

subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>29</sup>

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>30</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6)(iii)<sup>31</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that waiver of the operative delay would allow the Exchange to effect the changes to its Rulebook and By-Laws, which would eliminate obsolete provisions in the Exchange's Rulebook and better align provisions in the Exchange's By-Laws with those in the By-Laws of its affiliates, in time for the Exchange Board meeting on September 25, 2019. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.<sup>32</sup>

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 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:

<sup>29</sup> 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.

<sup>30</sup> 17 CFR 240.19b-4(f)(6).

<sup>31</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>32</sup> For purposes only of waiving the 30-day operative delay, the Commission also has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

#### 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-MRX-2019-21 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-MRX-2019-21. 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 (<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-MRX-2019-21 and should be submitted on or before October 30, 2019.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>33</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 2019-22020 Filed 10-8-19; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>33</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87209; File No. SR-PEARL-2019-26]

### Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIAX PEARL Fee Schedule

October 3, 2019.

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 September 20, 2019, MIAX PEARL, LLC ("MIAX PEARL" 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 PEARL Fee Schedule (the "Fee Schedule") to establish Application Programming Interface ("API") Testing and Certification fees.

The Exchange previously filed to establish API Testing and Certification fees on June 28, 2019 (SR-PEARL-2019-22).<sup>3</sup> That filing was withdrawn on August 27, 2019. It is replaced with the current filing (SR-PEARL-2019-26).

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/pearl> at MIAX PEARL'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

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

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

<sup>3</sup> See Securities Exchange Act Release No. 86363 (July 12, 2019), 84 FR 34445 (July 18, 2019) (SR-PEARL-2019-22) (the "Second Proposed Rule Change").

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 establish API Testing and Certification fees for Members<sup>4</sup> and non-Members. MIAX PEARL commenced operations as a national securities exchange registered under Section 6 of the Act<sup>5</sup> on February 6, 2017.<sup>6</sup> The Exchange adopted its transaction fees and certain of its non-transaction fees in its filing SR-PEARL-2017-10.<sup>7</sup> In that filing, the Exchange expressly waived API Testing and Certification fees for Members and non-Members to provide an incentive to prospective Members and non-Members to engage in early API testing and certification to be able to utilize the services of MIAX PEARL as soon as possible. At that time, the Exchange waived API Testing and Certification fees for the Waiver Period<sup>8</sup> and stated that it would provide notice to market participants when the Exchange intended to terminate the Waiver Period.

On March 14, 2019, the Exchange issued a Regulatory Circular which announced that the Exchange would terminate the Waiver Period for API Testing and Certification fees, among other non-transaction fees, beginning on April 1, 2019.<sup>9</sup> The Exchange initially filed the proposal to adopt API Testing and Certification fees, certain other non-

transaction fees, and to terminate the three-month New Member Non-Transaction Fee Waiver<sup>10</sup> on March 27, 2019, designating the proposed fees effective April 1, 2019.<sup>11</sup> The First Proposed Rule Change was published for comment in the **Federal Register** on April 12, 2019.<sup>12</sup> The proposed fees remained in effect until the Exchange withdrew the First Proposed Rule Change on May 20, 2019.<sup>13</sup>

The Exchange refiled the proposal on June 28, 2019, designating the proposed fees effective July 1, 2019.<sup>14</sup> The Second Proposed Rule Change was published for comment in the **Federal Register** on July 18, 2019.<sup>15</sup> The proposed fee changes remained in effect until the Exchange withdrew the Second Proposed Rule Change on August 27, 2019.<sup>16</sup>

The Exchange is now re-filing the proposal to establish API Testing and Certification fees for Members and non-Members. The Exchange will file separate proposals to establish certain other non-transaction fees and to terminate the New Member Non-Transaction Fee Waiver and remove the definitions for the Waiver Period and New Member Non-Transaction Fee Waiver from the Fee Schedule.

