

The Exchange places away markets in the fee tier grouping that best approximates the Exchange's costs and fees to route the orders in that segment to that away market. The per-contract transaction fee amount associated with each grouping approximates the Exchange's all-in cost (plus an additional, non-material amount)<sup>23</sup> to execute the corresponding contract at the corresponding exchange. Other exchanges employ more simplistic models that provide for even fewer tiers than the Exchange (e.g., two tiers on MEMX,<sup>24</sup> and five tiers on Cboe BZX)<sup>25</sup> in their attempt to reflect the costs and fees associated with routing and executing orders on other exchanges. The Exchange believes its tier structure represents the best approach to reflect the costs and fees associated with routing and executing orders on other exchanges.

#### *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. The Exchange's proposed re-categorization of certain exchange groupings is intended to enable the Exchange to recover the costs it incurs to route orders to away markets, while the introduction of a new fee tier is designed to allow the Exchange to better approximate the costs it incurs to route orders to Cboe BZX Options, Nasdaq ISE, and Nasdaq BX. The costs to the Exchange to route orders to away markets for execution primarily includes the transaction fees assessed by the away markets to which the Exchange routes orders, in addition to the Exchange's clearing costs, administrative, regulatory and technical costs. This new tier is reflective of the fees assessed on the away markets and the Exchange's cost to route orders to

"Public Customer" as a person that is not a broker or dealer in securities. See Exchange Rule 100.

<sup>23</sup> See *supra* note 6.

<sup>24</sup> See MEMX Options Fee Schedule, as of February 15, 2024, Routing Fees, which assesses a fee of \$0.60 for orders in penny classes routed to other exchanges and \$1.20 for orders in non-penny classes routed to other exchanges, available at <https://info.memxtrading.com/us-options-trading-resources/us-options-fee-schedule/>.

<sup>25</sup> See Cboe BZX Options Fee Schedule, as of March 1, 2024, Fee Codes and Associated Fees, which assesses a \$0.90 fee for non-customer orders in penny classes routed to other exchanges and a \$1.25 fee for non-customer orders in non-penny classes routed to other exchanges, and additionally provides for three additional fee tiers for customer orders routed to other exchanges, available at <https://www.cboe.com/us/options/membership/fee-schedule/bzx/>.

these away markets on behalf of Members. The Exchange does not believe that this proposal imposes any unnecessary burden on competition because it seeks to better reflect the costs and fees incurred by the Exchange when routing orders to away markets on behalf of Members and notes that at least one other options exchange has a similar routing fee structure.<sup>26</sup>

#### *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>27</sup> and Rule 19b-4(f)(2)<sup>28</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 (<https://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-2024-10 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-2024-10. This file number should be included on the subject line if email is used. To help the

<sup>26</sup> See *supra* note 4.

<sup>27</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>28</sup> 17 CFR 240.19b-4(f)(2).

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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-EMERALD-2024-10 and should be submitted on or before April 17, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>29</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-99827; File No. SR-NYSEAMER-2024-21]**

### **Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change To Amend Rule 7.31E**

March 21, 2024.

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 March 1, 2024, NYSE American LLC ("NYSE American" or the "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described

<sup>29</sup> 17 CFR 200.30-3(a)(12).

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

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

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 Rule 7.31E regarding Discretionary Pegged Orders. The proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

##### **1. Purpose**

The Exchange proposes to amend Rule 7.31E(h)(3) to modify the operation of the Discretionary Pegged Order.

The Discretionary Pegged Order is a non-displayed order to buy (sell) that is pegged to the same side of the PBBO and assigned a working price equal to the lower (higher) of the midpoint of the PBBO (the "Midpoint Price") or the limit price of the order.<sup>3</sup> A Discretionary Pegged Order will exercise the least amount of discretion necessary from its working price to its discretionary price (defined as the lower (higher) of the Midpoint Price or the limit price of the order) to trade with contra-side interest. Rule 7.31E(h)(3)(A) provides that a Discretionary Pegged Order must be designated Day.<sup>4</sup> Rule 7.31E(h)(3)(B) provides that when exercising discretion, Discretionary Pegged Orders

maintain their time priority at their working price as Priority 3—Non-Display Orders and are prioritized behind Priority 3—Non-Display Orders with a working price equal to the discretionary price of a Discretionary Pegged Order at the time of execution. If multiple Discretionary Pegged Orders are exercising price discretion during the same book processing action, they maintain their relative time priority at the discretionary price.

Rule 7.31E(h)(3)(C) currently provides that a Discretionary Pegged Order will not exercise discretion if the PBBO is determined to be unstable via a "quote instability calculation" that assesses the probability of a change to the PBB or PBO. Specifically, as set forth in current Rule 7.31E(h)(3)(D), the Exchange uses the quote instability calculation along with real-time relative quoting activity of protected quotations to assess the probability of an imminent change to the PBBO (the "quote instability factor"). When the quoting activity meets predefined criteria described in Rule 7.31E(h)(3)(D)(i)(A) through (C) and the quote instability factor calculated is greater than the Exchange's quote instability threshold (defined in Rule 7.31E(h)(3)(D)(i)(D)(2)), the Exchange treats the quote as unstable. The quote stability calculation utilizes quote stability coefficients and quote stability variables, as defined in Rules 7.31E(h)(3)(D)(i)(D)(1)(a) and (b). In July 2022, the Exchange modified the quote stability calculation to incorporate updated quote stability coefficients that would allow the quote stability calculation to identify changes to the PBBO more accurately.<sup>5</sup>

The Exchange proposes to amend Rule 7.31E(h)(3) to modify the operation of Discretionary Pegged Orders based on the Exchange's assessment of the order type's impact on system performance, including the system resources required to perform the quote stability calculation. Specifically, the Exchange proposes to modify Rule 7.31E(h)(3) to provide that the Discretionary Pegged Order would not be restricted from exercising discretion during periods of quote instability, thereby eliminating the need to perform the quote stability calculation.

