

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–90196; File No. SR–EMERALD–2020–11]

### Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees

October 15, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on October 1, 2020, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”), filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III 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 the MIAX Emerald Fee Schedule (the “Fee Schedule”) to adopt certain membership fees for MIAX Emerald Members,<sup>3</sup> including: (1) One-time membership application fees and (2) monthly Trading Permit<sup>4</sup> fees.

The text of the proposed rule change is available on the Exchange’s website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX’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 the Fee Schedule to adopt certain membership fees, including: (1) Establishing one-time membership application fees based upon the applicant’s status as either an Electronic Exchange Member (“EEM”)<sup>5</sup> or as a Market Maker;<sup>6</sup> and (2) adopting monthly Trading Permit fees for EEMs and Market Makers. MIAX Emerald commenced operations as a national securities exchange registered under Section 6 of the Act<sup>7</sup> on March 1, 2019.<sup>8</sup> The Exchange adopted its transaction fees and certain of its non-transaction fees in its filing SR–EMERALD–2019–15.<sup>9</sup> In that filing, the Exchange expressly waived, among other fees, its membership fees, including its one-time membership application fees and monthly Trading Permit fees, to provide an incentive to prospective EEMs and Market Makers to become Members of the Exchange. Accordingly, since the launch of the Exchange, all such membership fees have been waived for the Waiver Period.<sup>10</sup> When the Exchange adopted the framework for the membership fees, it stated that it would provide notice to market participants when the Exchange intended to

<sup>5</sup> “Electronic Exchange Member” or “EEM” means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed “members” under the Exchange Act. See Exchange Rule 100 and the Definitions section of the Fee Schedule.

<sup>6</sup> The term “Market Makers” refers to “Lead Market Makers”, “Primary Lead Market Makers” and “Registered Market Makers” collectively. See Exchange Rule 100 and the Definitions section of the Fee Schedule.

<sup>7</sup> 15 U.S.C. 78f.

<sup>8</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>9</sup> See Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR–EMERALD–2019–15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the MIAX Emerald Fee Schedule).

<sup>10</sup> “Waiver Period” means, for each applicable fee, the period of time from the initial effective date of the MIAX Emerald Fee Schedule until such time that the Exchange has an effective fee filing establishing the applicable fee. The Exchange will issue a Regulatory Circular announcing the establishment of an applicable fee that was subject to a Waiver Period at least fifteen (15) days prior to the termination of the Waiver Period and effective date of any such applicable fee. See the Definitions Section of the Fee Schedule.

terminate the Waiver Period for those fees. Accordingly, on September 15, 2020, the Exchange issued a Regulatory Circular which announced that the Exchange would be ending the Waiver Period for its membership fees, including the one-time membership application fees and monthly Trading Permit fees, among other non-transaction fees, beginning October 1, 2020.<sup>11</sup>

#### One-Time MIAX Emerald Membership Application Fee

The Exchange proposes to assess a one-time membership application fee based upon the applicant’s status as either an EEM or as a Market Maker. The Exchange proposes that applicants for MIAX Emerald Membership as an EEM will be assessed a one-time application fee of \$2,500. The Exchange proposes that applicants for MIAX Emerald Membership as a Market Maker will be assessed a one-time application fee of \$3,000. The difference in the proposed membership application fee to be charged to EEMs and Market Makers is because of the additional review and resources involved in processing a Market Maker’s application, as Market Makers have greater and more complex obligations with respect to doing business on the Exchange.<sup>12</sup> MIAX Emerald’s proposed one-time membership application fees are the same as the one-time application fees in place at the Exchange’s affiliate, Miami International Securities Exchange, LLC (“MIAX”) (\$2,500 for an EEM and \$3,000 for a MIAX Market Maker),<sup>13</sup> and similar to or less than application fees for the Cboe Exchange, Inc. (“Cboe”) (\$3,000 for an individual applicant and \$5,000 for an applicant organization)<sup>14</sup> and Nasdaq ISE, LLC (“Nasdaq ISE”) (\$7,500 per firm for a primary market maker, \$5,500 per firm for a competitive market maker, and \$3,500 per firm for an electronic access member).<sup>15</sup> Below is the table showing the proposed one-time MIAX Emerald membership application fees for EEMs and Market Makers:

<sup>11</sup> See MIAX Emerald Regulatory Circular 2020–41 available at [https://www.miaxoptions.com/sites/default/files/circular-files/MIAX\\_Emerald\\_RC\\_2020\\_41.pdf](https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Emerald_RC_2020_41.pdf).

