

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–96743; File No. SR–NYSEAMER–2023–08]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Modify the NYSE American Options Fee Schedule

January 24, 2023.

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 13, 2023, NYSE American LLC (“NYSE American” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to modify the NYSE American Options Fee Schedule (“Fee Schedule”) regarding (1) fees and credits for Qualified Contingent Cross (“QCC”) transactions and (2) the Floor Broker Fixed Cost Prepayment Incentive Program (the “FB Prepay Program”). The Exchange proposes to implement the fee change effective January 13, 2023.<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.

#### 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 to amend the Fee Schedule to (1) modify the fees and credits for QCC transactions<sup>5</sup> and (2) modify the FB Prepay Program. The Exchange proposes to implement the rule change on January 13, 2023.

##### Modifications to QCC Fees and Credits

The table in Section I.F. of the Fee Schedule sets forth the per contract fees and credits applicable to volume executed as part of a QCC trade.<sup>6</sup> Currently, Customers and Professional Customers do not incur a fee or earn a credit; Non-Customers, excluding Specialists and e-Specialists, are subject to a \$0.20 per contract fee; and Specialists and e-Specialists are subject to a \$0.13 per contract fee. Floor Brokers earn a credit for executed QCC orders of (\$0.11) per contract for the first 500,000 contracts or (\$0.14) per contract in excess of 500,000.<sup>7</sup>

The Exchange proposes to modify the table in Section I.F. to replace the term “Non-Customer” with “Market Maker, Firm, or Broker Dealer” and eliminate the exception of Specialists and e-Specialists, which would add clarity to the Fee Schedule regarding which market participants are considered “Non-Customers” for purposes of QCC fees and credits. The table would thus provide for a \$0.20 fee on QCC transactions by a Market Maker, Firm, or Broker-Dealer (as such terms are defined in the KEY TERMS and DEFINITIONS section of the Fee Schedule). Consistent with this change, the Exchange also proposes to eliminate the \$0.13 fee currently applicable to QCC transactions by Specialists and e-Specialists; as Specialists and e-Specialists are registered with the Exchange as Market Makers, they would, as proposed, be charged as such for QCC transactions.

The Exchange further proposes to modify the table in Section I.F.

<sup>5</sup> A QCC is defined as an originating order to buy or sell at least 1,000 contracts, or 10,000 mini-options contracts, that is identified as being part of a qualified contingent trade (as that term is defined in Commentary .01 to Rule 900.3NY), coupled with a contra side order or orders totaling an equal number of contracts. See Rule 900.3NY(y).

<sup>6</sup> See Fee Schedule, Section I.F., QCC Fees & Credits.

<sup>7</sup> QCC executions in which a Customer or Professional Customer, or both, is on both sides of the QCC trade are not eligible for the Floor Broker credit. The current Floor Broker credit is paid only on volume within the applicable tier and is not retroactive to the first contract traded. See Fee Schedule, Section I.F., QCC Fees & Credits at Footnote 1.

regarding credits applicable to Floor Brokers’ QCC transactions and proposes to provide Floor Brokers with credits based on the account type of the parties to the trade.<sup>8</sup> Specifically, the Exchange proposes that Floor Brokers may earn a credit of (\$0.12) per contract for QCC transactions of a Customer or Professional Customer vs. a Market Maker, Firm, or Broker Dealer, and a credit of (\$0.18) per contract for QCC transactions of a Market Maker, Firm, or Broker Dealer vs. a Market Maker, Firm, or Broker Dealer.

Finally, the Exchange proposes to modify the last sentence of Footnote 1 to Section I.F., which currently provides that the maximum Floor Broker credit paid for QCC transactions is \$525,000 per month per Floor Broker firm. The Exchange proposes to amend Footnote 1 to instead provide that Floor Broker credits paid for QCC trades and rebates paid through the Manual Billable Rebate Program (as proposed below) shall not combine to exceed \$2,000,000 per month per Floor Broker firm.

