

of the remote manner in which inspections for the calendar year 2022 may be conducted. Additionally, and as stated above, FINRA has recently submitted a filing to extend its substantively identical temporary remote relief rule for its trading permit holders and members in the same manner.<sup>19</sup>

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

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act<sup>20</sup> and Rule 19b-4(f)(6)<sup>21</sup> thereunder.

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

**IV. Solicitation of Comments**

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

*Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-MIAX-2022-09 on the subject line.

*Paper Comments*

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

All submissions should refer to File Number SR-MIAX-2022-09. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-MIAX-2022-09 and should be submitted on or before March 15, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

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**BILLING CODE 8011-01-P**

**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-94263; File No. SR-EMERALD-2022-06]

**Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing of a Proposed Rule Change To Establish Fees for the Exchange's cToM Market Data Product; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change**

February 15, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 7, 2022, MIAX Emerald, LLC ("MIAX Emerald" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Item II below, which Item has been prepared by the Exchange. The Exchange filed the proposed rule change pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>3</sup> and Rule 19b-4(f)(2) thereunder.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and is, pursuant to Section 19(b)(3)(C) of the Act, hereby: (i) Temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

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

The Exchange is filing a proposal to amend the Exchange's Fee Schedule ("Fee Schedule") to establish fees for the market data product known as MIAX Emerald Complex Top of Market ("cToM"). The fees became operative on February 7, 2022. The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX's principal office, and at the Commission's Public Reference Room.

**II. Self-Regulatory Organization's Description of 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

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

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

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

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

<sup>19</sup> See *supra* note 14.

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>22</sup> 17 CFR 200.30-3(a)(12).

proposed rule change. The text of these statements may be examined at the places specified in Item IV [sic] 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 Exchange proposes to amend Section 6(a) of the Fee Schedule to establish fees for the cToM data product. The Exchange initially filed this proposal on June 30, 2021 with the proposed fees to be effective beginning July 1, 2021 ("First Proposed Rule Change").<sup>5</sup> The First Proposed Rule Change was published for comment in the **Federal Register** on July 15, 2021.<sup>6</sup> Although the Commission did not receive any comment letters on the First Proposed Rule Change, on August 27, 2021, the Commission issued its Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Establish Fees for the Exchanges' cToM Market Data Products (relating to the First Proposed Rule Change and a similar filing by the Exchange's affiliate, Miami International Securities Exchange, LLC ("MIAX"), to also adopt cToM fees).<sup>7</sup> The Exchange withdrew the First Proposed Rule Change on September 30, 2021<sup>8</sup> and re-submitted the proposal, with the proposed fee changes being immediately effective ("Second Proposed Rule Change").<sup>9</sup> The Second Proposed Rule Change provided additional justification for the proposed fee changes and addressed comments provided by the Commission Staff. On October 14, 2021, the Exchange withdrew the Second Proposed Rule Change and submitted its proposal to adopt cToM fees to again provide additional justification for the proposed fee changes and address comments provided by the Commission Staff ("Third Proposed Rule Change").<sup>10</sup> The Third Proposed Rule Change was

<sup>5</sup> See Securities Exchange Act Release No. 92358 (July 9, 2021), 86 FR 37361 (July 15, 2021) (SR-EMERALD-2021-21).

<sup>6</sup> *Id.*

<sup>7</sup> See Securities Exchange Act Release No. 92789 (August 27, 2021), 86 FR 49364 (September 2, 2021) (SR-MIAX-2021-28, SR-EMERALD-2021-21) (the "Suspension Order").

<sup>8</sup> See Securities Exchange Act Release No. 93471 (October 29, 2021), 86 FR 60947 (November 4, 2021).

<sup>9</sup> See SR-EMERALD-2021-32.

<sup>10</sup> Securities Exchange Act Release No. 93427 (October 26, 2021), 86 FR 60310 (November 1, 2021) (SR-EMERALD-2021-34).

published for comment in the **Federal Register** on November 1, 2021.<sup>11</sup> Although the Commission did not again receive any comment letters on the Third Proposed Rule Change, the Exchange withdrew the Third Proposed Rule Change on December 10, 2021 submitted a revised proposal for immediate effectiveness ("Fourth Proposed Rule Change").<sup>12</sup> The Fourth Proposed Rule Change was published for comment in the **Federal Register** on December 23, 2021.<sup>13</sup> The Fourth Proposed Rule Change meaningfully attempted to provide additional justification and explanation for the proposed fee change in response to a telephone conversation with Commission Staff on December 7, 2021 relating to the Third Proposed Rule Change. Although the Commission again did not receive any comment letters on the Fourth Proposed Rule Change, the Exchange withdrew the Fourth Proposed Rule Change on February 7, 2022 and now submits this revised proposal for immediate effectiveness ("Fifth Proposed Rule Change"). This Fifth Proposed Rule Change provides additional justification and explanation for the proposed fee changes.

Background

The Exchange previously adopted rules governing the trading of Complex Orders<sup>14</sup> on the MIAX Emerald System<sup>15</sup> in 2018,<sup>16</sup> ahead of the Exchange's planned launch, which took place on March 1, 2019. Shortly thereafter, the Exchange adopted the market data product cToM and expressly waived fees for cToM to provide an incentive to prospective market participants to subscribe to that market data feed.<sup>17</sup> Prior to the First Proposed Rule Change, the Exchange did not charge fees to cToM subscribers

<sup>11</sup> *Id.*

<sup>12</sup> Securities Exchange Act Release No. 93811 (December 17, 2021), 86 FR 73051 (December 23, 2021) (SR-EMERALD-2021-44).

