



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96066; File No. SR-NYSEAMER-2022-45]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Amend the NYSE American Options Fee Schedule Concerning the Options Regulatory Fee
October 13, 2022.

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 September 28, 2022, 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”) regarding the Options Regulatory Fee (“ORF”), effective September 28, 2022. 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 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to (1) waive the ORF for the period November 1, 2022 through January 31, 2023; (2) eliminate the requirement that the Exchange may only modify the ORF semi-annually; and (3) delete outdated language relating to the ORF for August 30, 2019 (the “August 2019 ORF”).

Background

As a general matter, the Exchange may only use regulatory funds such as the ORF “to fund the legal, regulatory, and surveillance operations” of the Exchange.⁴ More specifically, the ORF is designed to recover a material portion, but not all, of the Exchange’s costs for the supervision and regulation of ATP Holders, including the Exchange’s regulatory program and legal expenses associated with options, such as the costs related to in-house staff, third-party service providers, and technology that facilitate surveillance, investigation, examinations and enforcement (collectively, the “ORF Costs”). ORF funds may also be used for indirect expenses such as human resources and other administrative costs. The Exchange monitors the amount of revenue collected from the ORF to ensure that this revenue, in combination with other regulatory fees and fines, does not exceed regulatory costs.

The ORF is assessed on ATP Holders for options transactions that are cleared by the ATP Holder through the Options Clearing Corporation (“OCC”) in the Customer range regardless of the exchange on which the transaction occurs.⁵ All options transactions must clear via a clearing firm and such clearing firms can then choose to pass through all, a portion, or none of the cost

⁴ The Exchange considers surveillance operations part of regulatory operations. The limitation on the use of regulatory funds also provides that they shall not be distributed. See Thirteenth Amended and Restated Operating Agreement of NYSE American LLC, Article IV, Section 4.05 and Securities Exchange Act Release No. 87993 (January 16, 2020), 85 FR 4050 (January 23, 2020) (SR-NYSEAMER-2020-04).

⁵ See Fee Schedule, Section VII, Regulatory Fees, Options Regulatory Fee (“ORF”), available here, https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf.

of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from ATP Holder clearing firms by the OCC on behalf of NYSE American,⁶ the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such ATP Holders. In addition, the Exchange notes that the costs relating to monitoring ATP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring ATP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating ATP Holders that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the ATP Holder's relationship with its Customers via more labor-intensive exam-based programs.⁷ As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., ATP Holder proprietary transactions) of its regulatory program.

ORF Collections and Monitoring of ORF

Exchange rules establish that the Exchange may only increase or decrease the ORF semi-annually, that any such fee change will be effective on the first business day of February or August, and that market participants must be notified of any such change via Trader Update at

⁶ See *id.* The Exchange uses reports from OCC when assessing and collecting the ORF. The ORF is not assessed on outbound linkage trades. An ATP Holder is not assessed the fee until it has satisfied applicable technological requirements necessary to commence operations on NYSE American. See *id.*

⁷ The Exchange notes that many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such as surveillance for position limit violations, manipulation, front-running and contrary exercise advice violations/expiring exercise declarations. The Exchange and other options SROs are parties to a 17d-2 agreement allocating among the SROs regulatory responsibilities relating to compliance by the common members with rules for expiring exercise declarations, position limits, OCC trade adjustments, and Large Option Position Report reviews. See, e.g., Securities Exchange Act Release No. 85097 (February 11, 2019), 84 FR 4871 (February 19, 2019).

least 30 calendar days prior to the effective date of the change.⁸

Because the ORF is based on options transactions volume, the amount of ORF collected is variable. For example, if options transactions reported to OCC in a given month increase, the ORF collected from ATP Holders will likely increase as well. Similarly, if options transactions reported to OCC in a given month decrease, the ORF collected from ATP Holders will likely decrease as well. Accordingly, the Exchange monitors the amount of ORF collected to ensure that it does not exceed the ORF Costs. If the Exchange determines the amount of ORF collected exceeds costs over an extended period, the Exchange may adjust the ORF by submitting a fee change filing to the Securities and Exchange Commission (the “Commission”).

Temporary ORF Waiver

Based on the Exchange’s recent review of regulatory costs and ORF collections, the Exchange proposes to waive the ORF from November 1, 2022 through January 31, 2023 in order to help ensure that the amount collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange’s total regulatory costs. The Exchange proposes to resume assessing the ORF on February 1, 2023 at the current rate of \$0.0055 per contract. The Exchange will notify ATP Holders of the proposed change to the ORF via Trader Update at least 30 calendar days prior to the proposed operative date of the waiver, November 1, 2022, so that market participants have an opportunity to configure their systems to account for the waiver of the ORF. The Exchange’s proposal to waive the ORF for the month of January 2023 would similarly provide ATP Holders with additional time in the new year to make any necessary adjustments or preparations for the resumption of the ORF effective February 1, 2023.

The proposed waiver is based on recent options volumes. The options industry has experienced extremely high options trading volumes and volatility, and options volume in 2022 remains high when compared to options volume in 2019, 2020, and 2021. The increased options

⁸ See Fee Schedule, *supra* note 5.

volumes have, in turn, impacted the Exchange's ORF collection.

