

which the Exchange has entered into a comprehensive surveillance sharing agreement.

(5) Prior to the commencement of trading, the Exchange will inform its members in an Information Circular of the special characteristics and risks associated with trading the Shares. Specifically, the Information Circular will discuss the following: (a) The procedures for purchases and redemptions of Shares in Creation Units (and that Shares are not individually redeemable); (b) BZX Rule 3.7, which imposes suitability obligations on Exchange members with respect to recommending transactions in the Shares to customers; (c) how information regarding the IIV and the Disclosed Portfolio is disseminated; (d) the risks involved in trading the Shares during the Pre-Opening<sup>47</sup> and After Hours Trading Sessions<sup>48</sup> when an updated IIV will not be calculated or publicly disseminated; (e) the requirement that members deliver a prospectus to investors purchasing newly issued Shares prior to or concurrently with the confirmation of a transaction; and (f) trading information.

(6) The Fund's investments, including derivatives, will be consistent with the 1940 Act and the Fund's investment objective and policies and will not be used to enhance leverage (although certain derivatives and other investments may result in leverage).<sup>49</sup>

(7) The Fund's investments will not be used to seek performance that is the multiple or inverse multiple (*i.e.*, 2Xs and 3Xs) of the Fund's primary broad-based securities benchmark index (as defined in Form N-1A).

(8) Credit default swaps held by the Fund will be traded on a U.S. Swap Execution Facility registered with the CFTC. At least 90% of the Fund's net assets in credit default swaps will be investment-grade at the time of purchase.

(9) To the extent that the Fund holds listed Inflation Swaps or interest rate swaps, all such listed Inflation Swaps and listed interest rate swaps held by the Fund will be traded on a U.S. Swap Execution Facility registered with the CFTC.

(10) The Trust is required to comply with Rule 10A-3 under the Act<sup>50</sup> for the initial and continued listing of the Shares of the Fund, and at least 100,000 Shares will be outstanding upon the commencement of trading.

The Exchange represents that all statements and representations made in this filing regarding the description of the portfolio or reference assets, limitations on portfolio holdings or reference assets, dissemination and availability of index, reference asset, and intraday indicative values, and the applicability of Exchange rules specified in this filing shall constitute continued listing requirements for the Fund. In addition, the issuer has represented to

the Exchange that it will advise the Exchange of any failure by the Fund or the Shares to comply with the continued listing requirements, and, pursuant to its obligations under Section 19(g)(1) of the Act, the Exchange will surveil for compliance with the continued listing requirements. If the Fund or the Shares are not in compliance with the applicable listing requirements, the Exchange will commence delisting procedures under BZX Rule 14.12.

This approval order is based on all of the Exchange's representations and descriptions of the Shares and the Fund, including those set forth above and in Amendment No. 1 to the proposed rule change. Except as described herein, the Commission notes that the Shares must comply with all applicable requirements of BZX Rule 14.11(i) to be listed and traded on the Exchange on an initial and continuing basis.

For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 11A(a)(1)(C)(iii) of the Act<sup>51</sup> and Section 6(b)(5) of the Act<sup>52</sup> and the rules and regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>53</sup> that the proposed rule change (SR-CboeBZX-2018-077), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>54</sup>

**Eduardo A. Aleman,**  
Deputy Secretary.

[FR Doc. 2019-03175 Filed 2-22-19; 8:45 am]

**BILLING CODE 8011-01-P**

#### SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 33377; 812-14850]

#### CM Finance Inc, et al.

February 19, 2019.

**AGENCY:** Securities and Exchange Commission ("Commission").

**ACTION:** Notice.

Notice of application for an order under sections 17(d) and 57(i) of the Investment Company Act of 1940 (the

"Act") and rule 17d-1 under the Act permitting certain joint transactions otherwise prohibited by sections 17(d) and 57(a)(4) of the Act and under rule 17d-1 under the Act.

**SUMMARY OF APPLICATION:** Applicants request an order to permit certain closed-end management investment companies to co-invest in portfolio companies with each other and with affiliated investment funds.

**APPLICANTS:** CM Finance Inc ("CMFN"), CM Credit Opportunities BDC I Inc. ("CM Credit" and together with CMFN, the "Existing Regulated Funds"), CM Investment Partners LLC ("CM Adviser") on behalf of itself and its successors,<sup>1</sup> CM Credit Opportunity Fund I LLC (the "Existing Affiliated Fund"), and CM Finance SPV Ltd. ("CM SPV"), a Wholly-Owned Investment Sub (defined below) of CMFN.