<sup>13</sup> *Id.*

<sup>14</sup> See Exchange Rule 518(a)(5) for the definition of Complex Orders.

<sup>15</sup> The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

<sup>16</sup> See Securities Exchange Act Release Nos. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (In the Matter of the Application of MIAX EMERALD, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission); and 85345 (March 18, 2019), 84 FR 10848 (March 22, 2019) (SR-EMERALD-2019-13) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 518, Complex Orders).

<sup>17</sup> See Securities Exchange Act Release No. 85207 (February 27, 2019), 84 FR 7963 (March 5, 2019) (SR-EMERALD-2019-09) (providing a complete description of the cToM data feed).

during the nearly three years since it was first available for subscription.

In summary, cToM provides subscribers with the same information as the MIAX Emerald Top of Market ("ToM") data product as it relates to the Strategy Book,<sup>18</sup> *i.e.*, the Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange. However, cToM provides subscribers with the following additional information that is not included in ToM: (i) The identification of the complex strategies currently trading on the Exchange; (ii) complex strategy last sale information; and (iii) the status of securities underlying the complex strategy (*e.g.*, halted, open, or resumed). cToM is therefore a distinct market data product from ToM in that it includes additional information that is not available to subscribers that receive only the ToM data feed. ToM subscribers are not required to subscribe to cToM, and cToM subscribers are not required to subscribe to ToM.<sup>19</sup>

Proposal

The Exchange now proposes to amend Section 6(a) of the Fee Schedule to charge monthly fees to Distributors<sup>20</sup> of cToM. Specifically, the Exchange proposes to assess Internal Distributors \$1,250 per month and External Distributors \$1,750 per month for the cToM data feed.<sup>21</sup> The Exchange notes that the proposed monthly cToM fees for Internal and External Distributors are the same prices that the Exchange charges for its ToM data product and are identical to the prices the Exchange's affiliate, MIAX, proposes to charge for its cToM product.

As it does today for ToM, the Exchange proposes to assess cToM fees on Internal and External Distributors in each month the Distributor is credentialed to use cToM in the production environment. Also, as the Exchange does today for ToM, market data fees for cToM will be reduced for new Distributors for the first month during which they subscribe to cToM,

<sup>18</sup> The "Strategy Book" is the Exchange's electronic book of complex orders and complex quotes. See Exchange Rule 518(a)(17).

<sup>19</sup> See *supra* note 15.

<sup>20</sup> A "Distributor" of MIAX Emerald data is any entity that receives a feed or file of data either directly from MIAX Emerald or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All Distributors are required to execute a MIAX Emerald Distributor Agreement. See Section 6(a) of the Fee Schedule.

<sup>21</sup> The Exchange also proposes to make a minor related change to remove "(as applicable)" from the explanatory paragraph in Section 6(a) as it will not charge fees for both the ToM and cToM data feeds.

based on the number of trading days that have been held during the month prior to the date on which that subscriber has been credentialed to use cToM in the production environment. Such new Distributors will be assessed a pro-rata percentage of the fees in the table in Section 6(a) of the Fee Schedule, which is the percentage of the number of trading days remaining in the

affected calendar month as of the date on which they have been credentialed to use cToM in the production environment, divided by the total number of trading days in the affected calendar month.

The Exchange believes that other exchanges' fees for complex market data are useful examples and provides the below table for comparison purposes

only to show how the Exchange's proposed fees compare to fees currently charged by other options exchanges for similar complex market data. As shown by the below table, the Exchange's proposed fees for cToM are similar to or less than fees charged for similar data products provided by other options exchanges.

Exchange	Monthly fee
MIAX Emerald (as proposed) .....	\$1,250—Internal Distributor. \$1,750—External Distributor
NYSE American, LLC (“Amex”) <sup>22</sup> .....	\$1,500 Access Fee. \$1,000 Redistribution Fee.
NYSE Arca, Inc. (“Arca”) <sup>23</sup> .....	\$1,500 Access Fee. \$1,000 Redistribution Fee.
NASDAQ PHLX LLC (“PHLX”) <sup>24</sup> .....	\$3,000—Internal Distributor. \$3,500—External Distributor.

The Exchange also proposes to amend the paragraph below the table of fees for ToM and cToM in Section 6(a) of the Fee Schedule to make a minor, non-substantive corrective edit. In particular, the Exchange proposes to delete the phrase “(as applicable)” in the first sentence following the table of fees for ToM and cToM. The purpose of this proposed change is to remove unnecessary text from the Fee Schedule.

**cToM Content Is Available From Alternative Sources**

cToM is also not the exclusive source for Complex Order information from the Exchange and market participants may choose to subscribe to the Exchange's other data products to receive such information. It is a business decision of market participants whether to subscribe to the cToM data product or not. Market participants that choose not to subscribe to cToM can derive much, if not all, of the same information provided in the cToM feed from other Exchange sources, including, for example, the MIAX Emerald Order Feed (“MOR”).<sup>25</sup> The following cToM information is provided to subscribers of MOR: The Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange; the identification of the complex strategies currently trading on the Exchange; and

the status of securities underlying the complex strategy (e.g., halted, open, or resumed). In addition to the cToM information contained in MOR, complex strategy last sale information can be derived from the Exchange's ToM data feed. Specifically, market participants may deduce that last sale information for multiple trades in related options series that are disseminated via the ToM data feed with the same timestamp are likely part of a Complex Order transaction and last sale.

