

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-91039; File No. SR-NYSEAMER-2021-05)

February 2, 2021

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing of Proposed Rule Change to Amend Rule 970NY and Rule 970.1NY to Eliminate the Use of Dark Series on the Exchange

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 January 26, 2021, 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 Rule 970NY (Firm Quotes) and Rule 970.1NY (Quote Mitigation) to eliminate the use of dark series on the Exchange. 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 rule change is to eliminate the exclusion of inactive or “dark” series (as described below) from the requirements of Rule 970NY (Firm Quotes). In addition, the Exchange proposes to delete Rule 970.1NY (Quote Mitigation) in its entirety.

Rule 970NY describes the obligations of the Exchange to collect, process and make available to quotation vendors the best bid and best offer for each option series that is a reported security.⁴ However, under Rule 970.1NY, the only quote messages that the Exchange sends to Options Price Reporting Authority (“OPRA”) are quotes for “active” series, which are defined as any series that: (i) has traded on any options exchange in the previous 14 calendar days; (ii) is solely listed on the Exchange; (iii) has been trading ten days or less; or (iv) is a series in which the Exchange has an order.⁵ Any options series that falls outside of the above categories of “active” series are deemed inactive or “dark” series. As such, under Rule 970.1NY, the Exchange still accepts quotes from ATP Holders in these series; however, such quotes are not disseminated to OPRA. The Exchange proposes to modify Rule 970NY and to delete Rule 970.1NY to eliminate the use of “dark” series.

By way of background, Rules 970NY and 970.1NY were adopted over a decade ago in conformance with the NYSE Arca Rule 6.86-O in connection with the Penny Pilot Program,

⁴ See Rule 970.10NY.

⁵ A series may be considered “active” on an intraday basis if: (i) the series trades at any options exchange; (ii) the Exchange receives an order in the series; or (iii) the Exchange receives a request for quote from a Customer in that series.” See Rule 970.1NY.

which has since been made permanent.⁶ In 2007, when NYSE Arca Rule 6.86-O was adopted, there were five options exchanges and an industry-wide concern about “capacity issues related to excessive quoting rates.”⁷ However, since that time, 11 new exchanges launched, resulting in a total 16 options exchanges. With the increase in the number of exchanges, and associated quote traffic, OPRA capacity has been increased without issue.

As discussed further below, the Exchange believes that OPRA has the capacity to accommodate any increase in quote traffic from the Exchange arising from the publication of quotes in “dark series.” As an OPRA participant, the Exchange makes capacity requests to OPRA. Notwithstanding Rule 970.1NY, when the Exchange makes capacity requests to OPRA, it has always factored the total quote traffic it receives from Market Makers, including quotes in dark series.⁸ In other words, the Exchange presumes that all series will be active and therefore

⁶ See Securities Exchange Act Release Nos. 59142 (December 22, 2008), 73 FR 80494, 80501 (December 31, 2008) (notice citing fact that Rules 970NY and 970.1NY copy the NYSE Arca quote mitigation rule); 59472 (February 29, 2009), 74 FR 9843 (March 6, 2009) (order approving adoption of Rules 970NY and 970.1NY) See also Securities Exchange Act Release Nos. 88532 (April 1, 2020), 85 FR 19545 (April 7, 2020) (File No. 4-443) (order approving Amendment No. 5 to the Plan for the Purpose of Developing and Implementing Procedures to Facilitate the Listing and Trading of Standardized Options); 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (SR-Amex-2006-106) (approval of Penny Pilot Program and original quote mitigation strategy).

⁷ See Securities Exchange Act Release No. 54590 (October 12, 2006), 71 FR 61525, 61527 (October 18, 2006) (SR-NYSEArca-2006-73) (notice regarding adoption of NYSE Arca Rule) (“Arca Notice”). For example, in 2006-2007, OPRA had the capacity to process 360,000 message per second and, at its peak message rate, the Exchange accounted for 15% of OPRA capacity, sending 55, 248 message per second for active series.

⁸ OPRA has delegated certain functions pertaining to planning the capacity of the OPRA System to an Independent System Capacity Advisor (“ISCA”) that “may provide less than all of the capacity that has been requested if it determines (a) that the capacity requests of one or more of the parties are unreasonable, or (b) that it is not reasonable to develop or maintain a System that has capacity sufficient to satisfy the requests of the parties.” See the OPRA Capacity Guidelines, at p. 1, [available here, https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5bf419b52de21fff3e88107f_capacity_guidelines.pdf](https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5bf419b52de21fff3e88107f_capacity_guidelines.pdf). The Exchange has never been informed by the ISCA that the capacity it has

requests capacity to accommodate sending quotes for all series to OPRA. As such, the Exchange does not believe the proposed rule change would impact or change its capacity requests to OPRA. Nor would it change the total amount of capacity needed at OPRA to accommodate quotes in dark series from the Exchange because those series have already been factored into the Exchange's capacity requests to OPRA. Similarly, because OPRA publishes quote capacity information to the market (which already incorporates capacity planning that includes quotes in dark series that would be disseminated to OPRA), market participants (including data vendors and subscribers) have the opportunity to prepare for and make any necessary accommodations for anticipated quote traffic. Accordingly, the elimination of the Exchange's suppression of quotes in dark series should not impact market participants or downstream users that consume Exchange or OPRA data. Thus, the Exchange believes that this proposal would not impact its capacity requests to OPRA nor would it impact market participants or downstream consumers of OPRA data.

