

Transactions and Co-Investment Transactions during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the Conditions.

(b) All information presented to the Regulated Fund's Board pursuant to this Condition will be kept for the life of the Regulated Fund and at least two years thereafter, and will be subject to examination by the Commission and its staff.

(c) Each Regulated Fund's chief compliance officer, as defined in rule 38a-1(a)(4), will prepare an annual report for its Board each year that evaluates (and documents the basis of that evaluation) the Regulated Fund's compliance with the terms and Conditions of the application and the procedures established to achieve such compliance. In the case of a BDC Downstream Fund that does not have a chief compliance officer, the chief compliance officer of the BDC that controls the BDC Downstream Fund will prepare the report for the relevant Independent Party.

(d) The Independent Directors (including the non-interested members of each Independent Party) will consider at least annually whether continued participation in new and existing Co-Investment Transactions is in the Regulated Fund's best interests.

11. *Record Keeping.* Each Regulated Fund will maintain the records required by section 57(f)(3) of the Act as if each of the Regulated Funds were a BDC and each of the investments permitted under these Conditions were approved by the Required Majority under section 57(f).

12. *Director Independence.* No Independent Director (including the non-interested members of any Independent Party) of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise be an "affiliated person" (as defined in the Act) of any Affiliated Fund.

13. *Expenses.* The expenses, if any, associated with acquiring, holding or disposing of any securities acquired in a Co-Investment Transaction (including, without limitation, the expenses of the distribution of any such securities registered for sale under the Securities Act) will, to the extent not payable by the Advisers under their respective advisory agreements with the Regulated Funds and the Affiliated Funds, be shared by the Regulated Funds and the participating Affiliated Funds in proportion to the relative amounts of the securities held or being acquired or disposed of, as the case may be.

14. *Transaction Fees.*<sup>29</sup> Any transaction fee (including break-up, structuring, monitoring or commitment fees but excluding brokerage or underwriting compensation permitted by section 17(e) or 57(k)) received in connection with any Co-Investment Transaction will be distributed to the participants on a pro rata basis based on the amounts they invested or committed, as the case may be, in such Co-Investment Transaction. If any transaction fee is to be held by an Adviser pending consummation of the transaction, the fee will be deposited into an account maintained by the Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1), and the account will earn a competitive rate of interest that will also be divided pro rata among the participants. None of the Advisers, the Affiliated Funds, the other Regulated Funds or any affiliated person of the Affiliated Funds or the Regulated Funds will receive any additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction other than (i) in the case of the Regulated Funds and the Affiliated Funds, the pro rata transaction fees described above and fees or other compensation described in Condition 2(c)(iii)(B)(z), (ii) brokerage or underwriting compensation permitted by section 17(e) or 57(k) or (iii) in the case of the Advisers, investment advisory compensation paid in accordance with investment advisory agreements between the applicable Regulated Fund(s) or Affiliated Fund(s) and its Adviser.

15. *Independence.* If the Holders own in the aggregate more than 25 percent of the Shares of a Regulated Fund, then the Holders will vote such Shares as directed by an independent third party when voting on (1) the election of directors; (2) the removal of one or more directors; or (3) any other matter under either the Act or applicable State law affecting the Board's composition, size or manner of election.

For the Commission, by the Division of Investment Management, under delegated authority.

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 2020-00312 Filed 1-10-20; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>29</sup> Applicants are not requesting and the Commission is not providing any relief for transaction fees received in connection with any Co-Investment Transaction.

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87903; File No. SR-NYSEAMER-2020-02]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend the NYSE American Options Fee Schedule Regarding the Floor Broker Prepayment Program

January 7, 2020.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on January 2, 2020, NYSE American LLC ("NYSE American" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the NYSE American Options Fee Schedule ("Fee Schedule") regarding the Floor Broker Prepayment Program. The Exchange proposes to implement the fee change effective January 2, 2020. The proposed 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.

#### 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.

<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.

