



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-102274; File No. SR-NYSEARCA-2024-90]

Self-Regulatory Organizations; NYSE Arca, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Waive the Options Regulatory Fee (ORF) for December 2024

January 23, 2025.

I. Introduction

On November 25, 2024, NYSE Arca, Inc. (“NYSE Arca” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change (File No. SR-NYSEARCA-2024-90) to amend its Options Fee Schedule (“Fee Schedule”) regarding the Options Regulatory Fee (“ORF”).³ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ The proposed rule change was published for comment in the Federal Register on December 16, 2024.⁵ The Commission has not received any comments on the proposal. Pursuant to Section 19(b)(3)(C) of the Act,⁶ the Commission is hereby: (1) temporarily suspending File No. SR-NYSEARCA-2024-90; and (2) instituting proceedings to determine whether to approve or disapprove File No. SR-NYSEARCA-2024-90.

II. Description of the Proposed Rule Change

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 101868 (Dec. 10, 2024), 89 FR 101650 (Dec. 16, 2024) (“Notice”).

⁴ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ See Notice, supra note 3.

⁶ 15 U.S.C. 78s(b)(3)(C).

The Exchange proposed to amend the Fee Schedule to temporarily waive the ORF for the period December 1, 2024 through December 31, 2024 and resume assessment of the ORF at the same rate of \$0.0038 per share on January 1, 2025.⁷ Noting that it adjusts the amount of ORF amount periodically to ensure that the revenue from its ORF does not exceed its regulatory costs, the Exchange proposed to waive assessment of the ORF from December 1 through December 31, 2024 “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.”⁸ According to the Exchange, the proposed waiver was based on its “analysis of recent options volumes and regulatory costs” and its belief 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.”⁹ The Exchange proposed to resume assessment of the ORF at the same rate on January 1, 2025, “based on the Exchange’s estimated projections for its regulatory costs, balanced with the observed increases in options volumes.”¹⁰ The exchange previously waived its ORF for selected months in 2022 and 2023.¹¹

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹² at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,¹³ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory

⁷ See Notice, supra note 3, at 101651. The Exchange also proposed a ministerial change to delete outdated language relating to a prior ORF waiver and superseded ORF rate. Id. The Exchange assesses the ORF on Options Trading Permit (“OTP”) Holders and OTP Firms (collectively, “OTP Holders”) for options transactions that are cleared by those firms through the Options Clearing Corporation (“OCC”) in the Customer range, regardless of the exchange on which the transaction occurs. See id. at 101650.

⁸ See id. at 101651.

⁹ Id.

¹⁰ Id. at 101652.

¹¹ See Securities Exchange Act Release Nos. 96374 (Nov. 22, 2022), 87 FR 73372 (Nov. 29, 2022) (SR-NYSEARCA-2022-78) and 98676 (Oct. 3, 2023), 88 FR 69969 (Oct. 10, 2023) (SR-NYSEARCA-2023-68).

¹² 15 U.S.C. 78s(b)(3)(C).

¹³ 15 U.S.C. 78s(b)(1).

organization (“SRO”) 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.¹⁴ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements”¹⁵

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;¹⁶ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;¹⁷ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁸ In justifying its proposal, the Exchange stated that its proposed temporary waiver and subsequent resumption of the assessment of the ORF on January 1, 2025 at the same rate “is reasonable because it would help ensure that collections from the ORF do not exceed a

¹⁴ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

¹⁵ See *id.*

¹⁶ 15 U.S.C. 78f(b)(4).

¹⁷ 15 U.S.C. 78f(b)(5).

¹⁸ 15 U.S.C. 78f(b)(8).

material portion of the Exchange’s ORF Costs.”¹⁹ The Exchange further stated that “resumption of the ORF at the current rate on January 1, 2025 . . . is reasonable because it would permit the Exchange to resume collecting an ORF that is designed to recover a material portion, but not all, of the Exchange’s projected ORF Costs” and “is based on the Exchange’s estimated projections for its regulatory costs, which are currently projected to increase in 2025, balanced with the increase in options volumes that has persisted into 2024 and that may continue into 2025.”²⁰ The Exchange also stated that the proposal is an equitable allocation of fees among its market participants and not unfairly discriminatory because the temporary waiver (and subsequent resumption of the assessment ORF on January 1, 2025 at the same rate) “would apply equally to all OTP Holders on all their transactions that clear in the Customer range at the OCC.”²¹ According to the Exchange, the proposed waiver “would not place certain market participants at an unfair disadvantage because it would apply equally to all OTP Holders on all their transactions that clear in the Customer range at the OCC and would allow the Exchange to continue to monitor the amount collected from the ORF to help ensure that the ORF collection, in combination with other regulatory fees and fines, does not exceed regulatory costs.”²² Further, the Exchange stated that resumption of the assessment of the ORF on January 1, 2025 at the current rate is equitable “because the ORF would resume applying equally to all OTP Holders . . . at a rate designed to recover a material portion, but not all, of the Exchange’s projected ORF Costs, based on current projections that such costs will increase in 2025.”²³

