

Securities Act. Rule 605 of Regulation E (17 CFR 230.605) under the Securities Act requires an SBIC or BDC claiming such an exemption to file an offering circular with the Commission that must also be provided to persons to whom an offer is made. Form 1-E requires an issuer to provide the names and addresses of the issuer, its affiliates, directors, officers, and counsel; a description of events which would make the exemption unavailable; the jurisdictions in which the issuer intends to offer the securities; information about unregistered securities issued or sold by the issuer within one year before filing the notification on Form 1-E; information as to whether the issuer is presently offering or contemplating offering any other securities; and exhibits, including copies of the rule 605 offering circular and any underwriting contracts.

The Commission uses the information provided in the notification on Form 1-E and the offering circular to determine whether an offering qualifies for the exemption under Regulation E. The Commission estimates that, each year, one issuer files one notification on Form 1-E, together with offering circulars, with the Commission.¹ Based on the Commission's experience with disclosure documents, we estimate that the burden from compliance with Form 1-E and the offering circular requires approximately 100 hours per filing. The annual burden hours for compliance with Form 1-E and the offering circular would be 200 hours (2 responses × 100 hours per response). Estimates of the burden hours are made solely for the purposes of the PRA, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

¹ According to Commission records, one issuer filed two notifications on Form 1-E, together with offering circulars, during 2013 and 2014.

Please direct your written comments to David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John R. Pezzullo, 100 F Street NE, Washington, DC 20549; or send an email to: PRA_Mailbox@sec.gov.

Dated: November 23, 2021.

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93639; File Nos. SR-MIAX-2021-41, SR-PEARL-2021-45]

Self-Regulatory Organizations; Miami International Securities Exchange LLC, MIAX PEARL, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Amend the Fee Schedules To Adopt a Tiered-Pricing Structure for Certain Connectivity Fees

November 22, 2021.

I. Introduction

On September 24, 2021, Miami International Securities Exchange LLC, LLC ("MIAX") and MIAX PEARL, LLC ("MIAX Pearl") (collectively, the "Exchanges") each filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change (File Numbers SR-MIAX-2021-41 and SR-PEARL-2021-45) to amend the MIAX Fee Schedule and MIAX Pearl Options Fee Schedule (collectively, the "Fee Schedules") to adopt a tiered pricing structure for certain connectivity fees. The proposed rule changes were immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule changes were published for comment in the **Federal Register** on October 4, 2021.⁴ Under Section

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as "establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization." 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ See Securities Exchange Act Release Nos. 93165 (September 28, 2021), 86 FR 54750 ("MIAX Notice"); 93162 (September 28, 2021), 86 FR 54739 ("Pearl Notice"). For ease of reference, citations to statements generally applicable to both notices are to the MIAX Notice. Comments received on the

19(b)(3)(C) of the Act,⁵ the Commission is hereby: (i) Temporarily suspending File Numbers SR-MIAX-2021-41 and SR-PEARL-2021-45; and (ii) instituting proceedings to determine whether to approve or disapprove File Numbers SR-MIAX-2021-41 and SR-PEARL-2021-45.

II. Description of the Proposed Rule Changes

The Exchanges propose to modify their Fee Schedules to adopt a tiered-pricing structure for 10 gigabit ("Gb") ultra-low latency ("ULL") fiber connections to the Exchanges' primary and secondary facilities available to both Members⁶ and non-Members. Specifically, the Exchanges propose to modify the pricing structure for 10Gb ULL connections from a flat monthly fee of \$10,000 per 10Gb ULL connection to the following fees (collectively, the "Proposed Access Fees"):⁷

- \$9,000 each for the 1st and 2nd connections;
- \$11,000 each for the 3rd and 4th connections; and
- \$13,000 for each additional connection after the 4th connection.

