

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-GEMX-2023-03 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-GEMX-2023-03. 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 such 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-GEMX-2023-03 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96922; File No. SR-NYSEAMER-2023-12]

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend Rule 7.19E Pertaining to Pre-Trade Risk Controls

February 14, 2023.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 ("Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on February 9, 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, 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 Rule 7.19E pertaining to pre-trade risk controls to make additional pre-trade risk controls available to Entering Firms. The proposed rule change is available on the Exchange's website at www.nyse.com, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to amend Rule 7.19E pertaining to pre-trade risk

controls to make additional pre-trade risk controls available to Entering Firms. The Exchange originally filed on November 17, 2022 to make this change immediately effective and that filing was published for comment on December 5, 2022.⁴ In light of a comment letter dated January 5, 2023,⁵ the Exchange withdrew the original filing and now submits this revised filing to address several of the points raised in the comment letter.

Background and Purpose

In 2020, in order to assist ETP Holders' efforts to manage their risk, the Exchange amended its rules to add Rule 7.19E (Pre-Trade Risk Controls),⁶ which established a set of optional pre-trade risk controls by which Entering Firms and their designated Clearing Firms⁷ could set credit limits and other pre-trade risk controls for an Entering Firm's trading on the Exchange and authorize the Exchange to take action if those credit limits or other pre-trade risk controls are exceeded. Specifically, the Exchange added a Gross Credit Risk Limit, a Single Order Maximum Notional Value Risk Limit, and a Single Order Maximum Quantity Risk Limit⁸ (collectively, the "2020 Risk Controls").

The Exchange now proposes to expand the list of the optional pre-trade risk controls available to Entering Firms by adding several additional pre-trade risk controls that would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. As detailed below, each of the proposed additional risk controls is modeled on risk settings that are already available on the Cboe,⁹

⁴ See Securities Exchange Act Release No. 96403 (November 29, 2022), 87 FR 74459 (December 5, 2022) (SR-NYSEAMER-2022-53).

⁵ See Letter to Vanessa Countryman, Secretary, Securities and Exchange Commission, from Gerard P. O'Connor, Vice President and General Counsel of Hyannis Port Research, Inc. ("HPR Letter") dated January 5, 2023, available at <https://www.sec.gov/comments/sr-nyseamer-2022-53/smyseamer202253-20154615-322842.pdf>. HPR is a provider of (among other things) non-exchange based risk controls solutions.

⁶ See Securities Exchange Act Release No. 88878 (May 14, 2020), 85 FR 30770 (May 20, 2020) (SR-NYSEAMER-2020-38).

⁷ The terms "Entering Firm" and "Clearing Firm" are defined in Rule 7.19E.

⁸ The terms "Gross Credit Risk Limit," "Single Order Maximum Notional Value Risk Limit, and "Single Order Maximum Quantity Risk Limit" are defined in Rule 7.19E.

⁹ See Securities Exchange Act Release Nos. 80611 (May 5, 2017), 82 FR 22045 (May 11, 2017) (SR-BatsBZX-2017-24) (adopting Rule 11.13, Interpretation and Policies .01); 80612 (May 5, 2017), 82 FR 22024 (May 11, 2017) (SR-BatsBYX-2017-07) (same); 80608 (May 5, 2017), 82 FR 22030 (May 11, 2017) (SR-BatsEDGA-2017-07) (adopting Rule 11.10, Interpretation and Policies .01); 80607 (May 5, 2017), 82 FR 22027 (May 11, 2017) (SR-BatsEDGX-2017-16) (same).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

¹⁴ 17 CFR 200.30-3(a)(12).

Nasdaq,¹⁰ MEMX,¹¹ and MIAX Pearl¹² equities exchanges.

Like the 2020 Risk Controls, use of the pre-trade risk controls proposed herein is optional, but all orders on the Exchange would pass through these risk checks. As such, an Entering Firm that does not choose to set limits pursuant to the new proposed pre-trade risk controls would not achieve any latency advantage with respect to its trading activity on the Exchange.

