

either approve the accommodation proposal, disapprove the accommodation proposal, or to institute proceedings to determine whether to approve or disapprove the accommodation proposal, to October 30, 2012.<sup>6</sup> On October 26, 2012, the Commission instituted proceedings to determine whether to approve or disapprove the accommodation proposal.<sup>7</sup> The Commission subsequently received six additional comment letters on the accommodation proposal<sup>8</sup> and a second response letter from Nasdaq.<sup>9</sup>

Section 19(b)(2) of the Act<sup>10</sup> provides that, after initiating disapproval proceedings, the Commission shall issue an order approving or disapproving the proposed rule change not later than 180 days after the date of publication of notice of filing of the proposed rule change.<sup>11</sup> The Commission may extend the period for issuing an order approving or disapproving the proposed rule change, however, by not more than 60 days if the Commission determines that a longer period is appropriate and publishes the reasons for such determination.<sup>12</sup> The proposed rule change was published for notice and comment in the **Federal Register** on August 1, 2012. January 28, 2013, is 180 days from that date, and March 29, 2013, is 240 days from that date.

The Commission finds it appropriate to designate a longer period within which to issue an order approving or disapproving the proposed rule change so that it has sufficient time to consider the accommodation proposal, the issues

raised in the comment letters that have been submitted in response to the accommodation proposal, including comment letters submitted in response to the Order Instituting Proceedings, and the Exchange's responses to such comments.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> designates March 29, 2013 as the date by which the Commission shall either approve or disapprove the proposed rule change (File No. SR-NASDAQ-2012-090).

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

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68711; File No. SR-MIAX-2013-01]

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

January 23, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 14, 2013, Miami International Securities Exchange LLC ("Exchange" or "MIAX") filed with the Securities and Exchange Commission ("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 is filing a proposal to amend the MIAX Options Fee Schedule (the "Fee Schedule") by adopting additional Transaction Fees and establishing an Options Regulatory Fee applicable to participants trading options on and using services provided by MIAX.

While changes to the Fee Schedule pursuant to this proposal are effective upon filing, the Exchange has designated these changes to be operative January 2, 2013.<sup>3</sup>

The text of the proposed rule change is available on the Exchange's Web site at [http://www.miaxoptions.com/filter/wotitle/rule\\_filing](http://www.miaxoptions.com/filter/wotitle/rule_filing), 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 purpose of the proposed rule change is to establish select transaction and regulatory fees applicable to market participants trading options on and using services provided by the Exchange. These fees will apply to all options traded on MIAX. This proposed rule change replaces previously submitted filing SR-MIAX-2012-06, which was withdrawn, in its entirety.

###### a. Transaction Fees

The proposed Fee Schedule sets forth transaction fees for all options traded on the Exchange in amounts that vary depending upon whether the transaction is for the account of a Market Maker or other market participant, as described more fully below.

###### i. Market Maker Transaction Fees

Transaction fees applicable to Market Makers will be based upon the type of Market Maker and whether the transaction resulted from an order that was directed to the Market Maker. Market Makers are registered in one of three categories: Primary Lead Market Maker ("PLMM"),<sup>4</sup> Lead Market Maker

<sup>6</sup> See Securities Exchange Act Release No. 67842 (September 12, 2012), 77 FR 57171 (September 17, 2012).

<sup>7</sup> See Securities Exchange Act Release No. 68115 (October 26, 2012), 77 FR 66197 (November 2, 2012) ("Order Instituting Proceedings").

<sup>8</sup> See letters to Elizabeth M. Murphy, Secretary, Commission, from John Robinson dated November 13, 2012 ("Robinson Letter"); Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated November 20, 2012 ("SIFMA Letter II"); Jeremy Abelson, MJA Capital, dated November 21, 2012 ("Abelson Letter"); Douglas G. Thompson, Michael G. McLellan, and Robert O. Wilson, Finkelstein Thompson LLP, Christopher Lovell, Victor E. Stewart, and Fred T. Isquith, Lovell Stewart Halebian Jacobson LLP, Jacob H. Zamansky and Edward H. Glenn, Zamansky & Associates LLC, dated November 23, 2012 ("Thompson Letter II"); Tim Mann dated November 23, 2012 ("Mann Letter"); Mark Shelton, Group Managing Director and General Counsel, UBS Securities LLC, dated November 23, 2012 ("UBS Letter II").