**FILING DATES:** The application was filed on December 13, 2017, and amended on April 30, 2018 and October 25, 2018.

**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 by writing to the Commission's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on March 18, 2019, and should be accompanied by proof of service on 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 to be notified of a hearing may request notification by writing to the Commission's Secretary.

**ADDRESSES:** Secretary, U.S. Securities and Exchange Commission, 100 F St. NE, Washington, DC 20549-1090. Applicants: 601 Lexington Avenue, 26th Floor, New York, NY 10022.

**FOR FURTHER INFORMATION CONTACT:** Laura L. Solomon, Senior Counsel, at (202) 551-6915 or David J. Marcinkus, Branch Chief, at (202) 551-6821 (Division of Investment Management, Chief Counsel's Office).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained via the Commission's

<sup>1</sup> The term "successor," as applied to each Adviser (as defined below), means an entity that results from a reorganization into another jurisdiction or change in the type of business organization.

<sup>47</sup> The Pre-Opening Session is from 8:00 a.m. to 9:30 a.m. Eastern Time.

<sup>48</sup> The After Hours Trading Session is from 4:00 p.m. to 5:00 p.m. Eastern Time.

<sup>49</sup> See *supra* note 23.

<sup>50</sup> See 17 CFR 240.10A-3.

<sup>51</sup> 15 U.S.C. 78k-1(a)(1)(C)(iii).

<sup>52</sup> 15 U.S.C. 78f(b)(5).

<sup>53</sup> 15 U.S.C. 78s(b)(2).

<sup>54</sup> 17 CFR 200.30-3(a)(12).

website by searching for the file number, or for an applicant using the Company name box, at <http://www.sec.gov/search/search.htm> or by calling (202) 551-8090.

### Applicants' Representations

1. CMFN is a Maryland corporation organized as a closed-end management investment company that has elected to be regulated as a business development company ("BDC") under section 54(a) of the Act.<sup>2</sup> The Objectives and Strategies<sup>3</sup> of CMFN are to maximize total return by investing primarily in privately held middle-market companies. The board of directors of CMFN (the "CMFN Board")<sup>4</sup> is comprised of six directors, four of whom are not "interested persons," within the meaning of section 2(a)(19) of the Act ("Non-Interested Directors").

2. CM Credit is a Maryland corporation and will be structured as a closed-end management investment company that intends to file an election to be regulated as a BDC under section 54(a) of the Act. CM Credit's Objectives and Strategies are to generate current income and capital appreciation by investing primarily in middle-market companies and leveraged companies. The board of directors of CM Credit (the "CM Credit Board") will be comprised of a majority of Non-Interested Directors.

3. The Existing Affiliated Fund is a Delaware limited liability company with the investment objective to seek current income and capital appreciation by investing primarily in middle-market companies. The Existing Affiliated Fund would be an investment company but for the exclusion from the definition of investment company provided by section 3(c)(7) of the Act.

4. CM Adviser is a Delaware limited liability company and is registered as an investment adviser under the Investment Advisers Act of 1940 (the "Advisers Act"). CM Adviser serves as the investment adviser to CMFN and will serve as the investment adviser to

<sup>2</sup> Section 2(a)(48) defines a BDC to be any closed-end investment company that operates for the purpose of making investments in securities described in sections 55(a)(1) through 55(a)(3) of the Act and makes available significant managerial assistance with respect to the issuers of such securities.

<sup>3</sup> "Objectives and Strategies" means the investment objectives and strategies of a Regulated Fund (as defined below), as described in the Regulated Fund's registration statement on Form N-2, other filings the Regulated Fund has made with the Commission under the Securities Act of 1933 (the "Securities Act"), or under the Securities Exchange Act of 1934, and the Regulated Fund's reports to shareholders.

<sup>4</sup> The term "Board" refers to the board of directors or trustees of any Regulated Fund.

CM Credit and the Existing Affiliated Fund.