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

1. Purpose

The purpose of this filing is to modify and extend the prepayment incentive program for Floor Broker organizations (each a "Floor Broker") which allows Floor Brokers to prepay certain annual costs in exchange for volume rebates, as set forth in the Fee Schedule (the "FB Prepay Program" or "Program").<sup>4</sup> The Exchange also plans to eliminate the Floor Broker Volume Rebate Program (the "FB Volume Rebate") as duplicative and superfluous in light of the proposed changes to the FB Prepay Program.<sup>5</sup>

Pursuant to the current FB Prepay Program, the Exchange offers Floor Brokers a 10% discount on their "Eligible Fixed Costs" if such costs are prepaid in advance of the year (the "10% Discount")<sup>6</sup> and an opportunity to qualify for the Percentage Growth Incentive (the "Growth Incentive"), which is designed to encourage Floor Brokers to increase their average daily volume ("ADV") in billable manual contract sides by certain percentages (correlated with Tiers) as measured against (the greater of) one of two benchmarks.<sup>7</sup>

The Exchange proposes to make several changes to this Program, including to make it renewable annually, to remove the 10% Discount, and to offer an alternative annual fixed

rebate amount if a participant qualifies for the Growth Incentive. Currently, if a Floor Broker qualifies for the Growth Incentive, it would be eligible for specified percentage reductions of its pre-paid annual fixed costs. The Exchange proposes to offer an alternative to receive a specified annual fixed rebate if a Floor Broker qualifies for the Growth Incentive. Participants that qualify would receive the greater of the two rebates. The Exchange also proposes to adjust the qualifying baseline volumes and benchmarks.

In addition, the FB Volume Rebate offers Floor Brokers the opportunity to qualify for a \$5,000 rebate each month that the Floor Broker increases its ADV by a certain percentage over one of two benchmarks. Given the proposed changes to the FB Prepay Program, the Exchange proposes to eliminate (as duplicative) the FB Volume Rebate Program as discussed further herein.

The Exchange proposes to implement the fee change effective January 2, 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 "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>8</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>9</sup> Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in the third quarter of 2019, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>10</sup>

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. To respond to this competitive marketplace, the Exchange has established incentives for Floor Brokers, as such participants serve an important function in facilitating the execution of orders via open outcry, which promotes price discovery on the public markets. To the extent that these incentives succeed, the increased liquidity on the Exchange would result in enhanced market quality for all participants.

Proposed Rule Change

The Exchange proposes to modify the Floor Broker Prepayment Program in several ways. First, the Exchange proposes to remove reference to specific years and to add rule text making clear that the Program is renewable on an annual basis.<sup>11</sup> The Exchange also proposes to remove language regarding the 10% Discount, as that would no longer be included in the Program.<sup>12</sup> In addition, the Exchange proposes to expand the Growth Incentive to provide an annual fixed-rebate option.

Currently, to qualify for the Growth Incentive, the minimum threshold that a participant needs to exceed is the greater of: 11,000 contract sides in billable manual ADV; or 110% of the Floor Broker's total billable manual ADV in contract sides during the second half of 2017—*i.e.*, July through December 2017.<sup>13</sup>

The Exchange proposes to revise the minimum thresholds that a participant needs to exceed to qualify for the Growth Incentive as follows: 20,000 contract sides (up from 11,000) in billable manual ADV; or 105% of the

<sup>4</sup> See Fee Schedule, Section I.E.1, Floor Broker Fixed Cost Prepayment Incentive Program (the "FB Prepay Program"), available here, [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf).

<sup>5</sup> See *id.*, Fee Schedule, Section I.E.2 Floor Broker Volume Rebate Program (the "FB Volume Rebate"). Given the plans to remove the FB Volume Rebate, the Exchange proposes a technical change to remove reference to "Floor Broker Programs" in the Table of Contents, as well as in the body of the Fee Schedule to re-number the FB Prepay Program as Section I.E., which would add clarity and transparency to the Fee Schedule.

<sup>6</sup> See *id.* (providing that Eligible Fixed Costs include: Section III.A. Monthly ATP Fees; Section III.B. Floor Access Fee; and Section IV. Monthly Floor Communication, Connectivity, Equipment and Booth or Podia Fees, specifically: Login, Transport Charges, Booth Premises, Telephone Service, Cellular Phones, Booth Telephone System—Line Charge, Booth Telephone System—Single line phone jack and data jack, and Wire Services).

