

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98951; File No. SR-NYSEAMER-2023-58)

November 15, 2023

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

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on November 1, 2023, NYSE American LLC (“NYSE American” or “Exchange”) filed with the Securities and Exchange Commission (“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 Proprietary Market Data Fee Schedule (“Fee Schedule”) to adopt fees for the NYSE Options Open-Close Volume Summary market data product, effective November 1, 2023. 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

it 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 adopt fees for the NYSE Options Open-Close Volume Summary,⁴ which will be available for purchase by any market participant, i.e., members⁵ and non-members. The Exchange proposes to implement fees for the NYSE Options Open-Close Volume Summary market data product on November 1, 2023.⁶ The proposed fees would be applied equally to all market participants and all market participants would receive the same information in the data feed.

Background

By way of background, pursuant to the Product Filing, the Exchange adopted two versions of the NYSE Options Open-Close Volume Summary: an End of Day Volume Summary market data product and an Intra-Day Volume Summary market data product. The Exchange initially introduced the End of Day Volume Summary market data product on March 1, 2022 and

⁴ See Securities Exchange Act Release No. 93803 (December 16, 2021), 86 FR 72647 (December 22, 2021) (SR-NYSEAMER-2021-46) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt a New Historical Market Data Product to Be Known as the NYSE Options Open-Close Volume Summary) (“Product Filing”).

⁵ References to “member organization” as used in Exchange rules include American Trading Permit (“ATP”) Holders, which are registered brokers or dealers approved to effect transactions on the Exchange’s options marketplace. Under the Exchange’s rules, an ATP Holder has the status as a “member” of the Exchange as that term is defined in Section 3 of the Act. See Rule 900.2NY.

⁶ The Exchange has announced that it will begin [sic] migrating Exchange-listed options to the Pillar technology platform on October 23, 2023, available here: <https://www.nyse.com/trader-update/history?page=5#110000635130>.

adopted fees for the End of Day Volume Summary market data product.⁷ The purpose of this filing is to adopt fees for the Intra-Day Volume Summary market data product.

The Intra-Day Volume Summary provides a volume summary of trading activity on the Exchange at the option level by origin (Customer, Professional Customer, Firm, Broker-Dealer, and Market Maker⁸), side of the market (buy or sell), contract volume, and transaction type (opening or closing). The Customer, Professional Customer, Firm, Broker-Dealer, and Market Maker volume is further broken down into trade size buckets (less than 100 contracts, 100-199 contracts, greater than 199 contracts). The Intra-Day Volume Summary provides similar information to that of the End of Day Volume Summary but is produced and updated every 10 minutes during the trading day. The data is captured in “snapshots” taken every 10 minutes throughout the trading day and will be available to subscribers within five minutes of the conclusion of each 10-minute period. Each update would represent combined data captured from the current “snapshot” and all previous “snapshots” and thus would provide open-close data on an aggregate basis.

The NYSE Options Open-Close Volume Summary is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed.

The Exchange anticipates a wide variety of market participants to purchase the Intra-Day Volume Summary data product, including, but not limited to, individual customers, buy-side investors, and investment banks. The Exchange believes the Intra-Day Volume Summary would

⁷ See Securities Exchange Act Release No. 94334 (March 1, 2022), 87 FR 12748 (March 7, 2022) (SR-NYSEAMER-2022-11) (Notice of Filing and Immediate Effectiveness of Proposed Change To Amend the NYSE American Options Proprietary Market Data Fee Schedule).

⁸ The terms Customer, Professional Customer, Firm and Market Maker are defined in Rule 900.2NY.

provide subscribers data that should enhance their ability to analyze options trade and volume data, and to create and test trading models and analytical strategies. The Exchange believes the Intra-Day Volume Summary will be a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular options series. The Intra-Day Volume Summary is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may purchase it only if they voluntarily choose to do so. The Exchange notes that other exchanges offer a similar product,⁹ including the Exchange's affiliate, NYSE Arca, Inc. (NYSE Arca").¹⁰

The Intra-Day Volume Summary is subject to direct competition from similar end of day options trading summaries offered by other options exchanges.¹¹ All of these exchanges offer essentially the same intra day options trading summary information. The options trading summary files offered by the Exchange's competitors are substitutes, not complements. The Intra-Day Volume Summary provides data on options market activity which can be used to infer longer-term trends. The information provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another, and market sentiment trends that appear on one exchange are likely to be similar to the sentiment

