

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90552; File No. SR-NYSEArca-2020-102)

December 2, 2020

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt New Rule 6.78A-O Regarding In-Kind Exchanges of Options Positions in Connection with Exchange-Traded Fund Shares and Unit Investment Trust Interests

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 24, 2020, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II 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 adopt new Rule 6.78A-O regarding in-kind exchanges of options positions and exchange-traded fund shares and unit investment trust interests. 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 it received on the proposed rule change. The text of those statements may be examined at the places

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 adopt Rule 6.78A-O regarding in-kind exchanges of options positions and exchange-traded fund (“Fund”) shares and unit investment trust (“UIT”) interests. This is a competitive filing that is substantively identical to rules in place on Cboe and its affiliated exchange Cboe BZX, except the Exchange proposes to add a provision allowing it to request information from OTP Holders and OTP Firms that utilize the new rule.⁴ Currently, in general, Funds and UITs can effect in-kind transfers with respect to equity securities and fixed-income securities. The in-kind process is the means by which assets may be added to or removed from Funds and UITs.

Proposed Rule 6.78A-O, like the Cboe Rule, would allow positions in options listed on the Exchange to be transferred off the Exchange by an OTP Holder or OTP Firm (collectively,

⁴ See Cboe Options Rule 6.9 (the “Cboe Rule”); see also Securities Exchange Act Release Nos. 87340 (October 17, 2019), 84 FR 56877 (October 23, 2019) (SR-CBOE-2019-048) (Order Approving on an Accelerated Basis a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, to Adopt Rule 6.9 (In-Kind Exchange of Options Positions and ETF Shares)); and 88786 (April 30, 2020), 85 FR 26998 (May 6, 2020) (SR-CBOE-2020-042) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 6.9 To Permit In-Kind Transfers of Positions Off of the Exchange in Connection With Unit Investment Trusts (“UITs”)). See also CboeBZX Rule 20.12; Securities Exchange Act Release No. 89313 (July 14, 2020), 85 FR 43907 (July 20, 2020) (SR-CboeBZX-2020-054) (immediately effective filing for, among other things, in-kind transfers of Funds and UITs). See also Nasdaq PHLX Rule 1059; Securities Exchange Act Release Nos. 87768 (December 17, 2019), 84 FR 70605 (December 23, 2019) (SR-Phlx-2019-53) (immediately effective filing to adopt new Rule 1059 to allow in-kind transfers of Funds). The new Phlx rule does not extend to allowing for in-kind transfers of UITs, thus the Exchange focuses on Cboe and its affiliates in this filing.

“OTP Holders”) in connection with transactions (1) to purchase or redeem “creation units” of Fund Shares between an “authorized participant”⁵ and the issuer⁶ of such Fund Shares⁷ or (2) to create or redeem units of a UIT between a broker-dealer and the issuer⁸ of such UIT units, which transfers would occur at the price used to calculate the net asset value (“NAV”) of such Fund Shares or UIT units, respectively. Allowing the Exchange to permit off-Exchange transfers of options positions in connection with the creation and redemption process would enable the Exchange to compete with other options exchanges that allow such transfers.⁹

However, the Exchange believes it is appropriate to include in proposed Rule 6.78A-O the requirement that OTP Holders that engage in such transfers “must, upon request of the Exchange, provide to the Exchange information relating to the transfers in a form and manner

⁵ The Exchange is proposing that, for purposes of proposed Rule 6.78A-O, the term “authorized participant” would be defined as an entity that has a written agreement with the issuer of Fund Shares or one of its service providers, which allows the authorized participant to place orders for the purchase and redemption of creation units (i.e., specified numbers of Fund Shares). While an authorized participant may be an OTP Holder and directly effect transactions in options on the Exchange, an authorized participant that is not an OTP Holder may effect transactions in options on the Exchange through an OTP Holder on its behalf.

⁶ The Exchange proposes that, for purposes of proposed Rule 6.78A-O, any issuer of Fund Shares would be registered with the Commission as an open-end management investment company under the Investment Company Act of 1940 (the “1940 Act”).

⁷ A Fund Share is a share or other security traded on a national securities exchange and defined as an NMS stock, as set forth in in Rule 600(b)(47) of Regulation NMS, which includes open-end management investment companies registered with the Commission. See Rule 5.3-O(g).

⁸ The Exchange proposes that, for purposes of proposed Rule 6.78A, any issuer of UIT units would be a trust registered with the Commission as a unit investment trust under the 1940 Act.

