This document is scheduled to be published in the Federal Register on 10/10/2023 and available online at **https://federalregister.gov/d/2023-22347**, and on **https://govinfo.gov**

BILLING CODE 8011-01P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98676; File No. SR-NYSEARCA-2023-68]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the NYSE Arca Options Fee Schedule to Modify the Options Regulatory Fee

October 3, 2023

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 29, 2023, NYSE Arca, Inc. ("NYSE Arca" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II 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 Arca Options Fee Schedule ("Fee Schedule") regarding the Options Regulatory Fee ("ORF"). 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.

1 15 U.S.C. 78s(b)(1).

2 15 U.S.C. 78a.

3 17 CFR 240.19b-4.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to decrease the ORF from $0.0055 per contract to $0.0038 per contract, effective on January 1, 2024, and to provide for a temporary waiver of the ORF for the three months leading up to such change, from October 1, 2023 through December 31, 2023 (the "Waiver Period").[4]

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.[5] 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 OTP Holders and OTP Firms (collectively, "OTP Holders"), including the Exchange's regulatory program and legal expenses associated with options regulation, such as the costs related to in-house staff, third-party service providers, and

4 See proposed Fee Schedule, NYSE Arca GENERAL OPTIONS and TRADING PERMIT (OTP) FEES, Regulatory Fees, Options Regulatory Fee ("ORF"). The Exchange proposes to modify the Fee Schedule to provide for a waiver of ORF from October 1, 2023 until December 31, 2023, and to provide that the ORF rate would be $0.0038 when the Exchange resumes assessing ORF on January 1, 2024.

5 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 Bylaws of NYSE Arca, Inc., Art. II, Sec. 2.03.

technology that facilitate regulatory functions such as 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 OTP Holders for options transactions that are cleared by the OTP Holder through the Options Clearing Corporation ("OCC") in the Customer range regardless of the exchange on which the transaction occurs and is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca.[6] 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 of the ORF to its customers, i.e., the entering firms. The Exchange notes that the costs relating to monitoring OTP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring OTP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating OTP 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 OTP Holder's relationship with its Customers via more labor-intensive exam-based programs.[7] As a result, the costs associated with administering the

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6 See Fee Schedule, NYSE Arca GENERAL OPTIONS and TRADING PERMIT (OTP) FEES, Regulatory Fees, Options Regulatory Fee ("ORF"). The Exchange uses reports from OCC when assessing and collecting the ORF. The ORF is not assessed on outbound linkage trades. An OTP Holder is not assessed the fee until it has satisfied applicable technological requirements necessary to commence operations on NYSE Arca. 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

customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., OTP Holder proprietary transactions) of its regulatory program.

ORF Collections and Monitoring of ORF

Exchange rules establish that market participants must be notified of any change in the ORF via Trader Update at 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 OTP Holders will likely increase as well. Similarly, if options transactions reported to OCC in a given month decrease, the ORF collected from OTP 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 ORF Costs, the Exchange will adjust the ORF by submitting a fee change filing to the Securities and Exchange Commission (the "Commission").

Reduction of ORF and Temporary ORF Waiver

The Exchange currently assesses an ORF of $0.0055 per contract. Based on the Exchange's recent review of regulatory costs, ORF collections, and options transaction volume, the Exchange proposes to decrease the ORF from the current rate of $0.0055 per contract to $0.0038 per contract effective January 1, 2024 and, in concert with the proposed reduction of the ORF, to waive the ORF from October 1, 2023 through December 31, 2023 in

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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).

8 See Fee Schedule, supra note 6.

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 notified OTP Holders of the proposed temporary waiver of the ORF via Trader Update on September 1, 2023 (which was at least 30 calendar days prior to the proposed operative date of the waiver, October 1, 2023)[9] and will also notify OTP Holders of the proposed change to the ORF rate via Trader Update at least 30 days prior to the proposed operative date of the new rate, January 1, 2024. The Exchange believes such notices will ensure that market participants have sufficient opportunity to configure their systems to account properly for both the ORF waiver and revised ORF.

The proposed modification of the ORF and accompanying waiver are informed by the Exchange's analysis of recent options volumes. The Exchange proposes to reduce the ORF because it believes that options transaction volume has increased to a level that if the ORF is not adjusted, the ORF revenue to the Exchange year-over-year could exceed a material portion of the Exchange's ORF Costs.[10] The options industry has continued to experience extremely high options trading volumes and volatility, as illustrated in the table below reflecting industry data from OCC for 2021, 2022, and 2023:[11]

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9 See https://www.nyse.com/trader-update/history#110000672056.

