SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98693; File No. SR-NYSEARCA-2023-69)

October 5, 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 September 29, 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 Customer Incentive Program and Market Maker Penny and SPY Posting Credit Tiers. The Exchange proposes to implement the fee change effective October 2, 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

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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 amend the Fee Schedule to modify certain qualifying bases for the Customer Incentive Program and the Market Maker Penny and SPY Posting Credit Tiers (the "Market Maker Posting Credit Tiers"). The Exchange proposes to implement the rule change on October 2, 2023.

Customer Incentive Program

The Customer Incentive Program offers OTP Holders and OTP Firms (collectively, "OTP Holders") an additional ($0.03) credit on Customer Posting Credits if they achieve one of two qualifying criteria.[4] Currently, an OTP Holder may earn this credit by achieving either (1) an ADV from Market Maker total electronic volume of at least 0.60% of TCADV, plus at least 0.10% of TCADV from Customer posted interest in non-Penny issues, or (2) at least 0.30% of TCADV from Customer posted interest in all issues, not including Professional Customer interest, plus executed ADV of 0.60% of U.S. equity market share posted and executed on the NYSE Arca Equities [sic] market.

The Exchange proposes to modify the first of these qualifications by increasing the required amount of Market Maker total electronic volume to at least 1.00% of TCADV and eliminating any required volume from Customer posted interest. The Exchange does not propose any changes to the second qualifying basis for the Customer Incentive Program or to the amount

[4] See Fee Schedule, CUSTOMER INCENTIVE PROGRAM.

of the credit available to qualifying OTP Holders, which will remain at ($0.03). In addition, OTP Holders would continue to be eligible to earn only one ($0.03) credit through the Customer Incentive Program.

The Exchange cannot predict with certainty whether any OTP Holders would seek to qualify for the Customer Incentive Program, but believes that the proposed change would continue to encourage OTP Holders to direct Market Maker interest to the Exchange to earn an additional credit on the Customer Posting Credits. Although the proposed change would increase the level of Market Maker posted interest required to qualify for the additional credit, it would also remove the Customer posted interest component of the qualification, which could make earning the credit more achievable for OTP Holders.

Market Maker Posting Credit Tiers

The Exchange currently offers qualifying OTP Holders tiered credits on electronic executions of Market Maker posted interest in Penny issues and SPY through the Market Maker Posting Credit Tiers.[5] Currently, an OTP Holder may qualify for Super Tier II of the Market Maker Posting Credit Tiers by achieving at least 0.10% of TCADV from Market Maker posted interest in all issues, plus ETP Holder and Market Maker posted volume in Tape B securities that is equal to at least 1.50% of US Tape B consolidated average daily volume ("CADV") for the billing month executed on NYSE Arca Equities [sic] market. The Exchange proposes to modify this qualification for Super Tier II to require at least 0.15% of TCADV from Market Maker posted interest in all issues, plus ETP Holder and Market Maker Tape B adding ADV that is equal to at least 1.40% of US Tape B CADV for the billing month executed on NYSE Arca Equities [sic] market.

5 See Fee Schedule, MARKET MAKER PENNY AND SPY POSTING CREDIT TIERS.

The Exchange does not propose any changes to the amounts of the credits available to OTP Holders that qualify for Super Tier II or to any of the other qualifications for or credits offered through the Market Maker Posting Tiers.

Although the Exchange cannot predict with certainty whether any OTP Holders would seek to qualify for the Market Maker Posting Credit Tiers, the Exchange believes that the proposed change would continue to encourage OTP Holders to direct Market Maker interest to the Exchange to earn the credits offered in Super Tier II. In addition, although the proposed change would increase the level of Market Maker posted interest required to qualify for Super Tier II, it would also reduce the requirement for posted volume in Tape B securities, which could make the incentive more achievable for 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,

6 15 U.S.C. 78f(b).

7 15 U.S.C. 78f(b)(4) and (5).

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, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in August 2023, 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, 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 that the proposed changes to the qualifying criteria for the Customer Incentive Program and Market Maker Posting Credit Tiers are reasonable because they

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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.](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 increased slightly from 11.36% for the month of August 2022 to 11.37% for the month of August 2023.

are intended to continue to incent OTP Holders to direct interest to the Exchange (and, in particular, Customer and Market Maker posted interest) in order to benefit from the credits offered through the Customer Incentive Program and Market Maker Posting Credit Tiers. Although the proposed changes would increase certain of the requirements to qualify for the credits offered through these programs, the proposed changes would also reduce or eliminate certain other requirements; accordingly, the Exchange believes that the proposed changes would not discourage OTP Holders from seeking to qualify for the credits and could instead make the credits more attainable for OTP Holders.

To the extent the proposed rule change attracts greater volume and liquidity by encouraging OTP Holders 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.

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 credits. The proposal is based on the amount and type of business transacted on the Exchange, and OTP Holders can attempt to qualify for the Customer Incentive Program and Market Maker Posting Credit Tiers or not. Moreover, the proposal is designed to incent OTP Holders to continue to direct Customer and Market Maker interest to the Exchange and to aggregate such interest at the Exchange as a primary execution venue. To the extent that the proposed change attracts more opportunities for execution of Customer or Market Maker interest on 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 changes to the Customer Incentive Program and Market Maker Posting Credit Tiers are not unfairly discriminatory because they 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 proposed qualifications to earn the credits, nor are they obligated to execute posted interest. To the extent that the proposed changes attract more interest, including Customer and Market Maker posting interest, 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 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 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.”[11]

Intramarket Competition. The proposed changes are designed to attract additional order flow to the Exchange, including both Customer and Market Maker posting interest. The Exchange believes that the proposed changes would continue to incent OTP Holders to direct order flow to the Exchange in order to qualify for the Customer Incentive Program and Market Maker Posting Credit Tiers. Greater liquidity benefits all market participants on the Exchange and increased order flow would increase opportunities for execution of other trading interest. The proposed changes to the qualifications for the Customer Incentive Program and Market Maker Posting Credit Tiers would apply to all similarly-situated market participants and, accordingly, the proposed change 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

[11] See Reg NMS Adopting Release, supra note 8, at 37499.

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.[12] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in August 2023, the Exchange had less than 12% market share of executed volume of multiply-listed equity and ETF options trades.[13]

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 Customer and Market Maker posted interest to the Exchange, to provide liquidity and to attract order flow. 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.

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.

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12 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.

13 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 increased slightly from 11.36% for the month of August 2022 to 11.37% for the month of August 2023.

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)[14] of the Act and subparagraph (f)(2) of Rule 19b-4[15] 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)[16] 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-2023-69 on the subject line.

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14 15 U.S.C. 78s(b)(3)(A).

15 17 CFR 240.19b-4(f)(2).

16 15 U.S.C. 78s(b)(2)(B).

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-2023-69. 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-2023-69 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.[17]

Sherry R. Haywood,

Assistant Secretary.

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17 17 CFR 200.30-3(a)(12).