

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89045; File No. SR-NYSEAMER-2020-45)

June 11, 2020

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending the NYSE American Options Fee Schedule to Adopt a New Incentive Program for Floor Brokers

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on June 5, 2020, NYSE American LLC (“NYSE American” 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 amend the NYSE American Options Fee Schedule (“Fee Schedule”) to adopt a new incentive program for Floor Brokers. The Exchange proposes to implement the fee change effective June 5, 2020.⁴ The proposed 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 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ The Exchange originally filed to amend the Fee Schedule on June 1, 2020 (SR-NYSEAMER-2020-43) and withdrew such filing on June 5, 2020.

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 purpose of this filing is to modify the Fee Schedule to introduce a new incentive program for Floor Broker organizations (each a “Floor Broker”) to encourage Floor Brokers to increase their billable volume on the Exchange.

Specifically, the Exchange proposes to offer a rebate of \$35,000 to Floor broker organizations for each month that a Floor Broker achieves a certain minimum level of average daily volume (“ADV”) of billable contracts, as specified below.

The Exchange proposes to implement the rule changes on June 5, 2020.

Background

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.”⁵

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.⁶ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in January 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.⁷

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. To respond to this competitive marketplace, the Exchange has established incentives to assist Floor Brokers in attracting more business to the Exchange—including the Percentage Growth Incentive for certain Floor Brokers⁸—as such participants serve an important function in facilitating the execution of orders via open outcry, which promotes price discovery on the public markets. To the extent that these

⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

⁶ 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/volume/default.jsp>.

⁷ Based on OCC data, see id., the Exchange’s market share in equity-based options declined from 9.82% for the month of January 2019 to 8.08% for the month of January 2020.

⁸ See Fee Schedule, Section III.E, Floor Broker Fixed Cost Prepayment Incentive Program (the “FB Prepay Program”).

incentives succeed, the increased liquidity on the Exchange would result in enhanced market quality for all participants.

Proposed Rule Change

The Exchange proposes to adopt a Floor Broker Billable Volume Rebate (“Rebate”).⁹ As proposed, a Floor Broker would earn a rebate of \$35,000 for each month that the Floor Broker achieves certain ADV in billable ADV. The calculation for billable ADV applies to manual executions and QCCs, but excludes any Customer volume and non-billable Professional Customer QCC volume, Firm Facilitation trades, and any volume calculated to achieve the Firm Monthly Fee Cap and the Strategy Execution Fee Cap, regardless of whether either of these caps is achieved.¹⁰ In short, any volume (or contract side) for which a Floor Broker is (potentially) not billed, including because of monthly fee caps, would not count towards achieving the Rebate.

To qualify for the proposed monthly Rebate, a Floor Broker must execute the greater of:

- (i) 75,000 contract sides in billable ADV or
- (ii) 150% of the Floor Broker’s total billable ADV in contract sides during the first half of 2019 (i.e., January - June 2019).¹¹

The Exchange believes that 75,000 contract sides in billable ADV (i.e., 150% of 50,000 contract sides) is a reasonable minimum threshold for a Floor Broker, including one that is new

⁹ See proposed Fee Schedule, Section III.E.2, Floor Broker Billable Volume Rebate (the “FB Billable Volume Rebate”). To accommodate this change, the Exchange proposes (re)name Section III.E of the Fee Schedule “Floor Broker Incentive and Rebate Programs,” and to number the FB Prepay Program and the FB Billable Volume Rebate as subsection 1 and 2. See proposed Fee Schedule, Table of Contents (setting forth new Section III.E.1,2) and Section III.E.1,2.

¹⁰ See proposed Fee Schedule, Section III.E.2.

¹¹ See id.

to the Exchange, to achieve given that numerous Floor brokers exceeded this volume requirement in 2019, even though it was not required. Similarly, the Exchange believes that the minimum alternative threshold of 150% of a Floor Broker's total billable ADV in contract sides during the first half of 2019 is reasonable for those Floor Brokers that achieve more than 75,000 ADV billable contract sides, given the increased options volume executed by Floor Brokers in the past year.

The Exchange believes the proposed Rebate would encourage Floor Brokers to seek out, and increase, diverse order flow for execution on the Exchange. The Exchange's fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those that may offer similar incentives. Thus, ATP Holders have a choice of where they direct their order flow. Fees and rebates for Floor Broker activity are designed to encourage Floor Brokers to execute a variety of transaction types on the Exchange, and the FB Billable Volume Rebate is intended to augment those fees and rebates with an incentive to encourage executing billable volume. The Exchange notes that all market participants stand to benefit from any increase in billable volume by Floor Brokers, which promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants.

