s(b)(2)(B).

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 Number SR-NYSEAMER-2021-03 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-2021-03. 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 Number SR-NYSEAMER-2021-03, 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>20</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>20</sup> 17 CFR 200.30-3(a)(12).