

change was published for comment in the **Federal Register** on January 30, 2023.⁴ The Commission has received no comments on the proposed rule change.

Section 19(b)(2) of the Act⁵ provides that within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after publication of the notice for this proposed rule change is March 16, 2023. The Commission is extending this 45-day time period.

The Commission finds it appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to section 19(b)(2) of the Act,⁶ designates April 28, 2023 as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR-NYSEARCA-2023-06).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97147; File No. SR-NYSEARCA-2023-24]

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 6.40P-O Pertaining to Pre-Trade Risk Controls

March 15, 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 March 9, 2023, NYSE Arca, Inc. (“NYSE Arca” 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 6.40P-O (Pre-Trade and Activity-Based Risk Controls) 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 6.40P-O (Pre-Trade and Activity-Based Risk Controls) pertaining to pre-trade risk controls to make additional pre-trade risk controls available to entering Firms.⁴ 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 (the “original filing”).⁵ In light of a comment letter dated January 5, 2023,⁶ 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 2022, in connection with the Exchange’s migration to Pillar and to better assist OTP Holders and OTP Firms in managing their risk, the Exchange adopted Rule 6.40P-O, which included pre-trade risk controls, among other activity-based controls, wherein an Entering Firm had the option of establishing limits or restrictions on certain of its trading behavior on the Exchange and authorizing the Exchange to take action if those limits or restrictions were exceeded.⁷ Specifically, the Exchange added a Single Order Maximum Notional Value Risk Limit, and a Single Order Maximum Quantity Risk Limit⁸ (collectively, the “Initial Pre-Trade 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

⁴ The term “Entering Firm” refers to an OTP Holder or OTP Firm (including those acting as Market Makers). See Rule 6.40P-O(a)(1).

⁵ See Securities Exchange Act Release No. 96829 (February 7, 2023), 88 FR 8980 (February 10, 2023) (SR-NYSEARCA-2022-82).

⁶ 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 19, 2023, available at <https://www.sec.gov/comments/sr-bx-2022-022/srbx2022022-20155250-323599.pdf>. HPR is a provider of (among other things) non-exchange based risk controls solutions.

⁷ See Securities Exchange Act Release No. 94072 (January 26, 2022), 87 FR 5592 (February 1, 2022) (Notice of filing Notice of Filing of Amendment No. 4 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 4) (SR-NYSEARCA-2021-47).

⁸ The terms “Single Order Maximum Notional Value Risk Limit, and “Single Order Maximum Quantity Risk Limit” are defined in Rule 6.40P-O(a)(2).

exchange from accepting or ranking orders priced greater than \$1.00 per share in an increment smaller than \$0.01. See Securities Exchange Act Release No. 71176 (December 23, 2013), 78 FR 79524 (December 30, 2013) (SR-NYSEARCA-2013-107).

⁴ See Securities Exchange Act Release No. 96741 (Jan. 24, 2023), 88 FR 5948.

⁵ 15 U.S.C. 78s(b)(2).

⁶ *Id.*

⁷ 17 CFR 200.30-3(a)(31).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 Exchange's affiliate equities exchanges, including NYSE American LLC ("NYSE American"),⁹ as well as on other equities exchanges, including Cboe,¹⁰ Nasdaq,¹¹ MEMX,¹² and MIAAX Pearl.¹³

Like the Initial Pre-Trade 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,"¹⁴ 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."¹⁵ Instead, Citadel recommended that exchanges "ensure orders follow the same order processing logic regardless of which options or features are enabled,"¹⁶ in order to eliminate any competitive advantage or disadvantages for clients.

This is the model that the Exchange used in building the Initial Pre-Trade Risk Controls that the Commission approved in 2020,¹⁷ 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 and quotes, regardless of whether a particular client has opted to use that functionality for a particular order or quote. For example, the Exchange's limit order price protection applies generally to trading on the Exchange and orders or quotes with limit prices are not processed more slowly than those without. Similarly, the Exchange's

trading systems check all orders and quotes 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.¹⁸ The Exchange also notes that the Citadel white paper cited above was written "in collaboration with several major exchanges, including NYSE, Nasdaq, MIAAX, 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.¹⁹

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 Initial Pre-Trade Risk Controls 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 NMS²⁰ applies here and should require the Exchange to justify this *de minimis* latency change in a number of ways.²¹ 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,²² but a functional enhancement to the Exchange's trading systems, and, like any change to a trading system's

⁹ See, e.g., Securities Exchange Act Release Nos. 96922 (February 14, 2023), 88 FR 10580 (February 14, 2023) (SR–NYSE AMER–2023–12) (modifying NYSE American Rule 7.19E).

¹⁰ 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).

¹¹ 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).

¹² 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).

¹³ 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)).

¹⁴ 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 collocated 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.