API Testing and Certification Fees for Members

The Exchange proposes to adopt an API Testing and Certification fee for Members. An API makes it possible for Member software to communicate with MIAX PEARL software applications, and is subject to Member testing with, and certification by, MIAX PEARL. API testing and certification includes, for

Electronic Exchange Members<sup>17</sup> ("EEMs"), testing all available order types, new order entry, order management, order throughput and mass order cancellation. For Market Makers,<sup>18</sup> API testing and certification also includes testing of all available quote types, quote throughput, quote management and cancellation, Aggregate Risk Manager settings and triggers, and confirmation of quotes within the trading engines.

The API Testing and Certification fees for Members are based upon the type of interface that the Member has been credentialed to use. The Exchange proposes to adopt an API testing and certification fee for Members (i) initially per API for FIX,<sup>19</sup> MEO,<sup>20</sup> FXD<sup>21</sup> and CTD<sup>22</sup> in the month the Member has been credentialed to use one or more ports in the production environment for the tested API, and (ii) each time a Member initiates a change to its system that requires testing and certification. The Exchange also proposes that API Testing and Certification fees will not be assessed in situations where the

<sup>17</sup> "Electronic Exchange Member" or "EEM" means the holder of a Trading Permit who is a Member representing as agent Public Customer Orders or Non-Customer Orders on the Exchange and those non-Market Maker Members conducting proprietary trading. Electronic Exchange Members are deemed "members" under the Exchange Act. See Exchange Rule 100. See the Definitions Section of the Fee Schedule.

<sup>18</sup> "Market Maker" means a Member registered with the Exchange for the purpose of making markets in options contracts traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of Exchange Rules. See Exchange Rule 100. See the Definitions Section of the Fee Schedule.

<sup>19</sup> "FIX Interface" means the Financial Information Exchange interface for certain order types as set forth in Exchange Rule 516. See Exchange Rule 100. See the Definitions Section of the Fee Schedule.

<sup>20</sup> "MEO Interface" means a binary order interface for certain order types as set forth in Rule 516 into the MIAX PEARL System. See Exchange Rule 100. See the Definitions Section of the Fee Schedule.

<sup>21</sup> "FXD Interface" or "FIX Drop Copy Port" means a messaging interface that provides a copy of real-time trade execution, trade correction and trade cancellation information to FIX Drop Copy Port users who subscribe to the service. FXD Port users are those users who are designated by an EEM to receive the information and the information is restricted for use by the EEM only. See the Definitions Section of the Fee Schedule.

<sup>22</sup> "CTD Port" or "Clearing Trade Drop Port" provides an Exchange Member with a real-time clearing trade updates. The updates include the Member's clearing trade messages on a low latency, real-time basis. The trade messages are routed to a Member's connection containing certain information. The information includes, among other things, the following: (i) Trade date and time; (ii) symbol information; (iii) trade price/size information; (iv) Member type (for example, and without limitation, Market Maker, Electronic Exchange Member, Broker-Dealer); and (v) Exchange MPID for each side of the transaction, including Clearing Member MPID. See the Definitions Section of the Fee Schedule.

<sup>4</sup> "Member" means an individual or organization that is registered with the Exchange pursuant to Chapter II of the Exchange Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" or "Market Maker." Members are deemed "members" under the Exchange Act. See Exchange Rule 100.

<sup>5</sup> 15 U.S.C. 78f.

<sup>6</sup> See Securities Exchange Act Release No. 79543 (December 13, 2016), 81 FR 92901 (December 20, 2016) (File No. 10-227) (order approving application of MIAX PEARL, LLC for registration as a national securities exchange).

<sup>7</sup> See Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR-PEARL-2017-10).

<sup>8</sup> "Waiver Period" means, for each applicable fee, the period of time from the initial effective date of the MIAX PEARL 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.

<sup>9</sup> See MIAX PEARL Regulatory Circular 2019-09 available at [https://www.miaxoptions.com/sites/default/files/circular-files/MIAX\\_PEARL\\_RC\\_2019\\_09.pdf](https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_PEARL_RC_2019_09.pdf).