<sup>12</sup> See Chapter VI of the Exchange’s rules, generally.

<sup>13</sup> See MIAX Fee Schedule, Section 3)a).

<sup>14</sup> See Cboe Fees Schedule, p. 9, Cboe Trading Permit Holder Application Fees.

<sup>15</sup> See Nasdaq ISE, Options Rules, Options 7, Pricing Schedule, Section 9. Legal and Regulatory A. Application.

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> The term “Member” means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed “members” under the Exchange Act. See Exchange Rule 100.

<sup>4</sup> The term “Trading Permit” means a permit issued by the Exchange that confers the ability to transact on the Exchange. See Exchange Rule 100.

Type of membership	Application fee
Electronic Exchange Member	\$2,500.00
Market Maker .....	3,000.00

**Monthly Trading Permit Fees**

The Exchange previously introduced the structure of Trading Permit fees (without proposing the actual fee amounts), but also explicitly waived the assessment of any such fees for the Waiver Period. Trading Permits are issued to Members who are either EEMs or Market Makers. The Exchange proposes to assess monthly fees for Trading Permits depending upon the category of Member that is issued a Trading Permit. Members issued Trading Permits during a calendar month will be assessed monthly Trading Permit Fees. The Exchange notes that the Exchange's affiliate, Miami International Securities Exchange, LLC ("MIAX"), charges a similar, fixed trading permit fee to its EEMs, and a similar, varying trading permit fee to its Market Makers, based upon the number of assignments of option classes or the percentage of volume in option classes.<sup>16</sup>

The Exchange proposes that monthly Trading Permit fees will be assessed, with respect to the calculation of such fee to EEMs (other than clearing firms), in any month the EEM is certified in the membership system and is credentialed to use one or more Financial

Information Exchange ("FIX")<sup>17</sup> ports in the production environment. Further, the Exchange proposes that monthly Trading Permit fees will be assessed with respect to EEM clearing firms in any month the clearing firm is certified in the membership system to clear transactions on the Exchange.

The Exchange proposes to assess EEMs a monthly fee of \$1,000 for each Trading Permit. Below is the proposed table showing the Trading Permit fees for EEMs:

Type of trading permit	Monthly MIAX emerald trading permit fee
Electronic Exchange Member	\$1,000.00

The Exchange proposes to assess monthly Trading Permit fees for Market Makers in any month the Market Maker (including a Registered Market Maker, Lead Market Maker, and Primary Lead Market Maker) is certified in the membership system, is credentialed to use one or more MIAX Emerald Express Interface ("MEI")<sup>18</sup> ports in the production environment and is assigned to quote in one or more classes. Specifically, the Exchange proposes to adopt the following Trading Permit fees for Market Makers: (i) \$7,000 for Market Maker Assignments in up to 10 option classes or up to 20% of option classes by national average daily volume ("ADV"); (ii) \$12,000 for Market Maker Assignments in up to 40 option classes

or up to 35% of option classes by ADV; (iii) \$17,000 for Market Maker Assignments in up to 100 option classes or up to 50% of option classes by ADV; and (iv) \$22,000 for Market Maker Assignments in over 100 option classes or over 50% of option classes by ADV up to all option classes listed on MIAX Emerald.

The Exchange also proposes to adopt an alternative lower Trading Permit fee for Market Makers who fall within the following Trading Permit fee levels, which represent the 3rd and 4th levels of the Market Maker Trading Permit fee table: (i) Market Maker Assignments in up to 100 option classes or up to 50% of option classes by volume; and (ii) Market Maker Assignments in over 100 option classes or over 50% of option classes by volume up to all option classes listed on MIAX Emerald. Specifically, the Exchange proposes to adopt footnote "■" following the Market Maker Trading Permit fee table for these Monthly Trading Permit tier levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.025% of the total monthly executed volume reported by OCC in the customer account type for MIAX Emerald-listed option classes for that month, then the fee will be \$15,500 instead of the fee otherwise applicable to such level.