The HPR Letter questions why the Exchange proposes to make all orders on the Exchange pass through its risk checks, even if a particular firm trading on the Exchange opts not to employ the Exchange's pre-trade risk controls. The Exchange has chosen to implement its risk checks "symmetrically" to all orders because that is the functionality that clients have specifically requested, and it is also the recognized best practice in this area. In a September 2021 white paper entitled "Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers,"¹³

¹⁰ See, e.g., Securities Exchange Act Release Nos. 82479 (January 10, 2018), 83 FR 2471 (January 17, 2018) (SR-Nasdaq-2018-002) (adopting IM-6200-1); 90577 (December 7, 2020), 85 FR 80202 (December 11, 2020) (SR-Nasdaq-2020-79) (moving IM-6200-1 into Equity 6, Section 5). See also Securities Exchange Act Release Nos. 82545 (January 19, 2018), 83 FR 3834 (January 26, 2018) (SR-BX-2018-001) (adopting Rule 4765 and commentary thereto); 91830 (May 10, 2021), 86 FR 26567 (May 14, 2021) (SR-BX-2021-012) (moving Rule 4765 and commentary into Equity 6, Section 5).

¹¹ See Securities Exchange Act Release No. 89581 (August 17, 2020), 85 FR 51799 (August 21, 2020) (SR-MEMX-2020-04) (adopting Rule 11.10, Interpretation and Policies .01).

¹² See Securities Exchange Act Release Nos. 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (SR-PEARL-2020-03) (adopting Rule 2618(a)(1)(A)-(D)); 96205 (November 1, 2022), 87 FR 67080 (November 7, 2022) (SR-PEARL-2022-43) (adopting subsections (E)-(H) to Rule 2618(a)(1)).

¹³ See Citadel Securities, "Market Lens: Exchange Best Practices for Reducing Operational Risk at Broker-Dealers" ("Citadel white paper") dated September 2021, available at https://www.citadelsecurities.com/wp-content/uploads/sites/2/2021/09/Citadel_Securities_Market-Lens_Sept_2021_Exchange-Best-Practices-for-Reducing-Operational-Risk.pdf. As Citadel put it (at page 5):

Insufficiently well-designed and tested controls can create what amount to penalties, driven by the time and computational power required to perform various stages of checks, if applied only to participants who opt-in to their use. This could produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage. One way to address this, while maintaining choice for member firms, is to ensure orders follow the same order processing logic regardless of which options or features are enabled—similar to how all colocated servers in an equalized data center incur the same cabling distance to the matching engine, regardless of their physical proximity to it. Additionally, exchanges should vigorously test controls to ensure no latency penalty exists in practice. Exchanges should actively publicize the net-neutral risk controls.

Citadel Securities requested that exchanges assist firms in mitigating operational trading risk by instituting exchange-based risk controls, but expressly cautioned exchanges against segmenting orders into those that would pass through risk checks versus those that would not. Citadel noted that such segmentation of orders would "produce incentives for all firms to avoid using any controls, for fear of suffering a competitive disadvantage."¹⁴ Instead, Citadel recommended that exchanges "ensure orders follow the same order processing logic regardless of which options or features are enabled,"¹⁵ in order to eliminate any competitive advantage or disadvantages for clients.

This is the model that the Exchange used in building the 2020 Risk Controls that the Commission approved in 2020,¹⁶ and is the same model that the Exchange proposes would apply to the additional pre-trade risk checks proposed here. There is nothing unique about this approach. Functionality on the Exchange's trading systems is often applied uniformly to all orders, regardless of whether a particular client has opted to use that functionality for a particular order. For example, the Exchange's limit order price protection applies generally to trading on the Exchange and orders with limit prices are not processed more slowly than those without. Similarly, the Exchange's trading systems check all orders for a variety of details and modifiers (e.g., duplicative client order check, order capacity check, and self-trade prevention).

The Exchange understands that the risk checks of other exchanges, on which the proposed rule is modeled, also apply symmetrically to all orders.¹⁷

¹⁴ *Id.* at 5.

¹⁵ *Id.*

¹⁶ See Securities Exchange Act Release No. 88776 (April 29, 2020), 85 FR 26768 (May 5, 2020) (SR-NYSE-2020-17) (order approving pre-trade risk controls on the Exchange's affiliate exchange, the New York Stock Exchange LLC). The Commission concluded that "the proposed rule change is reasonably designed to provide members with optional tools to manage their credit risk." *Id.* at 26770.