For example, total average daily volume in 2022, to date, is 115% higher than total average daily volume in 2019, and customer average daily volume in 2022, to date, is 123% higher than customer average daily volume in 2019. Below is industry data from OCC⁹ illustrating the significant increase in options volume between 2019 and 2022:

	2019	2020	2021	2022
Customer ADV	15,234,198	25,598,023	34,730,276	33,939,560
Total ADV	35,083,673	55,369,993	74,339,870	75,497,647

In addition, the below industry data from OCC demonstrates the high options trading volumes (especially when compared to 2019, 2020, and 2021) and volatility that the industry has continued to experience in 2022:

	April 2022	May 2022	June 2022	July 2022	August 2022	September 2022
Customer ADV	33,266,801	34,202,077	31,469,858	30,506,706	33,013,156	34,149,000
Total ADV	73,140,597	76,254,734	70,628,926	68,535,963	73,487,342	77,134,470

Because of the difficulty of predicting when volumes may return to more normal levels, the Exchange proposes to waive the ORF from November 1, 2022 through January 31, 2023. The Exchange cannot predict whether options volume will remain at these levels going forward and projections for future regulatory costs are estimated, preliminary, and may change. However, the Exchange believes that the proposed waiver of the ORF would allow the Exchange to continue to monitor the amount collected from the ORF to help ensure that ORF collection, in combination

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>. The volume discussed in this filing is based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, in contract sides.

with other regulatory fees and fines, does not exceed regulatory costs without the need to account for any ORF collection during that timeframe. The Exchange proposes to resume assessing the current ORF rate of \$0.0055 per contract side as of February 1, 2023.

Semi-Annual Changes to ORF

As noted above, the Fee Schedule currently specifies that the Exchange may only increase or decrease the ORF semi-annually and that any such fee change will be effective on the first business day of February or August.¹⁰ NYSE American proposes to eliminate this requirement to afford the Exchange increased flexibility in amending the ORF.¹¹ Although the Exchange proposes to eliminate the requirement to adjust the ORF only semi-annually, it would continue to submit a proposed rule change for each modification of the ORF and notify ATP Holders of any planned change to the ORF by Trader Update at least 30 calendar days prior to the effective date of such change. The Exchange believes that the prior notification to ATP Holders will provide guidance on the timing of any changes to the ORF and ensure that ATP Holders are prepared to configure their systems to properly account for the ORF. The Exchange will also issue a Trader Update informing ATP Holders of the ORF adjustment proposed in this filing, as described below, at least 30 calendar days prior to the proposed effective date.

August 2019 ORF

The Exchange proposes to delete language in the Fee Schedule pertaining to the August 2019 ORF, which was relevant only for the August 30, 2019 trading day and thus no longer reflects a fee currently assessed by the Exchange. The Exchange believes this change would improve the clarity of the Fee Schedule by removing obsolete language.

2. Statutory Basis

¹⁰ See Fee Schedule, *supra* note 5.

¹¹ The Exchange notes that at least one other options exchange has previously removed this requirement with respect to adjusting the ORF. See, e.g., Securities Exchange Act Release No. 76950 (January 21, 2016), 81 FR 4687 (January 27, 2016) (SR-NASDAQ-2016-003) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Options Regulatory Fee).

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)¹² of the Act, in general, and Section 6(b)(4) and (5)¹³ of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

The Proposal is Reasonable

The Exchange believes the proposed temporary waiver of the ORF is reasonable because it would help ensure that collections from the ORF do not exceed a material portion of the Exchange's ORF Costs. As noted above, the Exchange may only use regulatory funds such as ORF "to fund the legal, regulatory, and surveillance operations" of the Exchange.¹⁴ In this regard, the ORF is designed to recover a material portion, but not all, of the Exchange's ORF Costs.

Although there can be no assurance that the Exchange's final costs for 2022 will not differ materially from its expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward, the Exchange believes that the amount collected based on the current ORF rate, when combined with regulatory fees and fines, may result in collections in excess of the estimated ORF Costs for the year. Particularly, as noted above, the options market has seen a substantial increase in volume in 2022 as compared to 2019, 2020, and 2021, due in large part to the continued extreme volatility in the marketplace as a result of the COVID-19 pandemic. This unprecedented spike in volatility resulted in significantly higher volume than was originally projected by the Exchange, thereby resulting in substantially higher ORF collections than projected. The Exchange therefore believes that it would be reasonable to waive ORF from November 1, 2022 through January 31, 2023 to

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ See note 4, supra.

help ensure that ORF collection does not exceed the ORF Costs for 2022.¹⁵ Particularly, the Exchange believes that waiving the ORF from November 1, 2022 to January 31, 2023 and taking into account all of the Exchange's other regulatory fees and fines would allow the Exchange to continue covering a material portion of ORF Costs, while lessening the potential for generating excess funds that may otherwise occur using the current rate. The Exchange would resume assessing its current ORF (\$0.0055 per contract) as of February 1, 2023. Until effectiveness of the waiver on November 1, 2022, the Exchange will continue to monitor the amount collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed ORF Costs. The Exchange would also continue monitoring the amount collected from the ORF when such collection resumes on February 1, 2023 and, if necessary to ensure that such collections do not exceed such costs, subsequently adjust the ORF by submitting a filing a proposed rule change and notifying ATP Holders of such change by Trader Update.