Although the Exchange cannot predict with certainty whether the proposed change would encourage Floor Brokers to increase their QCC volume, the Exchange believes that the proposed change would continue to incent additional QCC executions by Floor Brokers by offering increased credits on QCC transactions and raising the maximum monthly amount that a Floor Broker firm could earn from Floor Broker QCC credits (or rebates via the proposed Manual Billable Rebate Program), and all Floor Brokers are eligible for the proposed credits, including the proposed higher credit on QCC transactions with a Market Maker, Firm or Broker on both sides of the trade, without any minimum volume requirement. The Exchange also believes that the proposed change with respect to the fee for QCC transactions by a Market Maker (including a Specialist or e-Specialist), Firm, or Broker-Dealer would improve the clarity of the Fee Schedule and, although the proposed change would increase the fee for QCC transactions by Specialists and e-Specialists, is reasonable and equitable because it would provide for the same fee on QCC transactions for all Market Makers, Firms, and Broker-Dealers.

<sup>8</sup> The Exchange also proposes to delete the sentence in Footnote 1 to Section I.F. providing that the Floor Broker credit is paid only on volume within the applicable tier and is not retroactive to the first contract traded, as such concept would not apply to the proposed Floor Broker credits.

<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 previously filed to amend the Fee Schedule on December 30, 2022 (SR–NYSEAMER–2022–58) and withdrew such filing on January 13, 2023.

**FB Prepay Program**

The Exchange also proposes to modify the FB Prepay Program, a prepayment incentive program that allows Floor Brokers to prepay certain of their annual Eligible Fixed Costs in exchange for volume rebates.<sup>9</sup>

Currently, the FB Prepay Program offers participating Floor Brokers an opportunity to qualify for rebates by achieving growth in billable manual volume by a certain percentage as measured against one of two benchmarks (the “Percentage Growth Incentive”). Specifically, the Percentage Growth Incentive is designed to encourage Floor Brokers to increase their average daily volume (“ADV”) in billable manual contract sides to qualify for a Tier; each Tier of the FB Prepay Program corresponds to an annual

rebate equal to the greater of the “Total Percentage Reduction of pre-paid annual Eligible Fixed Costs” or the annualization of the monthly “Alternative Rebate.”<sup>10</sup> In either case, participating Floor Brokers receive their annual rebate amount in the following January.<sup>11</sup> Floor Brokers that wish to participate in the FB Prepay Program for the following calendar year must notify the Exchange no later than the last business day of December in the current year.<sup>12</sup>

The Exchange now proposes to modify the FB Prepay Program to eliminate the Percentage Growth Incentive and accompanying annual rebates<sup>13</sup> and instead provide Floor Brokers participating in the program with monthly rebates based on manual billable transaction volume (the

“Manual Billable Rebate Program”). The calculation of volume on which rebates earned through the Manual Billable Rebate Program would be paid is based on transactions including at least one side for which manual transaction fees are applicable and excludes volume from QCC transactions.<sup>14</sup> The Exchange proposes to continue to exclude any volume calculated to achieve the Strategy Execution Fee Cap, regardless of whether the cap is achieved, from the Manual Billable Rebate Program because fees on such volume are already capped and therefore such volume does not increase billable manual volume.<sup>15</sup>

Participants in the FB Prepay Program that achieve the following monthly qualifications will be eligible for rebates through the Manual Billable Rebate Program, payable on a monthly basis:

Manual billable rebate qualification	Rebate per billable side
Execute 1 million combined manual billable and QCC billable contracts .....	(\$0.05)
Execute 3 million combined manual billable and QCC billable contracts .....	(0.08)
Execute 5 million combined manual billable and QCC billable contracts .....	(0.10)