¹⁵ *Id.* at 5.

¹⁶ *Id.*

¹⁷ 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.

¹⁸ 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."); MIAAX Pearl Equities Exchange User Manual, updated October 2022, available at https://www.miaaxequities.com/sites/default/files/website_file-files/MIAAX_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").

¹⁹ See Citadel white paper, *supra* note 14, at 2.

²⁰ 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>.

²¹ HPR Letter, *supra* note 6 at 5–6.

²² Indeed, the Commission did not treat any of the other exchanges' filings for pre-trade risk controls listed above in notes 9–13 as "intentional access delays."

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 functional enhancement to the Exchange's Pillar gateway²³ and the risk checks would be applied to all orders and quotes 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/quote 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.

Proposed Amendment to Rule 6.40P–O

To accomplish this rule change, the Exchange proposes to amend the definition of the term “Pre-Trade Risk Controls” set forth in Rule 6.40P–O(a)(2) to adopt the definition of “Single-Order Risk Controls,” which controls would be listed in proposed paragraph (A) to Rule 6.40P–O(a)(2). As proposed, the “Single-Order Risk Controls” would include the already-defined risk

²³ The one exception is the proposed pre-trade risk control in paragraph (a)(2)(A)(ii), 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 6.62P–O(a)(3)(A) regarding Limit Order Price Protection. This risk check, like the Exchange's Limit Order Price Protection, is implemented in the matching engine.

controls of the Single Order Maximum Notional Value Risk Limit and Single Order Maximum Quantity Risk Limit (collectively referred to herein as the “existing Single-Order Risk Checks”), with non-substantive changes to streamline the descriptions of these controls into new paragraph (i) of proposed Rule 6.40P–O(a)(2)(A).²⁴ However, because of a lack of demand for the option to apply the existing Single-Order Risk Checks to Market Maker quotes, the Exchange proposes to discontinue functionality supporting this optional feature.

In the addition, the Exchange proposes to add paragraphs (a)(2)(A)(ii) through (v) to enumerate the proposed new Single-Order Risk Controls, as follows:

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

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

(iv) controls to restrict the options class transacted; and

(v) controls to prohibit duplicative orders.

Each of the new Single-Order Risk Controls in proposed paragraph (a)(2)(A)(ii)–(v) is substantively identical to risk settings already in place on the Exchange's affiliate equities exchange, NYSE American as well as those on other equities exchanges, including Cboe, Nasdaq, MEMX, and MIAAX Pearl,²⁵ except that the proposed controls account for options trading, such as including reference to “an order or quote” versus “an order” and reference to restrictions on trading in an “options class” versus on “the types of securities transacted (including but not limited to restricted securities).”²⁶ As such, the proposed new optional Pre-Trade Risk Controls are familiar to market participants and are not novel.

The Exchange proposes to modify current paragraph (b)(2) regarding the setting and adjusting of the Pre-Trade Risk Controls to state that, in addition

²⁴ See proposed Rule 6.40P–O(a)(2)(A)(i) (setting forth “controls related to the maximum dollar amount for a single order to be applied one time (“Single Order Maximum Notional Value Risk Limit”) and the maximum number of contracts that may be included in a single order before it can be traded (“Single Order Maximum Quantity Risk Limit”). Orders designated GTC will be subject to these checks only once.”) Consistent with the foregoing changes, the Exchange proposes to delete current paragraph (B) to Rule 6.40P–O(a)(2)(B). See *id.*

²⁵ See *supra* notes 9–13.

²⁶ See proposed Rule 6.40P(a)(2)(A)(ii) and (a)(2)(A)(iv) as compared to NYSE American Rule 7.19E(b)(2)(B) and (b)(2)(F), respectively.

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, that Pre-Trade Risk Controls to restrict the options class(es) transacted must be set per option class.²⁷

The Exchange proposes to modify paragraph (c)(1) regarding “Breach Action for Pre-Trade Risk Controls.” First, the Exchange proposes to specify that “[a] Limit Order that breaches any Single-Order Risk Control will be rejected.”²⁸ The proposed functionality is consistent with the treatment of Limit Orders that breach the existing Single Order Risk Checks and simply extends the application of the breach action to the newly proposed Single-Order Risk Controls. Next, proposed Rule 6.40P–O(c)(1)(A)(ii) specifies that “[a] Market Order that arrives during a pre-open state will be cancelled if the quantity remaining to trade after an Auction breaches the Single Order Maximum Notional Value Risk Limit,” which functionality is identical to treatment of such interest under the current Rule.²⁹ Proposed Rule 6.40P–O(c)(1)(A)(ii) further specifies that “[a]t all other times, a Market Order that triggers or breaches any Single-Order Risk Control will be rejected.”³⁰ The proposed functionality is consistent with the treatment of Market Orders (that arrive other than during a pre-open state) that breach the existing Single Order Risk Checks and simply extends the application of the breach action to the newly proposed Single-Order Risk Controls. Further, proposed Rule 6.40P–O(c)(1)(A)(iii) addresses the breach action relevant to the new Single-Order Risk Control set forth in proposed Rule 6.40P–O(a)(2)(A)(ii) (*i.e.*, a breach of controls related to the price of an order or quote including percentage-based and dollar-based controls). As proposed, a Limit Order or quote that would breach a price control under paragraph (a)(2)(A)(ii) would be rejected or cancelled as specified in Rule 6.62P–O(a)(3)(A) (Limit Order Price Protection).³¹

