

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 will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2020-043 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-CBOE-2020-043. 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 (<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 Number SR-CBOE-2020-043 and should be submitted on or before June 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88873; File No. SR-NYSEArca-2020-44]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Modifying the NYSE Arca Options Fee Schedule Regarding Pricing Incentives for Certain Posted Volume

May 14, 2020.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on May 11, 2020, 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, 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 pricing incentives for certain posted volume. The Exchange proposes to implement the fee change effective May 11, 2020.<sup>4</sup> 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.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<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.

<sup>4</sup> The Exchange originally filed to amend the Fee Schedule on May 1, 2020 (SR-NYSEArca-2020-41) and withdrew such filing on May 11, 2020.

#### 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 purpose of this filing is to amend the Fee Schedule to introduce a new incentive program, and to modify other credits to encourage a variety of transactions to be executed on the Exchange.

Specifically, the Exchange proposes to adopt incentives designed to increase Firm and Broker Dealer transactions on the Exchange, including by offering credits based on posted Firm and Broker Dealer volume under existing and proposed incentive programs, which would increase available interest on the Exchange to the benefit of all market participants.<sup>5</sup> The proposed change would include a "cross-asset pricing" component to incentivize OTP Holders and affiliates to execute a certain amount of volume on both the Exchange's equities and options platform.

The Exchange proposes to implement the fee changes on May 11, 2020.

###### Background

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system

<sup>5</sup> Firm and Broker Dealer transactions are included as "Non-Customer" for purpose of fees and credits. See Fee Schedule, NYSE Arca Options Trade Related Charges For Standard Options, available here, [https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE\\_Arca\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf) (providing that for fee/credit purposes, Firms, Broker Dealers, and Market Makers are considered "Non-Customers" and, unless otherwise specified, Professional Customers are considered "Customers").

“has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>6</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>7</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in January 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>8</sup> Similarly, the equities markets also face stark competition, which is relevant because the Exchange may offer “cross-asset pricing,” which is designed to incent participants to execute a certain amount of volume on both the Exchange’s equities and options platform. As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”<sup>9</sup> Indeed, equity trading is currently dispersed across 13 exchanges,<sup>10</sup> 31 alternative trading systems,<sup>11</sup> and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange has more than 18% market share (whether including or excluding auction volume).<sup>12</sup> Therefore, currently no single exchange possesses significant pricing power in the execution of equity order flow. More specifically, the

Exchange’s market share of trading in Tapes A, B and C securities combined is less than 10%.

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. To respond to this competitive marketplace, the Exchange has established incentives—or posting credit tiers—designed to encourage OTP Holders and OTP Firms (collectively, “OTP Holders”) to direct additional order flow to the Exchange to achieve more favorable pricing and higher credits. The Exchange incentives also include “cross-asset pricing,” which allows OTP Holders to aggregate their options and equity volume with affiliated or appointed Order Flow Providers (“OFPs”) (collectively referred to as affiliates herein), making the NYSE Arca a more attractive trading venue.<sup>13</sup>

The Exchange proposes to modify its existing posting credit tiers and adopt a new posting credit tier program that would offer more favorable rates for increased Firm and Broker Dealer volume beyond certain minimum thresholds. The Exchange also proposes a related new incentive program that incorporates cross-asset pricing for OTP Holders that meet minimum Firm and Broker Dealer volume thresholds. The proposed change should encourage OTP Holders to increase their participation on the Exchange, thereby improving the quoted markets and attracting more order flow to the Exchange. The Exchange notes that the proposed change would be competitive with other options exchanges that offer pricing incentive for Firm and Broker Dealer volume as well as cross-asset pricing incentives.<sup>14</sup>

#### Proposed Rule Change

##### Firm and Broker Dealer Incentives

The Exchange proposes to adopt a new incentive program that would provide increasing levels of credit for posted Firm and Broker Dealer interest

<sup>13</sup> See Fee Schedule, Endnote 15 (providing that an “Appointed MM” is an NYSE Arca Market Maker designated as such by an Order Flow Provider (“OFP”) (as defined in NYSE Arca Rule 6.1A–O(a)(21)) and “Appointed OFP” is an OFP been designated as such by an NYSE Arca Market Maker).

