rules that qualify as common rules.[17] FINRA will then confirm in writing whether the rules listed in any updated list are common rules as defined in the Amended Plan. Under the Amended Plan, MIAX, MIAX PEARL, and MIAX Emerald also will provide FINRA with a current list of common members and shall update the list no less frequently than once each quarter.[18] The Commission believes that these provisions are designed to provide for continuing communication between the parties to ensure the continued accuracy of the scope of the proposed allocation of regulatory responsibility.

The Commission is hereby declaring effective an Amended Plan that, among other things, allocates regulatory responsibility to FINRA for the oversight and enforcement of all MIAX, MIAX PEARL, and MIAX Emerald rules that are substantially similar to the rules of FINRA for common members of FINRA and MIAX, FINRA and MIAX PEARL, and FINRA and MIAX Emerald. Therefore, modifications to the Certification need not be filed with the Commission as an amendment to the Amended Plan, provided that the parties are only adding to, deleting from, or confirming changes to MIAX, MIAX PEARL, or MIAX Emerald rules in the Certification in conformance with the definition of common rules provided in the Amended Plan. However, should the parties decide to add a MIAX, MIAX PEARL, or MIAX Emerald rule to the Certification that is not substantially similar to a FINRA rule; delete a MIAX, MIAX PEARL, or MIAX Emerald rule from the Certification that is substantially similar to a FINRA rule; or leave on the Certification a MIAX, MIAX PEARL, or MIAX Emerald rule that is no longer substantially similar to a FINRA rule, then such a change would constitute an amendment to the Amended Plan, which must be filed with the Commission pursuant to Rule 17d–2 under the Act.[19]

Under paragraph (c) of Rule 17d–2, the Commission may, after appropriate notice and comment, declare a plan, or any part of a plan, effective. In this instance, the Commission believes that appropriate notice and comment can take place after the proposed amendment is effective. In particular, the purpose of the amendment is to add MIAX PEARL equities rules and certain federal securities laws to the Certification. The Commission notes that the most recent prior amendment to the Plan was published for comment and the Commission did not receive any comments thereon.[20] The Commission believes that the current amendment to the Plan does not raise any new regulatory issues that the Commission has not previously considered, and therefore believes that the amended Plan should become effective without any undue delay.

[17] *See* paragraph 2 of the Amended Plan.

[18] *See* paragraph 3 of the Amended Plan.

[19] The addition to or deletion from the Certification of any federal securities laws, rules, and regulations for which FINRA would bear responsibility under the Amended Plan for examining, and enforcing compliance by, common members, also would constitute an amendment to the Amended Plan.

VI. Conclusion

This order gives effect to the Amended Plan filed with the Commission in File No. 4–678. The parties shall notify all members affected by the Amended Plan of their rights and obligations under the Amended Plan.

It is therefore ordered, pursuant to Section 17(d) of the Act, that the Amended Plan in File No. 4–678, between the FINRA, MIAX, MIAX PEARL, and MIAX Emerald, filed pursuant to Rule 17d–2 under the Act, hereby is approved and declared effective.

It is further ordered that MIAX, MIAX PEARL, and MIAX Emerald are each relieved of those responsibilities allocated to FINRA under the Amended Plan in File No. 4–678.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–89787; File No. SR–NYSEArca–2020–78]

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

September 8, 2020.

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 1, 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.

[20] *See* Securities Exchange Act Release No. 85189 (February 25, 2019), 84 FR 7153 (March 1, 2019).

[21] 17 CFR 200.30–3(a)(34).

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

[2] 15 U.S.C. 78a.

[3] 17 CFR 240.19b–4.

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 September 1, 2020. 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.

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 regarding pricing incentives for certain posted volume. In particular, the Exchange proposes to adopt a new Customer Posting Tier for non-Penny Issues and to implement a cap on the maximum per contract credit for Professional Customer executions. The Exchange proposes to implement the fee change effective September 1, 2020.

The Exchange has established various pricing 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. Currently, the Fee Schedule provides separate pricing programs for executed Customer posted interest in Penny issues and non-Penny issues—namely Customer Posting Credit Tiers in Penny Issues and Customer Posting Credit Tiers in non-Penny Issues (collectively, the ''Customer Posting Tiers''). As such, OTP Holders receive a base per contract credit for executions of Customer posted interest, which credit increases if certain volume criteria and thresholds are met. OTP Holders may also qualify for the Customer Incentive Program, which offers one of five ways to earn an additional credit (to the Customer Posting Tiers) if certain volume criteria and thresholds are met. The Exchange notes that for purposes of these pricing programs, Professional Customer interest is currently treated the same as Customer interest.[4]

The Exchange proposes two changes to the current pricing incentives: To adopt a new Customer Posting Tier for non-Penny Issues (the ''Non-Penny Posting Tiers'') and to implement a cap on the maximum per contract credit for Professional Customer executions regardless of whether an OTP Holders qualifies for higher credits per the pricing incentive programs, which are described in more detail below.