5. Applicants seek an order ("Order") to permit one or more Regulated Funds<sup>5</sup> and/or one or more Affiliated Funds<sup>6</sup> to participate in the same investment opportunities through a proposed co-investment program (the "Co-Investment Program") where such participation would otherwise be prohibited under section 57(a)(4) and rule 17d-1 by (a) co-investing with each other in securities issued by issuers in private placement transactions in which an Adviser negotiates terms in addition to price<sup>7</sup> and (b) making additional investments in securities of such issuers, including through the exercise of warrants, conversion privileges, and other rights to purchase securities of the issuers ("Follow-On Investments"). "Co-Investment Transaction" means any transaction in which a Regulated Fund (or its Wholly-Owned Investment Sub, as defined below) participated together with one or more other Regulated Funds and/or one or more Affiliated Funds in reliance on the requested Order. "Potential Co-Investment Transaction" means any investment opportunity in which a Regulated Fund (or its Wholly-Owned Investment Sub) could not participate together with one or more Affiliated Funds and/or one or more other Regulated Funds without obtaining and relying on the Order.<sup>8</sup>

6. Applicants state any of the Regulated Funds may, from time to time, form one or more Wholly-Owned Investment Subs.<sup>9</sup> A Wholly-Owned

<sup>5</sup> "Regulated Fund" means any of the Existing Regulated Funds and any Future Regulated Fund. "Future Regulated Fund" means any closed-end management investment company (a) that is registered under the Act or has elected to be regulated as BDC, (b) whose investment adviser is an Adviser, and (c) that intends to participate in the Co-Investment Program. The term "Adviser" means (a) CM Adviser and (b) any future investment adviser that controls, is controlled by or is under common control with CM Adviser and is registered as an investment adviser under the Advisers Act.

<sup>6</sup> "Affiliated Fund" means the Existing Affiliated Fund and any Future Affiliated Fund. "Future Affiliated Fund" means any entity (a) whose investment adviser is an Adviser, (b) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act, and (c) that intends to participate in the Co-Investment Program.

<sup>7</sup> The term "private placement transactions" means transactions in which the offer and sale of securities by the issuer are exempt from registration under the Securities Act.

<sup>8</sup> All existing entities that currently intend to rely upon the requested Order have been named as applicants. Any other existing or future entity that subsequently relies on the Order will comply with the terms and conditions of the application.

<sup>9</sup> The term "Wholly-Owned Investment Sub" means an entity (a) that is wholly-owned by a Regulated Fund (with the Regulated Fund at all times holding, beneficially and of record, 100% of the voting and economic interests); (b) whose sole business purpose is to hold one or more

Investment Sub would be prohibited from investing in a Co-Investment Transaction with any Affiliated Fund or Regulated Fund because it would be a company controlled by its parent Regulated Fund for purposes of section 57(a)(4) and rule 17d-1. Applicants request that each Wholly-Owned Investment Sub be permitted to participate in Co-Investment Transactions in lieu of its parent Regulated Fund and that the Wholly-Owned Investment Sub's participation in any such transaction be treated, for purposes of the requested order, as though the parent Regulated Fund were participating directly.<sup>10</sup> Applicants represent that this treatment is justified because a Wholly-Owned Investment Sub would have no purpose other than serving as a holding vehicle for the Regulated Fund's investments and, therefore, no conflicts of interest could arise between the Regulated Fund and the Wholly-Owned Investment Sub. The Regulated Fund's Board would make all relevant determinations under the conditions with regard to a Wholly-Owned Investment Sub's participation in a Co-Investment Transaction, and the Regulated Fund's Board would be informed of, and take into consideration, any proposed use of a Wholly-Owned Investment Sub in the Regulated Fund's place. If the Regulated Fund proposes to participate in the same Co-Investment Transaction with any of its Wholly-Owned Investment Subs, the Board will also be informed of, and take into consideration, the relative participation of the Regulated Fund and the Wholly-Owned Investment Sub.

7. When considering Potential Co-Investment Transactions for any Regulated Fund, the applicable Adviser will consider only the Objectives and Strategies, investment policies, investment positions, capital available

investments on behalf of the Regulated Fund (and in the case of a SBIC Subsidiary (as defined below) maintain a license under the SBA Act (as defined below) and issue debentures guaranteed by the SBA (as defined below); (c) with respect to which the Regulated Fund's Board has the sole authority to make all determinations with respect to the Wholly-Owned Investment Sub's participation under the conditions of the application; and (d) that would be an investment company but for section 3(c)(1) or 3(c)(7) of the Act. "SBIC Subsidiary" means a Wholly-Owned Investment Sub that is licensed by the Small Business Administration ("SBA") to operate under the Small Business Investment Act of 1958 (the "SBA Act") as a small business investment company.

