

Dated: November 23, 2021.

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meetings

TIME AND DATE: 2:00 p.m. on Thursday, December 2, 2021.

PLACE: The meeting will be held via remote means and/or at the Commission's headquarters, 100 F Street NE, Washington, DC 20549.

STATUS: This meeting will be closed to the public.

MATTERS TO BE CONSIDERED:

Commissioners, Counsel to the Commissioners, the Secretary to the Commission, and recording secretaries will attend the closed meeting. Certain staff members who have an interest in the matters also may be present.

In the event that the time, date, or location of this meeting changes, an announcement of the change, along with the new time, date, and/or place of the meeting will be posted on the Commission's website at <https://www.sec.gov>.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meeting.

The subject matter of the closed meeting will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION:

For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551-5400.

Authority: 5 U.S.C. 552b.

Dated: November 24, 2021.

Jill M. Peterson,
Assistant Secretary.

[FR Doc. 2021-26047 Filed 11-24-21; 4:15 pm]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93640; File Nos. SR-MIAX-2021-43, SR-EMERALD-2021-31]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC, MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Amend Fee Schedules To Adopt Tiered-Pricing Structures for Additional Limited Service MIAX and MIAX Emerald Express Interface Ports

November 22, 2021.

I. Introduction

On September 28, 2021, Miami International Securities Exchange, LLC ("MIAX") and MIAX Emerald, LLC ("MIAX Emerald") (each an "Exchange"; 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 ("Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt a tiered-pricing structure for additional limited service express interface ports. Each proposed rule change was 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 5, 2021.⁴ Pursuant to Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (1) Temporarily suspending

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. 93185 (September 29, 2021), 86 FR 55093 (October 5, 2021) (SR-MIAX-2021-43) ("MIAX Notice"); 93188 (September 29, 2021), 86 FR 55052 (October 5, 2021) (SR-EMERALD-2021-31) ("MIAX Emerald Notice"). For ease of reference, citations to statements generally applicable to both notices are to the MIAX Notice. Comments received on the proposed rule changes are available on the Commission's website at: <https://www.sec.gov/comments/sr-miax-2021-43/srmiac202143.htm> (SR-MIAX-2021-43); <https://www.sec.gov/comments/sr-emerald-2021-31/sremerald202131.htm> (SR-EMERALD-2021-31).

⁵ 15 U.S.C. 78s(b)(3)(C).

File Nos. SR-MIAX-2021-43 and SR-EMERALD-2021-31; and (2) instituting proceedings to determine whether to approve or disapprove File Nos. SR-MIAX-2021-43 and SR-EMERALD-2021-31.

II. Description of the Proposed Rule Changes

Limited Service MIAX Express Interface Ports and Limited Service MIAX Emerald Express Interface Ports (collectively, "Limited Service MEI Ports") provide Market Makers⁶ with the ability to send eQuotes and quote purge messages, and are also capable of receiving administrative information.⁷ Currently, each Exchange allocates two Limited Service MEI Ports, free of charge, per matching engine to which a Market Maker connects. Market Makers may request additional Limited Service MEI Ports for each matching engine to which they connect for an additional monthly fee for each such additional port. Prior to the proposed rule changes, each Exchange charged a flat \$100 monthly fee for each such additional port. Each Exchange has proposed to adopt a tiered-pricing structure.⁸ For both MIAX and MIAX Emerald, the first and second Limited Service MEI Ports for each matching engine would remain free of charge. For MIAX, the additional Limited Service MEI Port fees for each matching engine would increase from \$100 to: (i) \$150 for the third and fourth Limited Service MEI Ports; (ii) \$200 for the fifth and sixth Limited Service MEI Ports; and (iii) \$250 for the seventh or more Limited Service MEI Ports.⁹ For MIAX Emerald, the additional Limited Service MEI Port fees for each matching engine would increase from \$100 to: (i) \$200 for the third and fourth Limited Service MEI Ports; (ii) \$300 for the fifth and sixth Limited Service MEI Ports; and (iii) \$400 for the seventh to fourteenth Limited Service MEI Ports.¹⁰

⁶ Defined at MIAX Rule 100 and MIAX Emerald Rule 100.

