

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97841; File No. SR-NYSEARCA-2023-46)

July 5, 2023

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Arca Options Proprietary Market Data Fee Schedule

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 30, 2023, 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 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 amend the NYSE Arca Options Proprietary Market Data Fee Schedule (“Fee Schedule”) to introduce a data product to be known as the NYSE Options Open-Close Intra-Day Volume Summary (“Intra-Day Volume Summary”) that would be available for purchase by any market participant, i.e., members³ and non-members, on an ad-hoc basis and to adopt fees for such product.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Members of the Exchange are OTP Firms, OTP Holders and ETP Holders.

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 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 introduce a data product to be known as the Intra-Day Volume Summary that would be available for purchase by market participants on an ad-hoc basis and to adopt fees for such product.⁴

More specifically, the Exchange proposes to offer an ad-hoc historic monthly Intra-Day Volume Summary market data product that provides a volume summary of trading activity on the Exchange at the option level by origin (Customer, Professional Customer, Firm, Broker-Dealer, and Market Maker⁵), 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 ad-hoc historic monthly Intra-Day 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

⁴ The Exchange previously adopted a subscription-based market data product known as the NYSE Options Open-Close Volume Summary that market participants can purchase on a subscription basis. See Securities Exchange Act Release No. 93132 (September 27, 2021), 86 FR 54499 (October 1, 2021) (SR-NYSEArca-2021-82). The purpose of this filing is to introduce a historic monthly report of the NYSE Options Open-Close Volume Summary that would be available for purchase by any market participant on an ad-hoc basis.

⁵ The terms Customer, Professional Customer, Firm and Market Maker are defined in NYSE Arca Rule 1.1.

proposes to offer data that would go back to August 2022 and would contain all series in an underlying security if it has volume.⁶

The Exchange anticipates a wide variety of market participants to purchase the ad-hoc historic monthly Intra-Day Volume Summary, including, but not limited to, individual customers, buy-side investors, investment banks and academic institutions. For example, academic institutions may utilize the proposed product to promote research and studies of the options industry to the benefit of all market participants. The Exchange believes the proposed product may also provide helpful trading information regarding investor sentiment and may be used to create and test trading models and analytical strategies. The ad-hoc historic monthly 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 customers may purchase it on an ad-hoc basis only if they voluntarily choose to do so. The Exchange notes that other exchanges offer a similar product.⁷ As such, the ad-hoc historic monthly Intra-Day Volume Summary is subject to direct competition from similar intra-day options trading summaries offered by other exchanges. All of these exchanges offer essentially the same intra-day options trading summary information for purchase on an ad-hoc basis, and generally differ solely in the amount of history available for purchase.⁸

6 The specifications for the ad-hoc historic monthly Intra-Day Volume Summary can be found at <https://www.nyse.com/market-data/historical/open-close-volume-summary>.

7 See e.g., Securities Exchange Act Release Nos. 89496 (August 6, 2020), 85 FR 48743 (August 12, 2020) (SR-C2-2020-010) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Introduce a New Data Product To Be Known as Intraday Open-Close Data); and 97723 (June 14, 2023), 88 FR 40358 (June 21, 2023) (SR-BOX-2023-16) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule for Trading on the BOX Options Market LLC Facility To Offer Ad-Hoc Historical Requests for the Intraday Open-Close Data Report and Adopt Fees for This Data). The ad-hoc historic monthly Intra-Day Volume Summary report contains the same information that is provided in the monthly subscription-based market data product known as the NYSE Options Open-Close Volume Summary. See note 5, supra.

8 For example, Nasdaq PHLX LLC offers history for its intra-day data starting in January 2009 for purchase on an ad-hoc basis while Intra-Day Volume Summary history is only offered starting in August 2022. See <https://www.nasdaqtrader.com/micro.aspx?id=photo>.