<sup>10</sup> "New Member Non-Transaction Fee Waiver" means the waiver of certain non-transaction fees, as explicitly set forth in specific sections of the Fee Schedule, for a new Member of the Exchange, for the waiver period. For purposes of this definition, the waiver period consists of the calendar month the new Member is credentialed to use the System in the production environment following approval as a new Member of the Exchange and the two (2) subsequent calendar months thereafter. For purposes of this definition, a new Member shall mean any Member who has not previously been approved as a Member of the Exchange. See the Definitions Section of the Fee Schedule.

<sup>11</sup> See Securities Exchange Act Release No. 85541 (April 8, 2019), 84 FR 14983 (April 12, 2019) (SR-PEARL-2019-12) (the "First Proposed Rule Change").

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

<sup>13</sup> See Letter from Gregory P. Ziegler, AVP and Senior Associate Counsel, MIAX PEARL, LLC, to Vanessa Countryman, Acting Secretary, Commission, dated May 17, 2019.

<sup>14</sup> See *supra* note 3.

<sup>15</sup> See *id.*

<sup>16</sup> See Letter from Joseph Ferrara, SVP and Deputy General Counsel, MIAX PEARL, LLC, to Vanessa Countryman, Acting Secretary, Commission, dated August 26, 2019.

Exchange initiates a mandatory change to the Exchange's System<sup>23</sup> that requires testing and certification.

Any Member can select any type of interface (FIX Interface, MEO Interface, FXD Interface, and/or the CTD Port) to test and certify. The Exchange proposes the following fees: Each Member who uses the FIX Interface to connect to the System will be assessed an API Testing and Certification fee of \$1,000; each Member who uses the MEO Interface to connect to the System will be assessed an API Testing and Certification fee of \$1,500; each Member who uses the FXD Interface to connect to the system will be assessed an API Testing and Certification fee of \$500; and each Member who uses the CTD Port to connect to the system will be assessed an API Testing and Certification fee of \$500.

Below is the proposed fee table for API Testing and Certification fees for Members:

Type of interface	API testing and certification fee
FIX .....	\$1,000.00
MEO .....	1,500.00
FXD .....	500.00
CTD .....	500.00

API Testing and Certification Fees will be assessed (i) initially per API for FIX, MEO, FXD and CTD in the month the Member has been credentialed to use one or more ports in the production environment for the tested API, and (ii) each time a Member initiates a change to its system that requires testing and certification. API Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification.

**API Testing and Certification Fee for Non-Members**

The Exchange proposes to adopt an API Testing and Certification fee for Third Party Vendors,<sup>24</sup> Service Bureaus<sup>25</sup> and other non-Members (such as clearing firms) (i) initially per

API for FIX, MEO, FXD, and CTD in the month the non-Member has been credentialed to use one or more ports in the production environment for the tested API, and (ii) each time a Third Party Vendor, Service Bureau, or other non-Member initiates a change to its system that requires testing and certification. The Exchange also proposes that API Testing and Certification fees will not be assessed to non-Members in situations where the Exchange initiates a mandatory change to the Exchange's System that requires testing and certification.

The Exchange proposes to adopt API Testing and Certification fees for non-Members based upon the type of interface used by the non-Member to connect to the Exchange—the FIX Interface, the MEO Interface, the FXD Interface, and/or the CTD Port. Any non-Member can select any type of interface (FIX Interface, MEO Interface, FXD Interface, and/or the CTD Port) to test and certify. As with Members, an API makes it possible for Third Party Vendors' and Service Bureaus' software to communicate with MIAX PEARL's software applications, and is subject to testing with, and certification by, MIAX PEARL. The higher proposed fee charged to non-Members reflects the greater amount of time spent by MIAX PEARL employees testing and certifying non-Members. It has been MIAX PEARL's experience that Member testing takes less time than non-Member testing because Members have more experience testing these systems with exchanges, resulting in generally fewer questions and issues arising during the testing and certification process. Also, because Third Party Vendors and Service Bureaus are redistributing data and reselling services to other Members and market participants, the number and types of scenarios that need to be tested are more numerous and complex than those tested and certified for a single Member.