²⁷ See, *e.g.*, Rule 7.19E(d)(2) (specifying that pre-trade risk controls related to transacting in restricted securities must be set per symbol).

²⁸ See proposed Rule 6.40P(c)(1)(A)(i).

²⁹ See Rule 6.40P(c)(1)(A)(i) (providing, in relevant part, that “[a] Market Order that breaches the designated limit of a Single Order Maximum Quantity Risk Limit” will be “canceled if the order was received during a pre-open state and the quantity remaining to trade after an Auction concludes breaches the designated limit.”)

³⁰ See proposed Rule 6.40P(c)(1)(A)(ii).

³¹ See proposed Rule 6.40P(c)(1)(A)(iii).

Finally, the Exchange proposes to add new Commentary .02 to specify the interplay between the Exchange's Limit Order Price Protection ("LOPP") functionality and the price controls that may be set by an Entering Firm pursuant to proposed paragraph (a)(2)(A)(ii). Proposed Commentary .02 specifies that an Entering Firm may set price controls under paragraph (a)(2)(A)(ii) that are equal to or more restrictive than levels set by the Exchange LOPP functionality.

Continuing Obligations of OTP Holders Under Rule 15c3-5

The proposed Pre-Trade Risk Controls described here are meant to supplement, and not replace, the OTP 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 OTP 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 OTP Holder's obligations required by Exchange or federal rules (including, without limitation, the Rule 15c3-5 under the Act³² ("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 OTP Holder.³³

Timing and Implementation

The Exchange anticipates completing the technological changes necessary to implement the proposed rule change in the second quarter of 2023, but in any event no later than June 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,³⁴ in general, and furthers the objectives of Section 6(b)(5) of the Act,³⁵ 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.³⁶

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 optional additional Pre-Trade Risk Controls would provide Entering Firms with enhanced abilities to manage their risk with respect to orders or quotes on the Exchange. The proposed additional Pre-Trade Risk Controls are not novel; they are based on existing risk settings already in place on NYSE American, as well as those on Cboe, Nasdaq, MEMX and MIAx Pearl equities exchanges,³⁷ and market participants are already familiar with the types of protections that the proposed risk controls afford. Moreover, the proposed new Single-Order Risk Controls (like the existing Single-Order Risk Checks) are options and, as such, Entering Firms are free to utilize or not at their discretion. 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 OTP 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 (a)(2)(A)(ii) that are equal to or more restrictive than the levels established in the Exchange's LOPP functionality, which protects from aberrant trades, thus improving continuous trading and price discovery. To the extent that Entering Firms would like to further manage their exposure to aberrant trades, this proposed functionality affords such Firms the ability to set price controls at levels that are more restrictive than the LOPP levels. Additionally, because price controls set by an Entering Firm under paragraph (a)(2)(A)(ii) 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 cancelled as specified per Rule 6.62P-O(a)(3)(A) regarding the LOPP.

Finally, the Exchange believes that the proposed rule change does not unfairly discriminate among the Exchange's OTP 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 OTP 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 through the risk checks, even for OTP Holders or OTP Firms 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 and quotes on the Exchange; by applying them uniformly, the Exchange would avoid producing incentives for all firms to

³² See 17 CFR 240.15c3-5.

³³ See also Commentary .01 to Rule 6.40P-O, which provides that the Pre-Trade Risk Controls set forth in Rule 6.40P-O "are meant to supplement, and not replace, the OTP Holder's or OTP Firm'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 OTP Holder or OTP Firm."

³⁴ 15 U.S.C. 78f(b).

³⁵ 15 U.S.C. 78f(b)(5).

³⁶ 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 6, 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 9-13 as fee filings.

³⁷ See *supra* notes 9-13.

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 OTP Holders and OTP Firms 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 OTP Holders and OTP Firms 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.³⁸ 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

³⁸ See HPR Letter, *supra* note 6, 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.").

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 Initial Pre-Trade 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 OTP Holder's or OTP Firm'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 proposed pre-trade risk controls proposed here is *de minimis* and would not have a material impact on the order flow of OTP Holders and OTP Firms 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.³⁹ Since 2017, equities exchanges have been adding pre-trade risk controls to their trading systems. And, in 2022, the Exchange adopted the Initial Pre-Trade Risk Controls. 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 OTP Holders and OTP Firms 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.