**Implementation**

The proposed rule change is immediately effective.

**2. Statutory Basis**

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>26</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>27</sup> in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public

interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

On March 29, 2019, the Commission issued an Order disapproving a proposed fee change by the BOX Market LLC Options Facility to establish connectivity fees for its BOX Network (the “BOX Order”).<sup>28</sup> On May 21, 2019, the Commission Staff issued guidance “to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.”<sup>29</sup> Based on both the BOX Order and the Guidance, the Exchange believes that it has clearly met its burden to demonstrate that the proposed fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates MIAX and MIAX PEARL,

<sup>22</sup> See NYSE American Options Proprietary Market Data Fees, American Options Complex Fees, at [https://www.nyse.com/publicdocs/nyse/data/NYSE\\_American\\_Options\\_Market\\_Data\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Options_Market_Data_Fee_Schedule.pdf).

<sup>23</sup> See NYSE Arca Options Proprietary Market Data Fees, Arca Options Complex Fees, at [https://www.nyse.com/publicdocs/nyse/data/NYSE\\_Arca\\_Options\\_Proprietary\\_Data\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf).

<sup>24</sup> See PHLX Price List—U.S. Derivatives Data, PHLX Orders Fees, at <http://www.nasdaqtrader.com/Trader.aspx?id=DPPriceListOptions#PHLX>.

<sup>25</sup> See MIAX website, Market Data & Offerings, at <https://www.miaxoptions.com/market-data-offerings> (last visited December 10, 2021). In general, MOR provides real-time ultra-low latency updates on the following information: New Simple Orders added to the MIAX Emerald Order Book; updates to Simple Orders resting on the MIAX Emerald Order Book; new Complex Orders added to the Strategy Book (i.e., the book of Complex Orders); updates to Complex Orders resting on the Strategy Book; MIAX Emerald listed series updates; MIAX Emerald Complex Strategy definitions; the state of the MIAX Emerald System; and MIAX Emerald's underlying trading state.

<sup>26</sup> 15 U.S.C. 78f(b).

<sup>27</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>28</sup> See Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR-BOX-2018-24, SR-BOX-2018-37, and SR-BOX-2019-04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network).

<sup>29</sup> See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (the “Guidance”).

LLC (“MIAX Pearl”), to adopt or amend market data and non-transaction fees.<sup>30</sup>

#### The Proposed Fees Will Not Result in a Supra-Competitive Profit

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange sets certain non-transaction fees, including market data fees. The Exchange believes that it is important to demonstrate that these fees are based on its costs to provide these products and reasonable business needs.

In the Guidance, the Commission Staff stated that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”<sup>31</sup> The Guidance further states that, “. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”<sup>32</sup> In the Guidance, the Commission Staff further states that, “[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO’s costs, or will not result in excessive pricing or supra-competitive profit, specific information, including quantitative information, should be provided to support that argument.”<sup>33</sup> The Exchange does not assert that the proposed fees are constrained by competitive forces. Rather, the Exchange asserts that the proposed fees are reasonable because they will permit recovery of the Exchange’s costs in providing services to supply cToM data and will not result

in the Exchange generating a supra-competitive profit.

The Guidance defines “supra-competitive profit” as “profits that exceed the profits that can be obtained in a competitive market.”<sup>34</sup> The Commission Staff further states in the Guidance that “the SRO should provide an analysis of the SRO’s baseline revenues, costs, and profitability (before the proposed fee change) and the SRO’s expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question.”<sup>35</sup> The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the proposed fees are reasonable and do not result in a “supra-competitive”<sup>36</sup> profit. The Exchange believes that it is important to demonstrate that the proposed fees are based on its costs and reasonable business needs. The Exchange believes the proposed fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provides sufficient transparency (described below) into the costs and revenue underlying the proposed fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the proposed fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the proposed fees. As a result of this analysis, the Exchange believes the proposed fees are fair and reasonable as a form of cost recovery plus present the possibility of a reasonable return for the Exchange’s aggregate costs of offering cToM data, which has been offered for free for nearly three years.

The proposed fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs to provide cToM data, using what it believes to be a conservative methodology (*i.e.*, that strictly considers only those costs that are most clearly directly related to the provision and maintenance of cToM data) to estimate such costs,<sup>37</sup> as well as the relative costs of providing and maintaining cToM data feeds, and set fees that are designed to cover its costs

with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in the Exchange recouping less than all of its costs of providing and maintaining cToM data feeds because of the uncertainty of forecasting subscriber decision making with respect to firms’ needs for cToM data and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange’s costs to provide cToM data associated with the proposed fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange’s general expense ledger to determine whether each such expense relates to the proposed fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the cToM data product associated with the proposed fees.

The Exchange also provides detailed information regarding the Exchange’s cost allocation methodology—namely, information that explains the Exchange’s rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the services associated with the proposed fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of services associated with the proposed fees. This analysis included discussions with each Exchange department head to determine the expenses that support services associated with the proposed fees. This included numerous meetings between the Exchange’s Chief Information Officer, Chief Financial Officer, Head of Strategic Planning and Operations, Chief Technology Officer, various members of the Legal Department, and other group leaders. The Exchange reviewed each individual expense to determine if such expense was related to the proposed fees. Once the expenses were identified, the Exchange department heads, with the assistance of the Exchange’s internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing services for the proposed fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide services associated with the proposed fees. For the avoidance of doubt, no expense amount was allocated twice.