The Exchange proposes the following fees: each non-Member who uses the FIX Interface to connect to the System will be assessed an API Testing and Certification fee of \$1,200; each non-Member who uses the MEO Interface to connect to the System will be assessed an API Testing and Certification fee of \$2,000; each non-Member who uses the FXD Interface to connect to the system will be assessed an API Testing and Certification fee of \$600; and each non-Member who uses the CTD Port to connect to the system will be assessed an API Testing and Certification fee of \$600.

Below is the proposed fee table for API Testing and Certification fees for non-Members:

Type of interface	API testing and certification fee
FIX .....	\$1,200.00
MEO .....	2,000.00
FXD .....	600.00
CTD .....	600.00

API Testing and Certification Fees for Third Party Vendors, Service Bureaus and other non-Members will be assessed (i) initially per API for FIX, MEO, FXD, and CTD in the month the non-Member has been credentialed to use one or more ports in the production environment for the tested API, and (ii) each time a Third Party Vendor, Service Bureau, or other non-Member initiates a change to its system that requires testing and certification. API Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange's system that requires testing and certification.

The Exchange believes it is necessary to charge an API Testing and Certification fee to Members and non-Members because of the time and resources spent to ensure that Member and non-Member APIs function correctly to prevent any System malfunction. Further, the Exchange believes the price differential in API Testing and Certification fees for Members and non-Members is not unfairly discriminatory because, in the Exchange's experience, Member testing takes less time than non-Member testing as Members have more experience testing these systems with exchanges, resulting generally in fewer questions and issues arising during the testing and certification process.

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>26</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

<sup>23</sup> The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

<sup>24</sup> Third party vendors are subscribers of MIAX PEARL's market and other data feeds, which they in turn use for redistribution purposes. Third party vendors do not provide connectivity and therefore are not subject to Network testing and certification. See the Definitions Section of the Fee Schedule.

<sup>25</sup> "Service Bureau" means a technology provider that offers and supplies technology and technology services to a trading firm that does not have its own proprietary system. See the Definitions Section of the Fee Schedule.

<sup>26</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

than approximately 16% market share.<sup>27</sup> Therefore, no exchange possesses significant pricing power. More specifically, as of September 9, 2019, the Exchange had an approximately 5.30% market share of executed volume of multiply-listed equity and exchange traded fund (“ETF”) options.<sup>28</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 September 28, 2018, the Exchange filed with the Commission a proposal to decrease a transaction fee for certain types of orders (which fee was to be effective October 1, 2018).<sup>29</sup> The Exchange experienced an increase in total market share in the month of October 2018, after the proposal went into effect. Accordingly, the Exchange believes that the October 1, 2018 fee change, decreasing a transaction fee, may have contributed to the increase in the Exchange’s market share and, as such, the Exchange believes competitive forces constrain MIAX PEARL’s, and other options exchanges, ability to set non-transaction and transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

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,<sup>30</sup> the Exchange cannot predict with certainty whether any market participant is planning to utilize any of the services of the Exchange such that API testing and certification would be required, in which the Member or non-Member would be subject to the proposed API Testing and Certification fees established herein.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>31</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>32</sup> in particular, in that it is an equitable

<sup>27</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>28</sup> See *id.*

<sup>29</sup> See Securities Exchange Act Release No. 84387 (October 9, 2018), 83 FR 52039 (October 15, 2018) (SR-PEARL-2018-21).

<sup>30</sup> See *supra* note 27.

<sup>31</sup> 15 U.S.C. 78f(b).

<sup>32</sup> 15 U.S.C. 78f(b)(4) and (5).