The FB Prepay Program also currently offers participating Floor Brokers that increase their QCC credit eligible contracts in a month by at least 20% over the greater of their second half of 2021 average monthly QCC credit eligible volume or 1,500,000 contracts an additional credit of \$0.04 per contract on the first 300,000 QCC credit eligible QCC trades and an additional

credit of \$0.01 per contract on all QCC credit eligible QCC trades above 300,000, subject to the monthly maximum credit per Floor Broker firm. The Exchange now proposes to eliminate these QCC credits currently offered through the FB Prepay Program, and provide that program participants would instead be eligible to qualify for monthly rebates on QCC transactions in

addition to the credits set forth in Section I.F. (as modified in this filing) (the “QCC Billable Bonus Rebate”), as described in the table below, provided that they execute the required number of billable QCC transactions in a month. The Exchange proposes that the QCC Billable Bonus Rebate (including the Additional Bonus) would be payable back to the first billable side.

QCC billable bonus rebate qualification	Additional rebate on single billable side QCC contract	Additional rebate on two billable side QCC contract
Prepay Bonus Level—achieved with 2 million QCC billable contracts .....	(\$0.02)	(\$0.04)
Additional Bonus Level—achieved with 100% above Prepay Bonus Level .....	(0.04)	(0.06)

The Exchange further proposes to provide in Section III.E.1., consistent with Section I.F., that the maximum Floor Broker credits paid for QCC trades

and rebates paid through the Manual Billable Rebate Program shall not combine to exceed \$2,000,000 per month per Floor Broker firm.

Finally, the Exchange proposes to modify the date it will use for the calculation of a Floor Broker’s Eligible Fixed Costs for the following calendar

<sup>9</sup> See Fee Schedule, Section III.E.1., Floor Broker Fixed Cost Prepayment Incentive Program (the “FB Prepay Program”). “Eligible Fixed Costs” include monthly ATP Fees, the Floor Access Fee, and certain monthly Floor communication, connectivity, equipment and booth or podia fees, as set forth in the table in Section III.E.1.

<sup>10</sup> See *id.* The Percentage Growth Incentive excludes Customer volume, Firm Facilitation trades, and QCCs. Any volume calculated to achieve the Firm Monthly Fee Cap and the Strategy Execution Fee Cap, regardless of whether either of these caps is achieved, will likewise be excluded from the Percentage Growth Incentive because fees on such volume are already capped and therefore do not increase billable manual volume. See *id.*

<sup>11</sup> See Fee Schedule, Section III.E.1.

<sup>12</sup> See *id.*

<sup>13</sup> To effect the proposed change to eliminate the Percentage Growth Incentive and related rebates, the Exchange also proposes to delete the last sentence in Section III.E.1., which currently provides that Floor Brokers in the FB Prepay Program will receive their rebate in the following January, as no longer applicable.

<sup>14</sup> The Exchange proposes to continue to exclude volume from QCC transactions from the calculation of eligible volume for rebates paid through the Manual Billable Rebate Program, as proposed, because Floor Brokers would be eligible for separate credits and rebates for QCC transactions.

<sup>15</sup> The Exchange proposes to remove references to the exclusion of Customer volume and Firm Facilitation trades as redundant because such volume is not billable. The Exchange also proposes that it would no longer exclude volume calculated

to achieve the Firm Monthly Fee Cap from the Manual Billable Rebate Program and proposes conforming changes to reflect the deletion of the reference to the Firm Monthly Fee Cap in Section III.E.1. The Exchange proposes to include volume calculated to achieve the Firm Monthly Fee Cap in calculations for the Manual Billable Rebate Program in light of the recent change to increase the amount of the Firm Monthly Fee Cap and eliminate lower fee caps for firms that qualify for American Customer Engagement Program tiers, which results in more non-facilitation Firm volume being subject to regular transaction fees. See Securities Exchange Act Release No. 96501 (December 15, 2022) (SR–NYSEAMER–2022–55) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify the NYSE American Options Fee Schedule).

year. The FB Prepay Program currently specifies that a Floor Broker that commits to the program will be invoiced in January for Eligible Fixed Costs, based on annualizing their Eligible Fixed Costs incurred in November 2020. The Exchange proposes to modify the Fee Schedule to specify that the annualization of Eligible Fixed Costs would be based on costs incurred in November 2022, which the Exchange believes would more accurately reflect Eligible Fixed Costs for the coming calendar year.

