

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-97849; File No. SR-NYSEARCA-2023-45)

July 6, 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)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on June 30, 2023, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“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 modify the NYSE Arca Options Fee Schedule (“Fee Schedule”) regarding the Ratio Threshold Fee. The Exchange proposes to implement the fee change effective July 3, 2023. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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 (1) delete language relating to an expired waiver of the Ratio Threshold Fee and (2) add an exemption to the Ratio Threshold Fee for the first time that such fee is assessed in a rolling 12-month period. The Exchange proposes to implement the rule change on July 3, 2023.

The Ratio Threshold Fee is based on the number of orders entered as compared to the number of executions received in a calendar month and is intended to deter OTP Holders from submitting an excessive number of orders that are not executed.<sup>4</sup> In connection with the Exchange’s migration to the Pillar platform, the Exchange implemented a waiver of the Ratio Threshold Fee (the “Waiver”) that took effect beginning in the month in which the Exchange began its migration to the Pillar platform and would remain in effect for the three months following the month during which the Exchange completed its migration to the Pillar platform. As the Exchange completed the migration in July 2022, the Waiver was originally due to expire on October 31, 2022. The Exchange previously filed to extend the Waiver until January 31, 2023, and, subsequently, to extend the Waiver until April 30, 2023, and again to June 30, 2023.<sup>5</sup>

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<sup>4</sup> See Fee Schedule, RATIO THRESHOLD FEE; see also Securities Exchange Act Release No. 60102 (June 11, 2009), 74 FR 29251 (June 19, 2009) (SR-NYSEArca-2009-50).

<sup>5</sup> See Securities Exchange Act Release Nos. 96252 (November 7, 2022), 87 FR 68210 (November 14, 2022) (SR-NYSEARCA-2022-74) (extension of Waiver until January 31, 2023); 96878 (February 10, 2023), 88 FR 10156 (February 16, 2023) (SR-NYSEARCA-2023-14) (extension of Waiver until April 30, 2023); 97460 (May 9, 2023), 88 FR 31087 (May 15, 2023) (SR-NYSEArca-2023-35) (extension of Waiver until June 30, 2023).

The Exchange proposes to delete language from the Fee Schedule providing for the Waiver following its expiration, as it would no longer be applicable to any OTP Holders. The Exchange also proposes to adopt an exemption from the Ratio Threshold Fee for the first time that an OTP Holder incurs such fee in a rolling 12-month period (the “Exemption”), similar to the exemption currently offered by the Exchange’s affiliate, NYSE American Options.<sup>6</sup> The Exchange believes that the Exemption could help protect OTP Holders from incurring the Ratio Threshold Fee when they first encounter lower than expected executions in a rolling 12-month period, such as when they are new to the trading platform, deploying new technologies, or testing different trading strategies, thereby encouraging OTP Holders to maintain their trading activity on the Exchange by mitigating the initial impact of the Ratio Threshold Fee.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>8</sup> 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,

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<sup>6</sup> See NYSE American Options Fee Schedule, Section II. Monthly Excessive Bandwidth Utilization Fees, available at: [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf) (“The Monthly Excessive Bandwidth Utilization Fee will not be assessed for the first occurrence in a rolling 12-month period.”).

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4) and (5).

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.”<sup>9</sup>

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.<sup>10</sup> Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in May 2023, the Exchange had less than 13% market share of executed volume of multiply-listed equity and ETF options trades.<sup>11</sup>

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.

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

<sup>10</sup> 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>.

<sup>11</sup> 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 decreased from 13.08% for the month of May 2022 to 12.35% for the month of May 2023.

The Exchange believes the proposed deletion of the language describing the Waiver is reasonable because the Waiver would no longer be in effect, and the deletion would thus improve the clarity of the Fee Schedule and reduce confusion as to the fees and credits that are currently in effect. The Exchange also believes that the removal of obsolete text from the Fee Schedule would further the protection of investors and the public interest by promoting clarity and transparency in the Fee Schedule and making the Fee Schedule easier to navigate and understand.