⁹ See Securities Exchange Act Release Nos. 89497 (August 6, 2020), 85 FR 48747 (August 12, 2020) (SR-CboeBZX-2020-059); 89498 (August 6, 2020), 85 FR 48735 (August 12, 2020) (SR-Cboe-EDGX-2020-36); 89496 (August 6, 2020), 85 FR 48743 (August 12, 2020) (SR-C2-2020-010); 89586 (August 17, 2020), 85 FR 51833 (August 21, 2020) (SR-C2-2020-012); 62887 (September 10, 2010), 75 FR 57092 (September 17, 2010) (SR-Phlx-2010-121); 65587 (October 18, 2011), 76 FR 65765 (October 24, 2011) (SR-NASDAQ-2011-144); 61317 (January 8, 2010), 75 FR 2915 (January 19, 2010) (SR-ISE-2009-103); 81632 (September 15, 2017), 82 FR 44235 (September 21, 2017) (SR-GEMX-2017-42); 91963 (May 21, 2021), 86 FR 28662 (May 27, 2021) (SR-EMERALD-2021-18); 91964 (May 21, 2012), 86 FR 28667 (May 27, 2021) (SR-PEARL-2021-24); and 91965 (May 21, 2021), 86 FR 28665 (May 27, 2021) (SR-MIAX-2021-18).

¹⁰ See Securities Exchange Act Release No. 95201 (July 6, 2022), 87 FR 41366 (July 12, 2022) (SR-NYSEArca-2022-37) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Options Proprietary Market Data Fee Schedule).

¹¹ See supra note 9 [sic].

trends on other exchanges. The key differentiator in the quality of the data depends on the volume of transactions on a given exchange. The greater the volume of transactions, the greater the value of the data.

Proposed Rule Change

The Exchange proposes to adopt subscription fees for the purchase of the Intra-Day Volume Summary on a monthly basis. The Exchange proposes to assess a fee of \$2,000 per month for subscribing to the Intra-Day Volume Summary. As noted on the Fee Schedule, for mid-month subscriptions, new subscribers will be charged for the full calendar month for which they subscribe and will be provided NYSE Options Open-Close Volume Summary data for each trading day of the calendar month in which they subscribed. The proposed monthly fees will apply to all market participants. The Exchange notes that other exchanges provide similar data products that may be purchased on a monthly basis and are comparably priced.¹²

2. Statutory Basis

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

¹² See Price List – U.S. Derivatives Data for Nasdaq PHLX, LLC (“PHLX”), The Nasdaq Stock Market, LLC (“Nasdaq”), Nasdaq ISE, LLC (“ISE”), and Nasdaq GEMX, LLC (“GEMX”), available at <http://www.nasdaqtrader.com/Trader.aspx?id=DPPriceListOptions#web>. Particularly, PHLX offers “Nasdaq PHLX Options Trade Outline (PHOTO)” and assesses \$2,500 per month for an intra-day subscription; Nasdaq offers the “Nasdaq Options Trade Outline (NOTO)” and assesses \$750 per month for an intra-day subscription; ISE offers the “Nasdaq ISE Open/Close Trade Profile” and assesses \$2,000 per month for an intra-day subscription; and GEMX offers the “Nasdaq GEMX Open/Close Trade Profile” and assesses \$1,000 per month for an intra-day subscription. Cboe EDGX Exchange, Inc. (“EDGX”) assesses \$1,000 per month for an intraday subscription and Cboe BZX Exchange, Inc. (“BZX”) assesses \$1,500 per month for an intraday subscription. See EDGX fee schedule available at http://markets.cboe.com/us/options/membership/fee_schedule/edgx/; and BZX fee schedule available at http://markets.cboe.com/us/options/membership/fee_schedule/bzx/. Miami International Securities Exchange, LLC (“MIAX”), MIAX Emerald, LLC (“Emerald”) and MIAX PEARL, LLC (“PEARL”) each assesses \$2,000 per month for an intra-day subscription. See MIAX Fee Schedule, available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_09282021.pdf; Emerald Fee Schedule, available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_09282021.pdf; and PEARL Fee Schedule, available at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Pearl_Options_Fee_Schedule_092821.pdf.