³⁹ See *supra* notes 9–13.

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 Act⁴⁰ and Rule 19b–4(f)(6) thereunder.⁴¹ 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.⁴²

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)⁴³ 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-NYSEARCA-2023-24 on the subject line.

Paper Comments

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

⁴⁰ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴¹ 17 CFR 240.19b–4(f)(6).

⁴² 17 CFR 240.19b–4(f)(6)(iii). In addition, Rule 19b–4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

⁴³ 15 U.S.C. 78s(b)(2)(B).

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

All submissions should refer to File Number SR-NYSEARCA-2023-24. 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-NYSEARCA-2023-24 and should be submitted on or before April 11, 2023.

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

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97149; File No. SR-MIAX-2023-11]

Self-Regulatory Organizations: Miami International Securities Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Non-Substantively Amend the MIAX Fee Schedule

March 15, 2023.

Pursuant to the provisions of 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 March 3, 2023, Miami International Securities Exchange LLC (“MIAX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing a proposal to amend the MIAX Fee Schedule (“Fee Schedule”) to make minor, non-substantive clarifying changes.

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings>, at MIAX's principal office, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

The Exchange proposes to amend the Fee Schedule to make minor, non-substantive clarifying changes. Specifically, the Exchange proposes to amend instances of the phrases “MIAX Select Symbols” and “non-MIAX Select Symbols” in Section 1(a)iii) of the Fee Schedule to clarify that the terms “Select Symbols” and “non-MIAX Select Symbols” refer to options listed on MIAX.

Background

The Exchange initially created the list of Select Symbols on March 1, 2014,³ and has added, removed and amended symbol names of option classes from that list since that time.⁴ Select Symbols are rebated slightly higher in certain Priority Customer Rebate Program (“PCRP”)⁵ tiers and segments than non-Select Symbols. Currently, the term “MIAX Select Symbols” means options overlying AAL, AAPL, AMAT, AMD, AMZN, BA, BABA, BB, BIDU, BP, C, CAT, CLF, CVX, DAL, EBAY, EEM, FCX, GE, GILD, GLD, GM, GOOGL, GPRO, HAL, INTC, IWM, JNJ, JPM, KMI, KO, META, MO, MRK, NFLX, NOK, ORCL, PBR, PFE, PG, QCOM, QQQ, RIG, SPY, T, TSLA, USO, VALE, WBA, WFC, WMB, X, XHB, XLE, XLF, XLP, XOM and XOP.⁶

Proposal

First, the Exchange proposes to amend two column headers of the PCRP Table in Section 1(a)iii) of the Fee

³ See Securities Exchange Act Release No. 71700 (March 12, 2014), 79 FR 15188 (March 18, 2014) (SR-MIAX-2014-13).

⁴ See, e.g., Securities Exchange Act Release Nos. 89530 (August 12, 2020), 85 FR 50845 (August 18, 2020) (SR-MIAX-2020-26); 88850 (May 11, 2020), 85 FR 29497 (May 15, 2020) (SR-MIAX-2020-09); 87964 (January 14, 2020), 85 FR 3435 (January 21, 2020) (SR-MIAX-2020-01); 87790 (December 18, 2019), 84 FR 71037 (December 26, 2019) (SR-MIAX-2019-49); 85314 (March 14, 2019), 84 FR 10359 (March 20, 2019) (SR-MIAX-2019-07); 81998 (November 2, 2017), 82 FR 51897 (November 8, 2017) (SR-MIAX-2017-45); 81019 (June 26, 2017), 82 FR 29962 (June 30, 2017) (SR-MIAX-2017-29); 79301 (November 14, 2016), 81 FR 81854 (November 18, 2016) (SR-MIAX-2016-42); 74291 (February 18, 2015), 80 FR 9841 (February 24, 2015) (SR-MIAX-2015-09); 74288 (February 18, 2015), 80 FR 9837 (February 24, 2015) (SR-MIAX-2015-08); 73328 (October 9, 2014), 79 FR 62230 (October 16, 2014) (SR-MIAX-2014-50); 72567 (July 8, 2014), 79 FR 40818 (July 14, 2014) (SR-MIAX-2014-34); 72356 (June 10, 2014), 79 FR 34384 (June 16, 2014) (SR-MIAX-2014-26); 71700 (March 12, 2014), 79 FR 15188 (March 18, 2014) (SR-MIAX-2014-13).

⁵ See section 1(a)iii) of the Fee Schedule for a complete description of the PCRP.

⁶ See Fee Schedule, note 14.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁴⁴ 17 CFR 200.30-3(a)(12).