<sup>7</sup> The Percentage Growth Incentive excludes Customer volume, Firm Facilitation trades and QCCs. Any volume calculated to achieve the Firm and Broker Dealer Monthly Fee Cap and the Limit of Fees on Options Strategy Executions, are likewise excluded from the Percentage Growth Incentive because fees on such volume is already capped and therefore does not increase billable manual volume. See *id.*

<sup>8</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>9</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>10</sup> Based on OCC data, see *id.*, the Exchange's market share in equity-based options declined from 9.82% for the month of January to 7.86% for the month of September.

<sup>11</sup> See proposed Fee Schedule, Section I.E., Floor Broker Fixed Cost Prepayment Incentive Program (the "FB Prepay Program") (including removing reference to specific years and adding references to Floor Brokers prepaying for the "the following calendar year" after committing thereto by "the last business day of December in the current year"; being invoiced in January for Eligible Fixed Costs based on annualizing their Eligible Fixed Costs incurred in the previous November;" and participants receiving their rebate "in the following January." See *id.* For example, if a participating Floor Broker incurred \$6,000 in Eligible Fixed Costs in November, that Floor Broker would be invoiced in January of the following year in the amount of \$72,000 to prepay such costs for the entire year.

<sup>12</sup> See *id.* For consistency, the Exchange would also remove reference to "larger discounts" as it related to the smaller 10% Discount and replace this reference with the word "rebates." See *id.*

<sup>13</sup> See Fee Schedule, Section I.E.2 Floor Broker Volume Rebate Program (the "FB Volume Rebate").

Floor Broker’s total billable manual ADV in contract sides (down from 110%) during the second half of 2017—*i.e.*, July through December 2017.<sup>14</sup> The Exchange believes that 20,000 ADV is a reasonable minimum threshold above which a participating Floor Broker would need to increase volume in order to qualify for the Growth Incentive given the increased options volume executed by Floor Brokers in the past year. The Exchange also notes that Floor Brokers that are new to the Exchange would be able to qualify for the Growth Incentive based on the minimum threshold of 20,000 contract sides. In addition, because Floor Broker volume has increased, the Exchange believes that Floor Brokers that previously participated in the Program would be able to achieve this proposed minimum threshold. The Exchange likewise believes it is appropriate to reduce the requisite percentage to meet the 2017 benchmark because it would make this alternative more achievable for Floor Brokers that do not meet the billable manual ADV threshold. The Exchange notes that the changes to the Program

are designed to encourage those Floor Brokers that have previously enrolled in the Program to reenroll for the upcoming year as well as to attract Floor Brokers that have not yet participated.

Regardless of which benchmark a Floor Broker’s growth is measured against, all Floor Brokers that aim to qualify for the Growth Incentive would be required to increase volume executed on the Exchange. The total annual rebate available for achieving each Tier would be the same regardless of whether the Floor Broker relied on the minimum (proposed) 20,000 ADV contract sides as the benchmark or 105% of the second half of 2017 volume.

The Exchange also proposes to add an option for a Floor broker to receive a fixed rebate instead of a percentage reduction of pre-paid annual fixed costs if it qualifies for the Growth Incentive. To reflect this new option, the Exchange proposes to add rule text providing that “[e]ligible Floor Broker organizations are entitled to an annual rebate that is the greater of the ‘Total Percentage Reduction of pre-paid annual Eligible Fixed Costs’ or the ‘Alternative Rebate’

based upon the Percentage Growth Incentive Tier achieved, as set forth in the table below”.

As in prior years, the Exchange is proposing rebates based on the growth in ADV in contract sides, but proposes to modify (and make more achievable) the requisite Percentage Growth requirements to as low as 5% to achieve an annual rebate of 10% of prepaid Eligible Fixed Costs or \$2,000/month, whichever is greater, to Growth Incentive as high as 100% to achieve an annual rebate of 100% Eligible Fixed Costs or \$16,000/month (under new Tier 4), whichever is greater.<sup>15</sup> Just as the total percentage reduction increases as the Percentage Growth increases, the Exchange proposes that the annual Alternative Rebate, with fixed dollar amounts tied to each Tier, would also increase as the Percentage Growth increases. Participants that qualify for one of the Tiers would receive only the higher of the two potential rebates, paid annually.