<sup>14</sup> See, e.g., Cboe BZX Options Exchange Fee Schedule, available here, [https://markets.cboe.com/us/options/membership/fee\\_schedule/bzx/](https://markets.cboe.com/us/options/membership/fee_schedule/bzx/) (setting forth posting volume tiers for Firm and Broker Dealer volume in Penny Pilot Issues); Cboe BZX U.S. Equities Exchange Fee Schedule, Footnote 1 and Cboe EDGX Options Exchange Fee Schedule, Footnote 4 (regarding cross-asset pricing).

in Penny Pilot issues (the “FBD Posting Incentive”).<sup>15</sup> The Exchange currently provides a \$0.10 per contract credit on electronic executions of Firm and Broker Dealer posted interest in Penny Pilot issues, and proposes to include this \$0.10 credit in the FBD Posting Incentive table for reference only.<sup>16</sup> As proposed, OTP Holders that execute at least 0.15% of Total Customer Average Daily Volume (“TCADV”) <sup>17</sup> from Firm and Broker Dealer posted interest in all issues, which would qualify them for the Tier 1 level under the proposed FBD Posting Incentive, would receive a per contract credit of \$0.25. OTP Holders that execute at least 0.30% of TCADV from Firm and Broker Dealer posted interest in all issues, which would qualify them for the Tier 2 level under the proposed FBD Posting Incentive, would receive a per contract of \$0.35. As is the case with current posting credit tiers, OTP Holders may aggregate their volume with affiliated OTPs to achieve the proposed credits.<sup>18</sup>

The Exchange also proposes that OTP Holders that qualify for either the Tier 1 or Tier 2 FBD Posting Incentive described above may earn the greater of one of the following additional credits.<sup>19</sup> The first alternative of the proposed “Firm and Broker Dealer Incentive Program” would be a cross-asset incentive that would provide an additional \$0.03 per contract credit to OTP Holders that execute at least 0.30% ADV of U.S. Equity Tape C Market Share Posted and Executed on NYSE Arca Tape C Equity Market. The second alternative would provide an additional \$0.05 per contract credit to OTP Holders that execute at least 0.85% of TCADV of posted interest in all issues across all account types, of which at least 0.60% TCADV is from Firm and Broker Dealer

<sup>15</sup> See proposed Fee Schedule, FIRM AND BROKER DEALER PENNY PILOT POSTING CREDIT TIERS (providing in the preamble that “OTP Holders and OTP Firms meeting the qualifications below will receive the corresponding credit on all electronic executions of Firm and Broker Dealer posted interest in Penny Pilot Issues”).

<sup>16</sup> See Fee Schedule, *id.*; see also TRANSACTION FEE FOR ELECTRONIC EXECUTIONS—PER CONTRACT (referring in both places to same \$0.10 credit on Firm Broker Dealer transactions).

<sup>17</sup> TCADV includes OCC calculated Customer volume of all types, including Complex Order Transactions and QCC transactions, in equity and ETF options. See Fee Schedule, Endnote 8.

<sup>18</sup> See proposed Fee Schedule, Endnotes 8 (providing that the proposed incentives will include the activity of affiliates) and 15 (defining affiliates referenced in Endnote 8).

<sup>19</sup> See proposed Fee Schedule, Firm and Broker Dealer Incentive Program (providing that OTP Holders “that qualify for Tier 1 or Tier 2 Firm and Broker-Dealer Penny Pilot Posting Credit Tiers may earn the greater of the alternative additional credits listed above” and referencing Endnotes 8 and 15).

<sup>6</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>7</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/volume/default.jsp>.

<sup>8</sup> Based on OCC data, see *id.*, in 2019, the Exchange’s market share in equity-based options was 9.57% for the month of January 2019 and 9.59% for the month of January 2020.

<sup>9</sup> See Securities Exchange Act Release No. 84875 (December 19, 2018), 84 FR 5202, 5253 (February 20, 2019) (File No. S7–05–18) (Transaction Fee Pilot for NMS Stocks Final Rule).

<sup>10</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, available here [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/). See generally <https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html>.

<sup>11</sup> See FINRA ATS Transparency Data, available here: <https://otctransparency.finra.org/otctransparency/AtsIssueData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atstlist.htm>.