¹⁷ See, e.g., MEMX Risk FAQ, dated October 13, 2020, available at <https://info.memxtrading.com/us-equities-faq/#Bookmark21> ("The risk checks are applied in a consistent manner to all participant orders in order to mitigate risk without incurring latency disadvantage."); MIAX Pearl Equities Exchange User Manual, updated October 2022, available at https://www.miaxequities.com/sites/default/files/website_file-files/MIAX_Pearl_Equities_User_Manual_October_2022.pdf, at 29 (stating that all but two of the exchange's 14 risk checks "are latency equalized i.e. there is no latency penalty for a member when opting into and leveraging a risk protection available on the exchange when entering an order as compared to a member not opting into the risk protection when entering an order").

The Exchange also notes that the Citadel white paper cited above was written "in collaboration with several major exchanges, including NYSE, Nasdaq, MIAX, MEMX, and BOX," suggesting that some or all of those exchanges may also employ the symmetrical application of risk checks that the Citadel white paper recommends.¹⁸

The Exchange stated in its original filing for the current proposal that it expects that any latency added by the proposed additional pre-trade risk controls would be *de minimis*. Specifically, the Exchange expects that the latency added by the combination of the 2020 Risk Checks plus the proposed additional pre-trade risk controls would be significantly less than one microsecond. Nevertheless, seizing on the phrase "*de minimis*," HPR argues that the Commission's 2016 interpretation regarding automated quotations under Regulation NMS¹⁹ applies here and should require the Exchange to justify this *de minimis* latency change in a number of ways.²⁰ But that Commission interpretation pertains to "intentional access delays," like speed bumps—not to the issues here. The Exchange's pre-trade risk controls are not an intentional access delay,²¹ but a functional enhancement to the Exchange's trading systems, and, like any change to a trading system's function or performance, may impact the overall speed of trading on the Exchange in ways that can increase or decrease overall latency. It is within the Exchange's prerogative as a market center in the current hotly competitive environment to assess whether and when to make functional enhancements to its trading systems. What is key under the Exchange Act is that any anticipated latency effects of such enhancements are applied uniformly, to all orders of all market participants, in a non-discriminatory way—as the risk controls proposed here would be. If market participants find that the latency cost of such enhancements is not justified by the additional functionality they offer, such market participants will vote with their feet and send their order flow elsewhere.

With one exception, the additional risk checks proposed here would be a

¹⁸ See Citadel white paper, *supra* note 13, at 2.

¹⁹ See also Securities Exchange Act Release No. 78102 (June 17, 2016), 81 FR 40785 (June 23, 2016) (File No. S7-03-16) (Commission Interpretation Regarding Automated Quotations Under Regulation NMS), available at <https://www.sec.gov/rules/interp/2016/34-78102.pdf>.

²⁰ HPR Letter, *supra* note 5, at 5–6.

²¹ Indeed, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–12 as "intentional access delays."

functional enhancement to the Exchange's Pillar gateway²² and the risk checks would be applied to all orders on the Exchange. While the Exchange strongly believes that symmetrical application of all pre-trade risk controls is the appropriate approach (as explained above), providing customers an opt-out ability would require the Exchange to provide new order entry ports that would bypass the evaluation of such pre-trade risk protections. Providing such new ports would burden customers with additional costs to purchase such ports and to migrate their order flow to such ports. The Exchange does not believe that the added expense of creating such new ports (on the part of the Exchange) or of purchasing and migrating to them (on the part of customers) is justified in light of the *de minimis* latency imposed by the pre-trade risk controls at issue.

The proposed new pre-trade risk controls proposed herein would be available to be set by Entering Firms only. Clearing Firms designated by an Entering Firm would continue to be able to view all pre-trade risk controls set by the Entering Firm and to set the 2020 Risk Controls on the Entering Firm's behalf.

Proposed Amendment to Rule 7.19E

To accomplish this rule change, the Exchange proposes to amend paragraph (a) to include a new paragraph (a)(3) that would define the term "Pre-Trade Risk Controls" as all of the risk controls listed in proposed paragraph (b), inclusive of the 2020 Risk Controls and the proposed new risk controls.

