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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-86363; File No. SR-PEARL-2019-22]

### **Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX PEARL Fee Schedule July 12, 2019.**

Pursuant to the provisions of 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 June 28, 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 certain non-transaction fees applicable to participants and new members trading options on and/or using services provided by MIAX PEARL.

MIAX PEARL commenced operations as a national securities exchange registered under Section 6 of the Act<sup>3</sup> on February 6, 2017.<sup>4</sup> The Exchange adopted its transaction fees and certain of its non-transaction fees in its filing SR-PEARL-2017-10.<sup>5</sup>

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

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

<sup>3</sup> 15 U.S.C. 78f.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative on July 1, 2019.

The Exchange initially filed the proposal on March 27, 2019 (SR-PEARL-2019-12).<sup>6</sup> That filing was withdrawn on May 20, 2019. It is replaced with the current filing (SR-PEARL-2019-22).

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 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

##### Proposal

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<sup>4</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>5</sup> See Securities Exchange Act Release No. 80061 (February 17, 2017), 82 FR 11676 (February 24, 2017) (SR-PEARL-2017-10).

<sup>6</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").

The Exchange proposes to amend the Fee Schedule to establish certain non-transaction fees applicable to participants and new members trading options on and/or using services provided by MIAX PEARL. The Exchange initially filed the proposal on March 27, 2019, designating the proposed fees effective April 1, 2019.<sup>7</sup> The First Proposed Rule Change was published for comment in the Federal Register on April 12, 2019.<sup>8</sup> The proposed fee changes remained in effect until the Exchange withdrew the First Proposed Rule Change on May 20, 2019.<sup>9</sup> The Exchange is now re-filing the proposal to establish certain non-transaction fees applicable to market participants and new members trading options on and/or using certain services provided by the Exchange, to include additional information.

The Exchange introduced the structure of certain non-transaction fees in its filing SR-PEARL-2017-10<sup>10</sup> (without proposing actual fee amounts), but also explicitly waived the assessment of any such fees for the period of time which the Exchange defined as the “Waiver Period.”<sup>11</sup> The Exchange now proposes to adopt certain non-transaction fees as described below, and thereby terminate the Waiver Period applicable to such non-transaction fees. In general, the Exchange proposes to amend the Fee Schedule to establish a one-time membership application

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<sup>7</sup> See id.

<sup>8</sup> See id.

<sup>9</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>10</sup> See supra note 5.

<sup>11</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.

fee for MIAX PEARL Members<sup>12</sup>; Application Programming Interface (“API”) Testing and Certification fees; and MIAX PEARL Member Participant Identifier (“MPID”)<sup>13</sup> fees.

The Exchange also proposes to amend the Fee Schedule to remove the text and application of the three-month New Member Non-Transaction Fee Waiver.<sup>14</sup> The Exchange adopted the three-month New Member Non-Transaction Fee Waiver in its filing SR-PEARL-2018-07.<sup>15</sup>

The Exchange proposes to remove the New Member Non-Transaction Fee Waiver as described below, and thereby terminate the New Member Non-Transaction Fee Waiver as it applies to all relevant fees, which would include the Monthly Trading Permit fee; Port fees; and MIAX PEARL Top of Market (“ToM”) and MIAX PEARL Liquidity Feed (“PLF”) market data fees. The Exchange also proposes to amend the Definitions section of the Fee Schedule to delete the definitions of “New Member Non-Transaction Fee Waiver” and “Waiver Period” as those definitions would no longer be applicable in accordance with this proposal to remove the Waiver

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<sup>12</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>13</sup> An MPID is a code used in the MIAX PEARL system to identify the participant to MIAX PEARL and to the participant’s Clearing Member respecting trades executed on MIAX PEARL. Participants may use more than one MPID.

<sup>14</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>15</sup> See Securities Exchange Act Release No. 82867 (March 13, 2018), 83 FR 12044 (March 19, 2018)(SR-PEARL-2018-07).

Period for all remaining waived non-transaction fees, as described below, including the three-month fee waiver applicable to certain non-transaction fees for new Members of the Exchange.

#### MIAX PEARL Membership Application Fee

The Exchange proposes to assess a one-time membership application fee based upon the applicant's status as either an Electronic Exchange Member<sup>16</sup> ("EEM") or as a Market Maker.<sup>17</sup> The Exchange proposes that applicants for MIAX PEARL Membership as an EEM will be assessed a one-time application fee of \$500. The Exchange proposes that applicants for MIAX PEARL Membership as a Market Maker will be assessed a one-time application fee of \$1,500. The difference in the proposed membership application fee to be charged to EEMs and Market Makers reflects the additional review and processing costs and effort needed for Market Maker applications. MIAX PEARL's proposed one-time membership application fees are similar to and generally lower than one-time application fees in place at the Cboe Exchange, Inc. ("Cboe") (\$3,000 for an individual applicant and \$5,000 for an applicant organization)<sup>18</sup> and at Nasdaq ISE, LLC ("Nasdaq ISE") (\$7,500 per firm for a primary market maker, \$5,500 per firm for a competitive market maker, and \$3,500 per firm for an electronic market maker).<sup>19</sup> Below is the table for the proposed one-time membership application fee for MIAX PEARL:

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<sup>16</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>17</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>18</sup> See Cboe Fees Schedule, p. 12, Cboe Trading Permit Holder Application Fees.