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 its proposal to adopt API Testing and Certification fees provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. First, the Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>33</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% of the market share of executed volume of multiply-listed equity and ETF options.<sup>34</sup> Therefore, no exchange possesses significant pricing power. More specifically, as of September 9, 2019, the Exchange had approximately a 5.30% market share of executed volume of multiply-listed equity and ETF options.<sup>35</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 September 28, 2018, the Exchange filed with the Commission a proposal to

<sup>33</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>34</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>35</sup> See *id.*

decrease a transaction fee for certain types of orders (which fee was to be effective October 1, 2018).<sup>36</sup> The Exchange experienced an increase in total market share in the month of October 2018, after the proposal went into effect. Accordingly, the Exchange believes that the October 1, 2018 fee change, decreasing a transaction fee, may have contributed to the increase in the Exchange’s market share and, as such, the Exchange believes competitive forces constrain MIAX PEARL’s, and other options exchanges, ability to set non-transaction and transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

Second, the Exchange believes its proposal to adopt API Testing and Certification fees for Member and non-Members is an equitable allocation of reasonable dues and fees pursuant to Section 6(b)(4) of the Act<sup>37</sup> because of the time and resources spent to ensure that Member and non-Member APIs function correctly to prevent any System malfunction. Further, the Exchange believes the price differential in API Testing and Certification fees for Members and non-Members is not unfairly discriminatory because, in the Exchange’s experience, Member testing utilizes less Exchange resources and employee time than non-Member testing as Members have more experience testing these systems with exchanges, resulting generally in fewer questions and issues arising during the testing and certification process. Also, with respect to API testing and certification, because Third Party Vendors and Service Bureaus are redistributing data and reselling services to other Members and market participants the number and types of scenarios that need to be tested are more numerous and complex than those tested and certified for Members.

Accordingly, the Exchange no longer believes it is necessary to waive API Testing and Certification fees to attract market participants to the MIAX PEARL market since this market is now established and MIAX PEARL no longer needs to rely on such waivers to attract market participants. The Exchange believes its proposed API Testing and Certification fees are reasonable and well within the range of non-transaction fees assessed among other exchanges, including the Exchange’s affiliate, Miami International Securities Exchange, LLC (“MIAX”).<sup>38</sup>

<sup>36</sup> See Securities Exchange Act Release No. 84387 (October 9, 2018), 83 FR 52039 (October 15, 2018) (SR-PEARL-2018-21).

<sup>37</sup> 15 U.S.C. 78f(b)(4).

<sup>38</sup> See the MIAX Options Fee Schedule, Section (4)a and (4)b.

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*

MIAX PEARL 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.

#### *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 PEARL 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 PEARL does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Act. MIAX PEARL's proposed API Testing and Certification fee levels, as described herein, are comparable to fee levels charged by other options exchanges for the same or similar services, including those fees assessed by the Exchange's affiliate, MIAX.<sup>39</sup>

The Exchange believes that the proposed API Testing and Certification fees do not place certain market participants at a relative disadvantage to other market participants because the fees do not apply unequally to different size market participants, but instead would allow the Exchange charge for the time and resource necessary for API testing and certification for Members and non-Members to ensure proper functioning of all available order types, new order entry, order management, order throughput and mass order cancellation (as well as, for Market Makers, all available quote types, quote throughput, quote management and cancellation, Aggregate Risk Manager

settings and triggers, and confirmation of quotes within the trading engines). Accordingly, the proposed API Testing and Certification fees do not favor certain categories of market participants in a manner that would impose a burden on competition.

#### *Inter-Market Competition*

The Exchange believes the proposed API Testing and Certification 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.<sup>40</sup> 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. As of September 9, 2019, the Exchange had an approximately 5.30% market share<sup>41</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.

#### *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>42</sup> and Rule 19b-4(f)(2)<sup>43</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-PEARL-2019-26 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-PEARL-2019-26. 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-PEARL-2019-26 and should be submitted on or before October 30, 2019.

<sup>40</sup> See *supra* note 34.

<sup>41</sup> *Id.*

<sup>42</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>43</sup> 17 CFR 240.19b-4(f)(2).

<sup>39</sup> See the MIAX Options Fee Schedule.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>44</sup>

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2019-22010 Filed 10-8-19; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87211; File No. SR-Phlx-2019-38]

### Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Phlx's Second Amended Limited Liability Company Agreement and By-Laws

October 3, 2019.

