

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95976; File No. SR-NYSEARCA-2022-66)

October 4, 2022

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the NYSE Arca Options 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 September 30, 2022, NYSE Arca, Inc. (“NYSE Arca” 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 modify the NYSE Arca Options Fee Schedule (“Fee Schedule”) regarding the discount in take liquidity fees. The Exchange proposes to implement the fee change effective October 3, 2022. 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

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 amend the Fee Schedule to modify the amount of one of the alternatives offered as a Discount in Take Liquidity Fees for Professional Customer and Non-Customer Liquidity Removing Interest (“Take Fee Discount”).

If an OTP Holder or OTP Firm (collectively, “OTP Holders”) executes a transaction that removes or “takes” liquidity on the Exchange, the OTP Holder is charged a “Take Liquidity” fee (referred to herein as a “Take Fee”) and such liquidity may be referred to as “Liquidity Removing” or liquidity taking.⁴ To offset such costs and to encourage market participants to direct order flow to the Exchange, the Exchange offers, among other incentives, the Take Fee Discounts for executions in Penny Issues.

The Exchange currently offers OTP Holders three alternative Take Fee Discounts, with varying qualifying bases and amounts, and an OTP Holder may only earn one such discount. One of the Take Fee Discount alternatives is available to an OTP Holder that executes at least 0.80% of TCADV from Customer posted interest in all issues, plus executed ADV of 0.30% ADV of U.S. equity market share posted and executed on the NYSE Arca Equity market. The

⁴ See Fee Schedule, NYSE Arca OPTIONS: TRADE-RELATED CHARGES FOR STANDARD OPTIONS, TRANSACTION FEE FOR ELECTRONIC EXECUTIONS - PER CONTRACT (setting forth a per contract Take Fee of \$0.50 for such Penny executions in Professional Customer, Firm, Broker Dealer, and Market Maker range as compared to a per contract take fee of \$0.49 for such Penny executions in the Customer range).

amount of the Take Fee Discount would be \$0.04 when the executing buyer and seller are the same OTP Holder or an Affiliate or Appointed OFP or Appointed MM of such firm; otherwise, the Take Fee Discount is \$0.03.⁵

The Exchange proposes to modify the Take Fee Discount amounts for this alternative to be \$0.03 when the executing buyer and seller are the same OTP Holder or an Affiliate or Appointed OFP or Appointed MM of such firm, or \$0.02 otherwise.

The Exchange cannot predict with certainty whether any OTP Holders will seek to qualify for this Take Fee Discount alternative, as modified. Although the Exchange proposes to decrease the amount of the discount OTP Holders could earn through this alternative, the Exchange believes that OTP Holders would continue to be encouraged to direct liquidity-taking interest to the Exchange to take advantage of the available credits and discounts on Take Fees.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁶ in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,⁷ 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

⁵ For example, when an OTP Holder or its Affiliate trades against itself (e.g., Firm 1 MM trades against Firm 1 Customer or Firm 1 MM trades against Customer of an Affiliate of Firm 1), the \$0.04 Take Fee discount applies. If, however, the OTP Holder trades against another OTP Holder (e.g., Firm 1 MM trades against Firm 2 Customer), the \$0.03 Take Fee discount applies.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

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.”⁸

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.⁹ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in August of 2022, the Exchange had less than 12% market share of executed volume of multiply-listed equity and ETF options trades.¹⁰

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,

⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

⁹ 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>.

¹⁰ 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 12.32% for the month of August 2021 to 11.36% for the month of August 2022.

competitive forces constrain options exchange transaction fees. In response to this competitive environment, the Exchange has established incentives, such as the Take Fee Discount.

The Exchange believes that the proposed modification to the Take Fee Discount is reasonably designed to continue to offer OTP Holders discounts on Take Fees and to incent OTP Holders to increase the amount and type of Professional Customer and Non-Customer interest sent to the Exchange, especially posted and liquidity-taking interest, which benefits all market participants by providing more trading opportunities, thereby making the Exchange a more attractive execution venue.

To the extent the proposed rule change continues to attract greater volume and liquidity by encouraging OTP Holders (and their affiliates) to increase their options volume on the Exchange, the Exchange believes the proposed change 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 change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors, including another exchange that offers similar incentives on liquidity-taking interest.¹¹

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

The Exchange believes the proposed rule change is an equitable allocation of its fees and

¹¹ See, e.g., Nasdaq Options 7 Pricing Schedule, Section 2 Nasdaq Options Market - Fees and Rebates, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-options-7> (providing that Nasdaq participants that add 1.30% of Customer, Professional, Firm, Broker-Dealer or Non-NOM Market Maker liquidity in Penny Symbols and/or Non-Penny Symbols of TCADV per day in a month will pay “a \$0.48 per contract Penny Symbols Fee for Removing Liquidity when the Participant is (i) both the buyer and the seller or (ii) the Participant removes liquidity from another Participant under Common Ownership,” otherwise such participants pay \$0.50 per contract on such interest).

credits. The proposal is based on the amount and type of business transacted on the Exchange, and OTP Holders can seek to qualify for this discount or not. Moreover, although the Exchange proposes to decrease the amount of the discount OTP Holders could qualify for via one of the alternative Take Fee Discounts, the Exchange believes that the proposal is designed to continue to incent OTP Holders to aggregate all liquidity-taking interest at the Exchange as a primary execution venue. To the extent that the proposed change attracts more liquidity 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 the proposed change is not unfairly discriminatory because it would apply 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 OTP Holders are not obligated to try to earn the discount, nor are they obligated to execute liquidity-taking interest. To the extent that the proposed change attracts more Professional Customer and Non-Customer interest to the Exchange, especially posted and liquidity-taking interest, 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 change furthers 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."¹²

Intramarket Competition. The proposed change is designed to attract additional order flow to the Exchange, particularly take-liquidity interest. The Exchange believes that the proposed modifications, although they would reduce the amount of the discount offered by one of the Take Fee Discount alternatives, would continue to incent OTP Holders to direct their liquidity-taking order flow to the Exchange. Greater liquidity benefits all market participants on the Exchange and increased liquidity-taking order flow and posted Market Maker interest would increase opportunities for execution of other trading interest. The proposed change would apply

¹² See Reg NMS Adopting Release, supra note 8, at 37499.

to all similarly-situated market participants and thus would not impose a disparate burden on competition among market participants 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 has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.¹³ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in August 2022, the Exchange had less than 12% market share of executed volume of multiply-listed equity & ETF options trades.¹⁴

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to incent OTP Holders to direct trading interest (particularly Customer posted interest and Professional Customer and Non-Customer liquidity-taking interest) to the Exchange. 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.

¹³ See supra note 9.

¹⁴ 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 12.32% for the month of August 2021 to 11.36% for the month of August 2022.

The Exchange also believes that the proposed change could promote competition between the Exchange and other execution venues, including one that currently offers similar incentives relating to Take Fees,¹⁵ 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)¹⁶ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁷ 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)¹⁸ of the Act to determine whether the proposed rule change should be approved or disapproved.

¹⁵ See supra note 11.

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(2).

¹⁸ 15 U.S.C. 78s(b)(2)(B).

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-2022-66 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-NYSEARCA-2022-66. 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-2022-66, 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.¹⁹

J. Matthew DeLesDernier,
Deputy Secretary.

¹⁹ 17 CFR 200.30-3(a)(12).