The following table reflects the proposed changes (with deletions in brackets and new text italicized):<sup>16</sup>

**FB PREPAYMENT PROGRAM INCENTIVES**

[Based on *annual* ADV in contract sides *for the calendar year* (in 2019)]

Tier	Percentage growth incentive	Total Percentage Reduction of pre-paid annual Eligible Fixed Costs [for 2019]	Alternative Rebate
Tier 1 .....	[30]5	[40%]10 .....	\$2,000/month.
Tier 2 .....	[65]30	[75]50 .....	\$4,000/month.
Tier 3 .....	[100]50	[100*]80 .....	\$8,000/month.
Tier 4 .....	100	100 .....	\$16,000/month.

Thus, as proposed, a participating Floor Broker would qualify for the proposed Growth Incentive by executing ADV growth in manual billable contract sides that is 5%, 30%, 50%, or 100%, over the greater of (i) 20,000 contract sides ADV; or (ii) 105% of their ADV during the second half of 2017 (*i.e.*, July through December). Participants that qualify for Tiers 1, 2, 3, or 4 would be eligible for 10%, 50%, 80% or 100% of their pre-paid annual Eligible Fixed costs, respectively. However, if the amount of the annual Alternative Rebate works out to be greater than the rebate available under the Growth Incentive

program, the Floor Broker would be entitled to that amount.

The Exchange also proposes to eliminate the Floor Broker Volume Rebate, as it is now duplicative following the modifications to the FB Prepayment Program.<sup>17</sup> In particular, proposed Tier 3 of the FB Prepay Program requires the same level of growth as the FB Volume Rebate and a greater potential rebate. Both programs require the greater of 20,000 contract sides or a level of trading as compared to a prior period that is the same or greater than volume during that period. The Exchange notes, however, that the FB Volume Rebate uses the second half of 2018 volume as the prior volume

benchmark whereas the proposed FB Prepay Program uses the second half of 2017 volume. The Exchange believes the similarities in the program—both in terms of incentives and potential rebates—obviate the need to keep both programs. Thus, the Exchange proposes to delete as superfluous (and duplicative) the FB Volume Rebate.

Although the FB Prepay Program relates to fixed costs, the Exchange believes the Program (as modified) would continue to incent Floor Brokers to increase their billable volume executed in open outcry on the Exchange, which would benefit all market participants by expanding liquidity and providing more trading

<sup>14</sup> See proposed Fee Schedule, Section I.E., Floor Broker Fixed Cost Prepayment Incentive Program (the “FB Prepay Program”).

<sup>15</sup> See *id.* The Exchange notes that new Tier 4 effectively replacing current Tier 3 in terms of growth requirement and potential rebate, as the

Exchange has lowered (and made more achievable) proposed Tier 3. See *id.*

<sup>16</sup> Given that the annual Alternative Rebate will be available for all Tiers (and not just Tier 3 as is currently the case), the Exchange also proposes to delete the following language from the Fee

Schedule as obsolete: “\*Participants in the FB Prepay Program that qualify for Tier 3 will be rebated the greater of 100% of their pre-paid annual Eligible Fixed Costs, or \$10,000/month.” See *id.*

<sup>17</sup> See *id.*

opportunities, even to those market participants that have not committed to the Program. Regardless of which benchmark a participating Floor Broker's growth is measured against, all Floor Broker's that opt to participate would be required to increase volume executed on the Exchange in order to receive the enhanced discount. The Exchange cannot predict with certainty whether any Floor Brokers would avail themselves of this proposed fee change. However, all Floor brokers are eligible for this Program.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>18</sup> in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,<sup>19</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 broader forms that are most important to investors and listed companies."<sup>20</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>21</sup> Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More specifically, in the third quarter of 2019, the Exchange had less than 10% market share of executed volume of multiply-listed equity & ETF options trades.<sup>22</sup>