The Exchange proposes to provide in its Fee Schedule that market participants may purchase the ad-hoc historic monthly Intra-Day Volume Summary for a specified month (historical data). The Exchange proposes to assess a fee of \$1,000 per request per month for an ad-hoc request of historical Intra-Day Volume Summary covering all Exchange-listed securities. An ad-hoc request can be for any number of months beginning with August 2022 for which the data is available.⁹ The proposed fee for ad-hoc requests for the historic monthly Intra-Day Volume Summary will apply to all market participants. The Exchange notes that other exchanges provide a similar data product¹⁰ that may be purchased on an ad-hoc basis. The proposed fee is comparably priced to at least one other exchange that sells a market data product similar to Intra-Day Volume Summary that may be purchased on an ad-hoc basis.¹¹

The Exchange intends to offer the historic monthly Intra-Day Volume Summary on an ad-hoc basis and charge the proposed fees effective July 3, 2023.

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 Section 6(b)(5) of the Act,¹³ in particular, in

9 For example, a customer that requests historical Intra-Day Volume Summary for the months of October 2022 and November 2022, would be assessed a total of \$2,000.

10 See e.g., Cboe LiveVol, LLC Market Data Fees available at https://www.cboe.com/us/options/membership/fee_schedule/ctwo/. Cboe C2 Options (“C2”) offers Open-Close Data: Intraday Ad-hoc Request (historical data) and assesses a fee of \$500 per request per month. Cboe EDGX Exchange, Inc. (“EDGX”) similarly offers Open-Close Data: Intraday Ad-hoc Request (historical data) and assesses a fee of \$500 per request per month. See https://www.cboe.com/us/options/membership/fee_schedule/edgx/. Nasdaq ISE, LLC (“ISE”) offers Nasdaq ISE Open/Close Trade Profile Intraday Ad-Hoc Request (historical data) and assesses a fee of \$1,000 per request per month, \$2,000 per request per quarter and \$8,000 per request per year. See Sec. 10, Market Data, at <https://listingcenter.nasdaq.com/rulebook/ise/rules/ise-options-7>.

11 See ISE fees, note 11, supra.

12 15 U.S.C. 78f(b).

13 15 U.S.C. 78f(b)(5).

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 ad-hoc historic monthly Intra-Day Volume Summary is consistent with Section 6(b) of the Act¹⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁵ 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.

The Exchange believes that the proposed ad-hoc historic monthly Intra-Day Volume Summary market data product would further broaden the availability of U.S. options market data to investors consistent with the principles of Regulation NMS. The proposed rule change would benefit investors by providing access to historic data, which as noted above, may promote better informed trading, as well as research and studies of the options industry. Particularly, information regarding opening and closing activity across different options series may indicate investor sentiment, which can be helpful research and/or trading information. Customers of the historic data product may be able to enhance their ability to analyze options trade and volume

14 15 U.S.C. 78f(b).

15 15 U.S.C. 78f(b)(4).

data, and create and test trading models and analytical strategies. The Exchange believes ad-hoc historic monthly Intra-Day Volume Summary would provide a valuable tool that customers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading. Moreover, other exchanges offer a similar data product.¹⁶

The Exchange operates in a highly competitive market. Indeed, 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.¹⁷ Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in April 2023, the Exchange had less than 13% market share of executed volume of multiply-listed equity and ETF options trades.¹⁸

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.”¹⁹

16 See, note 8, supra.

17 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>.

18 Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of equity-based ETF options, see id., the Exchange’s market share in equity-based options decreased from 12.94% for the month of April 2022 to 12.54% for the month of April 2023.

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

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:

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.”²⁰

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.’”²¹ 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.²²

20 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).

21 Id. at 535.

22 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).

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 the event that a market participant views one exchange's historic 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 ad-hoc historic monthly Intra-Day Volume Summary data product.

The Exchange believes its proposal to provide the ad-hoc historic monthly Intra-Day Volume Summary is reasonable as the proposed fee is comparable to the fee charged by at least one other exchange that provides a similar historic data product.²³ Indeed, proposing fees that are excessively higher than established fees for similar historic data products would simply serve to reduce demand for the Exchange's historic data product, which as noted, is entirely optional. Like the ad-hoc historic monthly Intra-Day Volume Summary, other exchanges offer similar historic data products that each provide insight into trading on those markets and may likewise aid in assessing investor sentiment. Although each of these similar historic 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 options series based on open and closing interest on any one exchange. Similarly, market participants may be able to analyze options trade and volume data, and create and test trading models and analytical strategies using only the ad-hoc historic monthly Intra-Day Volume Summary data relating to trading activity on one or more of the other markets that provide similar historic data products. As such, if a market participant views another exchange's data as more attractive than the Exchange's offering, then such market participant can merely choose not to purchase the

23 See, note 12, supra.

Exchange's historic data product and instead purchase another exchange's historic 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 historic market data product that is designed to aid investors by providing insight into trading on the Exchange. 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, customers may also use such data to create and test trading models and analytical strategies.

