

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91112; File No. SR-PEARL-2020-30]

Self-Regulatory Organizations; MIAX PEARL, LLC; Order Granting Approval of a Proposed Rule Change To Amend the Exchange's By-Laws in Connection With an Equity Rights Program

February 11, 2021.

I. Introduction

On November 24, 2020, MIAX PEARL, LLC (the "Exchange" or "MIAX PEARL") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Amended and Restated By-Laws of MIAX PEARL (as amended, the "MIAX PEARL Amended and Restated By-Laws") to correspond with an Equity Rights Program recently established by the Exchange. The proposed rule change was published for comment in the *Federal Register* on December 9, 2020.³ On January 21, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule changes, or institute proceedings to determine whether to disapprove the proposed rule changes.⁵ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Background and Description of the Proposed Rule Change

On August 14, 2020, the Commission approved a proposed rule change to adopt rules governing the trading of equity securities on the Exchange and establish a platform for the trading of

equity securities referred to as MIAX PEARL Equities.⁶ On August 20, 2020, the Exchange filed an immediately effective proposed rule change to establish an Equity Rights Program ("ERP"),⁷ pursuant to which Units representing the right to acquire equity in the Exchange's parent holding company, Miami International Holdings, Inc. ("MIH"), were issued to participating Exchange Members in exchange for the prepayment of certain Exchange fees and the achievement of certain liquidity volume thresholds on MIAX PEARL Equities over a 42-month period.⁸ In that August 2020 filing to implement the ERP, the Exchange stated that "[w]hen a participating Member acquires a certain number of [U]nits, the Member can appoint one director to the MIAX PEARL Board [of Directors]."⁹ In this filing, the Exchange proposes to amend its By-Laws to provide for the right of such Exchange Members¹⁰ participating in the ERP to nominate or appoint a representative to the MIAX PEARL Board of Directors ("PEARL Board" or "Board"), as well as to make other changes, including certain non-substantive changes.¹¹

Specifically, the Exchange proposes to amend its By-Laws to provide that an ERP Member¹² (either by itself or with

its affiliates) that is not otherwise represented on the PEARL Board may have the right to nominate one ERP Director¹³ or appoint an Observer¹⁴ to the Board, as applicable.¹⁵ As proposed, ERP Directors will be classified as "Industry Directors"¹⁶ with attendant voting rights, while Observers will be invited to attend meetings of the Board in a non-voting Observer capacity.¹⁷

an ERP Director or an Observer position." See also Article I(l) of the MIAX PEARL Amended and Restated By-Laws, defining "ERP Agreement" as "the agreement between the Exchange's parent holding company, MIH, and ERP Members dated September 11, 2020 pursuant to which Units were issued;" and Article I(pp) of the MIAX PEARL Amended and Restated By-Laws, defining "Unit" as "the securities issued pursuant to the ERP Agreement."

¹³ See Article I(m) of the MIAX PEARL Amended and Restated By-Laws, defining "ERP Director" as "a MIAX PEARL Equities Industry Director who has been nominated by an ERP Member and appointed to the Board of Directors."

¹⁴ See Article I(gg) of the MIAX PEARL Amended and Restated By-Laws, providing that "Observer" has the meaning set forth in Article II, Section 2.2 of the [MIAX PEARL Amended and Restated] By-Laws. As described further below, an "Observer" is a person, appointed pursuant to Section 2.2 of the MIAX PEARL Amended and Restated By-Laws that "may be invited to attend meetings of the Board in a non-voting observer capacity."

¹⁵ See Article II, Section 2.2(e) of the MIAX PEARL Amended and Restated By-Laws. The ERP Member's right to nominate a Director or appoint an Observer pursuant to amended Section 2.2(e) will be perpetual, subject to the certain conditions discussed below. See Notice, *supra* note 3, 85 FR at 79254.