These fees are assessed in any month the Member or non-Member is credentialed to use any of the Exchanges' APIs or market data feeds in the Exchanges' production environment, pro-rated when a Member or non-Member makes a change to connectivity by adding or deleting connections, and assessed in any month during which the Member or non-Member has established connectivity with the Exchanges' disaster recovery facility.⁸

The Exchanges state that the Exchanges' MIAX Express Network Interconnect ("MENI") can be configured to provide Members and non-Members of the Exchanges network connectivity to the trading platforms,

proposed rule changes are available on the Commission's website at: <https://www.sec.gov/comments/sr-miax-2021-41/srmiac202141.htm> (SR-MIAX-2021-41); <https://www.sec.gov/comments/sr-pearl-2021-45/srpearl202145.htm> (SR-PEARL-2021-45).

⁵ 15 U.S.C. 78s(b)(3)(C).

⁶ The term "Member" means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" or "Market Maker." Members are deemed "members" under the Exchange Act. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁷ The Exchanges initially filed the proposed fee changes on July 30, 2021. See Securities Exchange Act Release Nos. 92643 (August 11, 2021), 86 FR 46034 (August 17, 2021) (SR-MIAX-2021-35), 92644 (August 11, 2021), 86 FR 46055 (August 17, 2021) (SR-PEARL-2021-36). These filings were withdrawn by the Exchanges and replaced with the instant filings, with additional information.

⁸ See MIAX Notice, *supra* note 4, at 54751.

market data systems, test systems, and disaster recovery facilities of both MIAx and MIAx Pearl, via a single, shared connection. The Exchanges state that Members and non-Members utilizing the MENI to connect to the trading platforms, market data systems, test systems, and disaster recovery facilities of MIAx and MIAx Pearl via a single, shared connection will be assessed one monthly connectivity fee per connection, regardless of the trading platforms, market data systems, test systems, and disaster recovery facilities accessed via such connection.⁹

III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,¹⁰ at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,¹¹ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) 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. As discussed below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

The Exchanges state that the tiered-pricing structure is reasonable, equitably allocated, and not unfairly discriminatory because it will encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchanges, and also enable the Exchanges to better monitor and provide access to the Exchanges’ network to ensure sufficient capacity and headroom in the System.¹² The Exchanges also state that the majority of Members and non-Members that purchase 10Gb ULL connections will either save money or pay the same amount after the tiered-

pricing structure is implemented.¹³ The Exchanges further state that firms that primarily route orders for best executions generally only need a limited number of connections to fulfill that obligation and connectivity costs will likely to be lower for these firms, while for firms that engaged in advanced trading strategies that typically require multiple connections will generate higher costs by utilizing more of the Exchanges’ resources.¹⁴

In further support of the proposed fee changes, the Exchanges argue principally that the fees for 10Gb ULL connections are constrained by competitive forces, and that this is supported by their revenue and cost analysis. The Exchanges state that they operate in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive and the Exchanges must continually adjust their fees for services and products, and in addition to order flow, to remain competitive with other exchanges.¹⁵ The Exchanges state that they are not aware of any evidence that a market share of approximately 5–6% provides the Exchanges with anti-competitive pricing power, and that market participants may look to connect to the Exchanges via cheaper alternatives or choose to disconnect from the Exchanges or reduce the number of connections to the Exchanges as a means to reduce costs.¹⁶ The Exchanges state that market participants can and do drop their access to exchanges based on non-transaction fee pricing.¹⁷ The Exchanges also state that

there is no regulatory requirement that any market participant connect to any one options exchange, or connect at a particular connection speed or act in a particular capacity on the Exchanges, and that the Exchanges are unaware of any one options exchange whose membership includes all registered broker-dealers.¹⁸

The Exchanges also state that the proposed fees are reasonable and appropriate to allow the Exchanges to offset expenses the Exchanges have and will incur in relation to providing the Proposed Access Fees and provide an analysis of their revenues, costs, and profitability associated with these fees.¹⁹ The Exchanges state that this analysis reflects an extensive cost review in which the Exchanges analyzed every expense item in the Exchanges’ general expense ledgers to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the access services.²⁰ The Exchanges state that this analysis shows the fee increases will not result in excessive pricing or supra-competitive profits when compared to MIAx’s and MIAx Pearl’s annual expense associated with providing the 10Gb ULL connections versus the annual revenue for the 10Gb ULL connections.²¹