⁷ See, e.g., MIAX Notice, *supra* note 4, at 55093 n.10.

⁸ The Exchanges initially filed the proposed fee changes on August 2, 2021. See Securities Exchange Act Release Nos. 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR-MIAX-2021-37), 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR-EMERALD-2021-25). These filings were withdrawn and replaced with the instant filings, with additional information. See also Securities Exchange Act Release No. 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (MIAX-2021-19) (allowing purchase of any number of additional Limited Service MEI Ports and stating that, at a continued monthly fee of \$100 for each additional port, the Exchange anticipates generating an annual loss from the provision).

⁹ See MIAX Notice, *supra* note 4, at 55094.

¹⁰ See MIAX Emerald Notice, *supra* note 4, at 55053. The MIAX Emerald Fee Schedule states that

III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,¹¹ 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,¹² 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 described 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.

In support of the proposed tiered-pricing structure and associated fee increases, the Exchanges argue that they operate in a highly competitive market¹³ and their ability to price access and ports is constrained by competition among exchanges and third parties.¹⁴ MIAX states that it has a market share of only 5.8%, and MIAX Emerald states that it has a market share of only 4.99%, of the U.S. equity options industry as of September 2021.¹⁵ The Exchanges also state that there are 15 other U.S. options exchanges which they must consider in their pricing discipline in order to compete for market participants.¹⁶ As evidence for their arguments, the Exchanges provide port fees for competing exchanges which, according to the Exchanges, demonstrate that the proposed tiered-pricing structure and proposed fees for additional Limited Service MEI Ports are less than or similar to fees charged by competing options exchanges for similar access on those exchanges.¹⁷

In further support of their arguments that competitive forces constrain the proposed tiered-pricing structure and the associated fee increases, the Exchanges state that the use of such additional Limited Service MEI Ports is entirely voluntary;¹⁸ and that there is

no regulatory requirement that any market participant access any one options exchange, use more than the two free Limited Service MEI Ports that the Exchanges provide per matching engine, access the Exchanges in a particular capacity, or trade any particular product offered on the Exchanges.¹⁹ Each Exchange further states that no options market participant is required by rule, regulation, or competitive forces to be a Member of its Exchange;²⁰ and that it is not aware of any reason why market participants could not simply drop their access (or not initially access an exchange) if an exchange were to establish non-transaction fees that did not make business or economic sense for such market participants.²¹ The Exchanges believe this is illustrated by the fact that market participants can and do drop their access to exchanges based on non-transaction fee pricing²² and that they are unaware of any one options exchange whose membership includes every registered broker-dealer.²³

The Exchanges also state that the proposed fee increases for additional Limited Service MEI Ports (which they reference as “Proposed Access Fees”) are intended to recover the Exchanges’ costs of providing access to their systems²⁴ and are a reasonable attempt to offset a portion of the costs associated with providing access to their network infrastructure.²⁵ The Exchanges provide an analysis of their revenues, costs, and profitability associated with the Proposed Access Fees. The Exchanges state that this analysis reflects an extensive cost review in which the Exchanges analyzed nearly 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 associated with the Proposed Access Fees.²⁶

For 2021, the total annual expense for providing the access services associated with the Proposed Access Fees is projected by the Exchanges to be approximately \$1.32 million for MIAX

and \$0.88 million for MIAX Emerald.²⁷ As described in more detail in the MIAX Notice and MIAX Emerald Notice, the total annual expense for each Exchange is comprised of the following, all of which the Exchanges state are directly related to the access services associated with the Proposed Access Fees:²⁸

- Third-party expense, relating to fees paid by the Exchanges to third-parties for certain products and services. This included allocating a portion of fees paid to: (1) Equinix for data center services; (2) Zayo Group Holdings, Inc. for network services; (3) Secure Financial Transaction Infrastructure, which supports connectivity and feeds; (4) various other service providers for content, connectivity, and infrastructure services; and (5) various other hardware and software providers; and
- internal expense, relating to the internal costs of the Exchanges to provide the access services associated with the Proposed Access Fees. This included allocating a portion of the Exchanges’: (1) Employee compensation and benefits expenses for full-time employees that support the access services associated with the Proposed Access Fees; (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees; and (3) occupancy expenses for leased office space for staff that provide the access services associated with the Proposed Access Fees.