<sup>10</sup> All subsidiaries of the Regulated Funds participating in Co-Investment Transactions will be Wholly-Owned Investment Subs and will have Objectives and Strategies that are either the same as, or a subset of, the Regulated Fund's Objectives and Strategies.

for investment (“Available Capital”),<sup>11</sup> and other pertinent factors applicable to that Regulated Fund. The Board of each Regulated Fund, including the Non-Interested Directors, has (or will have prior to relying on the requested Order) determined that it is in the best interests of the Regulated Fund to participate in Co-Investment Transactions.<sup>12</sup>

8. Other than pro rata dispositions and Follow-On Investments as provided in conditions 7 and 8, and after making the determinations required in conditions 1 and 2(a), the Adviser will present each Potential Co-Investment Transaction and the proposed allocation to the directors of the Board eligible to vote under section 57(o) of the Act (“Eligible Directors”), and the “required majority,” as defined in section 57(o) of the Act (“Required Majority”)<sup>13</sup> will approve each Co-Investment Transaction prior to any investment by the participating Regulated Fund.

9. With respect to the pro rata dispositions and Follow-On Investments provided in conditions 7 and 8, a Regulated Fund may participate in a pro rata disposition or Follow-On Investment without obtaining prior approval of the Required Majority if, among other things: (i) The proposed participation of each Regulated Fund and Affiliated Fund in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition or Follow-On Investment, as the case may be; and (ii) the Board of the Regulated Fund has approved that Regulated Fund’s participation in pro rata dispositions and Follow-On Investments as being in the best interests of the Regulated Fund. If the Board does not so approve, any such disposition or Follow-On Investment will be submitted to the Regulated Fund’s Eligible Directors. The Board of any Regulated Fund may at any time rescind, suspend or qualify its approval of pro rata dispositions and Follow-On Investments with the result that all dispositions and/or Follow-On Investments must be submitted to the Eligible Directors.

<sup>11</sup> The amount of each Regulated Fund’s Available Capital will be determined based on the amount of cash on hand, existing commitments and reserves, if any, the targeted leverage level, targeted asset mix and other investment policies and restrictions set from time to time by the Board of the applicable Regulated Fund or imposed by applicable laws, rules, regulations or interpretations.

<sup>12</sup> The Regulated Funds, however, will not be obligated to invest, or co-invest, when investment opportunities are referred to them.

<sup>13</sup> In the case of a Regulated Fund that is a registered closed-end fund, the Board members that make up the Required Majority will be determined as if the Regulated Fund were a BDC subject to section 57(o).

10. No Non-Interested Director of a Regulated Fund will have a financial interest in any Co-Investment Transaction, other than through share ownership in one of the Regulated Funds.

11. If the Advisers, the principal owners of any of the Advisers (the “Principals”), or any person controlling, controlled by, or under common control with the Advisers or the Principals, and the Affiliated Funds (collectively, the “Holders”) own in the aggregate more than 25 percent of the outstanding voting shares of a Regulated Fund (the “Shares”), then the Holders will vote such Shares as required under condition 14. Applicants believe that this condition will ensure that the Non-Interested Directors will act independently in evaluating the Co-Investment Program, because the ability of the Advisers or the Principals to influence the Non-Interested Directors by a suggestion, explicit or implied, that the Non-Interested Directors can be removed will be limited significantly. The Non-Interested Directors will evaluate and approve any such independent party, taking into account its qualifications, reputation for independence, cost to the shareholders, and other factors that they deem relevant.

12. Prior to the filing of the application, certain funds managed by Cyrus Capital Partners, L.P. (the “Cyrus Funds”) may have engaged in transactions with CMFN without obtaining an order under rule 17d–1 under the Act (the “Prior Transactions”). At the time of the Prior Transactions, the Cyrus Funds were affiliated persons of CMFN and CM Adviser, and the Cyrus Funds may have been deemed to indirectly control CMFN. Mr. Mauer, Mr. Jansen, and Stifel Venture Corp. (collectively with Messrs. Mauer and Jansen and the Cyrus Funds, the “Affiliated Parties”) are also affiliated persons of CMFN and CM Adviser. The Order, if granted, would not provide relief for the Prior Transactions. Further, the Order, if granted, would not provide relief for the Affiliated Parties to engage in Co-Investment Transactions.