The Exchanges state that, for 2021, the total annual expense for providing the access services associated with the Proposed Access Fees for MIAx and MIAx Pearl is projected to be approximately \$15.9 million.²² The \$15.9 million in projected total annual expense is comprised of the following, all of which the Exchanges state are directly related to the access services associated with the Proposed Access Fees: (1) Third-party expense, relating to fees paid by the Exchanges to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchanges to provide the services associated with the Proposed Access Fees. The Exchanges state that the \$15.9 million in projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any

⁹ See *id.* The Exchanges state that a firm that is a Member of both MIAx Pearl and MIAx can also allocate connections to the exchanges at the lowest rates. For example, a firm that purchases three or four total 10 Gb ULL connections can allocate one or two to MIAx Pearl and the remaining one or two to MIAx and pay the lowest rate of \$9,000 for each of these connections, due to the shared MENI infrastructure of MIAx Pearl and MIAx. See *id.*

¹⁰ 15 U.S.C. 78s(b)(3)(C).

¹¹ 15 U.S.C. 78s(b)(1).

¹² See MIAx Notice, *supra* note 4, at 54761–62. The term “System” means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

¹³ See MIAx Notice, *supra* note 4, at 54752, 54759. The Exchanges state that they initially filed the proposed fee changes on July 30, 2021 (SR–MIAx–2021–35 and SR–PEARL–2021–36) and, after the effective date of SR–MIAx–2021–35 and SR–PEARL–2021–36 on August 1, 2021, approximately 80% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 20% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered-pricing structure when compared to the flat monthly fee structure. See *id.* at 54752. The Exchanges also state that no Member or non-Member has altered its use of 10Gb ULL connectivity since the proposed fees went into effect on August 1, 2021.

¹⁴ See *id.*

¹⁵ See *id.* at 54751–52.

¹⁶ See *id.* at 54753. The Exchanges also note that non-Member third-parties, such as service bureaus and extranets, resell the Exchanges’ connectivity, which is another viable alternative for market participants to trade on the Exchanges. The Exchanges note that they receive no connectivity revenue when connectivity is resold, which the Exchanges believe creates and fosters a competitive environment and subjects the Exchanges to competitive forces in pricing their connectivity and access fees. See *id.* at 54759.

¹⁷ See *id.* at 54754.

¹⁸ See *id.* at 54759.

¹⁹ See *id.* at 54754–57.

²⁰ See *id.* at 54752. The Exchanges also state that no expense amount is allocated twice. *Id.* at 54755, 54757. Expenses associated with the MIAx Pearl equities market are accounted for separately and are not within the scope of this filing. See *id.* at 54754.

²¹ See *id.* at 54757.

²² See *id.* at 54754.

other product or service offered by the Exchanges.

The Exchanges state that the total third-party expense, relating to fees paid by MIAX and MIAX Pearl to third-parties for certain products and services for the Exchanges to be able to provide the access services associated with the Proposed Access Fees is projected to be \$3.9 million for 2021.²³ The Exchanges represent that they determined whether third-party expenses related to the access services associated with the Proposed Access Fees, and, if such expense did so relate, determined what portion (or percentage) of such expense represents the cost to the Exchanges to provide access services associated with the Proposed Access Fees. This includes allocating a portion of fees paid to: (1) Equinix, for data center services (approximately 62% of the Exchanges' total applicable Equinix expense); (2) Zayo Group Holdings, Inc. for network services (approximately 62%); (3) Secure Financial Transaction Infrastructure and various other services providers (approximately 75%);²⁴ and (4) various other hardware and software providers (approximately 51%).