<sup>9</sup> See letter to Elizabeth M. Murphy, Secretary, Commission, from Joan C. Conley, Senior Vice President and Corporate Secretary, The NASDAQ Stock Market LLC, dated December 7, 2012 ("Nasdaq Letter II").

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</sup> 15 U.S.C. 78s(b)(2)(B)(ii)(I).

<sup>12</sup> 15 U.S.C. 78s(b)(2)(B)(ii)(II).

<sup>13</sup> 15 U.S.C. 78s(b)(2).

<sup>14</sup> 17 CFR 200.30-3(a)(57).

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

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

<sup>3</sup> See File No. MIAX-2012-06, filed December 31, 2012 (withdrawn by MIAX on January 14, 2013).

<sup>4</sup> The term "Primary Lead Market Maker" means a Lead Market Maker appointed by the Exchange to

("LMM"),<sup>5</sup> or Registered Market Maker ("RMM").<sup>6</sup> When the term "Market Maker" is used herein, it shall refer collectively to all Market Makers registered in the categories of PLMM, LMM and RMM. As outlined in Chapter VI of the Exchange's rules, these categories are important in the differentiation of appointments, obligations and requirements for each type of Market Maker. As described in Rule 602, each option class can have only one PLMM appointed, but multiple LMMs and RMMs can be appointed in each option class up to a limit of 50 Market Makers per option class. PLMMs have a higher continuous quoting obligation than both LMMs and RMMs, and LMMs have a higher continuous quoting obligation than RMMs as described in Rule 604(e). Additionally, Rule 609 sets forth financial requirements—the highest level for PLMMs, the next highest level to LMMs and the lowest level for RMMs. Thus, transaction fees charged to PLMMs, LMMs and RMMs reflect the distinctions between these types of Market Makers. RMMs will be charged \$0.23 per executed contract, LMMs will be charged \$0.20 per executed contract and PLMMs will be charged \$0.18 per executed contract.

In addition, a discount of \$0.02 is applied for Directed Orders. An Electronic Exchange Member ("EEM")<sup>7</sup> may designate a Lead Market Maker ("Directed Lead Market Maker" or "Directed LMM") on orders it enters into the System. The LMM must have an appointment in the option class in order to receive a Directed Order in that option class.<sup>8</sup> An LMM may also be the

act as the Primary Lead Market Maker for the purpose of making markets in securities traded on the Exchange. The Primary Lead Market Maker is vested with the rights and responsibilities specified in Chapter VI of the Rules with respect to Primary Lead Market Makers. *See* Exchange Rule 100.

<sup>5</sup> The term "Lead Market Maker" means a Member registered with the Exchange for the purpose of making markets in securities traded on the Exchange and that is vested with the rights and responsibilities specified in Chapter VI of these Rules with respect to Lead Market Makers. When a Lead Market Maker is appointed to act in the capacity of a Primary Lead Market Maker, the additional rights and responsibilities of a Primary Lead Market Maker specified in Chapter VI of the Rules will apply. *See* Exchange Rule 100.

<sup>6</sup> The term "Registered Market Maker" means a Member registered with the Exchange for the purpose of making markets in securities traded on the Exchange, who is not a Lead Market Maker and is vested with the rights and responsibilities specified in Chapter VI of the Rules with respect to Registered Market Makers. *See* Exchange Rule 100.

<sup>7</sup> The term "Electronic Exchange Member" means the holder of a Trading Permit who is not a Market Maker. Electronic Exchange Members are deemed "members" under the Act. *See* Exchange Rule 100.

<sup>8</sup> *See* Exchange Rule 514(h) for the requirements related to Directed Orders.