<sup>5</sup> See Securities Exchange Act Release No. 95153 (June 24, 2022), 87 FR 39139 (June 30, 2022) (SR-NYSEAMER-2022-15) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 2, To Amend Rule 7.31E(h)(3) Relating to Discretionary Pegged Orders); see also <https://www.nyse.com/trader-update/history#110000436857> (Trader Update announcing implementation of updated quote stability calculation).

As proposed, the Discretionary Pegged Order would operate as defined in Rule 7.31E(h)(3) and as specified in current Rules 7.31E(h)(3)(A) and (B), without any changes except that the order would continue to exercise the least amount of price discretion necessary from its working price to its discretionary price to trade with contra-side orders on the Exchange Book without regard to potential quote instability. The Exchange thus proposes to delete the clause beginning with "except" in the last sentence of current Rule 7.31E(h)(3). In addition, because the Exchange proposes to permit Discretionary Pegged Orders to exercise discretion without considering potential quote instability, the Exchange would no longer perform the quote instability calculation to assess the probability of an imminent change to the PBBO or identify periods of quote instability. To effect this change, the Exchange proposes to delete current Rules 7.31E(h)(3)(C) and (D), including the subparagraphs thereunder. The Exchange also proposes to renumber current Rule 7.31E(h)(3)(E) as Rule 7.31E(h)(3)(C) to reflect those deletions.

Although the Discretionary Pegged Order, as modified, would no longer provide price protection during periods of quote instability, the Exchange believes that it would still provide ETP Holders with the flexibility and benefits of an order type that can exercise discretion to trade with contra-side interest. The Exchange notes that the Discretionary Pegged Order, as modified, would operate identically to the Discretionary Pegged Order offered by its affiliated exchange, NYSE Arca, Inc. ("NYSE Arca"), and similarly to order types currently offered by other equities exchanges.<sup>6</sup>

Because of the technology changes associated with this proposed rule change, the Exchange will announce the implementation of the proposed change by Trader Update. Subject to effectiveness of this rule filing, the Exchange will implement the proposed rule change no later than in the third quarter of 2024.

##### **2. Statutory Basis**

The proposed rule change is consistent with Section 6(b) of the Act,<sup>7</sup> in general, and furthers the objectives of

<sup>6</sup> See NYSE Arca Rule 7.31-E(h)(3) (defining Discretionary Pegged Order); see also, e.g., Cboe EDGA Exchange, Inc. Rule 11.8(e) (defining the MidPoint Discretionary Order as a limit order to buy or sell that is pegged to the NBBO with discretion to execute at prices up or down to and including the midpoint of the NBBO); Cboe EDGX Exchange, Inc. Rule 11.8(g) (same).

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

<sup>3</sup> See Rule 7.31E(h)(3). As defined in NYSE American Rule 1.1, "PBBO" means the Best Protected Bid and the Best Protected Offer.

<sup>4</sup> The Exchange also proposes a non-substantive change to Rule 7.31E(h)(3)(A) to delete an extraneous comma.

Section 6(b)(5),<sup>8</sup> 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 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.

The Exchange believes that the proposed change to modify the operation of the Discretionary Pegged Order, further to the Exchange's assessment of the order type's impact on system performance, would remove impediments to, and perfect the mechanism of, a free and open market and a national market system, as well as protect investors and the public interest, by continuing to provide ETP Holders with the benefits of an order type that can exercise discretion to trade with contra-side interest, without performing a quote instability calculation that would restrict such order from exercising discretion during periods of quote instability. The Exchange also believes that the proposed modification of the Discretionary Pegged Order would remove impediments to, and perfect the mechanism of, a free and open market and a national market system by modifying the Discretionary Pegged Order to function similarly to discretionary orders currently offered by other equities exchanges.<sup>9</sup>

#### *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. The Exchange believes that the proposed change would promote competition by permitting the Exchange to offer ETP Holders an order type that can exercise discretion to trade with contra-side interest and would not be restricted from doing so by a quote stability calculation. The Exchange also believes that the proposed modifications to the operation of the Discretionary Pegged Order could promote competition because the order type would function similarly to order types currently offered by other equities exchanges.<sup>10</sup>

#### *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 Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup> Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>13</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>14</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>15</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-NYSEAMER-2024-21 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-NYSEAMER-2024-21. 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 (<https://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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSEAMER-2024-21, and should be submitted on or before April 17, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> 17 CFR 240.19b-4(f)(6).

<sup>14</sup> 17 CFR 240.19b-4(f)(6)(iii).

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

<sup>8</sup> 15 U.S.C. 78f(b)(5).

<sup>9</sup> See note 7, *supra*.

<sup>10</sup> See *id.*