The Exchange believes that the proposed Exemption is reasonable because it would offer OTP Holders an exemption from the Ratio Threshold Fee the first time it is incurred in a rolling 12-month period and is designed to potentially protect firms that are, for example, new to the trading platform, deploying new technologies, or testing different trading strategies, from incurring excess Ratio Threshold Fees and affording them an opportunity to assess their order to execution ratios. To the extent the proposed change encourages OTP Holders to maintain their trading activity on the Exchange, the Exchange believes the proposed change would sustain the Exchange's overall competitiveness and 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 mitigate effects of an ever-changing marketplace without affecting its competitiveness.

#### The Proposed Rule Change is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed change is an equitable allocation of fees and credits. The proposed deletion of language relating to the expired Waiver would eliminate text from the Fee Schedule no longer applicable to any OTP Holders. Accordingly, the Exchange believes the proposal would impact all similarly situated OTP Holders on an equal basis. The

proposed Exemption is an equitable allocation of fees and credits because it would be available to all OTP Holders; all OTP Holders would be eligible for the Exemption the first time they incur the Ratio Threshold Fee in a rolling 12-month period. In addition, to the extent the Exemption encourages OTP Holders to maintain their trading activity on the Exchange by mitigating the initial impact of the Ratio Threshold Fee, the Exchange believes the proposed change would promote market quality to the benefit of all market participants.

#### The Proposed Rule Change is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory because it neither targets nor will it have a disparate impact on any category of market participant. The proposed elimination of text describing the expired Waiver would affect all OTP Holders on an equal and non-discriminatory basis, as the Waiver would no longer be applicable to any OTP Holders. The Exchange believes the proposed Exemption is not unfairly discriminatory because it would apply to all OTP Holders on an equal and non-discriminatory basis. The Exemption, as proposed, would provide all OTP Holders with an exemption from the Ratio Threshold Fee the first time such fee is incurred in a rolling 12-month period. The Exchange believes that the proposed change would encourage OTP Holders to continue trading on the Exchange by lessening the initial impact of the Ratio Threshold Fee and providing OTP Holders with an opportunity to evaluate order to execution ratios. The proposed change would thus support continued trading opportunities for all market participants, thereby promoting just and equitable principles of trade, removing impediments to and perfecting the mechanism of a free and open market and a national market system and, in general, protecting 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."<sup>12</sup>

*Intramarket Competition*

The Exchange does not believe the proposed changes would impose any burden on intramarket competition that is not necessary or appropriate. The deletion of the language relating to the Waiver would remove language from the Fee Schedule no longer applicable to any OTP Holders and, accordingly, would not have any impact on intramarket competition. The proposed Exemption would apply equally to all OTP Holders; all OTP Holders would be eligible for the Exemption for the first occurrence of the Ratio Threshold Fee in a rolling 12-month period. To the extent the proposed change is successful in encouraging OTP Holders to maintain their trading activity on the Exchange, the Exchange believes the proposed change could promote market quality to the benefit of all market participants.

*Intermarket Competition*

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<sup>12</sup> See Reg NMS Adopting Release, supra note 9, at 37499.

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.<sup>13</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in May 2023, the Exchange had less than 13% market share of executed volume of multiply-listed equity and ETF options trades.<sup>14</sup>

The Exchange does not believe the proposed changes would impose any burden on intramarket competition that is not necessary or appropriate. Deleting text describing the Waiver would add clarity to the Fee Schedule by removing expired pricing and, accordingly, would not have any impact on intermarket competition. The proposed Exemption would not impose any burden on competition that is not necessary or appropriate because it would apply equally to all OTP Holders. All OTP Holders would be eligible for the Exemption the first time the Ratio Threshold Fee is applied in a rolling 12-month period. To the extent the Exemption encourages OTP Holders to continue trading on the Exchange, the Exchange believes the proposed change

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<sup>13</sup> 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>.

<sup>14</sup> 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 decreased from 13.08% for the month of May 2022 to 12.35% for the month of May 2023.



would sustain the Exchange's overall competitiveness and its market quality for all market participants.

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 has become effective upon filing pursuant to Section 19(b)(3)(A)<sup>15</sup> of the Act and paragraph (f) thereunder. At any time within 60 days of the filing of the 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.

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](mailto:rule-comments@sec.gov). Please include file number SR-NYSEARCA-2023-45 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.

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<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

All submissions should refer to file number SR-NYSEARCA-2023-45. 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-2023-45 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.<sup>16</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>16</sup> 17 CFR 200.30-3(a)(12).