The internal cost analysis conducted by the Exchange is a proprietary process

<sup>30</sup> See Securities Exchange Act Release Nos. 91145 (February 17, 2021), 86 FR 11033 (February 23, 2021) (SR-EMERALD-2021-05) (proposal to establish market data fees for MIAX Emerald ToM, Administrative Information Subscriber feed, and MIAX Emerald Order Feed); 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR-PEARL-2021-01) (proposal to increase connectivity fees); 91460 (April 2, 2021), 86 FR 18349 (SR-EMERALD-2021-11) (proposal to adopt port fees, increase connectivity fees, and increase additional limited service ports); 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR-EMERALD-2021-03) (proposal to adopt trading permit fees).

<sup>31</sup> See Guidance, *supra* note 27.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> For example, the Exchange only included the costs associated with providing and supporting cToM data feeds and excluded from its cost calculations any cost not directly associated with providing and maintaining such cToM data feeds. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining cToM data feeds.

that is designed to make a fair and reasonable assessment of costs and resources allocated to support the provision of services associated with the proposed fees. The Exchange acknowledges that this assessment can only capture a moment in time and that costs and resource allocations may change. That is why the Exchange has historically, and on an ongoing basis, periodically revisits its costs and resource allocations to ensure it is appropriately allocating resources to properly provide services to the Exchange's constituents. Any requirement that an exchange should conduct a periodic re-evaluation on a set timeline of its cost justification and amend its fees accordingly should be established by the Commission holistically, applied to all exchanges and not just pending fee proposals such as this filing. In order to be fairly applied, such a mandate should be applied to existing market data fees as well.

In accordance with the Guidance, the Exchange has provided sufficient detail to support a finding that the proposed fees are consistent with the Exchange Act. The proposal includes a detailed description of the Exchange's costs and how the Exchange determined to allocate those costs related to the proposed fees. In fact, the detail and analysis provided in this proposed rule change far exceed the level of disclosure provided in other exchange fee filings that have not been suspended by the Commission during its 60-day suspension period. A Commission determination that it is unable to make a finding that this proposed rule change is consistent with the Exchange Act would run contrary to the Commission Staff's treatment of other recent exchange fee proposals that have not been suspended and remain in effect today.<sup>38</sup> For example, a proposed fee filing that closely resembles the Exchange's current filing was submitted

<sup>38</sup> See, e.g., Securities Exchange Act Release Nos. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-PHLX-2021-58) (increasing several market data fees and adopting new market data fee without providing a cost based justification); 91339 (March 17, 2021), 86 FR 15524 (March 23, 2021) (SR-CboeBZX-2021-020) (increasing fees for a market data product while not providing a cost based justification for the increase); 93293 (October 21, 2021), 86 FR 57716 (October 18, 2021) (SR-PHLX-2021-058) (increasing fees for historical market data while not providing a cost based justification for the increase); 92970 (September 14, 2021), 86 FR 52261 (September 20, 2021) (SR-CboeBZX-2021-047) (adopting fees for a market data related product while not providing a cost based justification for the fees); and 89826 (September 10, 2021), 85 FR 57900 (September 16, 2021) (SR-CBOE-2020-086) (increasing connectivity fees without including a cost based justification).

in 2021 by Nasdaq PHLX LLC ("PHLX"), which increased fees for PHLX's end of day, intra-day and historical market data, and adopted fees for external distribution of PHLX's derived data.<sup>39</sup> This filing was submitted on September 30, 2021, over two years after the Staff's Guidance was issued. In that filing, PHLX argued that the proposed fees were subject to competing products' fees at other exchanges and that there were available substitutes. This filing provided no cost based data or revenue analysis to support the amount of the proposed fees. Among other things, PHLX did not provide a description of the costs underlying its market data feeds to show that these particular fees did not generate supra-competitive profits or describe how any potential profit may be offset by increased costs associated with another fee included in its proposal. This filing, nonetheless, was not suspended by the Commission and remains in effect today.

The Exchange notes that the Investors Exchange, Inc. ("IEX") recently submitted a proposed rule change to adopt fees for two real-time proprietary market data feeds, TOPS and DEEP ("IEX Fee Proposal"). Like the Exchange proposes herein, IEX previously provided its TOP and DEEP market data feeds for free and proposed to adopt modest, below market fees. Also like in this proposal, the IEX Fee Proposal included a detailed subscriber data and cost-based analysis in compliance with the Guidance. Nonetheless, on December 30, 2021, the Commission suspended the IEX Fee Proposal and instituted proceedings to determine whether to approve or disapprove the IEX Fee Proposal.<sup>40</sup>

The Commission received three comment letters on the IEX Order.<sup>41</sup> The Virtu Letter and HMA Letter 2 specifically applauded the amount of detail included in the IEX Fee Proposal. Specifically, the Virtu Letter states that "[i]n significant detail, IEX provides data about three cost components: (1) Direct costs, such as servers,

<sup>39</sup> See Securities Exchange Act Release No. 93293 (October 12, 2021), 86 FR 57716 (October 18, 2021) (SR-PHLX-2021-58) (increasing several market data fees and adopting new market data fee without providing a cost based justification).

<sup>40</sup> See Securities Exchange Act Release No. 93883 (December 30, 2021), 87 FR 523 (January 5, 2021) (SR-IEX-2021-14) (the "IEX Order").