<sup>12</sup> See Cboe Global Markets U.S. Equities Market Volume Summary, available here: [http://markets.cboe.com/us/equities/market\\_share/](http://markets.cboe.com/us/equities/market_share/).

posted interest. If an OTP Holder qualifies for both additional credits, they would earn the greater of the two additional credits, not both.

To further encourage Firm and Broker dealer volume, the Exchange also proposes to add alternative qualification bases to the existing posting tiers set forth in both the Non-Customer, Non-Penny Pilot Posting Credit Tiers and the Customer and Professional Customer Posting Credit Tiers in Non-Penny Pilot Issues. As noted above, an OTP Holder that executes at least 0.15% of TCADV from Firm and Broker Dealer posted interest in all issues (the “FirmBD Threshold”) qualifies for Tier 1 of the proposed Firm and Broker Dealer Posting Credit Tiers. The Exchange proposes to add a new Tier to the Non-Customer, Non-Penny Pilot Posting Credit Tiers, and amend existing Tier A to the Customer and Professional Customer Posting Credit Tiers in Non-Penny Pilot Issues, to provide that if an OTP Holder that meets the FirmBD Threshold and also executes at least 0.10% TCADV from Customer posted interest in all issues, that OTP Holder would qualify for the following per contract credits on electronic executions (the “CustFirmBD Threshold”):

- A \$0.62 per contract credit from non-Customer posted interest in non-Penny Pilot issues, as proposed alternative qualification to new Tier 3 of the Non-Customer, Non-Penny Pilot Posting Credit Tiers; and
- A \$0.85 per contract credit from Customer posted interest in non-Penny Pilot issues, as proposed alternative qualification to Tier A of Customer and Professional Customer Posting Credit Tiers in Non-Penny Issues.<sup>20</sup>

#### Customer Penny and Non-Customer Non-Penny Volume Incentives

The Exchange also proposes additional modifications to the existing posting credit tier qualification thresholds and credits to encourage diverse order flow.

First, the Exchange proposes to modify the existing qualifications for Tier 2 under the Customer Penny Pilot

Posting Credit Tiers by replacing the existing alternative qualification, which requires an OTP Holder to have at least 0.70% of TCADV from posted interest in Penny Pilot Issues in all account types, with a new proposed Tier 2 alternative that would require an OTP Holder to increase or step-up posted interest in all issues, all account types other than Market Maker by at least 0.15% of TCADV over its March 2020 level of posted interest in all issues, all account types other than Market Maker.<sup>21</sup> The amount of the contract credit for Tier 2 would not change. The Exchange notes that although it has deleted the existing Tier 2 alternative qualification basis, an OTP Holder can still aim to achieve credits based on posted interest in Penny Pilot Issues under Tier 4, which has a slightly higher (0.85%) minimum qualification basis.<sup>22</sup>

The Exchange also proposes to modify the Non-Customer, Non-Penny Pilot Posting Credit Tiers by introducing a new Tier 3 with two alternatives to qualify for the proposed credit. As described above, OTP Holders can qualify for a \$0.62 per contract credit in proposed Tier 3 by achieving the CustFirmBD Threshold. As an alternative, OTP Holders can qualify for the same Tier 3 credit by executing at least 0.15% of TCADV from non-Customer posted interest in all non-Penny issues. In addition, current Tier 3 would become new Tier 4, and the qualification threshold for that tier would be increased to require at least 0.25% of TCADV (up from 0.20%) from Non-Customer posted interest in all non-Penny Issues and the per contract credit of \$0.82 would remain unchanged.<sup>23</sup>

The Exchange believes the proposed changes to the posting tiers are reasonable because OTP Holders (and their affiliates) can bring a variety of order flow to the Exchange, which may result in an increase volume and liquidity on both its options and equities platforms. The Exchange’s fees are constrained by intermarket competition, as OTP Holders may direct their order

flow to any of the 16 options exchanges, including those with similar posting incentives.<sup>24</sup> The proposed cross-asset pricing is designed to encourage participants to (continue to) conduct trading in both options and equities on the Exchange. The Exchange notes that all market participants stand to benefit from increased transaction volume, which promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants.