New Tier E to the Non-Penny Posting Tiers

The Non-Penny Posting Tiers consist of a base tier per contract credit of ($0.75) on executions of Customer posted interest in non-Penny issues as five other tiers—Tiers A–E, which offer increased credits, ranging from ($0.85) to ($1.02), based on meeting increased posted volume requirements. The Exchange proposes to modify the Fee Schedule to add a new Tier E, and to rename current Tier E as Tier F.[5] New Tier E would provide a ($1.01) per contract credit provided an OTP Holder executes at least 1.50% of Total Industry Customer equity and ETF option average daily volume (''TCADV'') from Customer posted interest in all issues.[6]

Proposed Cap on Available Credit for Professional Customer Volume

The Exchange also proposes to modify the Customer Posting Tiers and the Customer Incentive Program, which programs currently treat Professional Customer interest the same as Customer interest, by placing a limit or cap on the maximum available per contract credit on Professional Customer posted interest.[7]

Specifically, as proposed, the maximum per-contract credit for Professional Customer posted interest would be ($0.49) and ($1.00) in Penny and non-Penny issues, respectively.[8] The proposed per-contract credit limits on Professional Customer posted volume would apply regardless of which Customer Posting Credit Tier an OTP Holder achieves or whether an OTP Holder qualified for an additional credit per the Customer Incentive Program. This proposed change would impact OTP Holders with Professional Customer order flow that have achieved the highest Customer Posting Tiers. Specifically, OTP Holders with Professional Customer order flow that would be impacted by the proposed change includes those that achieve Tier 6 of the Customer Posting Tiers in Penny issues, proposed new Tiers E and F of the Customer Posting Tiers in non-Penny issues, and OTP Holders that qualify for an additional credit per the Customer Incentive Program, if those OTP Holders qualified for Tier 5 or 6 of the Customer Posting Tiers in Penny issues or Tiers E–D of the Customer Posting Tiers in non-Penny issues. Despite capping the per-contract credit on Professional Customers, the Exchange believes that the existing Customer Posting Tiers and Customer Incentive Program would continue to attract order flow, including Professional Customer volume.

The Exchange cannot predict with certainty whether any OTP Holders will avail themselves of new Tier E to the Non-Penny Posting Tiers or be impacted by the proposed limit on per-contract credits for Professional Customer volume under the Customer Posting Tiers or Customer Incentive Program.

2.Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[9] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[10] 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 broader forms that are most important to investors and listed companies.'' [11]

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.[12] Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in June 2020, the Exchange had slightly over 10% market share of executed volume of multiply-listed equity & ETF options trades.[13]

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 and rebates can have a direct effect on the ability of an exchange to compete for order flow.

The Exchange believes that proposed new Tier E to the Non-Penny Posting Tiers is reasonable as it is designed to incentivize OTP Holders to (continue to) direct order flow, particularly Customer flow, to the Exchange. An increase in Customer volume would create more

[4] *See* Fee Schedule, NYSE Arca OPTIONS: TRADE–RELATED CHARGES FOR STANDARD OPTIONS, Preamble (providing that ''[u]nless Professional Customer executions are specifically delineated, such executions will be treated as 'Customer' executions for fee/credit purposes'').

[5] *See* proposed Fee Schedule, Customer Posting Tier for non-Penny Issues.

[6] *See* Fee Schedule, Endnote 8 (providing that TCADV includes OCC calculated Customer volume of all types, including Complex Order Transactions and QCC transactions, in equity and ETF options).

[7] *See* proposed Fee Schedule, Endnote 16. *See also* Customer Posting Credit Tiers in Penny Issues, Customer Posting Credit Tiers in non-Penny Issues and Customer Incentive Program (referencing new Endnote 16).

[8] *See supra* note 4 (regarding Professional Customer executions being treated as 'Customer' executions for fee/credit purposes, unless otherwise specified in the Fee Schedule).

[9] 15 U.S.C. 78f(b).

[10] 15 U.S.C. 78f(b)(4) and (5).

[11] *See* Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7–10–04) (''Reg NMS Adopting Release'').

[12] 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.*

[13] Based on OCC data, *see id.,* the Exchange's market share in equity-based options was 9.59% for the month of June 2019 and 10.69% for the month of June 2020.

trading opportunities, which, in turn attracts Market-Makers. A resulting increase in Market-Maker activity may facilitate tighter spreads, which may lead to an additional increase of order flow from other market participants, further contributing to a deeper, more liquid market to the benefit of all market participants by creating a more robust and well-balanced market ecosystem. In addition, to the extent that proposed new Tier E attracts more Customer posted interest in non-Penny issues 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.