PLMM in an option class and receive a Directed Order (a "Directed PLMM"). If an order is directed to a Directed LMM, the transaction fee will be \$0.18 per executed contract for that Directed LMM and if an order is directed to the Directed PLMM in an option class, the transaction fee will be \$0.16 per executed contract for the Directed PLMM. This discount is in recognition of the effort on the part of Directed LMMs and Directed PLMMs to attract directed order flow to the Exchange. RMMs are not eligible to receive Directed Orders and therefore will not be offered this discount.

MIAX's Transaction Fees for Market Makers are comparable to those of other options exchanges.

For example, NYSEAmex assesses a \$0.18 per contract transaction fee to directed market makers, whereas MIAX is proposing the same \$0.18 per contract Transaction Fee for Directed LMMs, and a \$0.16 per contract Transaction Fee for Directed PLMMs. Non-directed NYSEAmex options market makers are assessed a \$0.20 per contract transaction fee. MIAX proposes to assess non-Directed LMMs the same \$0.20 per contract Transaction Fee, and non-Directed PLMMs a Transaction Fee of \$0.18.

MIAX RMMs would be assessed a Transaction Fee of \$0.23 per contract, which is the same amount as the transaction fee in non "maker-taker" options for market makers trading in non-Penny Pilot options on NASDAQ OMX PHLX ("PHLX").<sup>9</sup>

#### ii. Other Market Participant Transaction Fees

##### Orders for Priority Customer Accounts

There will be no transaction fees assessed to EEMs entering orders for the account(s) of Priority Customers.<sup>10</sup> Similarly, NYSEAmex and PHLX do not charge transaction fees for non-professional customer orders in non-"maker-taker" options.

##### Public Customer That Is Not a Priority Customer

An EEM that enters an order that is executed for the account of a Public Customer<sup>11</sup> that does not meet the criteria for designation as a Priority

Customer will be assessed a fee of \$0.25 per contract. This fee will also be charged to an EEM that enters an order for the account of a Public Customer that has elected to be treated as a Voluntary Professional.<sup>12</sup> This transaction fee is identical to the transaction fee assessed for orders for the account(s) of PHLX "professional customers" in the non-maker-taker option classes.

##### Non-MIAX Market Maker

An EEM that enters an order that is executed for the account of a non-MIAX market maker will be assessed a fee of \$0.45 per contract. A non-MIAX market maker is a market maker registered as such on another options exchange. At forty-five cents, MIAX's transaction fee per executed contract for the account of a non-MIAX market maker is the same as CBOE (in Penny Pilot issues).

##### Non-Member Broker-Dealer

An EEM that enters an order that is executed for the account of a non-Member Broker-Dealer will be assessed a fee of \$0.45 per contract. At forty-five cents, MIAX's Transaction Fee per executed contract for the account of a non-Member Broker-Dealer will be the same as the CBOE per-contract fee for transactions for the account of a broker-dealer applicable to option classes included in the Penny Pilot.

Moreover, other exchanges currently differentiate between Broker-Dealers (the equivalent of a MIAX non-Member Broker-Dealer), Firms and "Professional Customers" (the equivalent of a MIAX non-Priority Customer) respecting Transaction Fees. For example, the term "non-Member Broker-Dealer" is used by MIAX, and is analogous to the term "Broker-Dealer" as used on PHLX. MIAX uses the term "non-Priority Customer" synonymously with the PHLX "Professional Customer."

MIAX's proposed treatment of Transaction Fees for non-Member Broker-Dealers is similar to that of Broker-Dealers on the PHLX in that the Transaction Fees applicable to them would be differentiated, and higher, than those applicable to Firms (who clear as such through OCC) and MIAX non-Priority Customers, who are subject to the same restrictions as PHLX Professional Customers (*i.e.*, a person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on

<sup>9</sup> MIAX is not proposing a "maker-taker" fee model at this time.

<sup>10</sup> The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). *See* Exchange Rule 100.

<sup>11</sup> The term "Public Customer" means a person that is not a broker or dealer in securities. *See* Exchange Rule 100.

<sup>12</sup> The term "Voluntary Professional" means any Public Customer that elects, in writing, to be treated in the same manner as a broker or dealer in securities for purposes of Rule 514, as well as the Exchange's schedule of fees. *See* Exchange Rule 100.

average during a calendar month for its own beneficial account(s)).