Selling historic market data, such as the ad-hoc historic monthly Intra-Day Volume Summary, is also a means by which exchanges compete to attract business. To the extent that the Exchange is successful in attracting customers 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, customers can diminish or discontinue their use of the historic data and/or avail themselves of similar products offered by other exchanges.²⁴ The Exchange therefore believes that the proposed fees reflect the competitive environment and would be properly and equally assessed to all customers. The Exchange also believes the proposed fees are equitable and not unfairly discriminatory as the fees would apply equally to all customers who choose to purchase such data. The proposed fees would not differentiate between customers that purchase the ad-hoc historic monthly Intra-Day Volume Summary, and are set at a modest level that would allow any interested market participant to purchase such data based on their business needs. Nothing in this proposal treats any category of market participant any differently from any other category of market participant. The ad-hoc historic monthly Intra-Day

24 See, note 11, supra.

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 ad-hoc historic monthly Intra-Day Volume Summary data product, including but not limited to individual customers, buy-side investors, investment banks and academic institutions. As such, the Exchange anticipates that the historic data product may be used not just for commercial or monetizing purposes, but also for educational use and research. The Exchange reiterates that the decision as to whether or not to purchase the ad-hoc historic monthly Intra-Day Volume Summary is entirely optional for all potential customers. Indeed, no market participant is required to purchase the historic data product, and the Exchange is not required to make the historic data product available to market participants. Rather, the Exchange is voluntarily making the historic 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 customers 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 ad-hoc historic monthly Intra-Day Volume Summary data product.

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.²⁵ Such substitutes need not be identical, but only substantially similar to the product at hand. More specifically, in setting fees for the ad-hoc historic monthly Intra-Day

25 See, note 8, supra.

Volume Summary data product, the Exchange is constrained by the fact that, if its pricing is unattractive to customers, customers have their pick of an increasing number of alternative venues to use instead of the Exchange.²⁶ Because of the availability of substitutes, an exchange that overprices its historic market data products stands a high risk that customers may substitute another source of market data information for its own. Those competitive pressures imposed by available alternatives are evident in the Exchange's proposed pricing. 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 historic data product similar to those offered by other competitor options exchanges.²⁷ The Exchange is offering the ad-hoc historic monthly 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.

Furthermore, the Exchange operates in a highly competitive environment, and its ability

26 See, note 11, supra.

27 See, note 8, supra.

to price the ad-hoc historic monthly Intra-Day Volume Summary is constrained by competition among exchanges that offer similar historic data products to their customers. As discussed above, there are currently a number of similar products available to market participants and investors. A number of U.S. options exchanges offer a historic 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. For example, proposing fees that are excessively higher than established fees for similar historic data products would simply serve to reduce demand for the Exchange's historic 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 historic data 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 customer, in that the Exchange would not differentiate between customers that purchase the ad-hoc historic monthly Intra-Day Volume Summary and all customers 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 customers 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

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)(iii) of the Act²⁸ and Rule 19b-4(f)(6) thereunder.²⁹

A proposed rule change filed under Rule 19b-4(f)(6)³⁰ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),³¹ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposal does not raise any new or novel issues.³² Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.³³

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

²⁸ 15 U.S.C. 78s(b)(3)(A)(iii).

²⁹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires the Exchange 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.

³⁰ 17 CFR 240.19b-4(f)(6).

³¹ 17 CFR 240.19b-4(f)(6)(iii).

³² See supra, notes 7 and 10.

³³ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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)³⁴ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEARCA-2023-46 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-2023-46. 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

³⁴ 15 U.S.C. 78s(b)(2)(B).

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-NYSEARCA-2023-46 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.³⁵

Sherry R. Haywood,

Assistant Secretary.

³⁵ 17 CFR 200.30-3(a)(12).