The Exchange cannot predict with certainty whether any OTP Holders would avail themselves of this proposed fee change by achieving any of the qualifications. At present, whether or when an OTP Holder qualifies for the various incentive Tiers in a given month is dependent on market activity and an OTP Holder’s mix of order flow. Thus, the Exchange cannot predict with any certainty the number of OTP Holders that may qualify for the various proposed tiers—especially because the proposed credits for Firm and Broker Dealer volume would be new. However, the Exchange believes that OTP Holders would be encouraged to take advantage of the newly adopted and modified credits.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>25</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>26</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, 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

<sup>20</sup> The Exchange notes that the \$0.85 per contract credit would be an increase (from \$0.83) to the existing Tier A qualification basis that an OTP Holder execute “[a]t least 0.80% of TCADV from Customer posted interest in all issues.” See Fee Schedule, Customer Posting Credit Tiers in Non-Penny Issues. The Exchange proposes to remove reference to Professional Customer from the column heading given that such transactions are treated the same as Customer, which change would add clarity, transparency and internal consistency to the Fee Schedule making it easier to navigate. See proposed Fee Schedule, CUSTOMER POSTING CREDIT TIERS IN NON-PENNY PILOT ISSUES (with updated column title “Customer Posting Credit Tiers In Non-Penny Pilot Issues”).

<sup>21</sup> See proposed Fee Schedule, CUSTOMER PENNY PILOT POSTING CREDIT TIERS. As an example: If TCADV for the month of May 2020 is 1,500,000 contracts, then 0.15% of the TCADV would be 2,250 contracts. Assume an OTP Holder had an ADV in March 2020 of 11,000 contracts from posted Customer and Non-Customer interest (excluding Market Maker interest). To qualify for Tier 2 under this alternative, the OTP Holder would have to increase its posted Customer and Non-Customer volumes (exclusive of Market Maker interest) by at least 2,250 contracts ADV, to a minimum level of 13,250 contracts ADV.

<sup>22</sup> See Fee Schedule, CUSTOMER PENNY PILOT POSTING CREDIT TIERS, Tier 4.

<sup>23</sup> See proposed Fee Schedule, NON-CUSTOMER, NON-PENNY PILOT POSTING CREDIT TIERS.

<sup>24</sup> See *supra* note 14.

<sup>25</sup> 15 U.S.C. 78f(b).

<sup>26</sup> 15 U.S.C. 78f(b)(4) and (5).

broader forms that are most important to investors and listed companies.”<sup>27</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>28</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in January 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>29</sup> In addition, by including the cross-asset pricing in the Firm and Broker Dealer Incentive Program, it is important to note that the equities market is likewise subject to stark competition. As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”<sup>30</sup> Indeed, equity trading is currently dispersed across 13 exchanges, 32 alternative trading systems, and numerous broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange has more than 18% market share (whether including or excluding auction volume). Therefore, no exchange possesses significant pricing power in the execution of equity order flow. More specifically, the Exchange’s market share of trading in Tapes A, B, and C securities combined is less than 1%.

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, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

The proposed changes are designed to incent OTP Holders to transact more options (and equities) volume on the

Exchange. The FBD Posting Incentive is designed to encourage OTP Holders to increase the Firm and Broker dealer volume sent to the Exchange for execution. The Firm and Broker Dealer Incentive Program, which will be available to participants that qualify for the FBD Posting Incentive, would encourage increased equity market participation by OTP Holders and their affiliates. The Exchange believes this should increase volume and liquidity—on both its options and equities platforms—to the benefit of all market participants by providing more trading opportunities and tighter spreads, and may lead to a corresponding increase in order flow from other market participants.

Further, the proposed FBD Posting Incentive and related cross-asset pricing incentive are similar to and competitive with posting credit tiers for Firm and Broker Dealer volume and cross-asset pricing offered by other exchanges and is designed to attract (and compete for) order flow to the Exchange, which provides a greater opportunity for trading by all market participants.<sup>31</sup>

The Exchange believes that the proposed change to add new posting tiers as well as to modify thresholds and credits available under existing posting credit tiers would incent OTP Holders to increase the number and variety of orders sent to the Exchange for execution. Further, the Exchange notes that it continues to provide OTP Holders alternative methods (and thus increased opportunities) to qualify for posting credits and pricing incentives, resulting in favorable rates for a variety of order types. As such, OTP Holders would be encouraged to increase their participation on the Exchange, thereby improving the quoted markets and attracting more order flow to the Exchange. To the extent that the proposed change attracts more order flow to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution, which, in turn, promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system.

