SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97296; File No. SR-NYSEAMER-2023-25)

April 13, 2023

Self-Regulatory Organizations; NYSE American LLC; Notice of Filing and Immediate Effectiveness of Proposed Change to Amend Certain Standard Rates in the NYSE American Equities Price List and Fee Schedule

Pursuant to Section 19(b)(1)[1] of the Securities Exchange Act of 1934 (the "Act"),[2] and Rule 19b-4 thereunder,[3] notice is hereby given that on April 3, 2023, NYSE American LLC ("NYSE American" or the "Exchange") filed with the Securities and Exchange Commission (the "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 certain Standard Rates in the NYSE American Equities Price List and Fee Schedule ("Price List") for transaction fees and credits that add and remove liquidity in securities at or above $1. The Exchange proposes to implement the fee changes effective April 3, 2023. 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.

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1 15 U.S.C. 78s(b)(1).

2 15 U.S.C. 78a.

3 17 CFR 240.19b-4.

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

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

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

1. Purpose

The Exchange proposes to amend certain Standard Rates in its Price List for transaction fees and credits that add and remove liquidity in securities at or above $1. Specifically, the Exchange proposes to (1) lower the Tier 1 fee of $ 0.0026 per share for orders that remove liquidity from the Exchange; (2) lower the Tier 2 credit of $0.0024 per share for orders adding liquidity that set a new best bid or offer ("BBO") on the Exchange;[4] (3) increase the Tier 2 fee of $0.0028 per share for orders removing liquidity; and (4) decrease the Non-Tier credits of $0.0020 per share for orders adding displayed liquidity and $0.0020 per share for orders adding liquidity that set a new BBO on the Exchange.

The proposed changes respond to the current competitive environment where order flow providers have a choice of where to direct liquidity-providing and liquidity-removing orders by offering further incentives for ETP Holders to send additional adding and removing liquidity to the Exchange.

The Exchange proposes to implement the fee changes effective April 3, 2023.

4 See Rule 1.1E(h) (definition of BBO).

Competitive Environment

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."[5]

While Regulation NMS has enhanced competition, it has also fostered a "fragmented" market structure where trading in a single stock can occur across multiple trading centers. When multiple trading centers compete for order flow in the same stock, the Commission has recognized that "such competition can lead to the fragmentation of order flow in that stock."[6] Indeed, cash equity trading is currently dispersed across 16 exchanges,[7] numerous alternative trading systems,[8] and broker-dealer internalizers and wholesalers, all competing for order flow. Based on publicly-available information, no single exchange currently has more than 17%

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5 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (File No. S7-10-04) (Final Rule) ("Regulation NMS").

6 See Securities Exchange Act Release No. 61358, 75 FR 3594, 3597 (January 21, 2010) (File No. S7-02-10) (Concept Release on Equity Market Structure).

7 See Cboe U.S Equities Market Volume Summary, available at https://markets.cboe.com/us/equities/market_share. See generally https://www.sec.gov/fast-answers/divisionsmarketregmrexchangesshtml.html.

8 See FINRA ATS Transparency Data, *available at* https://otctransparency.finra.org/otctransparency/AtsIssueData. A list of alternative trading systems registered with the Commission is *available at* https://www.sec.gov/foia/docs/atslist.htm.

market share.[9] Therefore, no exchange possesses significant pricing power in the execution of cash equity order flow. More specifically, the Exchange currently has less than 1% market share of executed volume of cash equities trading.[10]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can move order flow, or discontinue or reduce use of certain categories of products. While it is not possible to know a firm's reason for shifting order flow, the Exchange believes that one such reason is because of fee changes at any of the registered exchanges or non-exchange venues to which the firm routes order flow.

In response to this competitive environment, the Exchange has established incentives for ETP Holders who submit orders that provide and remove liquidity on the Exchange. The proposed fee change is designed to attract additional order flow to the Exchange by incentivizing ETP Holders to send additional adding and removing liquidity to the Exchange to qualify for the liquidity adding and removing tiers and corresponding higher credits and lower fees, as follows.

Proposed Rule Change

Currently, for transactions in securities priced at or above $1.00, other than transactions by eDMMs in assigned securities, the Exchange offers the following tiered credits and fees for displayed and non-displayed orders, including orders setting a new Exchange BBO, that add and removed liquidity. The credits and fees are divided into Tier 1, Tier 2, and Non-Tier rates.

Tier 1 Rates

Currently, ETP Holders that add liquidity to the Exchange with an average daily volume

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9 See Cboe Global Markets U.S. Equities Market Volume Summary, available at http://markets.cboe.com/us/equities/market_share/.

10 See id.

("ADV")[11] ("Adding ADV") of at least 3,500,000 shares are eligible under Tier 1 for a fee of $0.0026 per share for orders removing liquidity. The Exchange proposes to decrease the fee to $0.0025 per share.