<sup>41</sup> See letters to Ms. Venessa A. Countryman, Secretary, Commission, from Douglas A. Cifu, Chief Executive Officer, Virtu Financial, Inc., dated January 26, 2022 (the "Virtu Letter"), Tyler Gellasch, Executive Director, Healthy Markets Association ("HMA"), dated January 26, 2022 (the "HMA Letter 2"), and Erika Moore, Vice President and Corporate Secretary, The Nasdaq Stock Market LLC, dated January 27, 2022 (the "Nasdaq Letter").

infrastructure, and monitoring; (2) enhancement initiative costs (e.g., new functionality for IEX Data and increased capacity for the proprietary market data feeds . . .); and (3) personnel costs.'"<sup>42</sup> HMA Letter 2 similarly commends the level of detail included in the IEX Fee Proposal and also highlights the disparate treatment by Commission Staff of exchange fee filings.<sup>43</sup> HMA Letter 2 provides three examples to support this assertion.<sup>44</sup> The Nasdaq Letter urges the Commission to approve the IEX Fee Proposal promptly and raises concern the questions asked by the Commission in the IEX Order imply that they are exercising rate making authority that they clearly do not possess. The Nasdaq Letter states that "[i]f the Commission believes it has authority to conduct cost-plus ratemaking, the Administrative Procedure Act dictates that it must propose a rule for notice and comment and that its final rule must be prepared to withstand judicial scrutiny."<sup>45</sup> The Exchange agrees.

The Exchange believes exchanges, like all businesses, should be provided flexibility when allocating costs and resources they deem necessary to operate their business, including providing market data and access services. The Exchange notes that costs and resource allocations may vary from business to business and, likewise, costs and resource allocations may differ from exchange to exchange when it comes to providing market data and access services. It is a business decision that must be evaluated by each exchange as to how to allocate internal resources and what costs to incur internally or via third parties that it may deem necessary to support its business and its provision of market data and access services to market participants. An exchange's

<sup>42</sup> See Virtu Letter at page 3, *id.*

<sup>43</sup> HMA previously expressed their "worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied." See letter from Tyler Gellasch, Executive Director, HMA, to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR-CboeEDGA-2021-017, SR-CboeBYX-2021-020, SR-CboeBZX-2021-047, SR-CboeEDGX-2021-030, SR-MIAX-2021-41, SR-PEARL-2021-45, and SR-EMERALD-2021-29 and stating that "MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. *Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension*") (emphasis added) ("HMA Letter 1").

<sup>44</sup> See HMA Letter 2 at 2-3. The Exchange has provided further examples to support HMA's assertion above. See *supra* note 39 and accompanying text.

<sup>45</sup> See Nasdaq Letter at page 13, *id.*

costs may also vary based on fees charged by third parties and periodic increases to those fees that may be outside of the control of an exchange.

To determine the Exchange's projected revenue associated with the proposed fees in the instant filing, the Exchange analyzed the number of Members and non-Members currently subscribing to the cToM data feeds and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing June 2021, the monthly billing cycle prior to the proposed fees going into effect, and compared it to its expenses for that month. As discussed below, the Exchange does not believe it is appropriate to factor into its analysis projected or estimated future revenue growth or decline for purposes of these calculations, given the uncertainty of such projections due to the continually changing market data needs of market participants and potential increase in internal and third party expenses. The Exchange is presenting its revenue and expense associated with the proposed fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the proposed fees were not in place in 2020 or for the first six months of 2021, the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the proposed fees. Accordingly, the Exchange believes it is more appropriate to analyze the proposed fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the proposed fees are reasonable because they will allow the Exchange to recover its costs associated with providing services related to the proposed fees and not result in excessive pricing or supra-competitive profit. Since 2019, when the Exchange launched operations with Complex Order functionality, the Exchange has spent time and resources building out various Complex Order functionality in its System to provide better trading strategies and risk functionality for market participants in order to better compete with other exchanges' complex functionality and similar data products

focused on complex orders.<sup>46</sup> The cToM data product allows market participants to better utilize the Exchange's Complex Order functionality by providing insights into the Exchange's Complex Order flow. The Exchange notes that no market participant ceased subscribing to the cToM feed since July 1, 2021, the date on which the fees became effective pursuant to the First Proposed Rule Change.

As outlined in more detail below, the Exchange projects that the final annualized expense for 2021 to provide cToM data to be \$202,657 per annum or an average of \$16,888 per month. The Exchange implemented the proposed fees on July 1, 2021 in the First Proposed Rule Change. For June 2021, prior to the proposed fees, Exchange Members and non-Members subscribed to a total of 14 cToM data feeds for which the Exchange charged \$0, as it has for the past three years. This resulted in a loss of approximately \$16,888 for that month. For the month of November 2021, which includes the proposed fees, Exchange Members and non-Members purchased 14 cToM data feeds, for which the Exchange charged approximately \$17,500 for that month. This resulted in a profit of \$612 for that month (a margin of approximately 3.5%). The Exchange cautions that this margin is likely to fluctuate from month to month based on the uncertainty of predicting how many cToM data feeds may be purchased from month to month as Members and non-Members are able to add and drop subscriptions at any time based on their own business decisions. This margin may also decrease due to the significant inflationary pressure on capital items that the Exchange needs to purchase to maintain the Exchange's technology and systems.<sup>47</sup> The Exchange has been

<sup>46</sup> See Securities Exchange Act Release Nos. 79405 (November 28, 2016), 81 FR 87086 (December 2, 2016) (SR-MIAX-2016-44) (amendment to clarify the manner in which the System allocates contracts at the end of a Complex Auction); 80089 (February 22, 2017), 82 FR 12153 (February 28, 2017) (SR-MIAX-2017-06) (adopting the Complex MIAX Options Price Collar, an additional price protection feature); 81229 (July 27, 2017), 82 FR 36023 (August 2, 2017) (SR-MIAX-2017-34) (amendment to ensure price and trade protections apply to Complex Orders); 89085 (June 17, 2020), 85 FR 37719 (June 23, 2020) (SR-MIAX-2020-16) (adopting new order type, Complex Attributable Order).