#### Applicants’ Legal Analysis

1. Section 57(a)(4) of the Act prohibits certain affiliated persons of a BDC from participating in joint transactions with the BDC or a company controlled by a BDC in contravention of rules as prescribed by the Commission. Under section 57(b)(2) of the Act, any person who is directly or indirectly controlling, controlled by, or under common control with a BDC is subject to section 57(a)(4).

Applicants submit that each of the Regulated Funds and Affiliated Funds could be deemed to be a person related to each Regulated Fund in a manner described by section 57(b) by virtue of being under common control. Section 57(i) of the Act provides that, until the Commission prescribes rules under section 57(a)(4), the Commission’s rules under section 17(d) of the Act applicable to registered closed-end investment companies will be deemed to apply to transactions subject to section 57(a)(4). Because the Commission has not adopted any rules under section 57(a)(4), rule 17d–1 also applies to joint transactions with Regulated Funds that are BDCs. Section 17(d) of the Act and rule 17d–1 under the Act are applicable to Regulated Funds that are registered closed-end investment companies.

2. Section 17(d) of the Act and rule 17d–1 under the Act prohibit affiliated persons of a registered investment company from participating in joint transactions with the company unless the Commission has granted an order permitting such transactions. In passing upon applications under rule 17d–1, the Commission considers whether the company’s participation in the joint transaction is consistent with the provisions, policies, and purposes of the Act and the extent to which such participation is on a basis different from or less advantageous than that of other participants.

3. Applicants state that in the absence of the requested relief, the Regulated Funds would be, in some circumstances, limited in their ability to participate in attractive and appropriate investment opportunities. Applicants believe that the proposed terms and conditions will ensure that the Co-Investment Transactions are consistent with the protection of each Regulated Fund’s shareholders and with the purposes intended by the policies and provisions of the Act. Applicants state that the Regulated Funds’ participation in the Co-Investment Transactions will be consistent with the provisions, policies, and purposes of the Act and on a basis that is not different from or less advantageous than that of other participants.

#### Applicants’ Conditions

Applicants agree that the Order will be subject to the following conditions:

1. Each time an Adviser considers a Potential Co-Investment Transaction for an Affiliated Fund or another Regulated Fund that falls within a Regulated Fund’s then-current Objectives and Strategies, the Regulated Fund’s Adviser will make an independent

determination of the appropriateness of the investment for such Regulated Fund in light of the Regulated Fund's then-current circumstances.

2. (a) If the Adviser deems a Regulated Fund's participation in any Potential Co-Investment Transaction to be appropriate for the Regulated Fund, it will then determine an appropriate level of investment for the Regulated Fund.

(b) If the aggregate amount recommended by the applicable Adviser to be invested by the applicable Regulated Fund in the Potential Co-Investment Transaction, together with the amount proposed to be invested by the other participating Regulated Funds and Affiliated Funds, collectively, in the same transaction, exceeds the amount of the investment opportunity, the investment opportunity will be allocated among them pro rata based on each participant's Available Capital, up to the amount proposed to be invested by each. The applicable Adviser will provide the Eligible Directors of each participating Regulated Fund with information concerning each participating party's Available Capital to assist the Eligible Directors with their review of the Regulated Fund's investments for compliance with these allocation procedures.

(c) After making the determinations required in conditions 1 and 2(a), the applicable Adviser will distribute written information concerning the Potential Co-Investment Transaction (including the amount proposed to be invested by each participating Regulated Fund and Affiliated Fund) to the Eligible Directors of each participating Regulated Fund for their consideration. A Regulated Fund will co-invest with one or more other Regulated Funds and/or one or more Affiliated Funds only if, prior to the Regulated Fund's participation in the Potential Co-Investment Transaction, a Required Majority concludes that:

(i) The terms of the Potential Co-Investment Transaction, including the consideration to be paid, are reasonable and fair to the Regulated Fund and its shareholders and do not involve overreaching in respect of the Regulated Fund or its shareholders on the part of any person concerned;

(ii) the Potential Co-Investment Transaction is consistent with:

(A) The interests of the shareholders of the Regulated Fund; and

(B) the Regulated Fund's then-current Objectives and Strategies;