10 The Exchange notes that it last modified the ORF rate in February 2014. See Securities Exchange Act Release No. 71409 (January 27, 2014), 79 FR 5499 (January 31, 2014) (SR-NYSEArca-2014-06). The Exchange also previously filed to waive the ORF from November 1, 2022 through January 31, 2023. See Securities Exchange Act Release No. 96374 (November 22, 2022), 87 FR 73372 (November 29, 2022) (SR-NYSEARCA-2022-78).

11 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.

	2021	2022	2023
Customer ADV	34,730,276	34,091,409	35,957,560
Total ADV	74,339,870	76,488,459	81,483,685

For example, although customer average daily volume decreased slightly from 2021 to 2022, both total average daily volume and customer average daily volume in 2023 increased over the already elevated levels in 2021 and 2022.

The below industry data from OCC demonstrates the high options trading volumes and volatility that the industry has continued to experience in 2023:

	April 2023	May 2023	June 2023	July 2023	August 2023
Customer ADV	32,498,578	34,535,662	37,028,394	35,965,918	35,387,029
Total ADV	73,005,006	78,571,791	83,362,815	80,391,999	81,381,473

The persisting increased options volumes have, in turn, impacted the amount of ORF collected. To determine whether ORF fees should be adjusted, the Exchange reviewed options transaction volume from 2021 through August 2023. Based on the Exchange's review and analysis of historical options transaction volume and predictions regarding future options transaction volume, the Exchange projects that options transaction volume is likely to continue to remain high into 2024.

The Exchange believes that it has sufficient information based on recent options transaction volume to determine how to adjust the ORF for 2024. Taking into consideration both the sustained increase in options transaction volume, which has persisted into 2023 (and which has translated to increased ORF collection), the Exchange proposes to decrease the ORF from \$0.0055 to \$0.0038 per contract. The Exchange further proposes to make this change effective on January 1, 2024 and to not assess any ORF during the Waiver Period, rather than further adjusting the ORF for the duration of the Waiver Period, as the Exchange believes this proposal would most efficiently accomplish the goals of ensuring that ORF collection does not exceed ORF Costs for 2023 and modifying the ORF rate so that the Exchange may assess an ORF that is designed to recover a material portion, but not all, of the Exchange's projected ORF Costs when the Exchange resumes assessing ORF on January 1, 2024.

The proposed decrease in ORF is based on the Exchange's estimated projections for its regulatory costs, balanced with the observed increase in options volumes. The Exchange cannot predict whether options volume will remain at the current level going forward and projections for future regulatory costs are estimated, preliminary, and may change. However, the Exchange believes that amounts collected from assessment of the ORF (as modified) will continue to cover a material portion, but not all, of the Exchange's ORF Costs. In addition, because of the sustained impact of the elevated trading volumes that have persisted into 2023, along with the difficulty of predicting when volumes may return to more normal levels, the Exchange believes that waiving ORF from October 1, 2023 to December 31, 2023 and implementing the reduced ORF rate of $0.0038 on January 1, 2024 (rather than reducing ORF more drastically in the interim) would lessen the potential for generating excess funds and help ensure that the ORF is designed to recover a material portion, but not all, of the Exchange's projected ORF Costs. The Exchange will continue monitoring ORF Costs in advance of the resumption of the ORF and when it resumes assessing ORF on January 1, 2024, and, if the Exchange determines that, in light of projected volumes and ORF Costs, the ORF rate should be further modified to help ensure that ORF collections would not exceed a material portion of ORF Costs, adjust the ORF by submitting a proposed rule change and notifying OTP Holders of such change by Trader Update.

2. Statutory Basis

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 reduction of ORF and accompanying 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 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 2023 will not differ materially from its expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at current or similar levels 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 and going forward. Particularly, as noted above, the options market has continued to experience elevated volumes and volatility in 2023, thereby resulting in substantially higher ORF collections than projected. The Exchange therefore believes that it would be reasonable to decrease the ORF from \$0.0055 per contract to \$0.0038 per contract effective January 1, 2024, and, in connection with that change, to waive ORF from October 1, 2023 through December 31, 2023. The Exchange believes the proposed change is

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12 15 U.S.C. 78f(b).

13 15 U.S.C. 78f(b)(4) and (5).

reasonable because it would help the Exchange ensure that ORF collection does not exceed a material portion of the ORF Costs for 2023 and facilitate the efficient implementation of a revised ORF rate designed to recover a material portion, but not all, of the Exchange's projected ORF Costs. The Exchange proposes to make the new ORF rate effective on January 1, 2024 and to not assess any ORF during the Waiver Period, rather than further adjusting the ORF for the duration of the Waiver Period, as the Exchange believes this proposal would most efficiently accomplish these objectives. The Exchange believes that not assessing ORF during the Waiver Period 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 also believes that it is reasonable to resume ORF at the decreased rate of $0.0038 on January 1, 2024. The proposed rate of $0.0038 per contract is based on the Exchange's estimated projections for its regulatory costs, balanced with the increase in options volumes that has persisted into 2023 and that is likely to continue into 2024; the Exchange thus believes that resumption of the ORF at this rate on January 1, 2024 is reasonable because it would permit the Exchange to resume assessing an ORF that is designed to recover a material portion, but not all, of the Exchange's projected ORF Costs. The Exchange would continue monitoring ORF Costs in advance of the resumption of the ORF and when it resumes assessing ORF on January 1, 2024 and, if the Exchange determines that, in light of projected volumes and ORF Costs, the ORF rate should be further modified to help ensure that ORF collections would not exceed a material portion of ORF Costs, further adjust the ORF by submitting a proposed rule change and notifying OTP Holders of such change by Trader Update.