Finally, to the extent the proposed change continues to attract greater volume and liquidity, the Exchange believes the proposed change would improve the Exchange’s overall competitiveness and strengthen its market quality for all market participants. In the backdrop of the competitive environment in which the

Exchange operates, the proposed rule change is a reasonable attempt by the Exchange to increase the depth of its market and improve its market share relative to its competitors.

The Exchange cannot predict with certainty whether any OTP Holders would avail themselves of this proposed fee change. At present, whether or when an OTP Holder qualifies for the various incentive Tiers in a given month is dependent on market activity and an OTP Holders mix of order flow. Thus, the Exchange cannot predict with any certainty the number of OTP Holders that may qualify for the various proposed tiers—especially because the credits for Firm and Broker Dealer volume is brand new. However, the Exchange believes that OTP Holders would be encouraged to take advantage of the newly adopted and modified credits.

The Proposed Rule Change Is an Equitable Allocation of Credits and Fees

The Exchange believes the proposed rule change is an equitable allocation of its fees and credits. The proposal is based on the amount and type of business transacted on the Exchange and OTP Holders can opt to avail themselves of the incentives or not. Moreover, the proposal is designed to encourage OTP Holders to submit orders from all account types to the Exchange as a primary execution venue. To the extent that the proposed change attracts more Firm and Broker Dealer orders to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery.

The Proposed Rule Change Is not Unfairly Discriminatory

The Exchange believes it is not unfairly discriminatory to introduce the various Tiers because the proposed modifications would be available to all similarly-situated market participants on an equal and non-discriminatory basis.

The proposal is based on the amount and type of business transacted on the Exchange and OTP Holders are not obligated to try to achieve the qualifications for any of the tiers, nor are they obligated to execute Firm and Broker Dealer orders. Rather, the proposal is designed encourage OTP Holders to utilize the Exchange as a primary trading venue for Firm and

<sup>27</sup> See Reg NMS Adopting Release, *supra* note 6, at 37499.

<sup>28</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/volume/default.jsp>.

<sup>29</sup> Based on OCC data, *see id.*, in 2019, the Exchange’s market share in equity-based options was 9.57% for the month of January 2019 and 9.59% for the month of January 2020.

<sup>30</sup> See *supra* note 9.

<sup>31</sup> See *supra* note 14.

Broker Dealer Executions (if they have not done so previously) or increase volume sent to the Exchange. To the extent that the proposed change attracts more Firm and Broker Dealer orders to the Exchange, this increased order flow would continue to make the Exchange a more competitive venue for, among other things, order execution. Thus, the Exchange believes the proposed rule change would improve market quality for all market participants on the Exchange and, as a consequence, attract more order flow to the Exchange thereby improving market-wide quality and price discovery. The resulting increased volume and liquidity would provide more trading opportunities and tighter spreads to all market participants and thus would promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

In accordance with Section 6(b)(8) of the Act, the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all market participants. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>32</sup>

*Intramarket Competition.* The proposed change is designed to attract additional order flow (particularly Firm and Broker Dealer orders) to the Exchange. The Exchange believes that the proposed FBD Posting Incentive, and related cross-asset pricing, would encourage market participants to direct a variety of order flow to the Exchange, including Firm and Broker Dealer

execution volume to the Exchange. Greater liquidity benefits all market participants on the Exchange and increased Firm and Broker Dealer transactions would increase opportunities for execution of other trading interest. The proposed change would be available to all similarly-situated market participants (including those that handle Firm and Broker Dealer order flow), and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

*Intermarket Competition.* The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing option exchanges if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees to remain competitive with other exchanges and to attract order flow to the Exchange. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% of the market share of executed volume of multiply-listed equity and ETF options trades.<sup>33</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in January 2020, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>34</sup>

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to encourage OTP Holders (and affiliates) to direct trading interest (particularly Firm and Broker Dealer order flow) to the Exchange, to provide liquidity and to attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar incentives, by encouraging additional orders to be sent to the Exchange for execution.<sup>35</sup>

<sup>33</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/volume/default.jsp>.

<sup>34</sup> Based on OCC data, see *id.*, in 2019, the Exchange's market share in equity-based options was 9.57% for the month of January 2019 and 9.59% for the month of January 2020.

<sup>35</sup> See *supra* note 14.