MIAX uses the term "Firm" to apply to a transaction for an account identified by the EEM for clearing in the OCC "Firm" range. PHLX's definition also uses the term "Firm" to apply to any transaction that is identified by a PHLX member or member organization for clearing in the "Firm" range at OCC.<sup>13</sup> An EEM that enters an order that is executed for an account identified by the EEM for clearing in the "Firm" range at OCC will be assessed a fee of \$0.25 per contract. At twenty-five cents, MIAX's transaction fee per executed contract for the account of a Firm is lower than PHLX (\$0.40 respecting options in the Penny Pilot) and is higher than CBOE, ISE in non-select symbols, and NYSE Amex (\$0.20 each, respectively).

Thus, there is precedent to treat non-Member Broker-Dealers (who are neither OCC members nor members of another options exchange) differently from Firms and non-Priority Customers respecting transaction fees.<sup>14</sup> Accordingly, MIAX believes that, because this differentiation is already made on PHLX and on NYSE Amex,<sup>15</sup> MIAX's proposal to differentiate among these participants raises no new regulatory issues. The instant MIAX proposal is therefore an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities, and is not unfairly discriminatory, consistent with Section (6)(b)(4) of the Act.<sup>16</sup>

The above Transaction Fees will be effective on and after January 2, 2013.

#### b. Options Regulatory Fee

MIAX will assess an Options Regulatory Fee ("ORF") to Members in the amount of \$0.0040 per contract side. The per-contract ORF will be assessed by MIAX to each MIAX Member for all options transactions executed and cleared, or simply cleared, by the Member, that are cleared by OCC in the "customer" range, regardless of the exchange on which the transaction occurs. The ORF will be collected indirectly from Members through their clearing firms by OCC on behalf of MIAX.

The ORF also will be charged for transactions that are not executed by a Member but are ultimately cleared by a Member. In the case where a non-Member executes a transaction and a

Member clears the transaction, the ORF will be assessed to the Member who clears the transaction. In the case where a Member executes a transaction and another Member clears the transaction, the ORF will be assessed to the Member who clears the transaction. As a practical matter, it is not feasible or reasonable for the Exchange (or any SRO) to identify each executing member that submits an order on a trade-by-trade basis. There are countless executing market participants, and each day such participants can and often do drop their connection to one market center and establish themselves as participants on another. It is virtually impossible for any exchange to identify, and thus assess fees such as an ORF on, each executing participant on a given trading day.

Clearing members, however, are distinguished from executing participants because they remain identified to the Exchange regardless of the identity of the initiating executing participant, their location, and the market center on which they execute transactions. Therefore, the Exchange believes it is more efficient for the operation of the Exchange and for the marketplace as a whole to assess the ORF to clearing members.

The Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC.

The Exchange believes that its broad regulatory responsibilities with respect to a Member's [sic] activities supports applying the ORF to transactions cleared but not executed by a Member. The Exchange's regulatory responsibilities are the same regardless of whether a Member executes a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activities, including performing surveillance for position limit violations, manipulation, front-running, contrary exercise advice violations and insider trading. These activities span across multiple exchanges.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Members' customer options business, including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs. The Exchange notes that its regulatory

responsibilities with respect to Member compliance with options sales practice rules have been allocated to the Chicago Board Options Exchange, LLC ("CBOE") under a 17d-2 Agreement. The ORF is not designed to cover the cost of options sales practice regulation.

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange expects to monitor MIAX regulatory costs and revenues at a minimum on an annual basis. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. The Exchange will notify Members of adjustments to the ORF via regulatory circular.

The Exchange believes it is reasonable and appropriate for the Exchange to charge the ORF for options transactions regardless of the exchange on which the transactions occur. The Exchange has a statutory obligation to enforce compliance by Members and their associated persons under the Act and the rules of the Exchange and to surveil for other manipulative conduct by market participants (including non-Members) trading on the Exchange. The Exchange cannot effectively surveil for such conduct without looking at and evaluating activity across all options markets. Many of the Exchange's market surveillance programs require the Exchange to look at and evaluate activity across all options markets, such as surveillance for position limit violations, manipulation, front-running and contrary exercise advice violations/expiring exercise declarations. Also, the Exchange and the other options exchanges are required to populate a consolidated options audit trail ("COATS")<sup>17</sup> system in order to surveil a Member's activities across markets.