Although the Exchange cannot predict with certainty whether the proposed changes to the FB Prepay Program would encourage Floor Brokers to participate in the program or to increase either their manual billable volume or QCC volume, the Exchange believes that the proposed changes would continue to incentivize Floor Brokers to participate in the FB Prepay Program by simplifying the structure of the program, modifying the qualifying criteria and rebates offered through the program to be on a monthly (rather than annual) basis, and offering rebates on manual billable volume and QCC transactions, thereby encouraging additional manual billable volume and QCC executions by Floor Brokers. All Floor Brokers are eligible to participate in the FB Prepay Program and qualify for the proposed rebates, and the rebates are achievable in any given month without regard to volumes from any other month.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>16</sup> in general, and furthers the objectives of sections 6(b)(4) and (5) of the Act,<sup>17</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>18</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>19</sup> Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2022, the Exchange had less than 7% market share of executed volume of multiply-listed equity and ETF options trades.<sup>20</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 that the proposed credits offered to Floor Brokers on QCC transactions, as well as the additional rebates on QCC transactions and manual billable volume offered through the FB Prepay Program, as proposed, are reasonable because they are designed to continue to incent Floor Brokers to increase the number of QCC transactions and manual billable orders executed on the Exchange. The Exchange also believes that the proposed increase in the maximum monthly amount that a Floor Broker firm could earn from Floor Broker QCC credits or from rebates via the proposed Manual Billable Rebate Program is reasonable because it is likewise intended to encourage Floor Brokers to direct QCC transactions and manual billable volume to the Exchange.

<sup>18</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>19</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/Market-Data-Reports/Volume-and-Open-Interest/Monthly-Weekly-Volume-Statistics>.

<sup>20</sup> Based on a compilation of OCC data for monthly volume of equity-based options and monthly volume of ETF-based options, see *id.*, the Exchange’s market share in equity-based options was 7.06% for the month of November 2021 and 6.98% for the month of November 2022.

The Exchange believes that the proposed changes to QCC transaction fees and credits, as set forth in Section I.F., are reasonable because they are designed to improve the clarity of the Fee Schedule regarding the fee applicable to “Non-Customer” QCC transactions and to apply a consistent fee to QCC transactions by Market Makers (including Specialists and e-Specialists), Firms, and Broker-Dealers. The Exchange also believes it is reasonable to provide an increased credit to Floor Brokers on QCC transactions with a Market Maker, Firm, or Broker-Dealer on both sides because such transactions are billable on both sides. To the extent that the proposed change attracts more volume to the Exchange and does not disincentivize Specialists and e-Specialists from directing orders to the Exchange, this 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.

With respect to the FB Prepay Program, the Exchange also believes that the proposed changes are reasonable because participation in the program is optional, and Floor Brokers can elect to participate in the program to be eligible to earn the proposed rebates on manual billable transactions and QCC transactions or not. The Exchange also believes that the proposed modification of the FB Prepay Program is reasonable because it is designed to simplify the program, to continue to encourage Floor Brokers to participate in the FB Prepay Program, and to provide liquidity on the Exchange. Specifically, the Exchange believes that the proposed qualifying thresholds for the Manual Billable Rebate Program and QCC Bonus Rebate are achievable by Floor Broker firms based on recent Floor Broker activity and in consideration of the proposed changes in this filing (including the proposed modification to Floor Broker QCC credits). The Exchange further believes that the proposed change to focus the FB Prepay Program on manual billable volume and QCC transactions is reasonable because it is intended to encourage Floor Brokers to increase manual billable volume and QCC transactions to the Exchange, and any increase in such volume would benefit all market participants. The Exchange also believes that the proposed rebate amounts are reasonable and comparable to rebate amounts offered by another options exchange to Floor Brokers on

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(4) and (5).