<u>The Proposal is an Equitable Allocation of Fees</u>

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. As noted above, the ORF is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca and is assessed on all options transactions that are cleared at the OCC in the Customer range. In addition, the Exchange notes that the costs relating to monitoring OTP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring OTP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating OTP 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 OTP 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., OTP Holder proprietary transactions) of its regulatory program. The Exchange believes that the proposed reduction of ORF from $0.0055 per contract to $0.0038 per contract effective January 1, 2024, along with a temporary waiver of the ORF for the three months prior to such change, is an equitable allocation of fees because the new ORF rate would apply equally to all OTP Holders on all their transactions that clear in the Customer range at the OCC, and the Exchange would not assess the ORF on any such transactions during the Waiver Period. The proposed change also would permit the Exchange to efficiently adjust the ORF, which is applicable to all OTP Holders' transactions that clear in the Customer range at the OCC, to an amount designed to recover a material portion, but not all, of the

Exchange's projected ORF Costs. The Exchange also believes that recommencing the ORF at the decreased rate of $0.0038 per contract effective January 1, 2024, unless the Exchange determines it necessary to further adjust the ORF to ensure that ORF collections do not exceed a material portion of ORF Costs, is equitable because the ORF would resume applying equally to all OTP Holders on options transactions in the Customer range, at a rate designed to recover a material portion, but not all, of the Exchange's projected ORF Costs.

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. As noted above, the ORF is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca and is assessed on options transactions that are cleared at the OCC in the Customer range. In addition, the Exchange notes that the costs relating to monitoring OTP Holders with respect to Customer trading activity are generally higher than the costs associated with monitoring OTP Holders that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating OTP 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 OTP 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., OTP Holder proprietary transactions) of its regulatory program. Thus, the Exchange believes the proposed reduction of ORF and accompanying temporary waiver of the ORF is not unfairly discriminatory because the changes would apply to all OTP Holders subject to the ORF and the Exchange would provide all such OTP Holders with 30 days' advance notice of planned changes to the ORF. The Exchange also believes that recommencing the ORF on January 1, 2024 at $0.0038, unless the Exchange determines it necessary to further adjust the ORF to ensure that ORF collections do not exceed a material portion of ORF Costs, is not unfairly discriminatory because the Exchange would resume assessing an ORF designed to recover a material portion, but not all, of the Exchange's projected ORF Costs, and the ORF would resume applying equally to all OTP Holders based on their transactions that clear in the Customer range at the OCC.

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 intramarket competition because the ORF is charged to all OTP 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 reduction of the ORF rate and 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. The ORF is collected from OTP Holder clearing firms by the OCC on behalf of NYSE Arca and is assessed on all options transactions cleared at the OCC in the Customer range. The Exchange also believes recommencing the ORF on January 1, 2024 at $0.0038 (unless the Exchange determines it necessary at that time to adjust the ORF to ensure that ORF collections do not exceed a material portion of ORF Costs) would not impose an undue burden on competition because the proposed decreased rate would apply equally to all OTP Holders subject to ORF and would permit the Exchange to resume assessing an ORF that is designed to recover a material portion, but not all, of the Exchange's projected ORF Costs and the ORF would, as currently, apply to all OTP Holders on their options transactions that clear in the Customer range at the OCC. The Exchange will continue to provide advance notice of changes to the ORF to all OTP Holders via Trader Update to provide OTP Holders with sufficient opportunity to configure their systems to account properly for both the Waiver Period and resumption of ORF at a new, lower rate on January 1, 2024.

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.

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)[14] of the Act and subparagraph (f)(2) of Rule 19b-4[15] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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14 15 U.S.C. 78s(b)(3)(A).

15 17 CFR 240.19b-4(f)(2).

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)[16] 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 (https://www.sec.gov/rules/sro.shtml); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSEARCA-2023-68 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-NYSEARCA-2023-68. 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

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16 15 U.S.C. 78s(b)(2)(B).

(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-2023-68 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.[17]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-22347 Filed: 10/6/2023 8:45 am; Publication Date: 10/10/2023]

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[17] 17 CFR 200.30-3(a)(12).