In proposed paragraph (b), the Exchange proposes to list all Pre-Trade Risk Controls available to Entering Firms, which would include the existing 2020 Risk Controls and the proposed new controls. The Exchange proposes to move the definition of Gross Credit Risk Limit from current paragraph (a)(5) to proposed paragraph (b)(1), with no substantive change. Next, the Exchange proposes to add paragraph (b)(2), which would list all available "Single Order Risk Controls." The Exchange proposes to move the definitions of Single Order Maximum Notional Value Risk Limit and Single Order Maximum Quantity Risk Limit from current paragraphs (a)(3) and (a)(4)

to proposed paragraph (b)(2)(A), with no substantive change. Next, the Exchange proposes to add paragraphs (b)(2)(B) through (b)(2)(F) to enumerate the proposed new Single Order Risk Controls, as follows:

(B) controls related to the price of an order (including percentage-based and dollar-based controls);

(C) controls related to the order types or modifiers that can be utilized;

(D) controls to restrict the types of securities transacted (including but not limited to restricted securities);

(E) controls to prohibit duplicative orders; and

(F) controls related to the size of an order as compared to the average daily volume of the security (including the ability to specify the minimum average daily volume for the securities for which such controls will be activated).

Each of the Single Order Risk Controls in proposed paragraph (b)(2) is substantively identical to risk settings available on the Cboe, Nasdaq, MEMX, and MIAX Pearl²³ equities exchanges. As such, the proposed new Pre-Trade Risk Controls are familiar to market participants and are not novel.

The Exchange proposes to move current paragraph (b)(2) to proposed paragraph (c) and to re-name that paragraph "Pre-Trade Risk Controls Available to Clearing Firms." The Exchange proposes to renumber current paragraphs (b)(2)(A), (b)(2)(B), and (b)(2)(C) as paragraphs (c)(1), (c)(2), and (c)(3) accordingly. The Exchange proposes to smooth the grammar in proposed paragraph (c)(1) by moving the "or both" language from the end of the sentence to the beginning, to clarify that an Entering Firm that does not self-clear may designate its Clearing Firm to take either or both of the following actions: viewing or setting Pre-Trade Risk Controls on the Entering Firm's behalf. Finally, in proposed paragraph (c)(1)(B), the Exchange proposes to specify that Clearing Firms so-designated may only set the 2020 Risk Controls on an Entering Firm's behalf; the proposed new risk controls set out in proposed paragraph (b)(2)(B) through (b)(2)(F) are available to be set by Entering Firms only. The Exchange does not propose any changes to proposed paragraph (c)(2), and with respect to proposed paragraph (c)(3), proposes only to update internal cross-references.

The Exchange proposes to move current paragraph (b)(3) regarding "Setting and Adjusting Pre-Trade Risk Controls" to proposed paragraph (d), and to renumber current paragraphs (b)(3)(A) and (b)(3)(B) as proposed

paragraphs (d)(1) and (d)(2) accordingly. The Exchange proposes to amend the text of proposed paragraph (d)(2) to state that in addition to Pre-Trade Risk Controls being available to be set at the MPID level or at one or more sub-IDs associated with that MPID, or both, Pre-Trade Risk Controls related to the short selling of securities, transacting in restricted securities, and the size of an order compared to the average daily volume of a security must be set per symbol.

The Exchange proposes to move current paragraph (b)(4) regarding "Notifications" to paragraph (e), with no changes.

The Exchange proposes to move current paragraph (c) regarding "Automated Breach Actions" to proposed paragraph (f) and to renumber current paragraphs (c)(1), (c)(2), (c)(3), and (c)(4) as paragraphs (f)(1), (f)(2), (f)(3), and (f)(4) accordingly. The Exchange proposes no changes to the text of proposed paragraphs (f)(1), (f)(3), or (f)(4), other than to update an internal cross-reference. With respect to proposed paragraph (f)(2) regarding "Breach Action for Single Order Risk Limits," the Exchange proposes to change the word "Limits" in the heading to "Controls." The Exchange further proposes to amend the text of current paragraph (c)(2) to specify in paragraph (f)(2)(A) that if an order would breach a price control under paragraph (b)(2)(B), it would be rejected or canceled as specified in Rule 7.31E(a)(2)(B) (the "Limit Order Price Protection Rule"), while providing in paragraph (f)(2)(B) that an order that breaches the designated limit of any other Single Order Risk Control would be rejected.

The Exchange proposes to move current paragraph (d) regarding "Reinstatement of Entering Firm After Automated Breach Action" to proposed paragraph (g), with no changes.

The Exchange proposes to move current paragraph (e) regarding "Kill Switch Actions" to proposed paragraph (h) with no changes, other than to update an internal cross-reference.