In addition, the Exchanges state that the total internal expense, relating to the internal costs of the Exchanges to provide the access services associated with the Proposed Access Fees, is projected to be approximately \$12 million for 2021.²⁵ The Exchanges represent that: (1) The Exchanges' employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be approximately \$6.1 million, which is a portion of the total projected expense of \$12.6 million for MIAX and \$9.2 million for MIAX Pearl for employee compensation and benefits; (2) the Exchanges' depreciation and amortization expense relating to providing the access services associated with the Proposed Access Fees is projected to be \$5.3 million, which is a portion of the total projected expense of \$4.8 million for MIAX and \$2.9 million for MIAX Pearl for depreciation and amortization; and (3) the Exchanges' occupancy expense relating to providing the access services associated with the Proposed Access Fees is projected to be

\$0.6 million, which is a portion of the Exchanges' total projected expense of \$0.6 million for MIAX and \$0.5 million for MIAX Pearl for occupancy.

The Exchanges state that this cost and revenue analysis shows that the proposed rule changes will not result in excessive pricing or supra-competitive profit.²⁶ The Exchanges project that, on a fully-annualized basis, the Proposed Access Fees will have an expense of approximately \$15.9 million per annum and a projected revenue of \$22 million per year, and including projected revenue for providing network connectivity for all connectivity alternatives to be approximately \$22.8 million per annum, resulting in a projected profit margin of 30% inclusive of the Proposed Access Fees and all other connectivity alternatives (\$22.8 million in total projected connectivity revenue minus \$15.9 million in projected expense = \$6.9 million profit per year). The Exchanges state that this profit margin does not take into account the cost of capital expenditures that MIAX and MIAX Pearl historically spent or are projected to spend each year going forward.

The Exchanges state that the proposed fees for 10Gb ULL connections is equitable and reasonable because the proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges.²⁷ The Exchanges also state that their projected revenue from access fees is less than, or similar to, the access fee revenues generated by access fees charged by other U.S. options exchanges based on the 2020 audited financial statements within their Form 1 filings.²⁸ The Exchanges also believe that their overall operating margin is in line with or less than the operating margins of competing options exchanges, including the revenue and expense associated with the Proposed Access Fees.²⁹ The Exchanges state that this incremental increase in revenue generated from the 30% profit margin on connectivity will allow the Exchanges to further invest in

their system architecture and matching engine functionality to the benefit of all market participants.³⁰

The Exchanges state that the proposed fees are equitably allocated, not unfairly discriminatory, and do not impose an unnecessary or inappropriate burden on competition because the Proposed Access Fees do not favor certain categories of market participants in a manner that would impose a burden on competition because the allocation reflects the network resources consumed by the various usage of market participants, with the lowest bandwidth consuming members paying the least, and highest bandwidth consuming members paying the most, particularly since higher bandwidth consumption translates to higher costs to the Exchanges;³¹ options market participants are not forced to connect to all options exchanges;³² and options market participants may choose alternative methods of connecting to the Exchanges, including routing through another participant or market center accessing the Exchanges indirectly.³³

The Commission received two comment letters from one commenter that opposes the proposed rule changes.³⁴ This commenter states that the Exchanges have not sufficiently demonstrated their proposed fees' consistency with the Act or addressed previous concerns with the proposed fees raised by the same commenter.³⁵ Specifically, this commenter argues that there are no reasonable substitutes for the Exchanges' 10Gb ULL connectivity lines, particularly for market makers whose business models require them to subscribe to direct connectivity to the Exchanges in the highest proposed pricing tier.³⁶ The commenter further

³⁰ See *id.*

³¹ See *id.* at 54759.

³² See *id.*

³³ See *id.*

³⁴ See letters from Richard J. McDonald, Susquehanna International Group, LLP, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 ("First SIG Letter") and October 26, 2021 ("Second SIG Letter").

