

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89335; File No. SR-NYSEAMER-2020-54)

July 16, 2020

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Amend the NYSE American Options Fee Schedule

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 July 10, 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 offer a new rebate for initiating a Complex Customer Best Execution Auction. The Exchange proposes to implement the fee change effective July 10, 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.

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

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 July 1, 2020 (SR-NYSEAMER-2020-51) and withdrew such filing on July 10, 2020.

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 offer a new rebate for initiating a Complex Customer Best Execution ("CUBE") auction, provided the ATP Holder meets the minimum volume requirements as discussed below.

The Exchange proposes to implement the rule changes on July 10, 2020.

Background

The Exchange has established various pricing incentives designed to encourage increased Electronic volume executed on the Exchange, including (but not limited to) the American Customer Engagement ("ACE") Program and the Professional Step-Up Incentive Program. The Exchange also offers an ACE Initiating Participant Rebate to participants in the ACE Program that initiate Single-Leg or Complex CUBE Auctions as well as an alternative to the ACE Initiating Participant Rebate—the Alternative Initiating Participant Rebate—that enables non-ACE Program participants to qualify for a rebate on certain initiating Single-Leg CUBE Orders provided they meet certain Professional volume requirements and increase their initiating CUBE volume. The Exchange is proposing to similarly offer an Alternative Initiating Rebate for certain initiating Complex CUBE transactions to encourage ATP Holders to submit initiating Complex CUBE Orders and to increase their initiating Single-Leg CUBE Orders and Electronic volume in

the “Professional” range.⁵ To the extent that this incentive succeeds, the increased liquidity on the Exchange would result in enhanced market quality for all participants.

Proposed Rule Change

CUBE Auction Fees & Credits: Alternative Initiating Participant Rebate

Section I.G. of the Fee Schedule sets forth the rates for per contract fees and credits for executions associated with Single-Leg and Complex CUBE Auctions.⁶ To encourage participants to utilize CUBE Auctions, the Exchange offers rebates on certain initiating CUBE volume, including an Alternative Initiating Participant Rebate, which applies to the each of the first 5,000 contracts per Single-Leg CUBE Order for those participants that do not qualify for the ACE Initiating Participant Rebate.⁷

The Exchange proposes to similarly offer an Alternative Initiating Participant Rebate to Complex CUBE transactions. As proposed, a (\$0.10) per contract Alternative Initiating Participant Rebate may be applied to each of the first 1,000 contracts per leg of a Complex CUBE Order executed in a Complex CUBE Auction, provided an ATP Holder executes a minimum of 10,000 contracts ADV in the Professional range and increases their Initiating CUBE Orders by the greater of 20% over their August 2019 volume or 10,000 contracts ADV.⁸ An ATP

⁵ For purposes of this filing, “Professional” Electronic volume includes: Professional Customer, Broker Dealer, Non-NYSE American Options Market Maker, and Firm (the “Professional volume”).

⁶ See Section I.G. of the Fee Schedule, CUBE Auction Fees & Credits.

⁷ See id., Single-Leg CUBE Auction, note 2 (providing that an ATP Holder may qualify for the (\$0.10) per contract Alternative Initiating Participant Rebate provided an ATP Holder executes a minimum of 10,000 contracts ADV in the Professional range and increase their Initiating CUBE Orders by the greater of 20% over their August 2019 volume or 10,000 contracts ADV).

⁸ See proposed Section I.G. of the Fee Schedule, CUBE Auction Fees & Credits, Complex CUBE Auction, note 2. For additional clarity, the Exchange proposes to specify that the qualifying Initiating CUBE Order volume applies to Single-Leg CUBE Auctions (see

Holder that qualifies for both the ACE Initiating Participant Rebate and the Alternative Initiating Participant Rebate is entitled only to the greater of the two rebates,⁹ however both of these Initiating Participant Rebates are available in addition to other CUBE Auction-related credits set forth in the Fee Schedule.¹⁰

This proposed change is designed to encourage ATP Holders to submit initiating Complex CUBE Orders and to increase their initiating Single-Leg CUBE Orders and Electronic volume in the Professional range. The proposed Alternative Initiating Participant Rebate would provide ATP Holders that initiate Complex CUBE Auctions another means of achieving a rebate based on Single-Leg CUBE and Professional volume, which should provide additional incentive to direct such order flow to the Exchange.¹¹ The Exchange cannot predict with certainty whether any ATP Holders would attempt to qualify for the proposed Complex CUBE Alternative Initiating Participant Rebate.

id.), but notes that, by definition, a “CUBE Order” is “an agency order that is guaranteed an execution in the Single-Leg CUBE Auction by a Contra Order.” See Fee Schedule, KEY TERMS and DEFINITIONS.

⁹ See id. The Exchange acknowledges that the two rebates are currently the same amount—i.e., (\$0.10) per contract, but the ATP Holder would nonetheless only be entitled to one of the rebates.

¹⁰ See proposed Section I.G. of the Fee Schedule, CUBE Auction Fees & Credits, Complex CUBE Auction, note 2.

¹¹ See, e.g., Fee Schedule, Section I. H, Professional Step-up Incentive (offering discounted rates on monthly Professional volume for ATP Holders that achieve Tier A, B or C as a result of increasing their Professional volume by specified percentages of TCADV over their August 2019 volume—or, for new ATP Holders that increase such volume by a specified percentages of TCADV above 10,000 contracts ADV).

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 June 2020, the Exchange

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) (“Reg NMS Adopting Release”).

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>.