<sup>47</sup> See "Supply chain chaos is already hitting global growth. And it's about to get worse", by Holly Ellyatt, CNBC, available at <https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html> (October 18, 2021); and "There will be things that people can't get, at Christmas, White House warns" by Jarrett Renshaw and Trevor Hunnicut, Reuters, available at <https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats->

subject to price increases upwards of 30% during the past year on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

Further, the Exchange chose to provide cToM data for free for the past three years to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems and market data products. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees. The Exchange could have sought to charge fees at the outset for the cToM data feed, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a free exchange data product to the options industry, which resulted in no revenues for providing this service for three years. The Exchange now proposes to amend its fee structure to enable it to continue to maintain and improve its overall market and systems while also providing a highly reliable and deterministic trading system to the marketplace, complete with robust market data products, including cToM.

As mentioned above, the Exchange projects that the final annualized expense for 2021 to provide cToM data to be approximately \$202,657 per annum or an average of \$16,888 per month and that these costs are expected to increase not only due to anticipated significant inflationary pressure, but also periodic fee increases by third parties.<sup>48</sup> The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange and various Exchange products. The Exchange incurs technology expense related to

*white-house-officials-warn-2021-10-12/* (October 12, 2021).

<sup>48</sup> For example, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their Secure Financial Transaction Infrastructure ("SFTI") network, which is relied on by a majority of market participants, including the Exchange. See email from ICE Data Services to the Exchange, dated October 20, 2021. The Exchange further notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network.

establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases the cost to the Exchange to provide services associated with the proposed fees. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide services and products to its Members is not fixed and indeed is likely to increase rather than decrease over time. The Exchange believes the proposed fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing certain Exchange products.

The Exchange only has four primary sources of revenue and cost recovery mechanisms to fund all of its operations: Transaction fees, access fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019.<sup>49</sup> This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and market data products or provide them at a very marginal cost, which has not been profitable to the Exchange, but beneficial to the overall options industry. This resulted in the Exchange forgoing revenue it could have generated from assessing any amount of fees.

<sup>49</sup> The Exchange has incurred a cumulative loss of \$22 million since its inception in 2019 to 2020, the last year for which the Exchange's Form 1 data is available. See Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28, 2021, available at <https://sec.report/Document/999999997-21-004557/>.

The Exchange believes that the proposed fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the proposed fees. As mentioned above, for 2021,<sup>50</sup> the total annual expense for providing the services associated with the proposed fees is projected to be approximately \$202,657, or approximately \$16,888 per month. This projected total annual expense is comprised of the following, all of which are directly related to the services associated with the proposed fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the proposed fees.<sup>51</sup> As noted above, the Exchange believes it is more appropriate to analyze the proposed fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.<sup>52</sup> The \$202,657 projected total annual expense is directly related to the services associated with the proposed fees, and not any other product or service offered by the Exchange. It does not include general costs of operating matching engines and other trading technology. No expense amount was allocated twice.

As discussed above, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such

<sup>50</sup> The Exchange has not yet finalized its 2021 year end results.

<sup>51</sup> The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

<sup>52</sup> For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled "Operating Expenses Incurred Directly or Allocated From Parent," in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. See Securities Exchange Act Release No. 87877 (December 31, 2019), 85 FR 738 (January 7, 2020) (SR-EMERALD-2019-39). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

expense relates to the services associated with the proposed fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, "in nature and closeness," directly related to those services. In performing this calculation, the Exchange considered other services and to which the expense may be applied and how much of the expense is directly or indirectly utilized in providing those other services. The sum of all such portions of expenses represents the total cost of the Exchange to provide services associated with the proposed fees.

#### External Expense Allocations

For 2021, total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the services associated with the proposed fees, is projected to be \$4,160. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. ("Zayo") for network services (fiber and bandwidth products and services) linking the Exchange's office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; and (3) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.).

For clarity, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to providing the services associated with the proposed fees. Only a portion of all fees paid to such third-parties is included in the third-party expense described herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the services associated with the proposed fees. Further, the Exchange notes that, with respect to the expenses included herein, those expenses only cover the MIAX market; expenses associated with MIAX Pearl for its options and equities markets and MIAX, are accounted for separately and are not included within the scope of this filing. As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties,

adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Further, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations, which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the services associated with the proposed fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these services from Equinix, the Exchange would not be able to operate and support the network and provide the cToM product associated with the proposed fees to its Members, non-Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the cToM product associated with the proposed fees, only that portion which the Exchange identified as being specifically mapped to providing the cToM product associated with the proposed fees. According to the Exchange's calculations, it allocated approximately 0.20% of the total applicable Equinix expense to providing the services associated with the proposed fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM product associated with the proposed fees, and not any other service, as supported by its cost review.<sup>53</sup>