Below is the proposed table showing the Trading Permit fees for Market Makers:

Type of trading permit	Monthly MIAX emerald trading permit fee	Market Maker assignments (the lesser of the applicable measurements below)	
		Per class	Percent of national average daily volume
Market Maker (includes RMM, LMM, PLMM) .....	\$7,000.00 12,000.00 ■ 17,000.00 ■ 22,000.00	Up to 10 Classes ..... Up to 40 Classes ..... Up to 100 Classes ..... Over 100 Classes .....	Up to 20% of Classes by volume. Up to 35% of Classes by volume. Up to 50% of Classes by volume. Over 50% of Classes by volume up to all Classes listed on MIAX Emerald.

■ For these Monthly MIAX Emerald Trading Permit tier levels, if the Market Maker's total monthly executed volume during the relevant month is less than 0.025% of the total monthly executed volume reported by OCC in the customer account type for MIAX Emerald-listed option classes for that month, then the fee will be \$15,500 instead of the fee otherwise applicable to such level.

For the calculation of the monthly Market Maker Trading Permit fees, the number of classes is defined as the greatest number of classes the Market Maker was assigned to quote in on any given day within the calendar month

and the class volume percentage is based on the total national ADV in classes listed on MIAX Emerald in the prior calendar quarter. Newly listed option classes are excluded from the calculation of the monthly Market

Maker Trading Permit fee until the calendar quarter following their listing, at which time the newly listed option classes will be included in both the per class count and the percentage of total national average daily volume. The

<sup>16</sup> See the MIAX Fee Schedule, Section 3)b).  
<sup>17</sup> "FIX Port" means an interface with MIAX Emerald systems that enables the Port user to submit simple and complex orders electronically to MIAX Emerald. See the Definitions Section of the Fee Schedule.  
<sup>18</sup> The MEI is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX

Emerald. The Exchange offers Full Service MEI Ports, which provide Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. The Exchange also offers Limited Service MEI Ports,

which provide Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. See the Definitions Section of the Fee Schedule.

Exchange proposes to assess MIAX Emerald Market Makers the monthly Market Maker Trading Permit fee based on the greatest number of classes listed on MIAX Emerald that the Market Maker was assigned to quote in on any given day within a calendar month and the applicable fee rate that is the lesser of either the per class basis or percentage of total national ADV measurement. The purpose of the alternative lower fee designated in proposed footnote “■” is to provide a lower fixed cost to those Market Makers who are willing to quote the entire Exchange market (or substantial amount of the Exchange market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on the Exchange. The Exchange believes that, by offering lower fixed costs to Market Makers that execute less volume, the Exchange will retain and attract smaller-scale Market Makers, which are an integral component of the option marketplace, but have been decreasing in number in recent years, due to industry consolidation and lower market maker profitability. Since these smaller-scale Market Makers utilize less Exchange capacity due to lower overall volume executed, the Exchange believes it is reasonable and equitable to offer such Market Makers a lower fixed cost. The Exchange notes that the Exchange’s affiliate, MIAX, provides a similar alternative lower Trading Permit fee for Market Makers who quote the entire MIAX market (or substantial amount of the MIAX market), as objectively measured by either number of classes assigned or national ADV, but who do not otherwise execute a significant amount of volume on MIAX.<sup>19</sup> The Exchange also notes that other options exchanges assess certain of their membership fees at different rates, based upon a member’s participation on that exchange,<sup>20</sup> and, as such, this

<sup>19</sup> See *supra* note 16.

<sup>20</sup> See e.g., NYSE Arca Options Fees and Charges, p.1 (assessing market makers \$6,000 for up to 175 option issues, an additional \$5,000 for up to 350 option issues, an additional \$4,000 for up to 1,000 option issues, an additional \$3,000 for all option issues on the exchange, and an additional \$1,000 for the fifth trading permit and for each trading permit thereafter); NYSE American Options Fee Schedule, p. 23 (assessing market makers \$8,000 for up to 60 plus the bottom 45% of option issues, an additional \$6,000 for up to 150 plus the bottom 45% of option issues, an additional \$5,000 for up to 500 plus the bottom 45% of option issues, and additional \$4,000 for up to 1,100 plus the bottom 45% of option issues, an additional \$3,000 for all issues traded on the exchange, and an additional \$2,000 for 6th to 9th ATPs; plus an addition fee for premium products). See also Cboe BZX Options Exchange (“BZX Options”) assesses the Participant

concept is not new or novel. The proposed changes to the Trading Permit fees for Market Makers who fall within the 3rd and 4th levels of the fee table are based upon a business determination of current Market Maker assignments and trading volume.