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—particularly to other exchanges offering similar incentives, or discontinue or reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain options exchange transaction fees.¹⁷ Stated otherwise, changes to exchange transaction fees and rebates can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes that the proposed Alternative Initiating Participant Rebate for initiating Complex CUBE volume is reasonable because it may encourage ATP Holders that choose to participate in the CUBE to direct order flow, including initiating Complex CUBE volume and Professional volume, to the Exchange. The proposed Rebate may encourage greater use of Single-Leg and Complex CUBE Auctions, which may lead to greater opportunities to trade—and for price improvement—for all participants. In addition, the proposed Rebate, which

¹⁶ Based on OCC data, see id., the Exchange’s market share in equity-based options increased slightly from 8.20% for the month of June 2019 to 8.32% for the month of June 2020.

¹⁷ See e.g., Cboe Exchange Inc. (“Cboe”), Fee Schedule, Volume Incentive Program (VIP), available here, https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf (providing per contract credits for volume executed in Cboe’s complex price improvement auction). See also MIAX Options fee schedule, Section 1.a.iv, Professional Rebate Program, available here, https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_04012019.pdf (setting forth per contract credits on volume submitted for the account of Public Customers that are not Priority Customers, Non-MIAX Market Makers, Non-Member Broker Dealers, and Firms (collectively, Professional for purposes of MIAX program), provided the Member achieves certain Professional volume increase percentage thresholds (set forth in the schedule) in the month relative to the fourth quarter of 2015).

is based on Professional order flow would provide ATP Holders an additional incentive (to the Professional Step-Up Incentive Program) to direct such order flow to the Exchange.¹⁸

The Exchange notes that all market participants stand to benefit from increased transaction volume, as such increase promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants that do not participate in (or qualify for) the Professional Step-Up Incentive Program. As with the Single-Leg Alternative Initiating Participant Rebate, the Exchange believes that the baseline of 10,000 ADV Professional volumes for ATP Holders is reasonable because these volumes are comparable to trading volumes in August 2019 for those firms that were active on the Exchange and eligible to increase their Single-Leg CUBE initiating volume by 20% to qualify for the proposed Alternative Initiating Participant Rebate. Moreover, the proposed Rebate provides another avenue (outside of the ACE Program) for participants to avail themselves of a rebate for initiating CUBE Auctions. The Exchange cannot predict with certainty whether any ATP Holders would attempt to qualify for the Complex CUBE Alternative Initiating Participant Rebate.

Finally, to the extent the proposal attracts greater volume and liquidity, the Exchange believes this would, in turn, 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 in Electronic executions, similar to other exchange programs with competitive

¹⁸ See supra note 11 (regarding discounted rates offered via the Professional Step-up Incentive).

pricing programs, thereby promoting market depth, price discovery and improvement and enhancing order execution opportunities for market participants.¹⁹

The Proposed Rule Change is an Equitable Allocation of Fees and Rebates

The Exchange believes the proposed rule change is an equitable allocation of its fees and rebates. The proposal is based on the amount and type of business transacted on the Exchange and ATP Holders can opt to avail themselves of these incentives or not. Moreover, the proposals are designed to encourage ATP Holders to aggregate their executions at the Exchange as a primary execution venue. To the extent that the proposed changes attract more initiating CUBE Auction (and Professional) volume 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 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 proposal is not unfairly discriminatory because the proposed modifications would be available to all similarly-situated market participants on an equal and non-discriminatory basis. ATP Holders would have increased opportunity to qualify for rebates based on their Professional volume with the Alternative Initiating Participant Rebate. The Alternative Initiating Participant Rebate also offers participants that choose to participate in the Complex CUBE, but do not qualify for the ACE Initiating Participant Rebate to be eligible to receive a rebate on initiating Complex CUBE volume. The Exchange believes that this proposal should incent ATP Holders to direct Electronic volume to the Exchange, which would increase

¹⁹ See, e.g., supra note 17 (regarding Cboe rebate on VIP and MIAX Professional Rebate Program).

liquidity on the Exchange to the benefit of all market participants, which may lead to greater opportunities to trade.

This proposal is based on the amount and type of business transacted on the Exchange and ATP Holders are not obligated to try to achieve the incentive pricing option. Rather, the proposal is designed to encourage participants to utilize the Exchange as a primary trading venue (if they have not done so previously) or increase volume sent to the Exchange. To the extent that the proposed changes attract more executions 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 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."²⁰

Intramarket Competition. The proposed change is designed to continue to attract order flow to the Exchange by offering competitive rates and rebates (via the Complex CUBE Alternative Initiating Rebate) based on increased volumes on the Exchange, which would enhance the quality of quoting and may increase the volumes of contracts traded on the Exchange. To the extent that this purpose 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.²¹ Therefore, no exchange currently possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow.

²⁰ See Reg NMS Adopting Release, supra note 14, at 37499.

²¹ See supra note 15.

More specifically, in June 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.²²

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees and rebates in a manner designed to encourage ATP Holders 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 believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar pricing incentives, by encouraging additional orders to be sent to the Exchange for execution.

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)²³ of the Act and subparagraph (f)(2) of Rule 19b-4²⁴ 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

²² Based on OCC data, supra note 16, the Exchange's market share in equity-based options was 8.20% for the month of June 2019 and 8.32% for the month of June 2020.

²³ 15 U.S.C. 78s(b)(3)(A).

²⁴ 17 CFR 240.19b-4(f)(2).

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)²⁵ 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAMER-2020-54 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-2020-54. 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

²⁵ 15 U.S.C. 78s(b)(2)(B).

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-2020-54, 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.²⁶

J. Matthew DeLesDernier
Assistant Secretary

²⁶ 17 CFR 200.30-3(a)(12).