(iii) the investment by any other Regulated Funds or Affiliated Funds would not disadvantage the Regulated Fund, and participation by the Regulated Fund would not be on a basis

different from or less advantageous than that of other Regulated Funds or Affiliated Funds; provided that, if any other Regulated Fund or Affiliated Fund, but not the Regulated Fund itself, gains the right to nominate a director for election to a portfolio company's board of directors or the right to have a board observer or any similar right to participate in the governance or management of the portfolio company, such event shall not be interpreted to prohibit the Required Majority from reaching the conclusions required by this condition (2)(c)(iii), if:

(A) The Eligible Directors will have the right to ratify the selection of such director or board observer, if any;

(B) the applicable Adviser agrees to, and does, provide periodic reports to the Regulated Fund's Board with respect to the actions of such director or the information received by such board observer or obtained through the exercise of any similar right to participate in the governance or management of the portfolio company; and

(C) any fees or other compensation that any Affiliated Fund or any Regulated Fund or any affiliated person of any Affiliated Fund or any Regulated Fund receives in connection with the right of the Affiliated Fund or a Regulated Fund to nominate a director or appoint a board observer or otherwise to participate in the governance or management of the portfolio company will be shared proportionately among the participating Affiliated Funds (who each may, in turn, share its portion with its affiliated persons) and the participating Regulated Funds in accordance with the amount of each party's investment; and

(iv) the proposed investment by the Regulated Fund will not benefit the Advisers, the Affiliated Funds or the other Regulated Funds or any affiliated person of any of them (other than the parties to the Co-Investment Transaction), except (A) to the extent permitted by condition 13, (B) to the extent permitted by section 17(e) or 57(k) of the Act, as applicable, (C) indirectly, as a result of an interest in the securities issued by one of the parties to the Co-Investment Transaction, or (D) in the case of fees or other compensation described in condition 2(c)(iii)(C).

3. Each Regulated Fund has the right to decline to participate in any Potential Co-Investment Transaction or to invest less than the amount proposed.

4. The applicable Adviser will present to the Board of each Regulated Fund, on a quarterly basis, a record of all investments in Potential Co-Investment

Transactions made by any of the other Regulated Funds or Affiliated Funds during the preceding quarter that fell within the Regulated Fund's then-current Objectives and Strategies that were not made available to the Regulated Fund, and an explanation of why the investment opportunities were not offered to the Regulated Fund. All information presented to the 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.

5. Except for Follow-On Investments made in accordance with condition 8,<sup>14</sup> a Regulated Fund will not invest in reliance on the Order in any issuer in which another Regulated Fund, Affiliated Fund, or any affiliated person of another Regulated Fund or Affiliated Fund is an existing investor.

6. A Regulated Fund will not participate in any Potential Co-Investment Transaction unless the terms, conditions, price, class of securities to be purchased, settlement date, and registration rights will be the same for each participating Regulated Fund and Affiliated Fund. The grant to an Affiliated Fund or another Regulated Fund, but not the Regulated Fund, of the right to nominate a director for election to a portfolio company's board of directors, the right to have an observer on the board of directors or similar rights to participate in the governance or management of the portfolio company will not be interpreted so as to violate this condition 6, if conditions 2(c)(iii)(A), (B) and (C) are met.

7. (a) If any Affiliated Fund or any Regulated Fund elects to sell, exchange or otherwise dispose of an interest in a security that was acquired in a Co-Investment Transaction, the applicable Advisers will:

(i) Notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed disposition at the earliest practical time; and

(ii) formulate a recommendation as to participation by each Regulated Fund in the disposition.

(b) Each Regulated Fund will have the right to participate in such disposition on a proportionate basis, at the same price and on the same terms and conditions as those applicable to the participating Affiliated Funds and Regulated Funds.

(c) A Regulated Fund may participate in such disposition without obtaining

<sup>14</sup> This exception applies only to Follow-On Investments by a Regulated Fund in issuers in which that Regulated Fund already holds investments.

prior approval of the Required Majority if: (i) The proposed participation of each Regulated Fund and each Affiliated Fund in such disposition is proportionate to its outstanding investments in the issuer immediately preceding the disposition; (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in such dispositions on a pro rata basis (as described in greater detail in the application); and (iii) the Board of the Regulated Fund is provided on a quarterly basis with a list of all dispositions made in accordance with this condition. In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such disposition solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

(d) Each Affiliated Fund and each Regulated Fund will bear its own expenses in connection with any such disposition.