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth

connections with respect to the network, linking the Exchange with its affiliates, MIAX Pearl and MIAAX, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the cToM data associated with the proposed fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the cToM data associated with the proposed fees, only the portion which the Exchange identified as being specifically mapped to providing the cToM data associated with the proposed fees. According to the Exchange's calculations, it allocated approximately 0.20% of the total applicable Zayo expense to providing the services associated with the proposed fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM data associated with the proposed fees, and not any other service, as supported by its cost review.<sup>54</sup>

The Exchange did not allocate any expense associated with the proposed fees towards SFTI and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) because the MIAAX Emerald architecture takes advantage of an advance in design to eliminate the need for a market data distribution gateway layer. The computation and dissemination via an API is done solely within the match engine environment and is then delivered via the Member and non-Member connectivity infrastructure. This architecture delivers a market data system that is more efficient both in cost and performance. Accordingly, the Exchange determined not to allocate any expense associated with SFTI and various other service providers.

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide cToM data to its Members, non-Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing

the cToM data associated with the proposed fees, only the portions which the Exchange identified as being specifically mapped to providing the cToM data associated with the proposed fees. According to the Exchange's calculations, it allocated approximately 0.20% of the total applicable hardware and software provider expense to providing the services associated with the proposed fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM data associated with the proposed fees.<sup>55</sup>

#### Internal Expense Allocations

For 2021, total projected internal expenses relating to the Exchange providing the cToM data associated with the proposed fees, is projected to be \$198,497. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the cToM data product associated with the proposed fees, including staff in network operations, trading operations, development, system operations, and business that support those employees and functions; (2) depreciation and amortization of hardware and software used to provide the cToM data product associated with the proposed fees, including equipment, servers, cabling, purchased software and internally developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the cToM data associated with the proposed fees. The breakdown of these costs is more fully-described below.

For clarity, and as stated above, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to providing services in connection with the proposed fees. Only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the cToM data associated with the proposed fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the proposed fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, as part its ongoing assessment of costs and expenses (described above), the Exchange recently conducted a periodic

<sup>53</sup> As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*



thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the cToM data associated with the proposed fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the cToM data associated with the proposed fees is projected to be approximately \$185,002, which is only a portion of the \$9.74 million total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features, products and enhancements), and Trade Operations. As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by nearly every employee on matters relating to cToM. Without these employees, the Exchange would not be able to provide the cToM product to its Members, non-Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the cToM product, only the portion which the Exchange identified as being specifically mapped to providing the cToM product associated with the proposed fees. According to the Exchange's calculations, it allocated approximately 2.0% of the total applicable employee compensation and benefits expense to providing the services associated with the proposed fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM data associated with the proposed fees, and not any other service, as supported by its cost review.<sup>56</sup>

The Exchange's depreciation and amortization expense relating to providing the cToM data associated with the proposed fees is projected to be \$3,635, which is only a portion of the \$1.9 million total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer

equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the cToM product. Without this equipment, the Exchange would not be able to operate the network and provide the cToM product to its Members, non-Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the cToM product, only the portion which the Exchange identified as being specifically mapped to providing the cToM product. According to the Exchange's calculations, it allocated approximately 0.20% of the total applicable depreciation and amortization expense to providing the services associated with the proposed fees, as this product would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM product associated with the proposed fees, and not any other service, as supported by its cost review.<sup>57</sup>

The Exchange's occupancy expense relating to providing the cToM product associated with the proposed fees is projected to be \$9,860, which is only a portion of the \$0.60 million total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the cToM product. This amount consists primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center ("NOC") and Security Operations Center ("SOC") from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network and Exchange products. The Exchange currently has approximately 200 employees. Approximately two-thirds of the Exchange's staff are in the Technology department, and the majority of those staff have some role in the operation and performance of the services associated with the proposed

fees. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the market data services associated with the proposed fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the market data services associated with the proposed fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network. According to the Exchange's calculations, it allocated approximately 2.0% of the total applicable occupancy expense to providing the services associated with the proposed fees. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the market data services associated with the proposed fees, and not any other service, as supported by its cost review.<sup>58</sup>

Based on the above, the Exchange believes that its provision of market data services associated with the proposed fees will not result in excessive pricing or supra-competitive profit. As discussed above, the Exchange projects that its annualized expense for 2021 to provide the cToM data associated with the proposed fees is projected to be approximately \$202,657, or approximately \$16,888 per month on average. The Exchange implemented the proposed fees on July 1, 2021 in the First Proposed Rule Change. For June 2021, prior to the proposed fees, Members and non-Members subscribed to a total of 14 cToM data feeds, for which the Exchange charged \$0, for the past three years. This resulted in a month over month loss of \$16,888. For the month of November 2021, which includes the proposed fees, Members and non-Members subscribed to 14 cToM data feeds, for which the Exchange charged approximately \$17,500 for that month. This resulted in a profit of \$612 for that month (a margin of approximately 3.5%). The Exchange believes this margin will allow it to begin to recoup its expenses and continue to invest in its technology infrastructure. Therefore, the Exchange also believes that this proposed margin is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this margin is likely to fluctuate from month to month based in the uncertainty of predicting how many market data feeds

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

may be purchased from month to month as Members and non-Members are free to add and drop subscriptions at any time based on their own business decisions. Notwithstanding that the revenue (and profit margin) may vary from month to month due to changes in subscriptions and to changes to the Exchange's expenses, the number of subscriptions has not materially changed over previous months. Consequently, the Exchange believes that the months it has used as a baseline to perform its assessment are representative of reasonably anticipated costs and expenses. This margin may also decrease due to the significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems. Accordingly, the Exchange believes its total projected revenue for the providing the market data services associated with the proposed fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes that conducting the above analysis on a per month basis is reasonable as the revenue generated from access services subject to the proposed fee generally remains static from month to month. The Exchange also conducted the above analysis on a per month basis to comply with the Guidance which requires a baseline analysis to assist in determining whether the proposal generates a supra-competitive profit. This monthly analysis was also provided in response to comment received on prior submissions of this proposed rule change.