The Exchange also believes that the proposed discontinuation of its suppression of quotes in dark series would increase transparency and enhance price discovery. Specifically, as proposed, all Market Maker quotes (including in "inactive series" under the current Rule) would be displayed and reflected in the market to the benefit of all market participants who would be on notice of such liquidity. The Exchange also notes that, over the years, certain market participants have expressed confusion regarding what quotes are being published and which are being suppressed. Therefore, the Exchange believes that the proposal would remove the element of

requested cannot be met for any reason, including because the ISCA had deemed the request to be unreasonable. Thus, the Exchange believes that any increase in quote traffic that might be sent to OPRA as a result of the current proposal should not impact any other exchange's capacity at OPRA.

potential confusion among market participants by publishing all quotes (not just those in active series) in the disseminated quote feed.

Importantly, since the adoption of Rule 970.1NY, the Exchange has implemented the following measures that serve as additional safeguards against excessive quoting:

-Monitoring: The Exchange actively monitors the quotation activity of its Market Makers. When the Exchange detects that a Market Maker is disseminating an unusual number of quotes, the Exchange contacts that Market Maker and alerts it to such activity. Such monitoring may reveal that the Market Maker may have internal system issues or has incorrectly set system parameters that were not immediately apparent. Alerting a Market Maker to the heightened levels of activity will usually result in a change that reduces the number of quotes sent to the Exchange by the Market Maker.

-Codification of select provisions of the Options Listing Procedures Plan (“OLPP”) in Rule 903A.⁹ The OLPP is a national market system plan that, among other things, sets forth procedures governing the listing of new options series. From the OLPP, the Exchange incorporated in Rule 903A “applied uniform standards to the range of options series exercise (or strike) prices available for trading on the [Exchange] as a quote mitigation strategy.”¹⁰ In approving the OLPP provisions, subsequently incorporated in Rule 903A, the Commission

⁹ See Securities Exchange Act Release No. 61978 (April 23, 2010), 75 FR 22886 (April 30, 2010) (SR-NYSEAmex-2010-3). See also OLPP, available at, <http://www.theocc.com/clearing/industry-services/olpp.jsp>.

¹⁰ Rule 903A codified Amendment No. 3 to the OLPP. See Securities Exchange Act Release No. 60531 (August 19, 2009), 74 FR 43173 (File No. 4-443). See also Rule 903A.

indicated that “adopting uniform standards to the range of options series exercise (or strike) prices available for trading on the [Exchange] should reduce the number of option series available for trading, and thus should reduce increases in the options quote message traffic because market participants will not be submitting quotes in those series.”¹¹ The Exchange believes that adherence to the OLPP standard for strike listings has contributed to the decline of the number of strikes listed, which has in turn, reduced the amount of quotes in “dark series.” that were held back from OPRA.¹²

-Refined Market Maker Quoting Obligations: One year after adopting select provisions of the OLPP, the Exchange refined the quoting obligations applicable to Market Makers as a quote mitigation strategy.¹³ Specifically, the Exchange adopted Commentary .01 to Rule 925.1NY, which states that Specialists’ and Market Makers’ continuous quoting obligations “shall not apply to Market Makers with respect to adjusted option series, and series with a time to expiration of nine months or greater, for options on equities and Exchange Traded Fund Shares, and series with a time to expiration of twelve months or greater for Index

¹¹ Id., 74 FR at 43174.

¹² When NYSE Arca adopted its quote mitigation rule, which the Exchange copied, it estimated that deployment of the rule would reduce its quote traffic by 20-30%. See supra note 7, Arca Notice, 71 FR at 61527. In actuality, the rule has resulted in a reduction of approximately 10% of quote message traffic to OPRA. The Exchange believes this disparity was a result of the number of “inactive” series being much lower than anticipated because of increased competition and quoting activity as well as limitations on proliferation of unnecessary strikes, per the OLPP.

¹³ See Securities Exchange Act Release No. 65572 (October 14, 2011), 76 FR 65310 (October 20, 2011) (NYSEAmex-2011-61). See also Commentary .01 to Rule 925.1NY.

options.”¹⁴ Because there are no Market Maker quoting obligations associated with adjusted options series, there is a reduction in quote traffic that is sent to OPRA. Indeed, in approving the text of Commentary .01 to Rule 925.1NY, the Commission noted, “...the Exchange’s proposal would reduce the burden on market makers to submit continuous quotes that the Exchange may not submit to OPRA.”¹⁵

The Exchange believes that these quote mitigation strategies would allow the Exchange to continue to effectively mitigate quote message traffic.