manual transactions.<sup>21</sup> Finally, the Exchange believes that the proposed modification of the qualifying criteria for and rebates offered through the FB Prepay Program to be on a monthly basis is reasonable and could increase opportunities for participating Floor Brokers to qualify for and receive the benefit of the incentives offered. To the extent that the proposed changes attract more volume 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 notes that all market participants stand to benefit from any increase in volume by Floor Brokers, which could promote market depth, facilitate tighter spreads and enhance price discovery, to the extent the proposed change encourages Floor Brokers to utilize the Exchange as a primary trading venue, and may lead to a corresponding increase in order flow from other market participants. In addition, any increased liquidity on the Exchange would result in enhanced market quality for all participants.

The Exchange also believes that the proposed change to update the date used for the calculation of Eligible Fixed Costs from November 2020 to November 2022 is reasonable because it expects Floor Broker organizations' more recent November 2022 costs to provide a more accurate basis for annualizing Eligible Fixed Costs for the coming calendar year based on anticipated fixed costs in 2023.

Finally, to the extent the proposed changes continue to attract greater volume and liquidity, the Exchange believes the proposed changes 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's fees are constrained by intermarket competition, as Floor Brokers may direct their order flow to any of the 16 options exchanges, including those offering rebates on QCC

orders<sup>22</sup> and Floor Broker rebates on manual billable orders.<sup>23</sup> Thus, Floor Brokers have a choice of where they direct their order flow, including their QCC transactions and manual billable orders. The proposed rule changes are designed to continue to incent Floor Brokers to direct liquidity (and, in particular, QCC orders and manual billable orders) to the Exchange; to the extent Floor Brokers are incentivized to aggregate their trading activity at the Exchange, that increased liquidity could promote market depth, price discovery and improvement, and enhanced 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; Floor Brokers are not obligated to participate in the FB Prepay Program and can choose to execute QCC transactions or manual billable transactions to earn the various proposed credits and rebates or not. In addition, the proposed credits and rebates are available to all Floor Brokers equally, and the proposed monthly limit on the amount that Floor Brokers could earn from credits and rebates on QCC transactions and manual billable transactions would apply to all Floor Brokers equally. The Exchange also believes that the proposed modification of the qualifying criteria for and rebates offered through the FB Prepay Program to be on a monthly basis is equitable because it could provide participating Floor Brokers opportunities each month to qualify for and receive the benefit of the incentives offered through the program.

The Exchange also believes that the proposed increased credit for QCC transactions with a Market Maker, Firm,

or Broker-Dealer on both sides is equitable because such transactions are billable on both sides (whereas a QCC transaction with a Customer or Professional Customer on one side is only billable on one side). In addition, the Exchange believes that the proposed changes with respect to the fees for QCC transactions executed by Market Makers (including Specialists and e-Specialists), Firms, and Broker-Dealers modify the Fee Schedule to provide clarity regarding QCC transaction fees for "Non-Customers" and are equitable because they provide that these similarly-situated market participants would be equally subject to a \$0.20 fee on their QCC transactions.

The Exchange also notes that the proposed changes are designed to encourage Floor Brokers that have previously enrolled in the FB Prepay Program to reenroll for the upcoming year, as well as to attract Floor Brokers that have not yet participated in the program. Moreover, the Exchange believes that the proposed modifications to the FB Prepay Program are an equitable allocation of fees and credits because they would apply to participating Floor Brokers equally and are intended to encourage the role performed by Floor Brokers in facilitating the execution of orders via open outcry, a function which the Exchange wishes to support for the benefit of all market participants. The Exchange further believes that the proposed change with respect to the calculation of Eligible Fixed Costs is equitable because it would continue to be based on each Floor Broker organization's annualized costs and because the November 2022 basis for annualizing costs would provide a more accurate reflection of Eligible Fixed Costs for the coming calendar year based on anticipated fixed costs in 2023.