The Exchange proposes no changes to Commentary .01 to the Rule. The Exchange proposes to add Commentary .02 to specify the interplay between the Exchange's Limit Order Price Protection Rule and the price controls that may be set by an Entering Firm pursuant to proposed paragraph (b)(2)(B). Proposed Commentary .02 specifies that pursuant to paragraph (b)(2)(B), an Entering Firm may always set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule

²² The one exception is the proposed pre-trade risk control in paragraph (b)(2)(B), discussed below, which would permit an Entering Firm to set dollar-based or percentage-based controls as to the price of an order that are equal to or more restrictive than the levels set out in Rule 7.31E(a)(2)(B) regarding Limit Order Price Protection. This risk check, like the Exchange's Limit Order Price Protection, is implemented in the matching engine.

²³ See *supra* notes 9–12.

7.31E(a)(2)(B) regarding Limit Order Price Protection (e.g., the greater of \$0.15 or 10% (for securities with a reference price up to and including \$25.00), 5% (for securities with a reference price of greater than \$25.00 and up to and including \$50.00), or 3% (for securities with a reference price greater than \$50.00) away from the NBB or NBO). However, an Entering Firm may set price controls under paragraph (b)(2)(B) that are less restrictive than the levels in the Limit Order Price Protection Rule only (i) outside of Core Trading Hours or (ii) with respect to LOC Orders.

Continuing Obligations of ETP Holders Under Rule 15c3-5

The proposed Pre-Trade Risk Controls described here are meant to supplement, and not replace, the ETP Holders' own internal systems, monitoring, and procedures related to risk management. The Exchange does not guarantee that these controls will be sufficiently comprehensive to meet all of an ETP Holder's needs, the controls are not designed to be the sole means of risk management, and using these controls will not necessarily meet an ETP Holder's obligations required by Exchange or federal rules (including, without limitation, the Rule 15c3-5 under the Act²⁴ ("Rule 15c3-5")). Use of the Exchange's Pre-Trade Risk Controls will not automatically constitute compliance with Exchange or federal rules and responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder.²⁵

Timing and Implementation

The Exchange anticipates completing the technological changes necessary to implement the proposed rule change in the first quarter of 2023, but in any event no later than April 30, 2023. The Exchange anticipates announcing the availability of the Pre-Trade Risk Controls introduced in this filing by Trader Update in the first quarter of 2023.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²⁶ in general, and furthers the objectives of Section 6(b)(5)

of the Act,²⁷ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.²⁸

Specifically, the Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed additional Pre-Trade Risk Controls would provide Entering Firms with enhanced abilities to manage their risk with respect to orders on the Exchange. The proposed additional Pre-Trade Risk Controls are not novel; they are based on existing risk settings already in place on the Cboe, Nasdaq, MEMX, and MIAX Pearl equities exchanges²⁹ and market participants are already familiar with the types of protections that the proposed risk controls afford. As such, the Exchange believes that the proposed additional Pre-Trade Risk Controls would provide a means to address potentially market-impacting events, helping to ensure the proper functioning of the market.

In addition, the Exchange believes that the proposed rule change will protect investors and the public interest because the proposed additional Pre-Trade Risk Controls are a form of impact mitigation that will aid Entering Firms in minimizing their risk exposure and reduce the potential for disruptive, market-wide events. The Exchange understands that ETP Holders implement a number of different risk-based controls, including those required by Rule 15c3-5. The controls proposed here will serve as an additional tool for Entering Firms to assist them in identifying any risk exposure. The

Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system.

The Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting Entering Firms to set price controls under paragraph (b)(2)(B) that are equal to or more restrictive than the levels in the Exchange's Limit Order Price Protection Rule, but preventing Entering Firms from setting price controls that are less restrictive than those levels during Core Trading Hours in most circumstances. The Exchange's Limit Order Price Protection Rule protects from aberrant trades, thus improving continuous trading and price discovery. The Exchange believes that Entering Firms should not be able to circumvent the protections of that rule by setting lower levels during Core Trading Hours, except with respect to orders that participate in the Closing Auction (e.g., LOC Orders).³⁰ But under the proposed rule, Entering Firms seeking to further manage their exposure to aberrant trades would be permitted to set price controls at levels that are more restrictive than in the Exchange's Limit Order Price Protection Rule. Additionally, because price controls set by an Entering Firm under paragraph (b)(2)(B) would function as a form of limit order price protection, the Exchange believes that it would remove impediments to and perfect the mechanism of a free and open market and a national market system for an order that would breach such a price control to be rejected or canceled as specified in the Limit Order Price Protection Rule.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's ETP Holders because use of the proposed additional Pre-Trade Risk Controls is optional and is not a prerequisite for participation on the Exchange. In addition, because all orders on the Exchange would pass through the risk checks, there would be no difference in the latency experienced by ETP Holders who have opted to use the proposed additional Pre-Trade Risk Controls versus those who have not opted to use them. The Exchange does not believe it is unfairly discriminatory to have all orders on the Exchange pass