The Exchanges state that their cost and revenue analyses show that the Proposed Access Fees will not result in excessive pricing or supra-competitive profits.²⁹ According to the Exchanges, on a fully-annualized basis, the revenue the Exchanges project to collect from the Proposed Access Fees³⁰ would be approximately \$3.21 million per year for MIAX and \$2.07 million per year for MIAX Emerald.³¹ This results in a projected profit margin of approximately 59% for MIAX (\$3.21 million in projected revenue minus \$1.32 million in projected expense = \$1.89 million profit per year) and

²⁷ See MIAX Notice, *supra* note 4, at 55096; MIAX Emerald Notice, *supra* note 4, at 55056.

²⁸ See, e.g., MIAX Notice, *supra* note 4, at 55096–99. The Exchanges clarify that the projected total annual expense includes costs related to *all* Limited Service MEI Ports, including the two Limited Service MEI Ports that Market Makers receive for free. See, e.g., *id.* at 55099.

²⁹ See, e.g., *id.* at 55099.

³⁰ The revenue numbers include the revenues the Exchanges project to collect only from the fees the Exchanges will charge for additional Limited Service MEI Ports *after* the first two Limited Service MEI Ports that Market Makers receive for free. See, e.g., *id.*

³¹ See MIAX Notice, *supra* note 4, at 55099; MIAX Emerald Notice, *supra* note 4, at 55058.

Market Makers are limited to twelve additional Limited Service MEI Ports per matching engine, for a total of fourteen per matching engine. See MIAX Emerald Fee Schedule 5.d.ii.

¹¹ 15 U.S.C. 78s(b)(3)(C).

¹² 15 U.S.C. 78s(b)(1).

¹³ See, e.g., MIAX Notice, *supra* note 4, at 55094.

¹⁴ See, e.g., *id.* at 55101.

¹⁵ See MIAX Notice, *supra* note 4, at 55095; MIAX Emerald Notice, *supra* note 4, at 55054–55.

¹⁶ See, e.g., MIAX Notice, *supra* note 4, at 55101.

¹⁷ See, e.g., *id.* at 55095.

¹⁸ See, e.g., *id.* at 55101.

¹⁹ See, e.g., *id.* at 55100.

²⁰ See, e.g., *id.* at 55096.

²¹ See, e.g., *id.*

²² See, e.g., *id.*

²³ See, e.g., *id.* at 55100–101.

²⁴ See, e.g., *id.* at 55099.

²⁵ See, e.g., *id.* at 55096.

²⁶ See, e.g., *id.* Each Exchange also states that no expense amount is allocated twice; and the expenses in each Exchange’s analysis only cover its own options market, not those of any affiliate. See, e.g., *id.* at 55097.

approximately 58% for MIAX Emerald (\$2.07 million in projected revenue minus \$0.88 million in projected expense = \$1.19 million profit per year).³² The Exchanges state that, based on the 2020 financial statements filed by competing options exchanges in Form 1 amendments, the Exchanges' revenues that are derived from access fees are in line with the revenue that is derived from access fees of competing exchanges, and the Exchanges' overall operating margins are in line with or less than the operating margins of competing exchanges.³³ MIAX further states that its anticipated operating margin, inclusive of its proposed fee change, would remain lower than or comparable to that of competing exchanges.³⁴

