

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98043; File No. SR-NYSEARCA-2023-51)

August 2, 2023

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 July 31, 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 modify the NYSE Arca Options Fee Schedule (“Fee Schedule”) regarding the Limit of Fees on Options Strategy Executions (the “Strategy Cap”). The Exchange proposes to implement the fee change effective August 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 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 purpose of this filing is to add dividend strategies to the list of strategy executions eligible for the Strategy Cap. The Exchange proposes to implement the rule change on August 1, 2023.

Currently, the Strategy Cap provides for a \$1,000 cap on transaction fees for strategy executions involving (a) reversals and conversions, (b) box spreads, (c) short stock interest spreads, (d) merger spreads, and (e) jelly rolls.⁴ The Strategy Cap applies to each strategy execution executed in standard option contracts on the same trading day. In addition, the cap is reduced to \$200 on transactions fees for qualifying strategies traded on the same trading day for those OTP Holders that trade at least 25,000 monthly billable contract sides in qualifying strategy executions.

The Exchange now proposes to modify the Strategy Cap to add dividend strategies as item (f) in the list of strategy executions eligible for the cap (and to make non-substantive conforming changes to include an item (f) in such list). The Exchange also proposes that dividend strategies would be included among the strategies that contribute to an OTP Holder's qualification for the lower cap of \$200. Finally, the Exchange proposes to modify Endnote 10 of the Fee Schedule to add subparagraph (f) defining a dividend strategy as transactions done to achieve a dividend arbitrage involving the purchase, sale, and exercise of in-the-money options

⁴ See Fee Schedule, LIMIT OF FEES ON OPTIONS STRATEGY EXECUTIONS and Endnote 10 (defining strategies eligible for the Strategy Cap).

of the same class, executed the first business day prior to the date on which the underlying stock goes ex-dividend.

The Exchange notes that other options exchanges currently offer similar caps on strategy trades that include dividend strategies.⁵ Although the Exchange cannot predict with certainty whether the proposed change would encourage OTP Holders to increase their dividend strategy executions, the proposed change is intended to encourage additional dividend strategy executions on the Exchange by including them in the strategies eligible for the Strategy Cap (including the lower cap for qualifying OTP Holders).

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

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

⁵ See, e.g., BOX Options Fee Schedule, Section V.D. (Strategy QOO Order Fee Cap and Rebate), available at: <https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-July-3-2023.pdf>; Nasdaq PHLX LLC Options 7, Section 4, available at: <https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207>.

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4) and (5).

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, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in June 2023, the Exchange had less than 13% 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, competitive forces constrain options exchange transaction fees. Stated otherwise, modifications to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes the proposed change is reasonable because it is designed to encourage OTP Holders to increase their dividend strategies executed on the Exchange by including dividend strategies among the strategy executions eligible for the Strategy Cap. The Exchange also believes the proposed change could incent OTP Holders to execute and aggregate

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 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 remained the same at 12.23% for the month of June 2022 and 12.23% for the month of June 2023.

dividend strategy orders as well as other types of strategy orders at NYSE Arca as a primary execution venue.

To the extent the proposed change attracts greater volume and liquidity, 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. The Exchange's fees are constrained by intermarket competition, as OTP Holders may direct their order flow to any of the 16 options exchanges, including those with similar caps on strategy executions, including dividend strategies.¹¹ Thus, OTP Holders have a choice of where they direct their order flow, including their strategy executions. The proposed rule change is designed to incent OTP Holders to direct liquidity, and specifically dividend strategies, to the Exchange, thereby promoting market depth and enhancing order execution opportunities for market participants.

The Proposed Change is an Equitable Allocation of Fees and Credits

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposed change is based on the amount and type of business transacted on the Exchange, and OTP Holders can opt to avail themselves of the Strategy Cap or not. In addition, the modified Strategy Cap, as proposed, would continue to be available to all OTP Holders that direct strategy executions, including dividend strategies, to the Exchange. Moreover, the proposal is designed to continue to encourage OTP Holders to aggregate strategy executions at the Exchange as a primary execution venue. To the extent that the proposed change attracts more

¹¹ See note 5, supra.

dividend strategies 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 Change is Not Unfairly Discriminatory

The Exchange believes the proposed change is not unfairly discriminatory because the proposed modification of the Strategy Cap 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 achieve the Strategy Cap, nor are they obligated to execute any dividend strategies. Rather, the proposal is designed to encourage OTP Holders to increase their dividend strategy executions and to utilize the Exchange as a primary trading venue for all strategy executions (if they have not done so previously). To the extent that the proposed change attracts more strategy executions (and, in particular, dividend strategy executions) to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, 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 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 change 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 Exchange does not believe the proposed change would impose any burden on intramarket competition that is not necessary or appropriate. The proposed change is designed to incent OTP Holders to direct their dividend strategy orders to the Exchange and could also encourage OTP Holders to continue to aggregate all strategy executions on the Exchange to qualify for the Strategy Cap. Greater liquidity benefits all market participants on the Exchange, and order flow from increased strategy executions could improve market quality for all market participants on the Exchange. In addition, the Strategy Cap, modified as proposed to include dividend strategies, would continue to be available to all similarly situated market participants and thus would not impose a disparate burden on competition.

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

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 and ETF options order flow. More specifically, in June 2023, the Exchange had less than 13% market share of executed volume of multiply-listed equity and 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 continue to incent OTP Holders to direct trading interest (in particular, dividend strategy executions) to the Exchange, to provide liquidity and to attract order flow. To the extent OTP Holders continue to be incentivized to aggregate strategy executions on the Exchange as a primary trading venue, all of the Exchange's market participants should benefit from the improved market quality and increased opportunities for order execution. The Exchange also believes that the proposed change could promote competition between the Exchange and other execution venues, as other

¹³ 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>.

¹⁴ 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 was 12.23% for the month of June 2022 and 12.23% for the month of June 2023.

competing options exchanges currently offer a similar fee cap for strategy orders, including dividend strategies.¹⁵

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.

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:

¹⁵ See note 5, *supra*.

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).

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-2023-51 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-2023-51. 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-NYSEARCA-2023-51 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.¹⁹

Sherry R. Haywood,

Assistant Secretary.

¹⁹ 17 CFR 200.30-3(a)(12).