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 September 20, 2019, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend its Second Amended Limited Liability Company Agreement ("LLC Agreement") and By-Laws ("By-Laws"), as further discussed below.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaqphlx.cchwallstreet.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 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 its LLC Agreement and By-Laws to (i) harmonize certain provisions related to the regulatory independence of the Exchange with those of the Exchange's affiliates, Nasdaq ISE, LLC ("ISE"), Nasdaq GEMX, LLC ("GEMX"), and Nasdaq MRX, LLC ("MRX"), (ii) modify Director categorizations, (iii) update compositional requirements of the Regulatory Oversight Committee ("ROC"), and (iv) make additional, non-substantive edits. Each change is discussed below.

##### LLC Agreement

The Exchange proposes to modify a number of provisions in its LLC Agreement related to the regulatory independence of the Exchange. As discussed below, the Exchange believes that the proposed changes will make these provisions more robust and will serve to align the Exchange's LLC Agreement with the LLC Agreements of its affiliates, ISE, GEMX, and MRX.

- **Distributions:** The Exchange currently has distribution provisions in Section 14 of the LLC Agreement that prohibits the Exchange from making distributions to its stockholder (*i.e.*, Nasdaq, Inc.), using Regulatory Funds.<sup>3</sup> The Exchange now proposes to amend this provision to substantively conform to Section 15 in the ISE, GEMX, and MRX LLC Agreements by specifying that Regulatory Funds shall not be used for non-regulatory purposes, but rather shall be used to fund the legal, regulatory and surveillance operations of the Exchange. The Exchange believes these are minor changes that make the distribution provisions more robust by specifying how Regulatory Funds may be used. Lastly, the Exchange proposes to add that it would not be required to make a distribution to the stockholder if such distribution would otherwise be required to fulfill the regulatory

functions or responsibilities of the Exchange.

- **Books and Records:** Section 15 of the LLC Agreement presently sets forth certain information relating to general administrative matters with respect to the books and records of the Exchange, including requirements as to where the Exchange's books and records are kept, the maintenance of such books and records, and inspection rights, among other provisions. The Exchange proposes to amend Section 15 to add substantively conforming language as set forth in Section 16 of the LLC Agreements of ISE, GEMX, and MRX by providing that all confidential information relating to the self-regulatory function of the Exchange (including but not limited to disciplinary matters, trading data, trading practices and audit information) contained in the books and records of the Exchange shall: (i) Not be made available to any persons other than to those officers, directors, employees and agents of the Exchange that have a reasonable need to know the contents thereof, (ii) be retained in confidence by the Exchange and the officers, directors, employees and agents of the Exchange, and (iii) must not be used for any non-regulatory purpose. Furthermore, the Exchange proposes to add, similar to the ISE, GEMX, and MRX LLC Agreements, that nothing in the LLC Agreement shall be interpreted as to limit or impede the rights of the Commission to access and examine such confidential information pursuant to federal securities laws and the rules and regulations thereunder, or to limit or impede the ability of any officers, directors, employees or agents of the Exchange to disclose such confidential information to the Commission. The Exchange believes that the proposed changes will add more specificity as to who may access the Exchange's books and records, especially relating to confidential information on the self-regulatory function of the Exchange, and the use of such information.

- **Assignments:** Section 20 of the LLC Agreement currently prohibits the Exchange's stockholder from transferring or assigning in whole or in part its limited liability company interest in the Exchange, except to an affiliate of the stockholder. The Exchange now proposes to provide in Section 20 that any transfer or assignment by the stockholder of its equity ownership interest in the Exchange is prohibited unless it is filed and approved by the Commission pursuant to a rule filing, and to delete the stockholder affiliate exception to the general prohibition on transfers and

<sup>44</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.

<sup>3</sup> "Regulatory Funds" means fees, fines, or penalties derived from the regulatory operations of the Exchange. "Regulatory Funds" shall not be construed to include revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of the Exchange, even if a portion of such revenues are used to pay costs associated with the regulatory operations of the Exchange. See By-Law Article I, Section (ii). The definition of Regulatory Funds is not changing under this proposal.