In connection with the foregoing, the Exchange proposes to amend paragraphs (b)(1) and (b)(2) of Rule 970NY to delete references to the “Quote Mitigation Plan,” which refer to the plan set forth in Rule 970.1NY. In addition, the Exchange proposes to delete Rule 970.1NY in its entirety.

Implementation

The Exchange will announce the implementation date of the proposed rule change in a Trader Update within 60 days of rule approval.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),¹⁶ in general, and furthers the objectives of Section 6(b)(5) of

¹⁴ An “adjusted series” is “an option series wherein, as a result of a corporate action by the issuer of the underlying security, one option contract in the series represents the delivery of other than 100 shares of underlying stock or Exchange-Traded Fund Shares.” See Commentary .01 to Rule 925.1NY.

¹⁵ See supra note 13, 76 FR at 65311.

¹⁶ 15 U.S.C. 78f(b).

the Act,¹⁷ in particular, in 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, in general, to protect investors and the public interest.

The Exchange believes that the proposed elimination of Rule 970.1NY (and references to quote mitigation in Rule 970NY) would promote just and equitable principles of trade, as well as serve to remove impediments to and perfect the mechanism of a free and open market because the Exchange's systems capacity is more than sufficient to accommodate any increase in quote traffic to OPRA as a result of the proposed rule change. First, the Exchange believes that the proposed elimination of Rule 970.1NY would promote just and equitable principles of trade, as well as serve to remove impediments to and perfect the mechanism of a free and open market because the proposed change would increase transparency and enhance price discovery. Specifically, as proposed, all Market Maker quotes (including those in "inactive series" under the current Rule) would be displayed and reflected in the market to the benefit of all market participants who would be on notice of such liquidity. The Exchange also believes that the proposal would remove the element of potential confusion among market participants by publishing all quotes (not just those in active series) in the disseminated quote feed.

In addition, the proposed change would promote just and equitable principles of trade, as well as serve to remove impediments to and perfect the mechanism of a free and open market because the Exchange's capacity requests already presume that all series are active. Hence, the Exchange believes that the existing capacity planning at OPRA already factors in quotes in dark series being lit and therefore does not believe that the elimination of this rule (and any resulting

¹⁷ 15 U.S.C. 78f(b)(5).

increase in quote traffic) would have a negative impact on capacity.

The Exchange further believes that the existing quote mitigation strategies (i.e., monitoring of quoting activity, codification of the OLPP, and refined Market Maker quoting obligations) employed by the Exchange serve to reduce the potential for excessive quoting and therefore reduce quote traffic.

Importantly, the circumstances giving rise to the NYSE Arca rule that the Exchange copied -- industry-wide concern about “capacity issues related to excessive quoting rates” -- has subsided given that OPRA capacity has increased exponentially over the last decade coincident with the influx of new options exchanges. In addition, the proposed increase in quote traffic as a result of this proposal is minimal and therefore unlikely to adversely impact the flow of message traffic and/or harm downstream consumers of OPRA data. As noted above, the increase in quotes message traffic in dark series is already considered in the Exchange’s capacity requests to OPRA and already published to downstream users of OPRA data. As such, the Exchange believes the proposed change would not impede the protection of investors and the public interest.

Thus, the Exchange believes there is sufficient capacity at OPRA to accommodate any additional quote traffic that will result from elimination of dark series. The Exchange therefore believes that its proposal will not impact the protection of investors and the public interest.

Finally, as discussed above, the Exchange does not anticipate that its proposal would negatively impact systems capacity. However, to the extent it does, the Exchange has analyzed its capacity and represents that it and the OPRA have the necessary systems capacity to handle any incremental additional traffic associated with this proposed rule change.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, as discussed above, the Exchange believes that any increase in quote traffic that might be sent to OPRA as a result of the proposed rule change would be minimal and should not impact any other exchange's capacity at OPRA. The Exchange likewise believes that there would be no adverse impact on any downstream consumers of OPRA data given that any increase in quote traffic would be minimal and has already been included in the Exchange's capacity planning requests to OPRA.

Intramarket Competition. The elimination of "dark series" would increase intra market competition and improve quote quality, because prices and sizes of all Exchange quotations would be sent to OPRA to be published and updated. At present, Market Makers cannot "see" the internal best bid and offer in a dark series, nor can they improve upon the displayed market to establish price/time priority. This proposal to publish the quotes in inactive series will enhance intramarket competition because Market Makers will be able to submit more competitive quotes.

Intermarket Competition. For reasons similar to those described in the Intramarket Competition section, eliminating the use of dark series and publishing to OPRA the Exchange's previously unpublished quotes on such series would increase competition between markets, because NYSE American's quotes would now be visible and included in the calculation of the NBBO. Including all NYSE American quotes in the NBBO (including those in dark series), an options participant will know if an order should be sent to NYSE American to get the best price. Market Makers that use a strategy to "match" the NBBO will now need to factor NYSE American quotes into their calculations.

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAMER-2021-05 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-2021-05. 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-2021-05 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.¹⁸

J. Matthew DeLesDernier
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).