³⁵ See Second SIG Letter, at 2. In the First SIG Letter the commenter requested that the Commission suspend the proposals and institute proceedings to determine whether to approve or disapprove the proposals on the basis that the proposals represent the same fee changes previously proposed by the Exchanges for which the commenter expressed concerns. See also letter from Richard J. McDonald, Susquehanna International Group, LLP, to Vanessa Countryman, Secretary, Commission, dated September 7, 2021, available at <https://www.sec.gov/comments/sr-miax-2021-35/srmiacx202135-9208444-249989.pdf> (comment letter submitted to File Nos. SR-MIAX-2021-35, SR-MIAX-2021-37, SR-PEARL-2021-33, SR-PEARL-2021-36, SR-EMERALD-2021-23, and SR-EMERALD-2021-25, and expressing similar concerns to those described herein).

³⁶ See Second SIG Letter, *supra* note 36, at 2-3.

²⁶ See *id.* at 54757.

²⁷ See *id.* at 54753. The Exchanges note that higher connectivity fees for competing exchanges have been in place for years (over 8 years in some cases), which allowed these exchanges to derive significantly more revenue from their access fees. See *id.* at 54753-54. The Exchanges state that the Exchanges and their affiliates have historically set their fees purposefully low in order to attract business and market share, and that it benefits overall competition in the marketplace to allow relatively new entrants like the Exchanges and their affiliates to propose fees that may help these new entrants recoup their substantial investment in building out costly infrastructure. See *id.* at 54758-59.

²⁸ See *id.* at 54758.

²⁹ See *id.*

²³ See *id.* at 54755.

²⁴ The Exchanges state that on October 22, 2019, the Exchanges were notified by Secure Financial Transaction Infrastructure that it was raising its fees charged to the Exchanges by approximately 11%, without being required to make a rule filing with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b-4 thereunder. See *id.* at 54755 n.29; see also 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4.

²⁵ See MIAX Notice, *supra* note 4, at 54756.

argues that the fact that no member or non-member has altered its use of 10Gb ULL connectivity since the fee changes went into effect serves as further support of its claim that there are no reasonable alternatives to the service.³⁷ This commenter also argues that the ability for a member to withdraw from an exchange should not support the reasonableness of any individual proposed fee, as a member would incur significant costs in withdrawing from an exchange in the form of lost infrastructure investments, the cost of withdrawal itself, and other opportunity costs.³⁸ This commenter further objects that the Exchanges have not provided sufficient quantitative support for their revenues, costs, and profitability under the current and proposed fees to support an analysis that the proposed fees and the Exchanges' profitability are reasonable.³⁹ Moreover, the commenter argues that the Exchanges' comparison of their projected access fee profit margins to the overall profit margins of competing exchanges is insufficient as it does not appropriately compare the individual components of these other exchange fees to those of the Exchanges.⁴⁰ The commenter also suggests that any comparisons made by the Exchanges to the revenues and margins of other exchanges are inapt because they do not account for the circumstances under which other exchanges established their fees, including, for example, whether the services are equivalent or the costs to provide them are similar.⁴¹ Finally, this commenter claims that the proposed tiers in the new fee structure are unfairly discriminatory because the Exchanges have not provided any cost breakdown to support the claim that the use of multiple connections creates higher costs for the Exchanges.⁴² Instead, the commenter argues that market participants who purchase more units of 10Gb ULL connections use more exchange bandwidth simply due to the fact that they have purchased more units, and that this does not justify the proposal to charge a higher rate *per unit*, which the commenter claims is unfairly discriminatory towards market maker subscribers.⁴³

Another commenter opposing the proposed rule changes states that the Exchanges have not met their burden of demonstrating that the proposed fees are consistent with the standards under the Act.⁴⁴ This commenter states that the Exchanges' argument that competition for order flow constrains pricing for products and services exclusively offered by the Exchanges does not demonstrate that the fees are reasonable.⁴⁵ This commenter also disagrees with the Exchanges' statement that they must continually adjust the fees for these services as a result of competition from other markets, arguing that this does not reflect marketplace reality.⁴⁶ This commenter also states that the Exchanges have failed to demonstrate that the proposed fees are equitably allocated and not unfairly discriminatory, claiming that the proposed fee changes directly impact market makers and the burden of the fee increases fall predominantly on market makers operating on the Exchanges because 10Gb ULL connections are an essential technology tool for market makers.⁴⁷ The commenter states that the Exchanges offer no concrete support for their arguments that the tiered pricing structure would encourage firms to be more economical and efficient in the number of connections they purchase, allowing the Exchanges to better monitor and provide access to their networks to ensure that they have sufficient capacity and headroom in their systems.⁴⁸ This commenter also states that the Exchanges provide no support for their position that the use of multiple 10Gb ULL connections generates higher costs for the Exchanges, positing that it is likely the Exchanges have fixed costs associated with providing connections and any additional connections purchased by users will result in greater Exchange profits.⁴⁹ The commenter also states that