⁹ See supra note 4. See proposed Rule 6.78A-O(a) (providing that positions in options listed on the Exchange may be transferred off the Exchange by a OTP Holder or OTP Firm to effect creations and redemptions in Funds or UITs on an in-kind basis; “provided, however, that such OTP Holder or OTP Firm comply with the requirements of paragraph (b) of this Rule”).

prescribed by the Exchange.”¹⁰ The Exchange believes that this proposed provision, which is not in the Cboe Rule (nor is it in Phlx Rule 1059), would help ensure that OTP Holders keep accurate books and records relating to such transfers for review by the Exchange, which is to the benefit of all market participants.¹¹

The Exchange’s proposal mirrors the Cboe Rule in that it applies solely in the context of transfers of options positions effected in connection with transactions to purchase or redeem creation units of Fund Shares between Funds and authorized participants,¹² and units of UITs between UITs and sponsors.

Other than the transfers covered by the proposed rule, transactions involving options, whether held by a Fund or an authorized participant, or a UIT or a sponsor would be fully subject to all applicable trading Rules.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of 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

¹⁰ See proposed Rule 6.78A-O(b). The Exchange anticipates informing OTP Holders of the notice requirements via Trader Update.

¹¹ See supra note 4 (regarding Cboe and Phlx rules).

¹² See supra note 5. The term “authorized participant” is specific and narrowly defined. As noted in the Investment Company Act Release No. 33140 (June 28, 2018), 83 FR 37332 (July 31, 2018) (the “Proposed ETF Rule Release”), the requirement that only authorized participants of a Fund may purchase creation units from (or sell creation units to) a Fund “is designed to preserve an orderly creation unit issuance and redemption process between [Funds] and authorized participants.” Furthermore, an “orderly creation unit issuance and redemption process is of central importance to the arbitrage mechanism.” See Proposed ETF Rule Release at 83 FR 37348.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(5).

principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to 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.

The Exchange believes proposed Rule 6.78A-O to permit off-Exchange transfers in connection with the in-kind Fund and UIT creation and redemption process would promote just and equitable principles of trade as it would permit Funds and UITs that invest in options traded on the Exchange to utilize the in-kind creation and redemption process that is available for Funds and UITs that invest in equities and fixed-income securities.

The Exchange believes it is appropriate to require OTP Holders that engage in off-floor transfers as provided in proposed Rule 6.78A-O(a) to keep records of such transactions such that this information could be shared with the Exchange upon request. The Exchange believes this provision, which is not in the Cboe Rule, would prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade because the provision would help ensure that OTP Holders keep accurate books and records relating to such transfers for review by the Exchange, which is to the benefit of all market participants.

Finally, this proposed rule change would align Exchange rules with that of other options exchanges, including Cboe and its affiliates, thereby allowing the Exchange to compete on equal footing.¹⁵

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The

¹⁵ See supra note 4.

Exchange does not believe the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Utilizing the proposed exception would be voluntary. Proposed Rule 6.78A-O would provide market participants with a means to transfer positions as part of the creation and redemption process for Funds and UITs only under the circumstances specified. The proposed exception would enable all Funds and UITs that hold options to enjoy the benefits of in-kind creations and redemptions already available to other Funds and UITs (and to pass these benefits along to investors). Use of the in-kind, off-exchange transfer process in connection with creating and redeeming ETFs or UITs would be voluntary and would apply in the same manner to all entities that meet the definition of “authorized participant” or to all broker-dealers, respectively, that opt to invoke such process.

The Exchange does not believe the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As indicated above, the proposed rule change is intended to provide a limited circumstance in which options positions can be transferred off an exchange. The Exchange believes the requirement that OTP Holders have the ability to produce to the Exchange, upon request, documentation relating to off-floor transfers would benefit market participants as it would add transparency to such transfers and would not pose an undue burden on intermarket competition.

Lastly, the Exchange notes that the proposed rule change is based on rules already in place on Cboe and its affiliate exchanges.¹⁶ As such, the Exchange believes that its proposal enhances fair competition between markets by providing for additional listing venues for Funds and UITs that hold options to utilize the in-kind transfers proposed herein.

¹⁶ See supra note 4.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁷ and Rule 19b-4(f)(6) thereunder.¹⁸

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act¹⁹ normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)²⁰ permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that waiver of the operative delay is consistent with the protection of investors and the public interest because it will ensure fair competition among the options exchanges by allowing the Exchange implement without delay proposed Rule 6.78A-O, which is substantially identical to Cboe Options Rule 6.9 and Cboe BZX Rule 21.12, except that the

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹⁹ 17 CFR 240.19b-4(f)(6).

²⁰ 17 CFR 240.19b-4(f)(6)(iii).

Exchange's proposed Rule 6.78A-O(b) is more restrictive in that it requires OTP Holders to provide to the Exchange information related to the transfers. For this reason, and because the proposal does not raise any novel regulatory issues, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.²¹

At any time within 60 days of the filing 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. If the Commission takes such action, the Commission shall institute proceedings 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-NYSEArca-2020-102 on the subject line.

Paper Comments:

²¹ For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

- 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-NYSEArca-2020-102. 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-NYSEArca-2020-102 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.²²

J. Matthew DeLesDernier
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).