<sup>19</sup> See Nasdaq ISE, Options Rules, Options 7, Pricing Schedule, Section 9. Legal and Regulatory A. Application.

Type of Membership	Application Fee
Electronic Exchange Member	\$500.00
Market Maker	\$1,500.00

MIAX PEARL will assess a one-time Membership Application Fee on the earlier of (i) the date the applicant is certified in the membership system, or (ii) once an application for MIAX PEARL membership is finally denied.

#### Member API Testing and Certification Fee

Next, the Exchange proposes to assess an API Testing and Certification fee to 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 EEMs, testing all available order types, new order entry, order management, order throughput and mass order cancellation. For Market Makers, 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 assess an API testing and certification fee for Members (i) initially per API for FIX<sup>20</sup>, MEO<sup>21</sup>, FXD<sup>22</sup> and CTD<sup>23</sup> in the

<sup>20</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>21</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>22</sup> “FXD Interface” or “FIX Drop Copy Port” means a messaging interface that provides a

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 Exchange initiates a mandatory change to the Exchange's System<sup>24</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.

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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>23</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>24</sup> The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

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.

Non-Member API Testing and Certification Fee

The Exchange proposes to assess an API Testing and Certification fee for Third Party Vendors,<sup>25</sup> Service Bureaus<sup>26</sup> and other non-Members (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 in situations where the Exchange initiates a mandatory change to the Exchange’s System that requires testing and certification.

The Exchange’s proposed API Testing and Certification fees for non-Members are based upon the type of interface used by the non-Member to connect to the Exchange – the FIX

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<sup>25</sup> Third party vendors are subscribers of MIAX’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>26</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.

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 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; generally fewer questions and issues arise 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.

### MPID Fees

The Exchange proposes to assess monthly MPID fees to Members based upon the type of MPID. MPID fees are assessed for assigning and managing these identifiers for each Member. The Exchange proposes that Members will be assessed a monthly MPID fee of \$125 for each FIX MPID and Members will be assessed a monthly MPID fee of \$125 for each MEO MPID. MPIDs allow the Exchange to provide additional services to its Members, including customer reporting, monitoring and risk protection services, down at the MPID level. MPIDs provide Members the ability to segment their business operations in a manner that can be tailored to their business needs, as well as receive certain additional administrative and operational services provided by the Exchange.

The Exchange also proposes to introduce a cap on the amount of MPID fees that can be assessed by the Exchange to a Member of \$500 per month, regardless of the actual number of EEM or MEO MPIDs assigned to such Member. The Exchange believes that establishing a monthly cap on MPID fees will provide Members greater flexibility to accommodate their varying business models and customer configurations, as many Members often request multiple MPIDs from the Exchange, and the Exchange does not want MPID costs to serve as a barrier for requesting multiple MPIDs. The Exchange notes that this fee cap is similar to the MPID fee cap

assessed by the Exchange's affiliate, Miami International Securities Exchange, LLC ("MIAX").<sup>27</sup>

Below is the proposed MPID fee table:

Type of MPID	Monthly MPID Fees
FIX MPID	\$125.00
MEO MPID	\$125.00

MPID fees are capped at \$500.00 per month per Member.

#### New Member Non-Transaction Fee Waiver

The Exchange proposes to remove the New Member Non-Transaction Fee Waiver from the Fee Schedule. The New Member Non-Transaction Fee Waiver waived the assessment of a fee for a Trading Permit, Port, ToM or PLF market data feed for a new Member of the Exchange for the first calendar month during which the new Member was approved as a Member and was credentialed to use the System in the production environment, and for the two (2) subsequent calendar months thereafter.

The Exchange initially waived certain non-transaction fees for new Members in order to attract new business and encourage Members to use the Exchange. The Exchange now believes that the New Member Non-Transaction Fee Waiver is no longer necessary since the MIAX PEARL market is established and MIAX PEARL no longer needs to rely on such waivers to attract market participants.

The Exchange notes that any Member who began receiving the New Member Non-Transaction Fee Waiver prior to the filing of this proposal, will continue to receive that benefit for the first calendar month during which they were approved as a Member and were

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<sup>27</sup> See Securities Exchange Act Release No. 82823 (March 7, 2018), 83 FR 10935 (March 13, 2018) (SR-MIAX-2018-09).

credentialed to use the System in the production environment, and for the two (2) subsequent calendar months thereafter.