In addition to its own surveillance programs, the Exchange works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG"),<sup>18</sup> the Exchange shares

<sup>17</sup> COATS effectively enhances intermarket options surveillance by enabling the options exchanges to reconstruct the market promptly to effectively surveil certain rules.

<sup>18</sup> ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by co-operatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory

<sup>13</sup> See Preamble to PHLX Pricing Schedule.

<sup>14</sup> See, e.g., PHLX Pricing Schedule, and NYSE Amex Fee Schedule.

<sup>15</sup> *Id.*

<sup>16</sup> 15 U.S.C. 78f(b)(4).

information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. The Exchange's participation in ISG helps it to satisfy the requirement that it has coordinated surveillance with markets on which security futures are traded and markets on which any security underlying security futures are traded to detect manipulation and insider trading.<sup>19</sup>

The Exchange believes that charging the ORF across markets will avoid having Members direct their trades to other markets in order to avoid the fee and to thereby avoid paying for their fair share for regulation. If the ORF did not apply to activity across markets then a Member would send their orders to the least cost, least regulated exchange. Other exchanges do impose a similar fee on their member's activity, including the activity of those members on MIAX.<sup>20</sup>

The Exchange notes that there is established precedent for an SRO charging a fee across markets, namely, FINRA's Trading Activity Fee<sup>21</sup> and the NYSE Amex, NYSE Arca, CBOE, PHLX, ISE and BOX ORF. While the Exchange does not have all the same regulatory responsibilities as FINRA, the Exchange believes that, like other exchanges that have adopted an ORF, its broad regulatory responsibilities with respect to a Member's activities, irrespective of where their transactions take place, supports a regulatory fee applicable to transactions on other markets. Unlike FINRA's Trading Activity Fee, the ORF would apply only to a Member's customer options transactions.

The ORF will be effective on and after January 2, 2013.

In addition to the above changes, the Exchange is proposing technical numbering amendments to account for the insertion of new footnotes in the Fee Schedule.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>22</sup> in general, and furthers the objectives of

Section 6(b)(4) and 6(b)(5) of the Act<sup>23</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges.

### Transaction Fees

The Exchange believes the fees proposed for transactions on MIAX are reasonable. MIAX operates within a highly competitive market in which market participants can readily send order flow to any of ten other competing venues if, among other things, they deem fees at a particular venue to be unreasonable or excessive. The proposed fee structure is intended to attract order flow to MIAX by offering market participants incentives to submit their orders to MIAX.

The Exchange believes it is equitable and not unfairly discriminatory for MIAX Market Makers to be assessed different Transaction Fees based on the category of Market Maker being assessed—that is, Primary Lead Market Maker ("PLMM"), Lead Market Maker ("LMM") and Registered Market Maker ("RMM"). In accordance with MIAX rules, PLMMs have a higher level of obligations and greater capital requirements than LMMs and RMMs, and LMMs have a higher level of obligations and greater capital requirements than RMMs. The transaction fees assessed to each type of Market Maker reflect these differences in obligations and capital requirements—PLMMs pay lower fees than LMMs and RMMs, and LMMs pay lower fees than RMMs. MIAX believes that this tiered fee structure provides incentives for Market Makers to undertake a higher level of obligation, which should result in more Market Makers providing a higher level of continuous quoting and a greater volume of liquidity.

MIAX believes the proposed Transaction Fees assessed to Market Makers are reasonable because they are comparable to transaction fees charged by other options exchanges, and in most cases, fall within the range of transaction fees charged by other options exchanges.

The Exchange believes that its proposed Transaction Fees are equitable and not unfairly discriminatory because they are available to all Market Makers and are reasonably related to the value to the Exchange that comes with higher market quality and higher levels of liquidity in the price and volume discovery processes. Such increased liquidity at the Exchange should allow it to spread its administrative and infrastructure costs over a greater

number of transactions leading to lower costs per transaction.