¹⁶ See Article I(t) of the MIAX PEARL Amended and Restated By-Laws, defining "Industry Director" to mean "a Director who (i) is or has served in the prior three years as an officer, director, or employee of a broker or dealer, excluding an outside director or a director not engaged in the day-to-day management of a broker or dealer; (ii) is an officer, director (excluding an outside director), or employee of an entity that owns more than 10% of the equity of a broker or dealer, and the broker or dealer accounts for more than 5% of the gross revenues received by the consolidated entity; (iii) owns more than 5% of the equity securities of any broker or dealer, whose investments in brokers or dealers exceed 10% of his or her net worth, or whose ownership interest otherwise permits him or her to be engaged in the day-to-day management of a broker or dealer; (iv) provides professional services to brokers or dealers, and such services constitute 20% or more of the professional revenues received by the Director or 20% or more of the gross revenues received by the Director's firm or partnership; (v) provides professional services to a director, officer, or employee of a broker, dealer, or corporation that owns 50% or more of the voting stock of a broker or dealer, and such services relate to the director's, officer's, or employee's professional capacity and constitute 20% or more of the professional revenues received by the Director or member or 20% or more of the gross revenues received by the Director's or member's firm or partnership; or (vi) has a consulting or employment relationship with or provides professional services to the Company or any affiliate thereof or has had any such relationship or provided any such services at any time within the prior three years."

¹⁷ See Article II, Section 2.2(g)(iii) of the MIAX PEARL Amended and Restated By-Laws, providing

⁶ See Securities Exchange Act Release Nos. 88132 (February 6, 2020), 85 FR 8053 (February 12, 2020) (SR-PEARL-2020-03) (Notice of Filing of a Proposed Rule Change to Adopt Rules Governing the Trading of Equity Securities); and 89563 (August 14, 2020), 85 FR 51510 (August 20, 2020) (Order Approving Proposed Rule Change to Establish Rules Governing the Trading of Equity Securities).

⁷ See Securities Exchange Act Release No. 89730 (September 1, 2020), 85 FR 55530 (September 8, 2020) (SR-PEARL-2020-10) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Implement a Second Equity Rights Program) ("ERP Notice").

⁸ See ERP Notice, *supra* note 7, 85 FR at 55530-31. In the ERP Notice, the Commission noted that MIAX PEARL would need to submit a separate proposed rule change to make changes to its corporate governance documents to accommodate aspects of the proposal that involve or affect the MIAX PEARL Board of Directors. See ERP Notice, *supra* note 7, 85 FR at 55532, n.16.

⁹ See ERP Notice, *supra* note 7, 85 FR at 55532.

¹⁰ See Article I(p) of the MIAX PEARL Amended and Restated By-Laws, defining "Exchange Member" as "any registered broker or dealer that has been admitted to membership in the national securities exchange operated by [MIAX PEARL]."

¹¹ See Notice, *supra* note 3, 85 FR at 79255. The non-substantive changes include deletion from the current by-laws of provisions that specifically referenced past deadlines and events that have since occurred and deletion of the definition of the term "Exchange Contract" in Article I(m) of the current By-Laws because the term is not used therein or in the MIAX PEARL Amended and Restated By-Laws.

¹² See Article I(n) of the MIAX PEARL Amended and Restated By-Laws, defining "ERP Member" as "an Exchange Member who acquired Units pursuant to an ERP Agreement sufficient to acquire

¹⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 90563 (December 3, 2020), 85 FR 79252 ("Notice").

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 90962, 86 FR 7317 (January 27, 2021). The Commission designated March 9, 2021, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule changes.

The Exchange proposes to amend Article II, Section 2.4(a) of its By-Laws to provide that the Nominating Committee shall nominate to ERP Director positions only those persons whose names have been approved and submitted by the applicable ERP Members having the right to nominate such person pursuant to Article II, Section 2.2.¹⁸ If an ERP Member is otherwise able to nominate an ERP Director but cannot because, for example, the ERP Member already is represented on the PEARL Board, *e.g.*, as a Member Representative Director,¹⁹ the ERP Member will have the right to appoint an Observer in lieu of such ERP Director nomination.²⁰