8. (a) If any Affiliated Fund or any Regulated Fund desires to make a Follow-On Investment in a portfolio company whose securities were acquired in a Co-Investment Transaction, the applicable Advisers will:

(i) Notify each Regulated Fund that participated in the Co-Investment Transaction of the proposed transaction at the earliest practical time; and

(ii) formulate a recommendation as to the proposed participation, including the amount of the proposed Follow-On Investment, by each Regulated Fund.

(b) A Regulated Fund may participate in such Follow-On Investment without obtaining prior approval of the Required Majority if: (i) The proposed participation of each Regulated Fund and each Affiliated Fund in such investment is proportionate to its outstanding investments in the issuer immediately preceding the Follow-On Investment; and (ii) the Board of the Regulated Fund has approved as being in the best interests of the Regulated Fund the ability to participate in Follow-On Investments on a pro rata basis (as described in greater detail in the application). In all other cases, the Adviser will provide its written recommendation as to the Regulated Fund's participation to the Eligible Directors, and the Regulated Fund will participate in such Follow-On Investment solely to the extent that a Required Majority determines that it is in the Regulated Fund's best interests.

(c) If, with respect to any Follow-On Investment:

(i) The amount of the opportunity is not based on the Regulated Funds' and the Affiliated Funds' outstanding investments immediately preceding the Follow-On Investment; and

(ii) the aggregate amount recommended by the applicable Adviser to be invested by the applicable Regulated Fund in the Follow-On Investment, together with the amount proposed to be invested by the other participating Regulated Funds and Affiliated Funds, collectively, in the same transaction, exceeds the amount of the investment opportunity; then the investment opportunity will be allocated among them pro rata based on each participant's Available Capital, up to the maximum amount proposed to be invested by each.

(d) The acquisition of Follow-On Investments as permitted by this condition will be considered a Co-Investment Transaction for all purposes and subject to the other conditions set forth in this application.

9. The Non-Interested Directors of each Regulated Fund will be provided quarterly for review all information concerning Potential Co-Investment Transactions and Co-Investment Transactions, including investments made by other Regulated Funds or Affiliated Funds that the Regulated Fund considered but declined to participate in, so that the Non-Interested Directors may determine whether all investments made during the preceding quarter, including those investments that the Regulated Fund considered but declined to participate in, comply with the conditions of the Order. In addition, the Non-Interested Directors will consider at least annually the continued appropriateness for the Regulated Fund of participating in new and existing Co-Investment Transactions.

10. 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) of the Act.

11. No Non-Interested Director of a Regulated Fund will also be a director, general partner, managing member or principal, or otherwise an "affiliated person" (as defined in the Act) of an Affiliated Fund.

12. 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 investment advisory agreements with Affiliated Funds and the Regulated Funds, be shared by the Regulated Funds and the Affiliated Funds in proportion to the relative amounts of the securities held or to be acquired or disposed of, as the case may be.

13. Any transaction fee (including break-up or commitment fees but excluding broker's fees contemplated by section 17(e) or 57(k) of the Act, as applicable), received in connection with a Co-Investment Transaction will be distributed to the participating Regulated Funds and Affiliated Funds 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 such Adviser at a bank or banks having the qualifications prescribed in section 26(a)(1) of the Act, and the account will earn a competitive rate of interest that will also be divided pro rata among the participating Regulated Funds and Affiliated Funds based on the amounts they invest in such Co-Investment Transaction. None of the Affiliated Funds, the Advisers, the other Regulated Funds or any affiliated person of the Regulated Funds or Affiliated Funds will receive additional compensation or remuneration of any kind as a result of or in connection with a Co-Investment Transaction (other than (a) 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)(C); and (b) in the case of an Adviser, investment advisory fees paid in accordance with the agreement between the Adviser and the Regulated Fund or Affiliated Fund).

14. If the Holders own in the aggregate more than 25% of the Shares of a Regulated Fund, then the Holders will vote such Shares (i) as directed by an independent third party, or (ii) in the same percentages as the Regulated Fund's other shareholders (not including the Holders) 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.

15. Each Regulated Fund's chief compliance officer, as defined in rule 38a-1(a)(4) under the Act, will prepare an annual report for its Board 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.