The proposed lower fee, together with the increased fee under Tier 2 for removing liquidity discussed below, seeks to encourage ETP Holders that are meeting or exceeding the minimum ADV requirement to qualify for Tier 2 rates to send additional liquidity in order to meet the higher Tier 1 requirement and therefore qualify for a lower fee.

Tier 2 Rates

Currently, ETP Holders with an Adding ADV of at least 700,000 shares are eligible for a credit of $0.0024 per share under Tier 2 for orders adding liquidity that set a new BBO on the Exchange. The Exchange proposes to decrease the credit to $0.0023 per share.

The Exchange determined that the current higher credit for setting the Exchange BBO did not incentivize setting activity by ETP Holders as expected and that lowering it was therefore reasonable. The Exchange notes that the proposed lower credit would bring the Tier 2 credit for setting the Exchange BBO into line with the current $0.0023 Tier 2 credit for adding displayed liquidity.

Similarly, ETP Holders with an Adding ADV of at least 700,000 shares are eligible for a fee of $0.0028 under Tier 2 for removing liquidity orders. The Exchange proposes to increase the current fee to $0.0029 per share.

In addition, as noted above, to seeking to encourage ETP Holders that are meeting or exceeding the minimum ADV requirements under Tier 2 to send additional liquidity to the

11 As defined in the Fee Schedule, Adding ADV means an ETP Holder's average daily volume of shares executed on the Exchange that provided liquidity.

Exchange, the proposed change would be consistent with the applicable rate on other marketplaces. For instance, Nasdaq charges a $0.0029 per share fee for removing liquidity for members meeting certain requirements; otherwise, its fee for removing liquidity is $0.0030 per share.[12] The Exchange's proposed fee increase to $0.0029 for removing liquidity from the Exchange would still be competitive with respect to Nasdaq PSX.

Non-Tier Rates

The Exchange's current Non-Tier rates are available to ETP Holders that do not qualify for either Tier 1 or Tier 2. Currently, orders adding displayed liquidity and orders adding liquidity that set a new BBO on the Exchange are both eligible for a Non-Tier credit of $0.0020 per share. The Exchange proposes to decrease both credits to $0.0016.

The proposed change would encourage ETP Holders to send additional liquidity in order to qualify for the minimum Tier 2 ADV requirements and therefore qualify for a higher credit. In addition, the proposed change would be consistent with the applicable rate on other marketplaces.[13]

Overall, the proposed fee changes are designed to be available to all ETP Holders on the Exchange and is intended to provide ETP Holders a greater incentive to direct more orders to the Exchange.

As noted, the Exchange operates in a competitive environment, particularly as it relates to attracting non-marketable orders, which add liquidity to the Exchange. The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange

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12 See Nasdaq Pricing at https://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2.

13 Both Cboe BZX Equities and Cboe EDGX Equities, for instance, offer a $0.0016 credit for adding displayed liquidity. See https://www.cboe.com/us/equities/membership/fee_schedule/bzx/ & https://www.cboe.com/us/equities/membership/fee_schedule/edgx/.

venues. The Exchange does not know how many ETP Holders could qualify for the proposed credits and fees based on their current trading profile on the Exchange and if they choose to direct order flow to the Exchange.   However, without having a view of ETP Holder's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder directing more orders to the Exchange.

The proposed changes are not otherwise intended to address any other issues, and the Exchange is not aware of any significant problems that market participants would have in complying with the proposed changes.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,[14] in general, and furthers the objectives of Sections 6(b)(4) and (5) of the Act,[15] in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities, is designed to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade, and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Proposed Fee Change Is Reasonable

As discussed above, the Exchange operates in a highly fragmented and competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, 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

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[14] 15 U.S.C. 78f(b).

[15] 15 U.S.C. 78f(b)(4) and (5).

system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”[16]

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. ETP Holders can choose from any one of the 16 currently operating registered exchanges, and numerous off-exchange venues, to route such order flow. Accordingly, competitive forces constrain exchange transaction fees that relate to orders on an exchange. Stated otherwise, changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow.

In light of the competitive environment in which the Exchange currently operates, the proposed rule change is a reasonable attempt to increase liquidity on the Exchange and improve the Exchange’s market share relative to its competitors. The Exchange believes the proposed change is also reasonable because it is designed to attract higher volumes of orders transacted on the Exchange by ETP Holders, which would benefit all market participants by offering greater price discovery and an increased opportunity to trade on the Exchange.