In addition, MIAX PEARL proposes to specify that an ERP Member's right to continued representation on the Board in the form of an ERP Director or Observer will be contingent upon the ERP Member meeting certain "Performance Criteria"²¹ (*i.e.*, achievement of certain specified liquidity volume thresholds on MIAX PEARL Equities²²) over a specified "Measurement Period."²³ Thus, ERP Members with the right to nominate an ERP Director or appoint an Observer may lose that right if the ERP Member

that Observers will have the right to attend all meetings of the Board of Directors in a nonvoting observer capacity and, in this respect, the Exchange shall give such representative copies of all notices, minutes, consents, and other materials that it provides to its Directors at the same time and in the same manner as provided to such Directors; provided, however, that such representative shall agree to hold in confidence and trust and to act in a fiduciary manner with respect to all information so provided. *See also* Article X, Section 10.3 of the MIAX PEARL Amended and Restated By-Laws further providing that the Exchange reserves the right, however, to withhold any information and to exclude Observers from any meeting or portion thereof if access to such information or attendance at such meeting could adversely affect the attorney-client privilege between the Exchange and its counsel or result in disclosure of trade secrets or a conflict of interest, and Section 10.4 of the MIAX PEARL Amended and Restated By-Laws, in which the Exchange has proposed to provide that Observers will be subject to the same requirements to maintain the confidentiality of all books and records of the Exchange reflecting confidential information pertaining to the self-regulatory function of the Exchange.

¹⁸ The Exchange states that MIH, as the sole member of MIAX PEARL, will then be obligated to vote for the nominated ERP Director. *See* Notice, *supra* note 3, 85 FR at 79254.

¹⁹ *See* Article II, Section 2.2(g) of the MIAX PEARL Amended and Restated By-Laws.

²⁰ *See* Notice, *supra* note 3, 85 FR at 79254. *See also* note 32 and accompanying text *infra*.

²¹ *See* MIAX PEARL Amended and Restated By-Laws, Article I(hh), defining "Performance Criteria."

²² *See* MIAX PEARL Amended and Restated By-Laws, Article I(cc), defining MIAX PEARL Equities as "the market of the Exchange on which equity securities are traded."

²³ *See* MIAX PEARL Amended and Restated By-Laws, Article I(y), defining "Measurement Period."

fails to meet the requisite Performance Criteria.²⁴ In the event of such occurrence, if the ERP Member later satisfies the requisite Performance Criteria for a subsequent Measurement Period, the ERP Member may regain its right to nominate or appoint such ERP Member or Observer.²⁵ Further, an ERP Director or Observer position will terminate if the nominating or appointing ERP Member effects a transfer of common stock or warrants that results in such ERP Member holding less than 25% of the aggregate number of shares of common stock issued (or issuable pursuant to Units acquired) pursuant to the ERP Agreement.²⁶

The Exchange proposes to amend Article II, Section 2.2(b)(i) to provide that ERP Directors will be included in the number of Industry Directors for purposes of calculating the composition of the Board,²⁷ and Article II, Section 2.2(b)(ii) to provide that Member Representative Directors will not include ERP Directors.²⁸ Accordingly, the Exchange states in its proposal that there will be no substantive changes to the Board's composition, and that although the Board size will increase, its composition will remain the same.²⁹

In addition, MIAX PEARL proposes to amend the By-Law provisions that currently provide for the removal and resignation of directors and the filling of vacancies to address ERP Directors. The Exchange proposes to adopt paragraph (c) under Article II, Section 2.8 to provide that if an ERP Director position becomes vacant for reasons other than failure by an ERP Member to meet its Performance Criteria as discussed above, the applicable ERP Member will retain the ability to nominate a person to fill the vacant ERP Director position.³⁰ The Exchange also proposes

²⁴ *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.3(c) and (d).

²⁵ *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.3(c) and (d).

²⁶ *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.3(d).

²⁷ *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.2(b)(i), and Notice, *supra* note 3, 85 FR at 79254.

²⁸ *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.2(b)(ii), and Notice, *supra* note 3, 85 FR at 79254.

²⁹ *See* Notice, *supra* note 3, 85 FR at 79254.