Moreover, the proposed changes are designed to continue to incent Floor Brokers to encourage ATP Holders to aggregate their executions—including QCC transactions and manual orders—at the Exchange as a primary execution venue. To the extent that the proposed change achieves its purpose in attracting more Floor Broker volume 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 changes 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.

<sup>21</sup> See, e.g., BOX Options Exchange Fee Schedule, Section V.C. (offering rebates to Floor Brokers on orders presented on the Trading Floor, including a \$0.075 rebate for Broker Dealer and Market Maker orders).

<sup>22</sup> See, e.g., EDGX Options Exchange Fee Schedule, QCC Initiator/Solicitation Rebate Tiers (applying (\$0.14) per contract rebate up to 999,999 contracts for QCC transactions when only one side of the transaction is a non-customer or (\$0.22) per contract rebate up to 999,999 contracts for QCC transactions with non-customers on both sides); BOX Options Fee Schedule at Section IV.D.1. (QCC Rebate) (providing for (\$0.14) per contract rebate up to 1,499,999 contracts for QCC transactions when only one side of the QCC transaction is a broker-dealer or market maker or (\$0.22) per contract rebate up to 1,499,999 contracts for QCC transactions when both parties are a broker-dealer or market maker); Nasdaq ISE, Options 7, Section 6.B. (QCC Rebate) (offering rebates on QCC transactions of (\$0.14) per contract when only one side of the QCC transaction is a non-customer or (\$0.22) per contract when both sides of the QCC transaction are non-customers).

<sup>23</sup> See note 21, *supra*.

### The Proposed Rule Change Is Not Unfairly Discriminatory

The Exchange believes the proposed fees, credits, and rebates applicable to Floor Brokers on QCC transactions and manual billable transactions are not unfairly discriminatory because they are based on the amount and type of business transacted on the Exchange, and Floor Brokers are not obligated to execute QCC or manual billable volume, or to participate in the FB Prepay Program. Rather, the proposal is designed to streamline the structure of the FB Prepay Program and to encourage Floor Brokers to utilize the Exchange as a primary trading venue for all transactions (if they have not done so previously) and increase QCC and manual billable volume sent to the Exchange. In addition, the proposed changes, including the modification of the monthly maximum Floor Broker credits paid for QCC trades and rebates paid through the Manual Billable Rebate Program, would apply to all similarly-situated Floor Brokers on an equal and non-discriminatory basis. The proposed credits and rebates are also not unfairly discriminatory to non-Floor Brokers because Floor Brokers serve an important function in facilitating the execution of orders on the Exchange, which the Exchange wishes to encourage and support to promote price improvement opportunities for all market participants.

The Exchange also believes that the proposed change relating to “Non-Customer” QCC transactions is not unfairly discriminatory because it is intended to clarify that the existing \$0.20 fee is applicable to QCC transactions by Market Makers, Firms, and Broker-Dealers and further believes that the proposed change with respect to Specialists and e-Specialists is not unfairly discriminatory because it would modify the Fee Schedule to charge the same fee on any QCC transactions executed by Market Makers (including Specialists and e-Specialists), Firms, and Broker-Dealers.

The Exchange further believes that the proposed change with respect to the calculation of Eligible Fixed Costs is not unfairly discriminatory because it would continue to be based on each Floor Broker organization’s annualized costs and because the Exchange expects that using November 2022 as the basis for annualizing costs would provide a more accurate reflection of Eligible Fixed Costs for the coming calendar year.