¹⁹ See Notice, supra note 3, at 101652. In its proposed rule change, the Exchange defined “ORF Costs” collectively to include “the Exchange’s costs for the supervision and regulation of 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 technology that facilitate regulatory functions such as surveillance, investigation, examinations, and enforcement.” Id. at 101650. The Exchange further stated that “ORF funds may also be used for indirect expenses such as human resources and other administrative costs.” Id.

²⁰ See id. 101652.

²¹ See id. at 101652.

²² Id.

²³ Id.

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to temporarily waive assessment of the ORF for one month and resume assessment of the ORF at the same rate thereafter is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁴

Therefore, the Commission finds that it is necessary and appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.²⁵

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)²⁶ and 19(b)(2)(B) of the Act²⁷ to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

²⁴ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²⁵ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁶ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

²⁷ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,²⁸ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed temporary ORF waiver (and subsequent recommencement of the assessment of the ORF on January 1, 2025 at the same rate) is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”²⁹ (emphasis added);
- Whether the Exchange has demonstrated how its proposed temporary ORF waiver (and subsequent recommencement of the assessment of the ORF on January 1, 2025 at the same rate) is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”³⁰ (emphasis added); and
- Whether the Exchange has demonstrated how its proposed temporary ORF waiver (and subsequent recommencement of the assessment of the ORF on January 1, 2025 at the same rate) is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”³¹

As noted above, the Exchange proposes to waive the assessment of ORF for the month of December 2024 “in order to help ensure that the amount collected from the ORF, in combination

²⁸ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

²⁹ 15 U.S.C. 78f(b)(4).

³⁰ 15 U.S.C. 78f(b)(5).

³¹ 15 U.S.C. 78f(b)(8).

with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs."³²

The Exchange further proposes to resume assessing the ORF at the same rate of \$0.0038 on January 1, 2025 because the Exchange "cannot predict whether options volumes will remain at [elevated] levels going forward and projections for future regulatory costs are estimated, preliminary, and may change."³³ However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity. For example, the proposal states that the proposed temporary waiver of the assessment of the ORF is equitable and not unfairly discriminatory because it would not place certain market participants at an unfair disadvantage and would apply equally to all OTP Holders on all their transactions that clear in the Customer range at the OCC. However, the proposal lacks specificity regarding how assessing the ORF to participants that execute transactions from January 1 – November 30, 2024, but waiving the assessment of the ORF for participants that execute transactions in December 2024 constitutes a reasonable, equitable, and not unfairly discriminatory fee when such ORF revenue is used to offset the Exchange's 2024 regulatory expenses, including those incurred in connection with transactions occurring in December 2024. In addition, as noted above, this is the third time that the Exchange has proposed an end-of-year fee waiver for ORF to avoid over-collection in excess of ORF Costs.³⁴ In light of that emerging pattern, the Exchange has not demonstrated with specificity how reimposing the unreduced ORF in January 2025 would not result in over-collection once again in 2025 beyond a general reference to potentially increased regulatory costs for 2025, and thus a question is presented as to whether reimposing the ORF at the unreduced former rate in 2025 would constitute a reasonable, equitable, and not unfairly discriminatory fee.

³² See Notice, supra note 3, at 101651.

³³ Id. at 101652.

³⁴ See supra note 11.

Further, the Exchange provides only broad information on options transaction volume trends, and generalized statements regarding the Exchange's anticipated regulatory costs for 2025 to justify its proposal. Without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate OTP Holders, including, e.g., Customer versus non-Customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed one-month ORF waiver and subsequent resumption at the same rate is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the Customer range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all OTP Holders.

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder...is on the [SRO] that proposed the rule change."³⁵ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,³⁶ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.³⁷

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent

³⁵ 17 CFR 201.700(b)(3).

³⁶ See id.

³⁷ See id.

with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.³⁸

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁹

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the Proposal, in addition to any other comments they may wish to submit about the proposed rule change.

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-2024-90 on the subject line.

³⁸ See 15 U.S.C. 78f(b)(4), (5), and (8).

³⁹ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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-2024-90. 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-2024-90 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁴⁰ that File No. SR-NYSEARCA-2024-90, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

Sherry R. Haywood

Assistant Secretary

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⁴⁰ 15 U.S.C. 78s(b)(3)(C).

⁴¹ 17 CFR 200.30-3(a)(57) and (58).