³⁰ *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.8 and Notice, *supra* note 3, 85 FR at 79254. The Exchange also proposes to adopt paragraph (f) under Article II, Section 2.2 to provide that if an ERP Director position needs to be added pursuant to amended Article II, Section 2.2(e), such ERP Director shall be nominated by the applicable ERP Member and elected by the LLC Member and additional Director positions shall be added and filled at the same time as the election of the new ERP Director, as required to comply with the requirements set forth in Article II, Section

to amend Article II, Section 2.9(a) to provide that, ERP Directors may only be removed for cause, which shall include, without limitation, such Director being subject to a statutory disqualification.³¹ Further, if at any time such ERP Member is otherwise able to nominate an ERP Director, but is unable to fill such position as a result of such ERP Member already having a representative on the Board, such ERP Member will have the right to nominate such Director in accordance with amended Article II, Section 2.2(e) upon the resignation or removal of such Director already serving on the Board.³²

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act,³³ and the rules and regulations thereunder applicable to a national securities exchange.³⁴ In particular, the Commission finds that the proposed rule change is consistent with Sections 6(b)(1) and (3) of the Act,³⁵ which requires, among other things, that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange; and assure the fair representation of its members in the selection of its directors and administration of its affairs, and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the Exchange, broker, or dealer.

A. Addition of ERP Directors and Related Provisions

The Commission finds that the Exchange's proposal to amend the By-Laws to provide for the inclusion of ERP Directors on the PEARL Board,

2.2(a) and (b). *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.2(f).

³¹ An Observer, likewise, may not be subject to a statutory disqualification. *See* MIAX PEARL Amended and Restated By-Laws, Article II, Section 2.2(g)(ii).

³² *See* Notice, *supra* note 3, 85 FR at 79253. The Exchange states that an ERP Member that is represented by a Member Representative Director may also have an Observer; however, an ERP Member that is represented by an ERP Director may not also have an Observer. *See* Notice, *supra* note 3, 85 FR at 79253, n.7.

³³ 15 U.S.C. 78f.

³⁴ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

³⁵ 15 U.S.C. 78f(b)(3).

including related amendments to add various definitions and provisions for terms of office, nomination and election, filling of vacancies, and removal and resignation, are consistent with the Act.³⁶ The Commission finds that although the Board may become larger if ERP Directors are added, the composition previously approved by the Commission in connection with MIAX PEARL's registration as a national securities exchange³⁷ will remain the same.³⁸ ERP Directors will be Industry Directors,³⁹ and the Board will continue to be comprised of a number of Non-Industry Directors,⁴⁰ including at least one Independent Director,⁴¹ that equals or exceeds the sum of the number of Industry Directors and Member Representative Directors.⁴² The number of Member Representative Directors will not include ERP Directors, and shall continue to comprise at least 20% of the PEARL Board.⁴³ Additionally, the process for nomination and election of Member Representative Directors is not impacted by the Exchange's proposal.⁴⁴ Accordingly, the Commission finds that the provisions reflecting the possible addition of ERP Directors to the PEARL Board are consistent with the Act, and in particular with Section 6(b)(3) of the Act,⁴⁵ in that the Exchange's By-Laws will continue to provide for the fair representation of members in the selection of directors and the administration of MIAX PEARL, as well as representation of issuers and investors.

³⁶ See Article II, Sections 2.2, 2.3, 2.4, 2.8, and 2.9 of the MIAX PEARL Amended and Restated By-Laws.

³⁷ See Securities Exchange Act Release No. 79543 (December 13, 2016), 81 FR 92901 (December 20, 2016) (File No. 10-277) (In the Matter of the Application of MIAX PEARL, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission) ("PEARL Approval Order").

³⁸ See *supra* note 29 and accompanying text.

³⁹ See *supra* note 16.

⁴⁰ See Article I(aa) of the MIAX PEARL Amended and Restated By-Laws, defining "Non-Industry Directors" to mean "a Director who is (i) an Independent Director; or (ii) any other individual who would not be an Industry Director."

⁴¹ See Article I(p) of the By-Laws, defining "Independent Director" to mean "a Director who has no material relationship with the Company or any affiliate of the Company, or any Exchange Member or any affiliate of any such Exchange Member; *provided*, however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of the Company or its LLC Member."