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 Exchange believes the FB Prepay Program, as modified, is reasonable because the Program is optional and Floor Brokers can elect to participate or not. In addition, the Exchange is continuing to offer two alternative means to achieve the same enhanced rebate to ensure that Floor Brokers that are new to the Exchange (or Floor Brokers that did not execute more than 20,000 ADV in contract sides) could also participate in the Program. The Exchange believes that increasing one of the alternate requirements to 20,000 ADV is a reasonable minimum threshold above which a participating Floor Broker would need to increase volume in order to realize the proposed Growth Incentive because numerous Floor brokers exceeded this volume requirement in 2019, even though it was not required. Because Floor Brokers are already performing at this level, the Exchange believes it is reasonable to adjust the eligibility requirement for the Growth Incentive to match current performance levels. Having demonstrated an ability to meet this higher volume threshold, the Exchange is seeking to encourage Floor Brokers to sustain this volume threshold throughout the year. The Exchange also believes it is reasonable to use each Floor Broker's historical volume in the second half of 2017 as a benchmark against which to measure future growth to achieve the proposed Growth Incentive, and to lower from 110% to 105% the requisite increase over the Floor Broker's 2017 volume, because it makes the Growth Incentive more achievable and provides an opportunity for more Floor Brokers to qualify for the Growth Incentive Program.

The Exchange further believes that the proposed changes to add an additional tier to the Growth Incentive is reasonable because it will provide greater opportunities to Floor Brokers to be eligible for one of the two rebates by providing lower thresholds to qualify. Overall, the proposed changes to the Growth Incentive program are designed

to make the existing Tiers more achievable while adding new Tier 4 (which has same threshold percentage as existing Tier 3) to encourage increased executions by Floor Brokers on the Exchange, which activity (even with lower volume thresholds) would benefit all market participants.

The Exchange also believes it is reasonable to provide an annual alternative fixed rebate because it provides an option for Floor brokers to earn the higher of the percentage reduction rebate, or the fixed-rebate amount.

Moreover, the FB Prepay Program provides Floor Brokers the opportunity to receive rebates on its Eligible Fixed Costs that they otherwise would not receive, based on trading activity. Such rebates may encourage Floor Brokers to increase their billable volume executed in open outcry on the Exchange, which would benefit all market participants by expanding liquidity and providing more trading opportunities, even to non-Floor Broker market participants (including participating Floor Brokers who do not hit the volume thresholds).

Finally, to the extent the proposed change continues to attract greater volume and liquidity to the Exchange (including to the Floor), 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 Floor Brokers would avail themselves of this proposed fee change. However, all Floor brokers are eligible to participate in the Program.

The proposed technical change to renumber the Table of Contents as well as the body of the Fee Schedule in light of the removal of the FB Volume Rebate program is reasonable as it would add clarity and transparency to the Fee Schedule.

### 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 Floor Brokers can opt to avail themselves of the Program or not, and to attempt to trade sufficient volume to achieve one of the Tiers, or not. All

<sup>18</sup> 15 U.S.C. 78f(b).

<sup>19</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>20</sup> See Reg NMS Adopting Release, *supra* note 8, at 37499.

<sup>21</sup> See *supra* note 9.

<sup>22</sup> Based on OCC data, see *supra* note 10, in 2019, the Exchange's market share in equity-based

options declined from 9.82% for the month of January to 7.86% for the month of September.

participating Floor Brokers have the ability to qualify for the same enhanced rebate under two alternatives means offered (*i.e.*, the greater of at least 20,000 contract sides in billable ADV or 105% of the Floor Broker's total billable manual ADV in the second half of 2017). The Exchange notes that the changes to the Program are designed to encourage those Floor Brokers that have previously enrolled in the Program to reenroll for the upcoming year as well as to attract Floor Brokers that have not yet participated.

Moreover, the proposed change applies to qualifying Floor Brokers equally and because Floor Brokers serve an important function in facilitating the execution of orders via open outcry, which as a price-improvement mechanism, the Exchange wishes to encourage and support.