The Exchange believes that the proposed elimination of language specifying that the Exchange may only increase or decrease the ORF semi-annually and that any such fee change must be effective on the first business day of February or August is reasonable because it is designed to afford the Exchange increased flexibility in making necessary adjustments to the ORF, as the Exchange is required to monitor the amount collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed ORF Costs . The Exchange also believes the proposed change is reasonable because the Exchange will continue to provide market participants with 30 days advance notice of changes to the ORF, thereby providing ATP Holders with adequate time to make any necessary adjustments to accommodate the change.

The Exchange also believes that the proposed deletion of language relating to the August

¹⁵ The Exchange's proposal to also waive the ORF for the month of January 2023 would provide ATP Holders with additional time in the new year to make any necessary adjustments or preparations for the resumption of the ORF effective February 1, 2023.

2019 ORF is reasonable because it would remove obsolete language and thus improve the clarity of the Fee Schedule.

The Proposal is an Equitable Allocation of Fees

The Exchange believes its proposal is an equitable allocation of fees among its market participants. The Exchange believes that the proposed waiver would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from ATP Holder clearing firms by the OCC on behalf of NYSE American, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion ORF Costs among such ATP Holders. In addition, the Exchange notes that the costs relating to monitoring ATP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring ATP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating ATP Holders that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the ATP Holder's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., ATP Holder proprietary transactions) of its regulatory program. Thus, the Exchange believes that a temporary waiver of the ORF is an equitable allocation of fees because it would apply equally to all ATP Holders on all their transactions that clear in the Customer range at the OCC.

The Exchange also believes that the proposed change to eliminate the requirement that the Exchange modify the ORF only semi-annually in February or August is equitable because the change would impact all ATP Holders subject to the ORF uniformly, and all ATP Holders

would continue to receive at least 30 days' advance notice of changes to the ORF. The proposed change to remove language relating to the August 2019 ORF is also equitable because it would eliminate language from the Fee Schedule that is no longer applicable to any ATP Holders.

The Proposed Fee is Not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes that the proposed waiver of the ORF would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from ATP Holder clearing firms by the OCC on behalf of NYSE American, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such ATP Holders. In addition, the Exchange notes that the costs relating to monitoring ATP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring ATP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating ATP Holders that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the ATP Holder's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., ATP Holder proprietary transactions) of its regulatory program. Thus, the Exchange believes the temporary waiver of the ORF and the proposed modification of language relating to the Exchange's ability to modify the ORF is not unfairly discriminatory because the changes would apply to all ATP Holders subject to the ORF and the Exchange would provide all such ATP Holders with 30 days' advance notice of planned changes to the ORF.

The Exchange believes that the proposed change to eliminate the semi-annual change requirement is not unfairly discriminatory because the change would apply to all ATP Holders subject to the ORF. Furthermore, all ATP Holders would continue to be notified of changes to the ORF at least 30 days prior to the effectiveness of any such change. The proposed change to remove language relating to the August 2019 ORF is also not unfairly discriminatory because it would eliminate language from the Fee Schedule describing a fee that was effective only for August 30, 2019 and thus no longer impacts any ATP Holders.

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.

Intramarket Competition. The Exchange believes the proposed change would not impose an undue burden on competition because the ORF is charged to all ATP Holders on all their transactions that clear in the Customer range at the OCC; thus, the amount of ORF imposed is based on the amount of Customer volume transacted. The Exchange believes that the proposed temporary waiver of the ORF would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. In addition, because the ORF is collected from ATP Holder clearing firms by the OCC on behalf of NYSE American, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such ATP Holders. The Exchange further believes that the proposed change to remove the semi-annual requirement would not impose any burden on competition because the change would impact all ATP Holders subject to the ORF, and the Exchange will continue to provide advance notice of changes to the ORF to all ATP Holders via Trader Update. The Exchange also believes that the proposed change to eliminate language relating to the August 2019 ORF would

not impact intramarket competition because it would simply add clarity to the Fee Schedule by removing text describing a fee that is no longer effective.

Intermarket Competition. The proposed fee change is not designed to address any competitive issues. Rather, the proposed change is designed to help the Exchange adequately fund its regulatory activities while seeking to ensure that total collections from regulatory fees do not exceed total regulatory costs and to promote clarity in the Fee Schedule by deleting obsolete text.

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)¹⁶ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁷ 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)¹⁸ of the Act to determine whether the proposed rule change should be approved or disapproved.

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f)(2).

¹⁸ 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 No. SR-NYSEAMER-2022-45 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 No. SR-NYSEAMER-2022-45. 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 No. SR-NYSEAMER-2022-45, 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.¹⁹

J. Matthew DeLesDernier,
Deputy Secretary.

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¹⁹ 17 CFR 200.30-3(a)(12).