More specifically, the Exchange believes that the proposed lower Tier 1 fee, together with the increased Tier 2 fee, for liquidity removing orders are reasonable. The purpose of these changes, taken together, is to encourage additional liquidity on the Exchange because market participants benefit from the greater amounts of displayed liquidity present on a public exchange. The Exchange believes that the proposed fees will incentivize additional liquidity on a public exchange to qualify for lower fees for removing liquidity, thereby promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders. The proposal is thus

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16 See Regulation NMS, supra note 5, 70 FR at 37499.

reasonable because all ETP Holders would benefit from such increased levels of liquidity.

The Exchange believes that the proposed changes to the credits available for orders adding liquidity to the Exchange are also reasonable.

The Exchange believes that lowering the Tier 2 credit for setting the Exchange BBO is reasonable because the current higher credit did not incentivize setting activity by ETP Holders and result in greater liquidity as the Exchange had anticipated. The Exchange believes it is reasonable to revise credits when such incentives become underutilized. In addition, the Exchange believes the proposed credit is reasonable because it would bring the credit into line with the current $0.0023 Tier 2 credit for adding displayed liquidity.

Finally, the proposed changes to Non-Tier credits for orders adding displayed liquidity and orders adding liquidity that set a new Exchange BBO are reasonable because the proposed change would encourage ETP Holders to increase the liquidity-adding orders they send to the Exchange to qualify for higher credits under Tier 2, which would support the quality of price discovery on the Exchange and provide additional liquidity for incoming orders. The Exchange notes that the adding ADV requirement for Tier 2 is 700,000 shares, which the Exchange believes is an achievable level for many member organizations, given the higher requirements at other marketplaces. For example, the requirement for the Cboe BZX Adding Tier 1 adding credit of $0.0020 is 5,000,000 shares or 0.05% of CADV. The Exchange believes that by correlating the level of credits to the level of executed adding volume on the Exchange, the Exchange's fee structure would encourage ETP Holders to submit more liquidity-providing orders to the Exchange that are likely to be executed, thereby increasing the potential for incoming marketable orders submitted to the Exchange to receive an execution. As noted above, the Exchange operates in a competitive environment, particularly as it relates to attracting non-marketable orders that add liquidity to the Exchange. In addition, the proposed change would be consistent with the applicable rate on other marketplaces.[17]

Because the proposal involves the introduction of new fee and credit levels, the Exchange does not know how many more ETP Holders could qualify for the new fees and credits based on their current trading profile on the Exchange and if they choose to direct order flow to the Exchange. As previously noted, without a view of ETP Holder activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether the proposed rule change would result in any ETP Holder directing additional liquidity to qualify for a better tier, and corresponding higher credit, or lower fee. The Exchange believes the proposed changes are reasonable as it would provide an incentive for ETP Holders to direct their order flow to the Exchange and provide meaningful added levels of liquidity in order to qualify for the credits, thereby contributing to depth and market quality on the Exchange.

<u>The Proposed Change Is an Equitable Allocation of Fees and Credits</u>

The Exchange believes its proposal equitably allocates its fees and credits among its market participants by fostering liquidity provision and stability in the marketplace.

The Exchange believes the proposal equitably allocates fees and credits among its market participants because all ETP Holders that participate on the Exchange may qualify for the proposed fees and credits. The Exchange believes that the proposed changes, taken together, will incentivize ETP Holders to send additional liquidity to achieve lower fees when removing liquidity from the Exchange, thereby increasing the number of orders that are executed on the Exchange, promoting price discovery and transparency and enhancing order execution opportunities and improving overall liquidity on a public exchange. The Exchange also believes

[17] <u>See</u> note 13, <u>supra</u>.

that the proposed change is equitable because it would apply to all similarly situated ETP Holders that add or remove liquidity. The proposed change also is equitable because it would be consistent with the applicable rate on other marketplaces.[18]

As previously noted, the Exchange operates in a competitive environment, particularly as it relates to attracting orders that add liquidity to the Exchange. The Exchange does not know how much order flow ETP Holders choose to route to other exchanges or to off-exchange venues. Because the proposed introduces new fees and credits, the Exchange does not know how many ETP Holders could qualify for the new rates based on their current trading profiles on the Exchange and if they choose to direct order flow to the Exchange. Without having a view of ETP Holder's activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holder directing orders to the Exchange. The Exchange anticipates that ETP Holders would endeavor to send more of their orders for execution on the Exchange in order to earning higher credits and lower fees.

The Exchange further believes that the proposed change is equitable because it is reasonably related to the value to the Exchange's market quality associated with higher volume in orders. The Exchange believes that the proposed pricing adjustments would attract order flow to the Exchange, thereby contributing to price discovery on the Exchange and benefiting investors generally.

The Exchange believes that the proposed rule change is equitable because maintaining or increasing the proportion of orders in exchange-listed securities that are executed on a registered national securities exchange (rather than relying on certain available off-exchange execution methods) would contribute to investors' confidence in the fairness of their transactions and

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[18] See notes 12-13, supra.

would benefit all investors by deepening the Exchange's liquidity pool, supporting the quality of price discovery, promoting market transparency, and improving investor protection.