The Exchange believes it is equitable and not unfairly discriminatory for MIAX Market Makers to have generally lower fees than other professional market participants (referred to as non-Priority Customers, Non-Member Broker-Dealers, non-MIAX Market Makers, Voluntary Professionals, and Firms in the Fee Schedule). Market Makers have obligations that other professional market participants do not. In particular, they must maintain continuous two-sided markets in the classes in which they are appointed, and must meet certain minimum quoting requirements. Therefore, the Exchange believes it is appropriate that Market Makers be assessed lower transaction fees since they provide greater volumes of liquidity to the market. In addition, MIAX believes the proposed fees charged to Market Makers and other professional market participants are reasonable because they are, as detailed in the Purpose section above, comparable to fees that such accounts are assessed at other competing exchanges.

The Exchange believes it is equitable and not unfairly discriminatory to assess discounted Transaction Fees to PLMMs and LMMs for orders that are directed to them. A Directed LMM or Directed PLMM that enters into a directed order arrangement with an order flow provider typically expends substantial time and financial resources in seeking out and entering into such an agreement. The \$0.02 discount, which is applied equally to the base per-contract rate of an LMM and a PLMM, is in recognition of the effort on the part of Directed LMMs and Directed PLMMs to attract directed order flow to the Exchange.

The Exchange believes that it is equitable and not unfairly discriminatory not to assess a per-contract Transaction Fee to an EEM that enters an order that is executed for the account of a Priority Customer, while assessing a Transaction Fee to an EEM that enters an order that is executed for the account of specified other participants. A Priority Customer is by definition not a broker or dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). This limitation does not apply to participants on MIAX whose behavior is substantially similar to that of professionals, including non-Priority Customers, Non-Member Broker-Dealers, non-MIAX Market Makers, Voluntary Professionals, and Firms,

efforts to address potential intermarket trading abuses and manipulations.

<sup>19</sup> See Section 6(h)(3)(I) of the Act.

<sup>20</sup> Similar regulatory fees have been instituted by PHLX (See Securities Exchange Act Release No. 61133 (December 9, 2009), 74 FR 66715 (December 16, 2009) (SR-PHLX-2009-100)); and ISE (See Securities Exchange Act Release No. 61154 (December 11, 2009), 74 FR 67278 (December 18, 2009) (SR-ISE-2009-105)).

<sup>21</sup> See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 3402 (June 6, 2003).

<sup>22</sup> 15 U.S.C. 78f(b).

<sup>23</sup> 15 U.S.C. 78f(b)(4) and (5).

who will generally submit a higher number of orders (many of which do not result in executions) than Priority Customers.

The Exchange believes that it is equitable and not unfairly discriminatory to assess lower Transaction Fees to EEMs that submit orders for the account(s) of Firms and for Public Customers that are not Priority Customers than for orders for the account(s) of non-MIAX Market Makers. Market makers that are not MIAX Members do not have the same quoting or financial obligations as MIAX Market Makers; the Exchange believes that these obligations entitle MIAX Market Makers to lower transaction fees than non-MIAX market makers, who do not have the same obligations.

The Exchange further believes that, because there is precedent to treat non-Member Broker-Dealers (who are neither OCC members nor members of another options exchange) differently from Firms and non-Priority Customers respecting transaction fees, such differentiation is not unfairly discriminatory. This differentiation is already made on PHLX and on NYSE Amex, and the MIAX's proposal to differentiate among these participants in the same manner as those other options exchanges therefore raises no new regulatory issues. The instant MIAX proposal is therefore an equitable allocation of reasonable fees and other charges among Exchange members and other persons using its facilities, and is not unfairly discriminatory, consistent with Section (6)(b)(4) of the Act.

#### ORF

The Exchange believes the ORF is equitable and not unfairly discriminatory because it is objectively allocated to Members in that it is charged to all Members on all their transactions that clear as customer at the OCC. Moreover, the Exchange believes the ORF ensures fairness by assessing fees to those Members that are directly based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Member proprietary transactions) of its regulatory program.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. The Exchange will monitor, on at least an annual basis the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. If the Exchange determines regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. The Exchange will notify Members of adjustments to the ORF via regulatory circular.