The Exchanges further state that the Proposed Access Fees are reasonable, equitably allocated, and not unfairly discriminatory because it benefits overall competition in the marketplace to allow relatively new entrants like the Exchanges and their affiliate, MIAX Pearl, LLC ("MIAX Pearl"), to propose fees that may help them recoup their substantial investment in building out costly infrastructure. The Exchanges state that they and MIAX Pearl have historically set their fees purposefully low in order to attract business and market share. The Exchanges also state that the concept of a tiered-pricing structure for ports is not new or novel.³⁵

In addition, the Exchanges state that the move from a flat fee per month to a tiered-pricing structure is reasonable, equitably allocated, and not unfairly discriminatory because the proposed structure would encourage firms to be more efficient and economical in the number of Limited Service MEI Ports they purchase, which the Exchanges believe will enable them to better monitor and provide access to the Exchanges' networks to ensure that the Exchanges meet their obligations under the Act to offer access to the Exchanges on terms that are not unfairly discriminatory, as well as to ensure sufficient capacity and headroom in their systems.³⁶

The Exchanges further state that firms that are primarily order routers seeking best-execution do not utilize Limited Service MEI Ports; and that, therefore, the fees described in the proposed tiered-pricing structure will only be allocated to market-making firms that

engage in advanced trading strategies and typically request multiple additional Limited Service MEI Ports.³⁷ The Exchanges further state that such market-making firms generate higher costs by utilizing more of the Exchanges' resources.³⁸ The Exchanges state that they must build out and continue to maintain networks that have the capacity to handle the message rate requirements of not only firms that consume minimal port resources, but also those firms that most heavily consume port resources, network consumers, and purchasers of numerous Limited Service MEI Ports, which handle billions of messages per day across the Exchanges' networks.³⁹ The Exchanges believe that, given that purchasers of the greatest amount of Limited Service MEI Ports utilize the most resources across their networks, it is reasonable to operate at profit margins of approximately 59% (for MIAX) and 58% (for MIAX Emerald) for these ports.⁴⁰ The Exchanges state that such profit margins should enable the Exchanges to continue to invest in their networks and systems, maintain their current infrastructure, support future enhancements to ports and network connectivity, and continue to offer enhanced customer reporting and monitoring services.⁴¹

The Commission received two comment letters from one commenter that opposes the proposed rule changes.⁴² 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.⁴³

³⁷ See, e.g., *id.* at 55094.

³⁸ See, e.g., *id.*

³⁹ See, e.g., *id.* at 55099.

⁴⁰ See MIAX Notice, *supra* note 4, at 55099; MIAX Emerald Notice, *supra* note 4, at 55059.

⁴¹ See MIAX Notice, *supra* note 4, at 55099; MIAX Emerald Notice, *supra* note 4, at 55059.

⁴² 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").

⁴³ See Second SIG Letter, *supra* note 42, 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/srmiac202135-9208444-249989.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).

Specifically, this commenter argues that the Exchanges' filings make the same general claims in support of their assertion that the port fee changes are fair and reasonable, equitably allocated, and not unfairly discriminatory as other filings relating to "10Gb ULL" connections,⁴⁴ and that the Exchanges' justifications for the Limited Service MEI Ports fail for the same reasons as those offered in the 10Gb ULL filings.⁴⁵ The commenter asserts 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.⁴⁶ The commenter further 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.⁴⁷ 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.⁴⁸ 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.⁴⁹ 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.⁵⁰ The commenter also suggests that any comparisons made by the Exchanges to the revenues and margins of other exchanges are inapt

⁴⁴ See Securities Exchange Act Release Nos. 93165 (September 28, 2021), 86 FR 54750 (October 4, 2021) (SR-MIAX-2021-41); 93162 (September 28, 2021), 86 FR 54739 (October 4, 2021) (SR-PEARL-45); and 93166 (September 28, 2021), 86 FR 54760 (October 4, 2021) (SR-EMERALD-29).

⁴⁵ See Second SIG Letter, *supra* note 42, at 7.

⁴⁶ See *id.* at 2-3.