the Act,¹³ in general, and furthers the objectives of Section 6(b)(5) of the Act, 14 in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposal to adopt fees for the Intra-Day Volume Summary market data product is consistent with Section 6(b) of the Act¹⁵ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁶ in particular, in that it is an equitable allocation of dues, fees and other charges among its members and other recipients of Exchange data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to users and consumers of such data and also spur innovation and competition for the provision of market data. Particularly, the Intra-Day Volume Summary further broadens the availability of U.S. options market data to investors consistent with the principles of Regulation NMS. Subscribers to the data may also be able to enhance their ability to analyze options trade and volume data and create and test trading models and analytical strategies. The Exchange believes the Intra-Day Volume Summary would provide a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ 15 U.S.C. 78f(b).

¹⁶ 15 U.S.C. 78f(b)(4).

data is not necessary for trading. Moreover, other exchanges offer a similar data product.¹⁷

The Exchange operates in a highly competitive market. Indeed, there are currently 17 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.¹⁸ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in July 2023, the Exchange had less than 8% market share of executed volume of multiply-listed equity and ETF options trades.¹⁹

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, 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.”²⁰

With respect to market data, the decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC upheld the Commission’s reliance on the existence of competitive market mechanisms to evaluate the reasonableness and fairness of fees for proprietary market data:

¹⁷ See supra notes 9 and 10.

¹⁸ The Options Clearing Corporation (“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>.

¹⁹ Based on OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see id., the Exchange’s market share in equity-based options decreased from 7.26% for the month of July 2022 to 7.09% for the month of July 2023.

²⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

In fact, the legislative history indicates that the Congress intended that the market system “evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed” and that the SEC wield its regulatory power “in those situations where competition may not be sufficient,” such as in the creation of a “consolidated transactional reporting system.”²¹

The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”²²

More recently, the Commission confirmed that it applies a “market-based” test in its assessment of market data fees, and that under that test:

the Commission considers whether the exchange was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees. If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless there is a substantial countervailing basis to find that the terms of the rule violate the Act or the rules thereunder.²³

Making similar historic data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supra-competitive fees. In

²¹ NetCoalition v. SEC, 615 F.3d 525, 535 (D.C. Cir. 2010) (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

²² Id. at 535.

²³ See Securities Exchange Act Release No. 34-90217 (October 16, 2020), 85 FR 67392 (October 22, 2020) (SR-NYSENAT-2020-05) (internal quotation marks omitted), quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (ArcaBook Approval Order).

the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products. The proposed fees are a result of the competitive environment, as the Exchange seeks to adopt fees to attract purchasers of the Intra-Day Volume Summary data product.

The Exchange believes the proposed fees are reasonable as they are comparable to the fees assessed by other exchanges that provide similar data products.²⁴ Indeed, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. Like the Intra-Day Volume Summary, other exchanges offer similar data products that each provide insight into trading on those markets and may likewise aid in assessing investor sentiment. Although each of these similar data products provide only proprietary trade data and not trade data from other exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange. Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only the Intra-Day Volume Summary data relating to trading activity on one or more of the other markets that provide similar data products. As such, if a market participant views another exchange's data as more attractive than the Exchange's data product, then such market participant can merely choose not to purchase the Exchange's data product and instead purchase another exchange's product, which offer similar data points, albeit based on that other market's trading activity.

The Exchange also believes the proposed fees are reasonable as they would support the introduction of a new historic market data product that is designed to aid investors by providing

²⁴ See supra note 12.

insight into trading on the Exchange. Once the Intra-Day Volume Summary is made available, it would provide options market participants with valuable information about opening and closing transactions executed on the Exchange throughout the trading day, similar to other trade data products offered by competing options exchanges. In turn, this data would assist market participants in gauging investor sentiment and trading activity, resulting in potentially better-informed trading decisions. As noted above, subscribers may also use such data to create and test trading models and analytical strategies.