To the extent that the proposed change continues to attract more participation in the programs of the Exchange, the 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 FB Prepayment program because the proposed modification would be available to all similarly-situated Floor Brokers on an equal and non-discriminatory basis.

The proposed modified Program is not unfairly discriminatory to non-Floor Brokers because Floor Brokers serve an important function in facilitating the execution of orders via open outcry, which as a price-improvement mechanism, the Exchange wishes to encourage and support. To the extent that the proposed change continues to attract more participation in the programs of the Exchange, the 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.

Moreover, the proposal is based on the amount and type of business transacted on the Exchange and Floor Broker organizations are not obligated to participate in the Program and, if they do, they are not obligated to try to achieve any of the Tiers.

To the extent that the proposed change attracts a variety of transactions 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 Floor of) 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>23</sup>

*Intramarket Competition.* The Exchange believes the proposed Program, as modified, should continue to encourage order flow to be directed to the (Floor of the) Exchange, which

would enhance the quality of quoting and may increase the volumes of contracts trade on the Exchange. To the extent that there is an additional competitive burden on non-Floor Brokers, the Exchange believes that this is appropriate because Floor Brokers serve an important function in facilitating the execution of orders via open outcry, which as a price-improvement mechanism, the Exchange wishes to encourage and support.

To the extent that this function is achieved, all of the Exchange's market participants should benefit from the improved market liquidity. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange will benefit all market participants and improve competition on the Exchange.

The proposed technical change to renumber the Table of Contents as well as the body of the Fee Schedule in light of the removal of the FB Volume Rebate program is not designed to impact competition but instead should add clarity and transparency to the Fee Schedule.

*Intermarket Competition.* The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, by encouraging additional orders to be sent to the (Floor of the) Exchange for execution. The proposed adjustments to the Program are designed to make the incentives more achievable and to continue to encourage Floor Brokers to execute orders on the Floor of the Exchange, which would increase volume and liquidity, to the benefit of all market participants by providing more trading opportunities and tighter spreads.

Given the robust competition for volume among options markets, many of which offer the same products, implementing programs to attract order flow, such as the proposed modification to the FB Prepayment Program, are consistent with the above-mentioned goals of the Act.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

<sup>23</sup> See Reg NMS Adopting Release, *supra* note 8, at 37499.

*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>24</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>25</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>26</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 Number SR-NYSEAMER-2020-02 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-NYSEAMER-2020-02. 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-NYSEAMER-2020-02, and should be submitted on or before February 3, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-00264 Filed 1-10-20; 8:45 am]

**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-87902; File No. SR-NYSEAMER-2020-01]

**Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend the NYSE American Options Fee Schedule Regarding Fees Charged Under the Market Maker Sliding Scale**

January 7, 2020.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on January 2, 2020, NYSE American LLC ("NYSE American" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the

proposed rule change as described in Items I, II, and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend the NYSE American Options Fee Schedule ("Fee Schedule") regarding fees charged under the Market Maker Sliding Scale. The Exchange proposes to implement the fee change effective January 2, 2020. The proposed 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.

**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 Statutory Basis for, the Proposed Rule Change*

1. Purpose

The purpose of this filing is to modify certain of the fees charged under the Market Maker Sliding Scale program, as described in more detail below.

Section I.C. of the Fee Schedule sets forth the Sliding Scale of transaction fees charged to NYSE American Options Market Makers (referred to as Market Makers herein), which fees decrease upon the Market Maker trading certain minimum (increasing) monthly volume thresholds as expressed in five tiers (the "MM Sliding Scale").<sup>4</sup> The MM Sliding

<sup>4</sup> See Fee Schedule, Section I.C., NYSE American Options Market Maker Sliding Scale—Electronic, available here, [https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE\\_American\\_Options\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf) (excluding any volumes attributable to QCC trades, CUBE Auctions, and Strategy Execution Fee Caps, as these transactions are subject to separate pricing described in Fee Schedule Sections I.F., I.G., and I.J., respectively). The thresholds are based on a Market Makers' volume transacted Electronically as a percentage of

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>25</sup> 17 CFR 240.19b-4(f)(2).

<sup>26</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>27</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.