To the extent that the proposed changes attract more QCC orders and manual 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 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, 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,<sup>24</sup> 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>25</sup>

*Intramarket Competition.* The proposed modification of the FB Prepay Program and the proposed credits and rebates offered to Floor Brokers on QCC transactions and manual billable orders are designed to incent participation in the FB Prepay Program and to attract additional order flow to the Exchange, which could increase the volumes of contracts traded on the Exchange. Greater liquidity benefits all market participants on the Exchange, and increased QCC and manual billable transactions could increase opportunities for execution of other

trading interest. The proposed QCC credits would be available to all similarly-situated Floor Brokers that execute QCC trades and the rebates available through the Manual Billable Rebate Program and QCC Billable Bonus Rebate would be available to all Floor Brokers that choose to participate in the FB Prepay Program and meet the qualifying criteria for such rebates. The modification of the monthly maximum Floor Broker credits paid for QCC trades and rebates paid through the Manual Billable Rebate Program, would likewise apply equally to all similarly-situated Floor Brokers. To the extent that there is an additional competitive burden on non-Floor Brokers, the Exchange believes that any such burden would be appropriate because Floor Brokers serve an important function in facilitating the execution of orders and price discovery for all market participants. Finally, the Exchange believes the elimination of a lower QCC fee for Specialists and e-Specialists could also promote intramarket competition by establishing the same fee for all Market Makers, Firms, and Broker Dealers on QCC transactions.

*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>26</sup> Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, in November 2022, the Exchange had less than 7% market share of executed volume of multiply-listed equity and ETF options trades.<sup>27</sup>

The Exchange believes that the proposed changes reflect this competitive environment because they modify the Exchange’s fees and credits in a manner designed to continue to incent Floor Brokers to direct trading interest (particularly QCC transactions and manual orders) to the Exchange, to provide liquidity and to attract order flow. To the extent that Floor Brokers are encouraged to participate in the FB Prepay Program and/or incentivized to

<sup>24</sup> See 15 U.S.C. 78f(b)(8).

<sup>25</sup> See Reg NMS Adopting Release, *supra* note 18, at 37499.

<sup>26</sup> See note 19, *supra*.

<sup>27</sup> See note 20, *supra*.

utilize the Exchange as a primary trading venue for all transactions, all of the Exchange's market participants should benefit from the improved market quality and increased opportunities for price improvement. 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.

The Exchange further believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer rebates on QCC transactions and Floor Broker rebates on manual billable volume,<sup>28</sup> by encouraging additional orders to be sent to the Exchange for execution.

*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>29</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>30</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>31</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-2023-08 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-2023-08. 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-2023-08, and should be submitted on or before February 21, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>32</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023-01745 Filed 1-27-23; 8:45 am]

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**SECURITIES AND EXCHANGE COMMISSION**

[Investment Company Act Release No. 34814; File No. 812-15375]

**Fidelity Private Credit Fund and Fidelity Diversifying Solutions LLC**

January 24, 2023.

**AGENCY:** Securities and Exchange Commission ("Commission" or "SEC").  
**ACTION:** Notice.

Notice of an application under section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 18(a)(2), 18(c) and 18(i) and section 61(a) of the Act.

*Summary of Application:* Applicants request an order to permit certain closed-end management investment companies that have elected to be regulated as business development companies ("BDCs") to issue multiple classes of shares with varying sales loads and asset-based service and/or distribution fees.

*Applicants:* Fidelity Private Credit Fund and Fidelity Diversifying Solutions LLC.

*Filing Dates:* The application was filed on July 28, 2022 and amended on August 19, 2022, and January 9, 2023.

*Hearing or Notification of Hearing:* An order granting the requested relief will be issued unless the Commission orders a hearing. Interested persons may request a hearing on any application by emailing the Commission's Secretary at [Secretaries-Office@sec.gov](mailto:Secretaries-Office@sec.gov) and serving the Applicants with a copy of the request by email, if an email address is listed for the relevant Applicant below, or personally or by mail, if a physical address is listed for the relevant Applicant below.

Hearing requests should be received by the Commission by 5:30 p.m. on February 17, 2023, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Pursuant to rule 0-5 under the Act, hearing requests should state the nature of the writer's interest, any facts bearing upon the desirability of a hearing on the matter, the reason for the request, and the issues contested. Persons who wish

<sup>28</sup> See notes 21 & 22, *supra*.

<sup>29</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>30</sup> 17 CFR 240.19b-4(f)(2).

<sup>31</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>32</sup> 17 CFR 200.30-3(a)(12).