⁴⁷ See *id.* at 3.

⁴⁸ See *id.*

⁴⁹ 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.*

⁵⁰ See *id.* at 4-5.

³² See MIAX Notice, *supra* note 4, at 55099; MIAX Emerald Notice, *supra* note 4, at 55058.

³³ See, e.g., MIAX Notice, *supra* note 4, at 55100.

³⁴ See MIAX Notice, *supra* note 4, at 55100.

³⁵ See, e.g., MIAX Notice, *supra* note 4, at 55100.

³⁶ See, e.g., *id.*

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.⁵¹ 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.⁵² 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.⁵³

Another commenter asks the Commission to disapprove the proposed fee changes because the Exchanges have not met their burden of demonstrating that they are consistent with the standards under the Exchange Act.⁵⁴ This commenter states that the Exchanges' argument that competition for order flow constrains pricing for products and services exclusively offered by the Exchange does not demonstrate that the fees are reasonable.⁵⁵ 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 because it does not reflect marketplace reality.⁵⁶ This commenter also states that the Exchanges have failed to demonstrate that the proposed fees are equitably allocated and not unfairly discriminatory, with the proposed fee changes "clearly and directly" impacting market makers and burden of the fee increases falling predominantly on market makers operating on the

Exchanges.⁵⁷ 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.⁵⁸ 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.⁵⁹ This commenter believes that the Exchanges have withdrawn and refiled essentially identical proposals,⁶⁰ subverting proper consideration of the proposed fee changes under the process set forth in the Exchange Act.⁶¹

When an exchange files a proposed rule change with the Commission, including fee filings, it is required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.⁶² The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."⁶³

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), requires, among other things, that the rules of an exchange: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;⁶⁴ (2) be designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and not be

designed to permit unfair discrimination between customers, issuers, brokers, or dealers;⁶⁵ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁶⁶

In temporarily suspending the Exchanges' proposed rule changes, the Commission intends to further consider whether the proposed additional Limited Service MEI Port fees are 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; are designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and are not designed to 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.⁶⁷

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.⁶⁸

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

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)⁶⁹ and 19(b)(2)(B) of the Act⁷⁰ to determine whether the Exchanges' 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

⁵¹ See *id.* at 4–5.

⁵² 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.

⁵³ See *id.* at 5. 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.*

⁵⁴ See *supra* note 8.

⁵⁵ See SIFMA Letter, *supra* note 54, at 5–6.

⁵⁶ See 17 CFR 240.19b-4 (General Instructions for Form 19b-4—Information to be Included in the Complete Form—Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

⁵⁷ See *id.*

⁵⁸ 15 U.S.C. 78f(b)(4).

⁶⁵ 15 U.S.C. 78f(b)(5).

⁶⁶ 15 U.S.C. 78f(b)(8).

⁶⁷ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

⁶⁸ 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).

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

⁷⁰ 15 U.S.C. 78s(b)(2)(B).

⁵¹ See *id.*

⁵² See *id.* at 5.

⁵³ See *id.* at 6.

⁵⁴ 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").

⁵⁵ See *id.* at 3. This commenter asserts that the proposals are similar to proprietary market data products offered by the Exchanges, which are unique to the Exchanges and market participants cannot obtain anywhere else. *Id.* The commenter also states that for market makers, additional MEI ports are critical for market makers to provide liquidity on the Exchanges and the argument that the additional MEI ports are options "does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable." *Id.* at 4.

⁵⁶ See *id.* at 4.