²⁷ 15 U.S.C. 78f(b)(5).

²⁸ HPR argues that the Exchange should be compelled to submit this proposal as a fee filing pursuant to Section 19(b)(3)(A)(ii) of the Exchange Act. See HPR Letter, *supra* note 5, at 6-8. But that provision only applies to rule filings "establishing or charging a due, fee, or other charge imposed by the [SRO] . . ." Because the Exchange does not propose to charge any fees for the proposed services here, Section 19(b)(3)(A)(ii) is inapplicable. Notably, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9-12 as fee filings.

²⁹ See *supra* notes 9-12.

³⁰ LOC Orders are not subject to the Limit Order Price Protection in Rule 7.31E(a)(2)(B).

²⁴ See 17 CFR 240.15c3-5.

²⁵ See also Commentary .01 to Rule 7.19E, which provides that "[t]he pre-trade risk controls described in this Rule are meant to supplement, and not replace, the ETP Holder's own internal systems, monitoring and procedures related to risk management and are not designed for compliance with Rule 15c3-5 under the Exchange Act. Responsibility for compliance with all Exchange and SEC rules remains with the ETP Holder."

²⁶ 15 U.S.C. 78f(b).

through the risk checks, even for ETP Holders that opt not to use the Exchange's pre-trade risk controls. As described above, the proposed risk checks are a functional enhancement to the Exchange's trading systems that the Exchange proposes to apply uniformly to all orders on the Exchange; by applying them uniformly, the Exchange would avoid producing incentives for all firms to avoid using the risk controls for fear of suffering a competitive disadvantage. Additionally, any latency imposed by the pre-trade risk controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

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 that is not necessary or appropriate in furtherance of the purposes of the Act. In fact, the Exchange believes that the proposal will have a positive effect on competition because, by providing Entering Firms additional means to monitor and control risk, the proposed rule will increase confidence in the proper functioning of the markets. The Exchange believes the proposed additional Pre-Trade Risk Controls will assist Entering Firms in managing their financial exposure which, in turn, could enhance the integrity of trading on the securities markets and help to assure the stability of the financial system. As a result, the level of competition should increase as public confidence in the markets is solidified.

In its letter, HPR contends that it is an unnecessary burden on competition for the Exchange to have all orders—even the orders of ETP Holders that choose not to use the proposed pre-trade risk controls—to pass through the Exchange's checks because doing so will reduce customer demand for HPR's risk control services. HPR argues that by imposing latency from its risk checks on all orders, the Exchange has created a "latency tax" that would encourage customers to use the Exchange's risk controls instead of third-party risk solutions like HPR's.³¹ These assertions are factually incorrect and obscure the very real differences between the Exchange's pre-trade risk controls and

the services that HPR offers. The Exchange understands that HPR's enterprise risk management solutions, like those of its competitors, permit its clients to track aggregated risk across all markets and provide consolidated risk management capabilities. In contrast, exchange based-solutions such as the Exchange's only offer tools to manage risk across the Exchanges and its affiliate exchanges (e.g., the NYSE Group exchanges). The Exchange's proposed risk checks would not and could not replace HPR's far broader offering. In addition, as the Exchange made clear in its filing for the 2020 Risk Controls and repeats here, the Exchange's pre-trade risk controls are not a complete Rule 15c3-5 solution. The Exchange's risk controls are meant to supplement, and not replace, an ETP Holder's own internal risk management systems (which firms may outsource to providers like HPR), and the Exchange's controls are not designed to be the sole means of risk management that any firm uses. Additionally, any latency imposed by the Pre-Trade Risk Controls proposed here is *de minimis* and would not have a material impact on the order flow of ETP Holders that choose to employ non-exchange providers (such as HPR) to provide them with risk control solutions.