The proposal neither targets nor will it have a disparate impact on any particular category of market participant. All ETP Holders would be eligible to qualify for the proposed fees and credits. The Exchange believes that offering fees for removing liquidity and credits for providing liquidity will continue to attract order flow and liquidity to the Exchange, thereby providing additional price improvement opportunities on the Exchange and benefiting investors generally. As to those market participants that do not presently meet the Adding ADV requirements to qualify for the Exchange's best prices, the proposal would not adversely impact the ability of those ETP Holders to qualify for other credits or fees provided by the Exchange and in fact would encourage them to increase the orders sent to the Exchange in order to qualify for the Exchange's best prices.

<u>The Proposed Fee Change Is Not Unfairly Discriminatory</u>

The Exchange believes that the proposal is not unfairly discriminatory. In the prevailing competitive environment, ETP Holders are free to disfavor the Exchange's pricing if they believe that alternatives offer them better value. The Exchange believes it is not unfairly discriminatory to provide the proposed fees and credits for ETP Holders that add or remove liquidity because the proposed fees and credits would be provided on an equal basis to all ETP Holders.

Further, the Exchange believes the proposed fees and credits would incentivize ETP Holders to send more orders to the Exchange to qualify for the revised fees and credits, thereby promoting price discovery and transparency and enhancing order execution opportunities for ETP Holders. Since the proposed fees and credits would be new, no ETP Holder currently qualifies for them. As noted, without a view of ETP Holder activity on other exchanges and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would result in any ETP Holders qualifying for the proposed adding tiers. The Exchange believes the proposal is reasonable as it would provide an incentive for ETP Holders to direct their order flow to the Exchange and provide meaningful added levels of liquidity in order to qualify for the credits, thereby contributing to depth and market quality on the Exchange.

In addition, the Exchange believes that the proposal is not unfairly discriminatory because it neither targets nor will it have a disparate impact on any particular category of market participant. All ETP Holders would be eligible to qualify for the proposed credits if they meet the proposed Adding ADV requirements for each proposed tier. The proposal does not permit unfair discrimination because the proposed rates would be applied to all similarly situated ETP Holders and other market participants, who would all be eligible for the same rates on an equal basis. Accordingly, no ETP Holder already operating on the Exchange would not be disadvantaged by the proposed allocation of fees and credits. The Exchange believes that offering credits for providing liquidity will continue to attract order flow and liquidity to the Exchange, thereby providing additional price improvement opportunities on the Exchange and benefiting investors generally. As to those market participants that do not presently qualify for the revised fees and credits, the proposal will not adversely impact their ability to qualify for other credits provided by the Exchange. Finally, the submission of orders is optional for ETP Holders in that they could choose whether to submit orders to the Exchange and, if they do, they can choose the extent of their activity in this regard. The Exchange believes that it is subject to significant competitive forces, as described above and below in the Exchange's statement regarding the burden on competition.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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

In accordance with Section 6(b)(8) of the Act,[19] the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed fee change would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery, and transparency and enhancing order execution opportunities for ETP Holders. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."[20]

Intramarket Competition. The Exchange believes the proposed change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed change is designed to attract additional orders to the Exchange. The Exchange believes that the proposed changes would incentivize market participants to direct orders to the Exchange. Greater overall order flow, trading opportunities, and pricing transparency benefit all market participants on the Exchange by enhancing market quality and continuing to encourage ETP Holders to send orders, thereby contributing towards a robust and well-balanced market ecosystem.

Intermarket Competition. The Exchange operates in a highly competitive market in

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19 15 U.S.C. 78f(b)(8).

20 See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

which market participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. As noted above, the Exchange currently has less than 1% market share of executed volume of equities trading. In such an environment, the Exchange must continually adjust its fees and credits to remain competitive with other exchanges and with off-exchange venues. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their order routing practices, the Exchange does not believe its proposed fee change can impose any burden on intermarket competition.

The Exchange believes that the proposed change could promote competition between the Exchange and other execution venues, including those that currently offer similar order types and comparable transaction pricing, by encouraging additional orders to be sent to the Exchange for execution.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)[21] of the Act and subparagraph (f)(2) of Rule 19b-4[22] thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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

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21 15 U.S.C. 78s(b)(3)(A).

22 17 CFR 240.19b-4(f)(2).

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)[23] 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAMER-2023-25 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NYSEAMER-2023-25. 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

23 15 U.S.C. 78s(b)(2)(B).

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-NYSEAMER-2023-25, 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.[24]

Sherry R. Haywood,
Assistant Secretary.

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[24] 17 CFR 200.30-3(a)(12).