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,⁷¹ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how the proposed fees 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”;⁷²

- Whether the Exchanges have demonstrated how the proposed fees 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 mechanism 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”;⁷³ and

- Whether the Exchanges have demonstrated how the proposed fees 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].”⁷⁴

As discussed in Section III above, the Exchanges made various arguments in support of the proposals, and the Commission received comment letters disputing the Exchanges' arguments and expressing concerns regarding the proposals.⁷⁵ In particular, the 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.⁷⁶ The Commission believes that there are questions as to whether

the Exchanges have provided sufficient information to demonstrate that the proposals 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 [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”⁷⁷ 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,⁷⁸ 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.⁷⁹

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, and 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 mechanism 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 a burden on competition not necessary or appropriate in furtherance of the purposes of the Act;⁸⁰ 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 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.⁸¹

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 proposed rule changes 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-2021-43 and SR-EMERALD-2021-31 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 Nos. SR-MIAX-2021-43 and SR-EMERALD-2021-31. 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 filing also will be available for

⁷¹ 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.*

⁷² 15 U.S.C. 78f(b)(4).

⁷³ 15 U.S.C. 78f(b)(5).

⁷⁴ 15 U.S.C. 78f(b)(8).

⁷⁵ *See* First SIG Letter and Second SIG Letter, *supra* note 42; SIFMA Letter, *supra* note 54.

⁷⁶ *See id.*

⁷⁷ 17 CFR 201.700(b)(3).

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *See* 15 U.S.C. 78f(b)(4), (5), and (8).

⁸¹ 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).

inspection and copying at the principal office of the Exchanges. 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 Nos. SR–MIAX–2021–43 and SR–EMERALD–2021–31 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,⁸² that File Nos. SR–MIAX–2021–43 and SR–EMERALD–2021–31 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.⁸³

J. Matthew DeLesDernier,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–93644; File No. SR–EMERALD–2021–29]

Self-Regulatory Organizations; MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend the Exchange's Fee Schedule To Adopt a Tiered-Pricing Structure for Certain Connectivity Fees

November 22, 2021.

I. Introduction

On September 24, 2021, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) 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 Number SR–EMERALD–2021–29) to amend the Exchange's Fee Schedule (“Fee Schedule”) to adopt a tiered pricing structure for certain

connectivity fees. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the **Federal Register** on October 4, 2021.⁴ Under Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (i) Temporarily suspending File Number SR–EMERALD–2021–29; and (ii) instituting proceedings to determine whether to approve or disapprove File Number SR–EMERALD–2021–29.

II. Description of the Proposed Rule Change

MIAX Emerald proposes to modify the Exchange's Fee Schedule to adopt a tiered-pricing structure for 10 gigabit (“Gb”) ultra-low latency (“ULL”) fiber connections to the Exchange's primary and secondary facilities available to both Members⁶ and non-Members. Specifically, the Exchange proposes 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 Exchange's APIs or market data feeds in the Exchange's production environment, pro-rated when a Member or non-Member makes a change to connectivity by adding or deleting connections, and

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 No. 93166 (September 28, 2021), 86 FR 54760 (“Notice”). Comments received on the proposed rule change are available on the Commission's website at: <https://www.sec.gov/comments/sr-emerald-2021-29/sremerald202129.htm>.

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 Exchange initially filed the proposed fee change on July 30, 2021. See Securities Exchange Act Release No. 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR–EMERALD–2021–23). That filing was withdrawn by the Exchange and replaced with the instant filing, with additional information.

assessed in any month during which the Member or non-Member has established connectivity with the Exchange's disaster recovery facility.⁸

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,⁹ 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,¹⁰ 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 change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

The Exchange states 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 Exchange, and also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.¹¹ The Exchange also states 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.¹² The Exchange further states 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

⁸ See Notice, *supra* note 4, at 54761.

⁹ 15 U.S.C. 78s(b)(3)(C).

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ See Notice, *supra* note 4, at 54761. The term “System” means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

¹² See Notice, *supra* note 4, at 54761, 54769. The Exchange states that it initially filed this proposed fee change on July 30, 2021 (SR–EMERALD–2021–23) and, after the effective date of SR–EMERALD–2021–23 on August 1, 2021, approximately 60% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 40% 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 54761. The Exchange also states 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. See *id.* at 54768.

⁸² 15 U.S.C. 78s(b)(3)(C).

⁸³ 17 CFR 200.30–3(a)(57) and (58).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.