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

**Eduardo A. Aleman,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85164; File No. SR-EMERALD-2019-03]

### Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 519, MIAX Emerald Order Monitor

February 19, 2019.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 11, 2019, MIAX Emerald, LLC ("MIAX Emerald" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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 is filing a proposal to amend Exchange Rule 519, MIAX Emerald Order Monitor, in order to harmonize its rule to the rules of the Exchange's affiliate, MIAX PEARL, LLC ("MIAX PEARL").

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX Emerald's principal office, 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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

The Exchange proposes to amend Exchange Rule 519, MIAX Emerald Order Monitor, to align its behavior pertaining to the handling of limit orders to buy and limit orders to sell to that of MIAX PEARL.

##### Current Functionality

In order to avoid the occurrence of potential obvious or catastrophic errors on the Exchange the MIAX Emerald Order Monitor will prevent certain orders from executing or being placed on the Book at prices outside pre-set standard limits. Beginning after the Opening Process is complete, the MIAX Emerald Order Monitor will be operational each trading day until the close of trading.

Paragraph (3), Limit Orders to Buy or Sell, of the Rule, states that the System will reject an incoming limit order that crosses the contra-side NBBO by at least 50% or \$2.50, whichever is less. The following examples illustrate those situations where lower priced limit orders are rejected because they cross the NBBO by at least 50%: (A) If the NBBO on the offer side is \$4.00, an order to buy options for \$6.00 or more will be rejected; and (B) if the NBBO on the bid side is \$4.00, an order to sell options for \$2.00 or less will be rejected. Additionally, the following are examples of those situations where higher priced limit orders are rejected because they cross the NBBO by \$2.50 or more: (A) If the NBBO on the offer side is \$12.00, an order to buy options for \$14.50 or more will be rejected; and (B) if the NBBO on the bid side is \$12.00, an order to sell options for \$9.50 or less will be rejected. Notwithstanding the foregoing, with respect to limit orders to sell, the MIAX Emerald Order Monitor will not be activated when the NBBO on the bid side is equal to or less than \$0.25. Thus, the System will accept all limit orders to sell regardless of price during this time.

##### Proposal

MIAX Emerald plans to commence operations as a national securities

exchange registered under Section 6 of the Act<sup>3</sup> on March 1, 2019. As described more fully in MIAX Emerald's Form 1 application,<sup>4</sup> the Exchange is an affiliate of Miami International Securities Exchange, LLC ("MIAX Options") and MIAX PEARL, LLC ("MIAX PEARL"). MIAX Emerald Rules, in their current form, were filed as Exhibit B to its Form 1 on August 16, 2018, and at that time MIAX Emerald Rule 519 was substantially similar to MIAX PEARL Rule 519. In the time between when the Exchange filed its Form 1 and the time the Exchange received its approval order, MIAX PEARL made changes to its Rule 519.<sup>5</sup> In order to ensure consistent operation of both MIAX Emerald and MIAX PEARL through having consistent rules, the Exchange now proposes to amend the MIAX Emerald Rule as described below.

The Exchange proposes to amend current subsection (3) to create a separate subsection for limit orders to buy (proposed subsection (3)), and for limit orders to sell (proposed subsection (4)). The Exchange proposes to introduce a new threshold for limit orders to buy which will provide that for options with a National Best Offer ("NBO") less than or equal to \$0.50 the System<sup>6</sup> will reject an incoming limit order that has a limit price that is equal to or greater than the NBO Price by \$0.25. The Exchange believes that creating separate subsections dedicated to limit orders to buy and limit orders to sell will add clarity and additional detail to the Exchange's rule. Additionally, the Exchange proposes to provide new examples demonstrating the operation of the MIAX Emerald Order Monitor functionality for both limit orders to buy and limit orders to sell.

Proposed subsection (3), Limit Orders to Buy, will provide that for options with a National Best Offer ("NBO") greater than \$0.50 the System will reject an incoming limit order that has a limit price equal to or greater than the NBO by the lesser of (i) \$2.50, or (ii) 50% of the NBO price. The proposed rule will also provide that for options with an NBO less than or equal to \$0.50 the System will reject an incoming limit

<sup>3</sup> 15 U.S.C. 78f.

<sup>4</sup> See Securities Exchange Act Release No. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (File No. 10-233) (order approving application of MIAX Emerald, LLC for registration as a national securities exchange.)

<sup>5</sup> See Securities Exchange Act Release No. 84887 (December 20, 2018), 83 FR 67452 (December 28, 2018) (SR-PEARL-2018-25).

<sup>6</sup> The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

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

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