The Exchange believes the proposed limit on per contract credit for Professional Customer volume is reasonable as it is consistent with pricing on other options exchanges that likewise offer higher credits/rebates for Customer volume other than Professional Customer volume.[14] In addition, the Exchange believes it is reasonable to continue to offer the highest rebates for Customer volume. Customer volume offers unique benefits to the market by providing more trading opportunities, which attracts market makers to the benefit of all market participants. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Customer volume is the most sought after liquidity among OTP Holders. With respect to Professional Customers, the Exchange believes that its Customer Posting Tiers and Customer Incentive Program would continue to encourage OTP Holders to post Professional Customer volume to the Exchange despite the new cap on per contract credit, which increased liquidity would promote market depth, price discovery and improvement and enhance order execution opportunities for market participants.

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 are not obligated to try to achieve new Tier E. Moreover, the proposal is designed to incent OTP Holders to aggregate all Customer posting interest at the Exchange as a primary execution venue. To the extent that the proposed change attracts more Customer posting interest 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 Proposed Rule Change Is not Unfairly Discriminatory

The Exchange believes it is not unfairly discriminatory to modify the Customer posting credits because the proposed modification 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 new Tier E, nor are they obligated to execute posted interest, particularly Professional Customer interest. Rather, the proposal is designed to encourage OTP Holders to utilize the Exchange as a primary trading venue for Customer posted interest (if they have not done so previously) or increase volume sent to the Exchange. To the extent that the proposed change attracts more Customer interest, including posted interest, 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.

Regarding the proposed limit of the per contract credit on Professional Customer volume, the Exchange notes that is equitable and not unfairly discriminatory to cap incentives for Professional Customers who, unlike Customers, have access to sophisticated trading systems that contain functionality not available to retail Customers, including continuously updated pricing models based on real-time streaming data, access to multiple markets simultaneously, and order and risk management tools. As such, the Exchange believes placing a cap on the credits available to Professional Customers (while imposing no such cap on Customer flow) is not unfairly discriminatory to these sophisticated actors.

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.''[15]

Intramarket Competition. The proposed new Tier E as well as the cap on available credit for Professional Customer volume is designed to (continue to) attract additional order flow (particularly Customer posted interest) to the Exchange. Customer volume offers unique benefits to the market which benefits all market participants. Customer volume benefits all market participants by providing more trading opportunities, which attracts market makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding

[14] *See e.g.,* NASDAQ Options Market LLC (''NOM'') Pricing Schedule, Options 7, Section 2, Nasdaq Options Market Fees and Rebates (paying Professionals a $0.48 per contract Rebate to Add Liquidity in Penny Symbols whereas Customers are paid $0.50 per contract; paying Professionals a $0.90 per contract Rebate to Add Liquidity in Non-Penny Symbols whereas Customers are paid $1.00 per contract).

[15] *See* Reg NMS Adopting Release, *supra* note 11, at 37499.

increase in order flow from other market participants. The Exchange believes that the credits available via the Customer Posting Tiers and the Customer Incentive Program—despite the proposed credit cap on Professional Customer volume—would continue to encourage OTP Holders to direct their Professional Customer order flow to the Exchange, as the proposed limit is competitive with rates offers on other options exchanges.[16] Moreover, the Exchange notes that Professional Customers, unlike Customers, have access to sophisticated trading systems that contain functionality not available to Customers and therefore the proposed disparate treatment of Professional Customer volume would not pose an undue burden on competition.

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.[17] 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 slightly more than 10% market share of executed volume of multiply-listed equity & ETF options trades.[18]

The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's fees in a manner designed to incent OTP Holders to (continue to) direct trading interest (particularly Customer posted interest) 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 Customer posting credits, by encouraging additional orders to be sent to the Exchange for execution. The Exchange also believes that the proposed change is designed to provide the public and investors with a Fee Schedule that is clear and consistent, thereby reducing burdens on the marketplace and facilitating investor protection.

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)[19] of the Act and subparagraph (f)(2) of Rule 19b–4[20] 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)[21] 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.* Please include File Number SR–NYSEArca–2020–78 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–2020–78. 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–NYSEArca–2020–78 and should be submitted on or before October 5, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[22]

J. Matthew DeLesDernier,

Assistant Secretary.

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[16] *See supra* note 14.

[17] 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.*

[18] Based on OCC data, *see id.,* the Exchange's market share in equity-based options was 9.59% for the month of June 2019 and 10.69% for the month of June 2020.

[19] 15 U.S.C. 78s(b)(3)(A).

[20] 17 CFR 240.19b–4(f)(2).

[21] 15 U.S.C. 78s(b)(2)(B).

[22] 17 CFR 200.30–3(a)(12).