#### Applicability to and Impact on Participants<sup>28</sup>

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>29</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than approximately 16% market share.<sup>30</sup> Therefore, no exchange possesses significant pricing power. More specifically, as of June 2019, the Exchange has less than 5% market share of

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<sup>28</sup> On May 21, 2019, the SEC Division of Trading and Markets (the “Division”) issued fee filing guidance titled “Staff Guidance on SRO Rule Filings Relating to Fees” (“Guidance”). Within the Guidance, the Division noted, among other things, that the purpose discussion should address “how the fee may apply differently (e.g., additional cost vs. additional discount) to different types of market participants (e.g., market makers, institutional brokers, retail brokers, vendors, etc.) and different sizes of market participants.” See Guidance (available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>). The Guidance also suggests that the purpose discussion should include numerical examples. Where possible, the Exchange is including numerical examples. In addition, the Exchange is providing data to the Commission in support of its arguments herein. The Guidance covers all aspects of a fee filing, which the Exchange has addressed throughout this filing.

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

<sup>30</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>.

executed volume of multiply-listed equity & ETF options trades.<sup>31</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 fee changes. Accordingly, competitive forces constrain the Exchange's ability to set its fees for various products, services and transactions.

The proposed adoption of certain non-transaction fees would be applied uniformly to all market participants. Further, as there are currently 16 registered options exchanges competing for order flow with no single exchange accounting for more than approximately 16% of market share, the Exchange cannot predict with certainty whether any participant is planning to become a Member or utilize any of the services that the Exchange is planning to establish fees for and thus would be subject to the proposed fees.

The Exchange has issued a Regulatory Circular announcing the establishment of the aforementioned fees that were subject to the Waiver Period at least 15 days prior to the termination of the Waiver Period and effective date of the applicable fee.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>32</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>33</sup> in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free

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<sup>31</sup> See id.

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

<sup>33</sup> 15 U.S.C. 78f(b)(4) and (5).

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. Moreover, the Exchange believes that its proposal complies with Commission guidance on SRO fee filings that the Commission Staff issued on May 21, 2019.<sup>34</sup>

The Exchange believes that the proposed change to eliminate the waiver of the non-transaction fees described above is reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the market for options transaction and non-transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’....”<sup>35</sup>

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options transaction services. The Exchange is one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing options exchanges offer complex order functionality, with varying pricing schedules. The Exchange believes its proposed fees are

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<sup>34</sup> See Guidance, supra note 28.

<sup>35</sup> NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

reasonable and well within the range of non-transaction fees assessed among other exchanges, including the Exchange's affiliate, MIAX.<sup>36</sup>

Within this environment, market participants can freely and often do shift their order flow among the Exchange and competing venues in response to changes in their respective pricing schedules.<sup>37</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 trades.<sup>38</sup> Therefore, no exchange possesses significant pricing power. More specifically, as of June 2019, the Exchange had less than 5% market share of executed volume of multiply-listed equity & ETF options trades.<sup>39</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 fee changes. Accordingly, competitive forces constrain the Exchange's ability to set its fees for various products, services and transactions.

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<sup>36</sup> See the MIAX Fee Schedule.

<sup>37</sup> While MIAX PEARL has not charged certain non-transaction fees as described above, to date, the Exchange perceives no regulatory, structure, or cost impediments to market participants shifting order flow away from it as a result of this rule change. See Guidance, supra note 28. In particular, the Exchange notes that these examples of shifts in liquidity and market share, along with many others, have occurred within the context of market participants' existing duties of Best Execution and obligations under the Order Protection Rule under Regulation NMS.

<sup>38</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>39</sup> See id.

Further, the Exchange no longer believes it is necessary to waive these 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 that the proposed changes are equitable and not unfairly discriminatory because the elimination of the non-transaction fees will uniformly apply to all Exchange participants based on market participant type.

The Exchange believes its one-time membership application fees are reasonable, equitable and not unfairly discriminatory. As described above, the one-time application fees are similar and generally lower than application fees in place at other options exchanges,<sup>40</sup> and are designed to recover costs associated with the processing of such applications. The Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that Market Maker applicants are charged slightly more than EEM applicants because of the additional costs involved in processing a Market Maker's application.

The Exchange believes it is reasonable, equitable, and not unfairly discriminatory to begin to assess API Testing and Certification fees for both Members and non-Members. The Exchange believes the proposed API Testing and Certification fees are a reasonable allocation of its costs and expenses among its Members and non-Members using its facilities since it is recovering the costs associated with providing such infrastructure testing and certification services.