#### Applicability to and Impact on Participants

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>21</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 approximately 16% market share.<sup>22</sup> Therefore, no exchange possesses significant pricing power. More specifically, for the month of August 2020, the Exchange had an approximately 3.24% market share of executed volume of multiply-listed equity options.<sup>23</sup>

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to non-transaction and transaction fee changes. For example, on February 28, 2019, the Exchange’s affiliate, MIAX PEARL, LLC (“MIAX PEARL”) filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1,

Fee, which is a membership fee, according to a member’s ADV. See Cboe BZX Options Exchange Fee Schedule under “Membership Fees”. The Participant Fee is \$500 if the member ADV is less than 5,000 contracts and \$1,000 if the member ADV is equal to or greater than 5,000 contracts. *Id.*

<sup>21</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>22</sup> The Options Clearing Corporation (“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>23</sup> See *id.*

2019).<sup>24</sup> MIAX PEARL experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that the MIAX PEARL March 1, 2019 fee change, to increase certain transaction fees and decrease certain transaction rebates, may have contributed to the decrease in MIAX PEARL’s market share and, as such, the Exchange believes competitive forces constrain the Exchange’s, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The proposed adoption of a one-time membership application fee and monthly Trading Permit fees applicable to EEMs and Market Makers would be applied uniformly to each of these market participants. Further, as there are currently 16 registered options exchanges competing for order flow with no single exchange accounting for more than approximately 16% of market share, the Exchange cannot predict with certainty whether any participant is planning to become a Member and thus would be subject to the proposed fees.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>25</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>26</sup> in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to 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 and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the proposal to adopt a one-time membership application fee and Trading Permit fees applicable to EEMs and Market Makers, as described above, is reasonable in several respects. First, the Exchange is subject to significant competitive forces in the market for options transaction and non-transaction services that constrain its pricing

<sup>24</sup> See Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR-PEARL-2019-07).

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

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

determinations in that 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>27</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules. 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 approximately 16% of the market share of executed volume of multiply-listed equity and ETF options.<sup>28</sup> Therefore, no exchange possesses significant pricing power. More specifically, for the month of August 2020, the Exchange had an approximately 3.24% market share of executed volume of multiply-listed equity options.<sup>29</sup>

The Exchange also believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to non-transaction and transaction fee changes. For example, on February 28, 2019, the Exchange’s affiliate, MIAX PEARL, filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).<sup>30</sup> MIAX PEARL experienced a decrease in total

market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that the MIAX PEARL March 1, 2019 fee change, to increase certain transaction fees and decrease certain transaction rebates, may have contributed to the decrease in MIAX PEARL’s market share and, as such, the Exchange believes competitive forces constrain the Exchange’s, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

Further, the Exchange no longer believes it is necessary to waive these fees to attract market participants to the MIAX Emerald market since this market is now established and MIAX Emerald no longer needs to rely on such waivers to attract market participants. The Exchange believes that the proposal is equitable and not unfairly discriminatory because the elimination of the fee waiver for one-time membership application fees and monthly Trading Permit fees will uniformly apply to all EEMs and Market Makers seeking to become Members of the Exchange. Additionally, the Exchange believes its proposal for a one-time membership application fees applicable to EEMs and Market Makers is reasonable and well within the range of fees assessed among other exchanges, including the Exchange’s affiliate, MIAX.<sup>31</sup> The Exchange also notes that the Exchange’s affiliate, MIAX, charges a similar, fixed trading permit fee to its EEMs, and a similar, varying trading permit fee to its Market Makers, based upon the number of assignments of option classes or the percentage of volume in option classes.<sup>32</sup>

The Exchange believes its one-time membership application fees are reasonable, equitable and not unfairly discriminatory. As described above, the one-time application fees are similar to the application fees in place at other options exchanges,<sup>33</sup> and are associated with the time and resources of processing of such applications. The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Maker applicants are charged slightly more than EEM applicants because of the additional review and resources involved in processing a Market Maker’s application, as Market Makers have greater and more complex obligations