Finally, the Exchange believes it would be an unfair burden on competition for the Commission to suspend and ultimately disapprove the pre-trade risk controls proposed here, where substantially identical controls are already in place on numerous of the Exchange's competitor exchanges.³² Since 2017, equities exchanges have been adding pre-trade risk controls to their trading systems. It would be an unjustifiable burden on competition and on the Exchange for the Commission to permit all equities exchanges to offer such functionality *except* for the Exchange and its affiliates mentioned in the HPR Letter. Specifically, the Exchange would be at a significant competitive disadvantage vis-à-vis other equities exchanges that already offer the type of pre-trade risk controls proposed in this filing as ETP Holders may choose to direct order flow away from the Exchange until it is able to offer such competing pre-trade risk controls.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³³ and Rule 19b-4(f)(6) thereunder.³⁴ Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act³⁵ and subparagraph (f)(6) of Rule 19b-4 thereunder.³⁶

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)³⁷ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSEAMER-2023-12 on the subject line.

Paper Comments

- Send paper comments in triplicate to: Secretary, Securities and Exchange

³³ 15 U.S.C. 78s(b)(3)(A)(iii).

³⁴ 17 CFR 240.19b-4(f)(6).

³⁵ 15 U.S.C. 78s(b)(3)(A)(iii).

³⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

³⁷ 15 U.S.C. 78s(b)(2)(B).

³¹ See HPR Letter, *supra* note 5, at 4 (claiming the Exchange has "architected the proposed risk controls to give [itself] an unfair and anti-competitive latency advantage over non-exchange offerings provided by broker-dealers or vendors such as HPR.").

³² See *supra* notes 9-12.

Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEAMER-2023-12. 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-2023-12 and should be submitted on or before March 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁸

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023-03482 Filed 2-17-23; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96924; File No. SR-MRX-2023-04]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchanges Pricing Schedule at Options 7, Section 3

February 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 30, 2023, Nasdaq MRX, LLC ("MRX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the 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 proposes to amend the Exchange's Pricing Schedule at Options

7, Section 3 (Regular Order Fees and Rebates).

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, 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 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 purpose of the proposed rule change is to amend the Exchange's Pricing Schedule at Options 7, Section 3 (Regular Order Fees and Rebates).³

Today, as set forth in Table 1 of Options 7, Section 3, the Exchange assesses the following fees for regular orders in Penny Symbols:

PENNY SYMBOLS

| Market participant | Maker fee tier 1 | Maker fee tier 2 | Taker fee tier 1 | Taker fee tier 2 |
|---|------------------|------------------|------------------|------------------|
| Market Maker | \$0.20 | \$0.10 | \$0.50 | \$0.50 |
| Non-Nasdaq MRX Market Maker (FarMM) | 0.47 | 0.47 | 0.50 | 0.50 |
| Firm Proprietary/Broker-Dealer | 0.47 | 0.47 | 0.50 | 0.50 |
| Professional Customer | 0.47 | 0.47 | 0.50 | 0.50 |
| Priority Customer | 0.00 | 0.00 | 0.00 | 0.00 |

The Exchange now proposes to introduce a growth incentive in new note 6 that would allow Market Makers⁴ to reduce their maker fees described above. The proposed growth incentive will be aimed at rewarding new and existing Market Makers to grow the

extent of their liquidity adding activity in Penny Symbols on the Exchange over time. Market Makers, including any new Market Makers, who did not have any volume in the Market Maker Penny add liquidity segment for the month of December 2022 (and therefore lack

December 2022 baseline volume against which to measure subsequent growth) would meet the growth requirement through whatever volume of Market

³⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange initially filed the proposed pricing changes on January 3, 2023 (SR-MRX-2023-01) to adopt a Market Maker growth incentive

and to amend complex order fees. On January 17, 2023, the Exchange withdrew that filing and submitted SR-MRX-2023-02. On January 30, 2023, the Exchange withdrew that filing and submitted separate filings for the Market Maker growth incentive and complex order fees. This specific

filing replaces the Market Maker growth incentive set forth in SR-MRX-2023-02.

⁴ The term "Market Makers" refers to "Competitive Market Makers" and "Primary Market Makers" collectively. See Options 1, Section 1(a)(21).