MIAX PEARL believes it is reasonable, equitable and not unfairly discriminatory to assess different API Testing and Certification fees to Members and non-Members. The higher fee charged to non-Members reflects the greater amount of time spent by MIAX PEARL

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<sup>40</sup> See supra notes 18 and 19.

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; generally fewer questions and issues arise 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.

The Exchange believes its proposal to assess monthly MPID fees to Members based upon the type of MPID is reasonable, equitable and not unfairly discriminatory because the proposed fees apply to all Members assigned MPIDs equally and will allow the Exchange to assess fees for assigning and maintaining such services. The Exchange believes its proposal is a reasonable allocation of fees because MPIDs provide Members the ability to segment their business operations in a manner that can be tailored to their business needs, as well as receive certain additional administrative and operational services provided by the Exchange. The proposed monthly MPID fees are equitable and not unfairly discriminatory because the proposed MPID fees will allow the Exchange to continue to maintain and enhance value-added services, including reporting of relevant trade information through enhanced reporting tools and provide ongoing services to customers that are assigned each MPID. The Exchange also notes that Members are not required to purchase multiple MPIDs. As of June 2019, the Exchange had 41 Members (including affiliates of Members) that have at least 1 MPID each. Of those 41 Members, 20 Members have multiple MPIDs. Further, of the 20 Members with multiple MPIDs, only 8 of those Members have more than 4 MPIDs each. Accordingly, with the proposed fee cap

of \$500, those 8 Members with the greatest number of MPIDs would benefit from the proposed fee cap.

The Exchange also believes that its proposal to establish a fee cap for Members on MPID fees is reasonable, equitable, and not unfairly discriminatory. The proposal to cap the total amount of MPID fees that can be assessed upon a Member to a maximum of \$500 per month is designed to promote just and equitable principles of trade by encouraging Members to configure their MPID assignments with greater granularity and for MPID costs to not serve as a barrier for requesting multiple MPIDs. Because any Member is eligible to take advantage of the fee cap, the Exchange believes the fee cap is fair and equitable and not unreasonably discriminatory because it applies equally to all Members, and access to such fee cap is offered on terms that are not unfairly discriminatory.

The Exchange believes that the proposal to remove the New Member Non-Transaction Fee Waiver is reasonable, equitable, and not unfairly discriminatory because the removal of the New Member Non-Transaction Fee Waiver applies equally to all new Members of the Exchange. The Exchange initially waived certain non-transaction fees for new Members in order to attract new business and encourage Members to join the Exchange. The Exchange believes that the New Member Non-Transaction Fee Waiver is no longer necessary since the MIAX PEARL market is established and MIAX PEARL no longer relies on such waivers to attract market participants. Further, the proposed rule change will not apply to any new Member who began receiving the New Member Non-Transaction Fee Waiver prior to the filing of this proposal and will continue to receive that benefit for the first calendar month during which they were approved as a Member and were credentialed to use the System in the production environment, and for the two (2) subsequent calendar months thereafter.

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 non-transaction 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 its affiliate, MIAX.

The Exchange believes that the proposed non-transaction fees do not place certain market participants at a relative disadvantage to other market participants because the pricing is associated with costs to the Exchange of the relevant fee being proposed. The proposed non-transaction fees do not apply unequally to different size market participants, but instead would

allow the Exchange to recoup some of its costs in reviewing and processing Market Maker and EEM membership applications; costs 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); and costs associated with assigning and managing MPIDs for Members to ensure proper reporting, monitoring and risk protection services for customers. Accordingly, the proposed non-transaction fees do not favor certain categories of market participants in a manner that would impose a burden on competition.

Further, the Exchange believes that the proposed rule change will promote transparency by making it clear to Members and non-Members the fees that MIAX PEARL will assess for Membership application to MIAX PEARL, API testing and certification, and MPID fees, as well as the cap on MPID fees for EEMs. This will permit Members and non-Members to more accurately anticipate and account for non-transactional costs, which promotes consistency.

#### Inter-Market Competition

The Exchange believes the proposed non-transaction fees do not place an undue burden on competition on other SROs that is not necessary or appropriate. The Exchange operates in a highly competitive market in which market participants can readily favor one of the 16 competing options venues if they deem fee levels at a particular venue to be excessive. Based on publicly-available information, and excluding index-based options, no single exchange has more than 16% market share. Therefore, no exchange possesses significant pricing power in the execution of multiply-listed and ETF options order flow. As of June 2019, to date, the Exchange

had less than 5% market share 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>41</sup> and Rule 19b-4(f)(2)<sup>42</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:

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<sup>41</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>42</sup> 17 CFR 240.19b-4(f)(2).

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>);  
or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-PEARL-2019-22 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-2019-22. This file number should be included on the subject line if e-mail 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-2019-22 and

should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>43</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>43</sup> 17 CFR 200.30-3(a)(12).

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