with respect to doing business on the Exchange.<sup>34</sup>

The Exchange believes that the proposed monthly Trading Permit fees are reasonable, equitable and not unfairly discriminatory because they are within the range of comparable fees at other competing options exchanges.<sup>35</sup> As such, the proposal is reasonably designed to continue to compete with other options exchange by incentivizing market participants to register as Market Makers on the Exchange in a manner that enables the Exchange to improve its overall competitiveness and strengthen its market quality for all market participants. The proposed fees are fair and equitable and not unreasonably discriminatory because they apply equally to all Market Makers regardless of type and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange designed the fee rates in order to provide objective criteria for Market Makers of different sizes and business models to be assessed a Trading Permit Fee that best matches their quoting activity on the Exchange. The Exchange notes that trading volume and quoting activity in the options market tends to be concentrated in the top ranked options classes; with the vast majority of options classes being thinly quoted and traded. The Exchange believes that the proposed fee rates and criteria provide an objective and flexible framework that will encourage Market Makers to be assigned and quote in option classes with lower total national average daily volume while also equitably allocating the fees in a reasonable manner amongst Market Maker assignments to account for quoting and trading activity.

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees for services and products, in addition to order flow, to remain competitive with other exchanges. The Exchange believes that the proposed changes reflect this competitive environment.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

<sup>27</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>28</sup> See *supra* note 22.

<sup>29</sup> See *id.*

<sup>30</sup> See *supra* note 24.

<sup>31</sup> See *supra* notes 13, 14 and 15.

<sup>32</sup> See *supra* note 16.

<sup>33</sup> See *supra* notes 14 and 15.

<sup>34</sup> See *supra* note 12.

<sup>35</sup> See *supra* note 20.

### Intra-Market Competition

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. Unilateral action by MIAX Emerald in the assessment of certain non-transaction fees for services provided to its Members and others using its facilities will not have an impact on competition. As a more recent entrant in the already highly competitive environment for equity options trading, MIAX Emerald does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Act. MIAX Emerald's proposed one-time membership application fees and monthly Trading Permit fees, as described herein, are comparable to fees charged by other options exchanges for the same or similar services, including those fees assessed by the Exchange's affiliate, MIAX.<sup>36</sup>

The Exchange believes that the proposed one-time membership application fees and monthly Trading Permit fees do not place certain market participants at a relative disadvantage to other market participants because the pricing is associated with the Exchange's time and resources to process such applications. The proposed one-time membership application fees do not apply unequally to different size market participants, but instead would allow the Exchange to charge for reviewing and processing Market Maker and EEM membership applications. Accordingly, the proposed one-time membership application fees do not favor certain categories of market participants in a manner that would impose a burden on competition.

Further, the Exchange believes that the proposed rule change will promote transparency by making it clear to EEMs and Market Makers the fees that MIAX Emerald will assess for Membership application to MIAX Emerald. This will permit EEMs and Market Makers to more accurately anticipate and account for the costs of one-time membership application in order to become Members of the Exchange, which promotes consistency.

The Exchange believes that the proposal increases intra-market competition by enabling Market Makers to qualify for lower Trading Permit fee rates on the Exchange in a manner that is designed to provide objective criteria

for Market Makers of different sizes and business models to be assessed a Trading Permit fee that best matches their quoting activity on the Exchange yet still be in the range of comparable fees on other exchanges. The Exchange believes that the proposal will increase competition amongst Market Makers of different sizes and business models by encouraging Market Makers to be assigned and quote in option classes with lower total national average daily volume.

### Inter-Market Competition

The Exchange believes the proposed one-time membership application fees and monthly Trading Permit fees do not place an undue burden on competition on other SROs that is not necessary or appropriate. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing options venues if they deem fee levels at a particular venue to be excessive. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% market share. Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. For the month of August 2020, the Exchange had an approximately 3.24% market share of executed volume of multiply-listed equity options,<sup>37</sup> and the Exchange believes that the ever-shifting market share among exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products, or shift order flow, in response to fee changes. In such an environment, the Exchange must continually adjust its fees and fee waivers to remain competitive with other exchanges and to attract order flow to the Exchange. The Exchange believes that the proposal reflects this competitive environment because it modify the Exchange's fees in a manner that continues to encourage market participants to register as Market Makers on the Exchange, to provide liquidity, and to attract order flow. To the extent that this purpose is achieved, all the Exchange's market participants should benefit from the improved market liquidity.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>38</sup> and Rule 19b-4(f)(2)<sup>39</sup> thereunder. At any time within 60 days of the filing of the 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 to determine whether the proposed rule 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-EMERALD-2020-11 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-EMERALD-2020-11. 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

<sup>36</sup> See *supra* notes 13, 14 and 15.