⁴² See Article II, Section 2.2(b)(i) of the MIAX PEARL Amended and Restated By-Laws.

⁴³ See Article II, Section 2.2(b)(ii) of the MIAX PEARL Amended and Restated By-Laws.

⁴⁴ See Article V, Section 5.3 of the MIAX PEARL Amended and Restated By-Laws.

⁴⁵ 15 U.S.C. 78f(b)(3).

The Commission also notes that ERP Directors will be subject to the same duties and obligations as any other member of the PEARL Board, including provisions that are designed to help maintain the independence of the regulatory functions of the Exchange and help facilitate MIAX PEARL's ability to carry out its responsibilities and operate in a manner consistent with the Act.⁴⁶ For example, ERP Directors will be subject to By-Law provisions requiring the PEARL Board, in connection with managing the business and affairs of MIAX PEARL, to consider applicable requirements under Section 6(b) of the Act governing conflicts of interest; requiring the PEARL Board, when evaluating any proposal, to take into account MIAX PEARL's status as a self-regulatory organization ("SRO"); and protecting the confidentiality of information and records related to the Exchange's SRO function.⁴⁷ In this regard, the Commission finds that the provisions reflecting the addition of ERP Directors to the PEARL Board are consistent with the Act, and in particular with Section 6(b)(1), which requires an exchange to be so organized and have the capacity to carry out the purposes of the Act.⁴⁸

B. Addition of Observer Positions and Related Provisions

The Commission finds that the proposed amendments to the By-Laws that add provisions relating to the appointment of Observers, including related amendments that add various definitions and provisions for appointment and terms of office are consistent with the Act.⁴⁹ The Commission also finds that the proposed amendments governing the rights and obligations of Observers are consistent with the Act. The Commission finds that although Observers will generally have the right to attend all meetings of the Board and receive materials provided to directors,⁵⁰ they will have the right to attend those meetings only in a non-voting capacity and must agree to hold such information in confidence and trust and to act in a fiduciary manner

⁴⁶ See PEARL Approval Order, *supra* note 37, 81 FR at 92906.

⁴⁷ See Article 2.1(d) and (e) and Section 2.20, and Article X, Section 10.4 of the MIAX PEARL Amended and Restated By-Laws. The Exchange represents that the ERP Directors will be subject to the same restrictions as current directors, including the provisions noted above. See Notice, *supra* note 3, 85 FR at 79266.

⁴⁸ 15 U.S.C. 78f(b)(1).

⁴⁹ See Article II, Sections 2.2 and 2.3 of the MIAX PEARL Amended and Restated By-Laws.

⁵⁰ See *supra* note 17 and accompanying text.

with respect to such information.⁵¹ Additionally, the Exchange represents that Observers will be subject to the same requirements as members of the Board to maintain the confidentiality of all books and records of the Exchange reflecting confidential information pertaining to the SRO function of the Exchange.⁵² The Exchange also reserves the right to withhold any information from an Observer and to exclude an Observer from any meeting or portion thereof that could, among other things, result in the disclosure of trade secrets or a conflict of interest.⁵³ The Commission finds that these restrictions on, and obligations of, Observers are consistent with the Act, particularly Section 6(b)(1),⁵⁴ in that they are designed to ensure that MIAX PEARL will remain so organized as to have the capacity to carry out the purposes of the Act.

IV. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁵⁵ that the proposed rule change (SR-PEARL-2020-30), be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁶

J. Matthew DeLesDernier,
Assistant Secretary.

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⁵¹ See Article II, Section 2.2(g)(iii), and Article X, Sections 10.3 and 10.4 of the MIAX PEARL Amended and Restated By-Laws; see also *supra* note 17.

⁵² See Notice, *supra* note 3, 85 FR at 79255.

⁵³ See Article II, Section 2.2(g)(iii) of the MIAX PEARL Amended and Restated By-Laws; see also *supra* note 17.

⁵⁴ 15 U.S.C. 78s(b)(1).

⁵⁵ *Id.*

⁵⁶ 17 CFR 200.30-3(a)(12).