The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side. In this regard, the Exchange believes that the initial level of the fee is reasonable.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

MIAX 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. Unilateral action by MIAX in establishing fees for services provided to its Members and others using its facilities will not have an impact on competition. As a new entrant in the already highly competitive environment for equity options trading, MIAX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Act. MIAX's proposed Transaction Fees and the ORF, as described herein, are comparable to fees charged by other options exchanges for the same or similar services.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

Written comments were neither solicited or 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>24</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 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-MIAX-2013-01 on the subject line.

##### *Paper Comments*

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

All submissions should refer to File Number SR-MIAX-2013-01. 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 Web site (<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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for

<sup>24</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File Number SR-MIAX-2013-01 and should be submitted on or before February 19, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68709; File No. SR-NYSE-2013-04]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 107C To Allow Retail Liquidity Providers To Enter Retail Price Improvement Orders in a Non-RLP Capacity for Securities to Which the RLP Is Not Assigned

January 23, 2013.

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 January 14, 2013, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II 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 NYSE Rule 107C to clarify that Retail Liquidity Providers ("RLPs") may enter Retail Price Improvement Orders ("RPIs") in a non-RLP capacity for securities to which the RLP is not assigned. The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at

the Commission's Public Reference Room.

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

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

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

###### 1. Purpose

The Exchange is proposing an amendment to Rule 107C to clarify that RLPs may enter RPIs in a non-RLP capacity for securities to which the RLP is not assigned.

Under current Rule 107C, a member organization that is registered as an RLP must submit RPIs for securities that are assigned to the RLP, with an RPI being required to be priced better than the PBBO by at least \$0.001 per share. For each assigned securities, an RLP must maintain RPIs that are better than the PBBO at least 5% of the trading day. If an RLP fails to meet this 5% quoting requirement in any assigned security for three consecutive months, the Exchange may: (1) Revoke the assignment of any or all of the affected securities; (2) revoke the assignment of unaffected securities; or (3) disqualify the member organization to serve as a Retail Liquidity Provider. Under the Retail Liquidity Program, member organizations that are not RLPs are permitted to interact with Retail Orders within the Program by also submitting RPIs. Member organizations are not eligible for the lower execution fees available to RLPs who satisfy their quoting requirements.

The Exchange is proposing to amend Rule 107C to clarify that RLPs may act in a non-RLP capacity for those securities to which it is not assigned, and as a result, may submit RPIs for those securities. For securities to which it is not assigned, the RLP would not be required to satisfy the quoting requirements found in NYSE Rule 107C(f), but would also not be eligible for the lower execution fees available to RLPs submitting RPIs for assigned

securities.<sup>3</sup> For assigned securities, the RLP would still be subject to the quoting requirements found in NYSE Rule 107C(f), and failure to meet those requirements could still result in the actions found in NYSE Rule 107C(g).

###### 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),<sup>4</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>5</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes the change proposed herein meets these requirements because it permits member organizations who have taken on the extra requirements of being an RLP in its assigned securities to still participate in the Program with other member organizations for those securities to which it is not assigned, which promotes just and equitable principles of trade. Without such permission, an RLP would be effectively penalized for taking on the responsibilities of becoming an RLP in assigned securities by not being permitted to participate in the program in securities to which it is not assigned. The proposed rule change would rectify this disparate treatment between RLPs and non-RLP member organizations in non-assigned securities. Additionally, the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because it will allow RLPs to submit RPIs in both its assigned and non-assigned securities, thus creating a larger pool of liquidity for Retail Orders to interact with and stimulating further price competition for retail orders.

##### B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the amendment, by increasing the level of participation

<sup>3</sup> Currently, RLPs who satisfy the applicable percentage requirement of Rule 107C are not charged a fee per share per execution of RPIs against a Retail Order. Non-RLP member organizations, unless they execute an average daily volume during the month of at least 500,000 shares of RPIs, would be charged a fee per share per execution of RPIs against Retail Orders of \$0.0003.

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

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

<sup>25</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.