<sup>37</sup> See *supra* note 22.

<sup>38</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>39</sup> 17 CFR 240.19b-4(f)(2).

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-EMERALD-2020-11 and should be submitted on or before November 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>40</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90193; File No. SR-NYSEAMER-2020-76]

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

October 15, 2020.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 9, 2020, 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, 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 Strategy Execution Fee Cap. The Exchange proposes to implement the fee change

effective October 9, 2020.<sup>4</sup> 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 the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of this filing is to amend the Fee Schedule to modify the Strategy Execution Fee Cap (“Strategy Cap”), effective October 9, 2020.

Currently, the Fee Schedule provides that transaction fees for ATP Holders are limited or capped at \$1,000 for certain options strategy executions “on the same trading day,” meaning it is a daily fee cap.<sup>5</sup> Strategy executions that qualify for the Strategy Cap are (a) reversals and conversions, (b) box spreads, (c) short stock interest spreads, (d) merger spreads, and (e) jelly rolls, which are described in detail in the Fee Schedule (the “Strategy Executions”).<sup>6</sup>

The Exchange proposes to modify the Strategy Cap to offer a lower cap of \$200 for those ATP Holders that trade at least 25,000 monthly billable contract sides in Strategy Executions.<sup>7</sup> Thus, at the end of the month, qualifying ATP Holders would have transaction fees for their Strategy Executions for each day of the month capped at \$200 (as opposed

to \$1,000 for non-qualifying ATP Holders).<sup>8</sup>

For example, assume an ATP Holder executes the following Strategy Executions against interest in the Trading Crowd on the third business day of the month on behalf of a non-Customer that is not a Specialist or e-Specialist, which participants are subject to a \$0.25 per Manual transaction fee. Under the current Fee Schedule an ATP Holder would be charged a total of \$1,000 in options fees, per the daily fee cap:

- *Trade 1: A Reversal Conversion* in DEF comprised of 3,000 call options against 3,000 put options would be \$1,500 (at \$0.25 per execution), absent the \$1,000 Strategy Cap.
- *Trade 2: A Reversal Conversion* in ABC comprised of 1,000 call options against 1,000 put options would be \$500 (at \$0.25 per execution), absent the Strategy Cap. However, because the ATP Holder reached the daily cap (with Trade 1), the ATP Holder would not be charged for these transactions.

However, if, in addition to the two trades above, the ATP Holder executes a “jelly roll” consisting of 5,000 October puts and 5,000 October calls against 5,000 November calls and 5,000 November puts on the fifteenth business day of the month, the total fees for these qualifying Strategy Executions under the proposed Fee Schedule would be capped at \$200 for this trading day, given that the total number of contracts on day three and day fifteen is above minimum 25,000 billable contract sides threshold. Similarly, having met this threshold, the fees charged on Trades 1 and 2 that were executed on the third business day would likewise be capped at \$200. Thus, the fees for each of the third and fifteenth trading day would be capped at \$200 each, for a monthly total of \$400 for Strategy Executions.

The Exchange’s fees are constrained by intermarket competition, as ATP Holders may direct their order flow to any of the 16 options exchanges, including those with similar Strategy Fee Caps.<sup>9</sup> Thus, ATP Holders have a choice of where they direct their order flow. This proposed change is designed to incent ATP Holders to increase their Strategy Execution volumes by executing (often smaller) strategies that are not necessarily economically viable on a per symbol basis, but which may be profitable when fees on Strategy Executions—regardless of symbol—are

<sup>8</sup> See *id.*

<sup>9</sup> See e.g., Cboe fee schedule, footnote 13. Cboe caps fees for each participant at \$0.00 for the following strategies executed on the same trading day: Short stock interest, reversal, conversion, jelly roll, and merger strategies.

<sup>4</sup> The Exchange originally filed to amend the Fee Schedule on October 1, 2020. (SR-NYSEAMER-2020-72) and withdrew such filing on October 9, 2020.

<sup>5</sup> See Fee Schedule, Section I.J., Strategy Execution Fee Cap, 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). Any reversal and conversion strategy executed as a QCC order is eligible for this cap; however, any other strategy executed as a QCC order is excluded from this fee cap. See *id.*

<sup>6</sup> See *id.*

<sup>7</sup> See proposed Fee Schedule, Section I.J., Strategy Execution Fee Cap.

<sup>40</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.