the Exchanges have provided no public information on how they derived the cost amounts they determined to allocate to the products and services subject to the proposed fee changes nor any meaningful baseline information regarding the Exchanges' overall costs.⁵⁰ This commenter believes that the Exchanges have withdrawn and refiled essentially identical proposals,⁵¹ subverting proper consideration of the proposed fee changes under the process set forth in the Act.⁵²

A different commenter, while not expressing support or opposition for the specific proposed fee changes, applauds the Exchanges for the enhanced disclosure they have provided with respect to their proposed fee changes as compared to the information in prior rule filings by other exchanges proposing similar types of market data or connectivity fees.⁵³ This commenter states that the proposed fee changes would "materially lower costs for many users, while increasing the costs for some of [the Exchanges'] heaviest of users," noting that when these fee filing proposals were withdrawn and refiled, they contained "significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension."⁵⁴

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchanges' present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.⁵⁵ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement

⁵⁰ See *id.* The commenter believes that such information is needed to allow commenters to judge whether the allocations are supportable. *Id.* This commenter also believes that the Exchanges' discussion of profit margins are "high-level and conclusory," and fail to provide sufficient detail to understand whether or not the fees are reasonable. *Id.*

⁵¹ See *supra* note 8.

⁵² See SIFMA Letter, *supra* note 46, at 5-6.

⁵³ See letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Gary Gensler, Chair, Commission, dated October 29, 2021, at 17. This commenter also petitioned the Commission for rulemaking regarding the process for reviewing self-regulatory organization fee filings.

⁵⁴ See *id.* The commenter highlights that the Exchanges' proposals detailed both the projected revenues generated from the proposed fees by user class as well as the percentage of subscribers whose fees increased or decreased as a result of the proposed changes. See *id.*

⁵⁵ See 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

⁴⁴ See letter from Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated November 16, 2021 ("SIFMA Letter").

⁴⁵ See *id.* at 3. This commenter asserts that the proposals are similar to proprietary market data products offered by the Exchanges, which the commenter states are unique to the Exchanges and market participants cannot obtain anywhere else. *Id.*

⁴⁶ See *id.* at 4.

⁴⁷ See *id.* at 4-5. The commenter asserts that without high speed access provided through 10Gb ULL connections, market makers could be exposed to tremendous risk if their quotes become "stale" due to price movements in underlying securities. See *id.* at 4.

⁴⁸ See *id.* at 4. The commenter also states that the Exchanges fail to provide any discussion of why their current capacity needs are constrained under the current pricing structure.

⁴⁹ See *id.* at 5.

³⁷ See *id.* at 3.

³⁸ See *id.*

³⁹ See *id.* at 4. The commenter further argues that the Exchanges have not sufficiently justified the profit margins they would be accruing with the proposed fees by, for example, explaining specific technological undertakings the Exchanges expect to fund with the revenue from the new fees. See *id.*

⁴⁰ See *id.* at 4-5.

⁴¹ See *id.*

⁴² See *id.* at 5.

⁴³ See *id.* at 6.