#### *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)<sup>36</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>37</sup> 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)<sup>38</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEArca-2020-44 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-NYSEArca-2020-44. 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 (<http://www.sec.gov/>

<sup>36</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>37</sup> 17 CFR 240.19b-4(f)(2).

<sup>38</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>32</sup> See Reg NMS Adopting Release, *supra* note 6, at 37499.

*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-NYSEArca-2020-44, and should be submitted on or before June 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

**J. Matthew DeLesDernier,**  
*Assistant Secretary.*

[FR Doc. 2020-10816 Filed 5-19-20; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88870; File No. SR-FINRA-2020-013]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change To Add FINRA Rule 6800 Series (Consolidated Audit Trail Compliance Rule) to FINRA's Minor Rule Violation Plan ("MRVP")

May 14, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on April 29, 2020, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and

II below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and approving the proposal on an accelerated basis.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to add industry member compliance rules relating to the Consolidated Audit Trail ("CAT") to FINRA's Minor Rule Violation Plan ("MRVP").

The text of the proposed rule change is available on FINRA's website at <http://www.finra.org>, at the principal office of FINRA 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, FINRA 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 these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

FINRA Rule 9216(b) provides procedures for disposition of certain rule violations designated as minor rule violations pursuant to a plan declared effective by the Commission in accordance with Section 19(d)(1) of the Act and Rule 19d-1(c)(2) thereunder. FINRA's MRVP allows FINRA to impose a fine of up to \$2,500 on any member or person associated with a member for a minor violation of an eligible rule. FINRA Rule 9217 sets forth the rules eligible for disposition pursuant to FINRA's MRVP. FINRA is proposing to amend Rule 9217 to make minor violations of the CAT industry member compliance rules in the Rule 6800 Series eligible for disposition under FINRA's MRVP.

The purpose of the MRVP is to provide reasonable but meaningful sanctions for minor or technical violations of rules when the conduct at issue does not warrant stronger, immediately reportable disciplinary sanctions. The inclusion of a rule in

FINRA's MRVP does not minimize the importance of compliance with the rule, nor does it preclude FINRA from choosing to pursue violations of eligible rules through an Acceptance, Waiver and Consent ("AWC") or Complaint if the nature of the violations or prior disciplinary history warrants more significant sanctions. Rather, the option to impose an MRVP sanction gives FINRA additional flexibility to administer its enforcement program in the most effective and efficient manner, while still fully meeting FINRA's remedial objectives in addressing violative conduct. For example, MRVP dispositions provide a useful tool for implementing the concept of progressive discipline to remediate misconduct.<sup>3</sup>

With this proposed rule change, FINRA would add its CAT industry member compliance rules to its MRVP. FINRA adopted its CAT industry member compliance rules in the Rule 6800 Series to implement the National Market System Plan Governing the Consolidated Audit Trail (the "CAT NMS Plan" or "Plan"). The CAT NMS Plan was filed by the Plan Participants to comply with Rule 613 of Regulation NMS under the Exchange Act,<sup>4</sup> and each Plan Participant accordingly has adopted the same compliance rules that FINRA has in its Rule 6800 Series. The common compliance rules adopted by each Participant are designed to require industry members to comply with the provisions of the CAT NMS Plan, which broadly calls for industry members to record and report timely and accurate customer, order, and trade information relating to activity in NMS Securities and OTC Equity Securities.

FINRA notes that the CAT industry member compliance rules are highly similar to rules already covered in FINRA's MRVP. Specifically, the CAT industry member compliance rules in the Rule 6800 Series include rules relating to clock synchronization (Rule 6820), the recording and reporting of order and trade data (Rules 6830, 6840, 6850, 6860, 6870, 6880, and 6893), and recordkeeping (Rule 6890). FINRA's current MRVP includes the same kinds of audit trail-related rules relating to clock synchronization (Rule 4590), the recording and reporting of order audit trail data (Rules 7440, 7450), and recordkeeping (Rule 4510 Series and SEA Rule 17a-3(a) and 17a-4).

If approved, FINRA plans to employ the MRVP for CAT compliance rules the

<sup>3</sup> See *Notice to Members* 04-19 (March 2004) (providing guidance on FINRA's approach to progressive discipline under its MRVP).

<sup>4</sup> 17 CFR 242.613.

<sup>39</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.