Selling historic market data is also a means by which exchanges compete to attract business. To the extent that the Exchange is successful in attracting subscribers to the Exchange's historic data product, it may earn trading revenues and further enhance the value of its data products. If the market deems the proposed fees to be unfair or inequitable, subscribers can diminish or discontinue their use of the historic data and/or avail themselves of similar products offered by other exchanges.²⁵ The Exchange therefore believes that the proposed fees reflect the competitive environment and would be properly and equally assessed to all subscribers. The Exchange also believes the proposed fees are equitable and not unfairly discriminatory as the fees would apply equally to all subscribers who choose to purchase such data. Nothing in this proposal treats any category of market participant any differently from any other category of market participant. The Intra-Day Volume Summary is available to all market participants, i.e., members and non-members, and all market participants would receive the same information in the data feed.

As noted above, the Exchange anticipates a wide variety of market participants to purchase the Exchange's data product, including but not limited to individual customers, buy-

²⁵ See supra notes 9 and 10.

side investors and investment banks. The Exchange reiterates that the decision as to whether or not to purchase the Intra-Day Volume Summary is entirely optional for all potential subscribers. Indeed, no market participant is required to purchase the data product, and the Exchange is not required to make the data product available to market participants. Rather, the Exchange is voluntarily making the Intra-Day Volume Summary data product available, as requested by customers, and market participants may choose to receive (and pay for) this data based on their own business needs. Potential subscribers may request the data at any time if they believe it to be valuable or may decline to purchase such data.

In sum, the fierce competition for order flow constrains any exchange from pricing its historic market data at a supra-competitive price, and constrains the Exchange here in setting its fees for the Intra-Day Volume Summary data product. As described above, the Exchange's data product competes head-to-head with numerous products currently available in the marketplace. These products each serve as reasonable substitutes for one another as they are each designed to provide data on options market activity which can be used to infer longer-term trends. The information provided by one exchange is generally similar to that provided by other exchanges because order flow can move from one exchange to another, and market sentiment trends that appear on one exchange are likely to be similar to the sentiment trends on other exchanges. The key differentiator in the quality of the data depends on the volume of transactions on a given exchange. The greater the volume of transactions, the greater the value of the historic data. The proposed fees are therefore reasonable because in setting them, the Exchange is constrained by the availability of numerous substitute venues offering historic market data products and trading. Such substitutes need not be identical, but only substantially similar to the product at hand.

More specifically, in setting fees for the Intra-Day Volume Summary, the Exchange is constrained by the fact that, if its pricing is unattractive to subscribers, subscribers have their pick of an increasing number of alternative venues to use instead of the Exchange. The existence of numerous alternatives to the Exchange ensures that the Exchange cannot set unreasonable fees for historic market data without suffering the negative effects of that decision in the fiercely competitive market in which it operates.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange also does not believe the proposed fees would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to introduce their own comparable historic data product and adopt fees to better compete with the Exchange's offering. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to sell a data product similar to those offered by other competitor options exchanges.²⁶ The Exchange is offering the Intra-Day Volume Summary in order to keep pace with changes in the industry and evolving customer needs, and believes the data product will contribute to robust competition among national securities exchanges. At least eight other U.S. options exchanges offer a market data product that is substantially similar to the Exchange's offering. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Furthermore, the Exchange operates in a highly competitive environment, and its ability to price Intra-Day Volume Summary is constrained by competition among exchanges that offer

²⁶ Id.

similar data products to their customers. As discussed above, there are currently a number of similar products available to market participants and investors. At least eight other U.S. options exchanges offer a market data product that is substantially similar to the Exchange's offering, which the Exchange must consider in its pricing discipline in order to compete effectively.²⁷ For example, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as discussed, market participants are under no obligation to utilize or purchase. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition. Particularly, the proposed fees would apply uniformly to any subscriber, in that the Exchange would not differentiate between subscribers that purchase the Intra-Day Volume Summary and all subscribers would receive the same information in the data feed. The Exchange believes the proposed fees are set at a modest level that would allow interested subscribers to purchase such data based on their business needs.

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 has become effective upon filing pursuant to Section 19(b)(3)(A)²⁸ of the Act and paragraph (f) thereunder. At any time within 60 days of the filing

²⁷ See *supra* note 12.

²⁸ 15 U.S.C. 78s(b)(3)(A).

of the 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.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEAMER-2023-58 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-2023-58. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEAMER-2023-58 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁹

Sherry R. Haywood,

Assistant Secretary.

²⁹ 17 CFR 200.30-3(a)(12).