“should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”⁵⁶

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;⁵⁷ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;⁵⁸ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁵⁹

In temporarily suspending the Exchanges’ fee changes, the Commission intends to further consider whether the proposals to modify fees for certain connectivity options and implement a tiered pricing fee structure is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange’s rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁶⁰

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.⁶¹

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Changes

In addition to temporarily suspending the proposals, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)⁶² and 19(b)(2)(B)

of the Act⁶³ to determine whether the proposed rule changes should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes to inform the Commission’s analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,⁶⁴ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”⁶⁵
- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”⁶⁶ and
- Whether the Exchanges have demonstrated how the proposals are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”⁶⁷

As discussed in Section III above, the Exchanges makes various arguments in support of the proposals, and the Commission received comment letters disputing the Exchanges’ arguments and

Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

⁶³ 15 U.S.C. 78s(b)(2)(B).

⁶⁴ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

⁶⁵ 15 U.S.C. 78f(b)(4).

⁶⁶ 15 U.S.C. 78f(b)(5).

⁶⁷ 15 U.S.C. 78f(b)(8).

expressing concerns regarding the proposals.⁶⁸ In particular, two commenters argue that the Exchanges did not provide sufficient information to establish that the proposed fees are consistent with the Act and the rules thereunder.⁶⁹ The Commission believes that there are questions as to whether the Exchanges have provided sufficient information to demonstrate that the proposed 10Gb ULL connectivity fees are consistent with the Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”⁷⁰ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁷¹ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁷²

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposals are consistent with the Act, specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act;⁷³ as well as any other provision of the Act, or the rules and regulations thereunder.

V. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect

⁶⁸ *See* First SIG Letter and Second SIG Letter, *supra* note 36; SIFMA Letter, *supra* note 46.

⁶⁹ *See id.*

⁷⁰ 17 CFR 201.700(b)(3).

⁷¹ *See id.*

⁷² *See id.*

⁷³ *See* 15 U.S.C. 78f(b)(4), (5), and (8).

⁵⁶ *Id.*

⁵⁷ 15 U.S.C. 78f(b)(4).

⁵⁸ 15 U.S.C. 78f(b)(5).

⁵⁹ 15 U.S.C. 78f(b)(8).

⁶⁰ *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

⁶¹ For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules’ impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

⁶² 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change,

to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by December 20, 2021. Rebuttal comments should be submitted by January 3, 2022. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁷⁴

The Commission asks that commenters address the sufficiency and merit of the Exchanges' statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposals are consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Nos. SR-MIAX-2021-41 and SR-PEARL-2021-45 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 Numbers SR-MIAX-2021-41 and SR-PEARL-2021-45. These file numbers should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filings also will be available for inspection and copying at the principal office of each 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 Numbers SR-MIAX-2021-41 and SR-PEARL-2021-45 and should be submitted on or before December 20, 2021. Rebuttal comments should be submitted by January 3, 2022.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,⁷⁵ that File Numbers SR-MIAX-2021-41 and SR-PEARL-2021-45 be, and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁶

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93641; File No. SR-CboeBZX-2021-076]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend Interpretation and Policy .01 to Rule 11.13 in Connection With a Risk Setting That Users May Elect To Apply to Their Orders in Hard To Borrow Securities

November 22, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November

8, 2021, Cboe BZX Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Cboe BZX Exchange, Inc. ("BZX" or the "Exchange") is filing with the Securities and Exchange Commission (the "Commission") a proposal to amend Interpretation and Policy .01 to Rule 11.13 in connection with a risk setting that Users³ may elect to apply to their orders in hard to borrow securities. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/), at the Exchange's Office of the Secretary, 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 this proposal is to amend Interpretation and Policy .01 to Rule 11.13 to allow the Exchange to offer its Users a hard to borrow risk setting ("Hard to Borrow List") that Users may elect to apply to their short sale orders in U.S. equity securities. Pursuant to Interpretation and Policy .01 to Rule 11.13, the Exchange currently offers certain optional risk settings applicable to a User's activities on the Exchange. Specifically,

³ A User is any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.13. See Rule 1.5(cc).

⁷⁴ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

⁷⁵ 15 U.S.C. 78s(b)(3)(C).

⁷⁶ 17 CFR 200.30-3(a)(57) and (58).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.