The Exchange cannot predict with certainty whether any Floor Brokers would avail themselves of this proposed fee change. However, all Floor brokers are potentially eligible for this Rebate.

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 Sections 6(b) (4) and (5) of the Act,¹³ 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 promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁴

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.¹⁵ Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in January 2020, the

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ See Reg NMS Adopting Release, supra note 5, at 37499.

¹⁵ 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/volume/default.jsp>.

Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.¹⁶

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, changes 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 FB Billable Volume Rebate, which offers two alternative methods to achieve the Rebate, is reasonable because it is designed to incent Floor Brokers to increase the amount and variety of billable order flow directed to the Exchange. The Exchange notes that all market participants stand to benefit from any increase in billable volume by Floor Brokers, which promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants.

The Exchange believes it is reasonable to only include transactions for which a Floor Broker is billed in the calculation for the FB Volume Rebate because Floor Brokers are already incented to execute transactions for non-billable business (e.g., Customer volume and Firm Facilitation trades or those on which monthly fees are capped per the Firm Monthly Fee Cap and the Strategy Execution Fee Cap) because there is no charge.

¹⁶ Based on OCC data, see id., the Exchange's market share in equity-based options declined from 9.82% for the month of January 2019 to 8.08% for the month of January 2020.

Finally, to the extent the proposed pricing incentives attract greater volume and liquidity, the Exchange believes the proposed changes 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 changes are 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 changes are designed to incent ATP Holders to direct liquidity to the Exchange, thereby promoting market depth, price discovery and improvement and enhancing order execution opportunities for market participants.

The Exchange cannot predict with certainty whether any Floor Brokers would avail themselves of this proposed fee change. However, all Floor brokers are potentially eligible for this Rebate.

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 Floor Brokers can opt to attempt to trade sufficient volume to achieve the Rebate or not. All Floor Brokers have the ability to qualify for the same Rebate under two alternatives means offered (i.e., the greater of at least 75,000 contract sides in billable ADV or 150% of the Floor Broker's total billable ADV in contract sides during the first half of 2019).

In addition, the proposed change applies to qualifying Floor Brokers equally and because Floor Brokers serve an important function in facilitating the execution of orders via open outcry, which as a price-improvement mechanism, the Exchange wishes to encourage and support.

Moreover, the proposed Rebate is designed to incent Floor Brokers to encourage ATP Holders to aggregate their executions—particularly billable volumes—at the Exchange as a

primary execution venue. To the extent that the proposed changes attract more billable volume 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 changes 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 that the proposed Rebate is not unfairly discriminatory because the proposed modifications would be available to all similarly-situated market participants on an equal and non-discriminatory basis. The proposed Rebate is not unfairly discriminatory to non-Floor Brokers because Floor Brokers serve an important function in facilitating the execution of orders via open outcry, which as a price-improvement mechanism, the Exchange wishes to encourage and support.

The proposed Rebate is based on the amount and type of business transacted on the Exchange and Floor Brokers are not obligated to try to achieve the Rebate. Rather, the proposed Rebate is designed to encourage these participants to utilize the Exchange as a primary trading venue (if they have not done so previously) or increase billable volume sent to the Exchange. To the extent that the proposed changes attract more order flow to the Exchange (including to the Floor), this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule changes 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."¹⁷

Intramarket Competition. The proposed Rebate is designed to assist Floor Brokers in (continuing to) attract additional order flow to the Exchange, including to the Floor, which would enhance the quality of quoting and may increase the volumes of contracts trade on the Exchange. To the extent that there is an additional competitive burden on non-Floor Brokers, the Exchange believes that this is appropriate because Floor Brokers serve an important function in facilitating the execution of orders via open outcry, which as a price-improvement mechanism, the Exchange wishes to encourage and support.

¹⁷ See Reg NMS Adopting Release, supra note 5, at 37499.

To the extent that this function is achieved, all of the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition 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 currently has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.¹⁸ Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in January 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.¹⁹

The Exchange believes that the proposed Rebate change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to incentivize Floor Brokers to direct trading 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.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must

¹⁸ See supra note 6.

¹⁹ Based on OCC data, supra note 7, the Exchange's market share in equity-based options was 9.82% for the month of January 2019 and 8.08% for the month of January 2020.

continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment. And, in fact, the Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, by encouraging additional orders to be sent to the Exchange for execution, including to the Floor.

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)²⁰ of the Act and subparagraph (f)(2) of Rule 19b-4²¹ 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)²² of the Act to determine whether the proposed rule change should be approved or disapproved.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(2).

²² 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-NYSEAMER-2020-45 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-NYSEAMER-2020-45. 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-NYSEAMER-2020-45, 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.²³

J. Matthew DeLesDernier
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).