The Exchange reiterates that it only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. As a result, each of these fees cannot be "flat" and cover only the expenses directly related to the fee that is charged. The above revenue and associated profit margin therefore are not solely intended to cover the costs associated with providing services subject to the proposed fees. Moreover, as noted above, because the Exchange was previously offering the cToM data feed at no cost, the provision of the feed during the time in which it generated no revenue was being subsidized by other fees charged by the Exchange. The Exchange believes establishing a separate fee for the cToM feed is therefore reasonable and equitable so that the provision of the cToM data feed is no longer subsidized by other fees

less directly related to providing cToM. Instead, the cToM feed will be supported primarily through fees charged only to users who choose to subscribe to cToM.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the market data services associated with the proposed fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing market data services to the Exchange. Further, the Exchange notes that, without the specific third-party and internal expense items listed above, the Exchange would not be able to provide the market data services associated with the proposed fees to its Members, non-Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing market data services. The proposed fees are intended to recover the costs of providing cToM data. Accordingly, the Exchange believes that the proposed fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the proposed fees.

No market participant is required by any rule or regulation to utilize the Exchange's Complex Order functionality or subscribe to the cToM data feed. Further, unlike orders on the Exchange's Simple Order Book, Complex Orders are not protected and will never trade through Priority Customer<sup>59</sup> orders, thus protecting the priority that is established in the Simple Order Book.<sup>60</sup> Additionally, unlike the continuous quoting requirements of Market Makers in the simple order market, there are no continuous quoting requirements respecting Complex Orders. It is a business decision whether market

participants utilize Complex Order strategies on the Exchange and whether to purchase cToM data to help effect those strategies.

The Proposed Fees Are Reasonable When Compared to the Fees of Other Options Exchanges With Similar Market Share

The Exchange does not have visibility into other options exchanges' costs to provide market data or their fee markup over those costs, and therefore cannot use other exchange's market data fees as a benchmark to determine a reasonable markup over the costs of providing market data. Nevertheless, the Exchange believes the other exchanges' market data fees are useful examples of alternative approaches to providing and charging for market data. To that end, the Exchange believes the proposed pricing is reasonable because the proposed rates are similar to or less than the fees charged by other options exchanges for similar data products.<sup>61</sup>

Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019.<sup>62</sup> This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products (including the cToM data feed) or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry which resulted in lower initial revenues. An example of this is cToM, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Since the Exchange initially established the cToM data product when it launched trading operations on March 1, 2019, all Exchange Members and non-Members have had the ability to receive the Exchange's cToM data free of charge for the past three years.<sup>63</sup> Since 2019, when the Exchange launched operations with Complex

<sup>59</sup> The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). The term "Priority Customer Order" means an order for the account of a Priority Customer. See Exchange Rule 100.

<sup>60</sup> The "Simple Order Book" is the Exchange's regular electronic book of orders and quotes. See Exchange Rule 518(a)(5).

<sup>61</sup> See *supra* notes 20, 21 and 22.

<sup>62</sup> See *supra* note 47.

<sup>63</sup> See *supra* note 15.

Order functionality, the Exchange has spent time and resources building out various Complex Order functionality in its System to provide better trading strategies and risk functionality for market participants in order to better compete with other exchanges' complex functionality and similar data products focused on complex orders.<sup>64</sup> The cToM data product allows market participants to better utilize the Exchange's Complex Order functionality by providing insights into the Exchange's Complex Order flow. The Exchange currently has 14 subscribers (12 Members and 2 non-Members) for its cToM data product. None of these subscribers has paid a specific fee to receive cToM data (other than the five months in which the First, Second and Third Proposed Rule Changes were in effect) but has received the benefit of the Exchange building out its Complex Order functionality to better compete with other exchanges complex functionality. The Exchange notes that no market participant ceased subscribing to the cToM feed since July 1, 2021, the date on which the fees became effective when established in the First Proposed Rule Change.

#### The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess Internal Distributors fees that are less than the fees assessed for External Distributors for subscriptions to the cToM data feed because Internal Distributors have limited, restricted usage rights to the market data, as compared to External Distributors, which have more expansive usage rights. All Members and non-Members that determine to receive any market data feed of the Exchange (or its affiliates, MIAX Pearl and MIAX), must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement (the "Exchange Data Agreement").<sup>65</sup> Pursuant to the Exchange Data Agreement, Internal Distributors are restricted to the "internal use" of any market data they receive. This means

that Internal Distributors may only distribute the Exchange's market data to the recipient's officers and employees and its affiliates.<sup>66</sup> External Distributors may distribute the Exchange's market data to persons who are not officers, employees or affiliates of the External Distributor,<sup>67</sup> and may charge their own fees for the redistribution of such market data. Accordingly, the Exchange believes it is fair, reasonable and not unfairly discriminatory to assess External Distributors a higher fee for the Exchange's market data products as External Distributors have greater usage rights to commercialize such market data and can adjust their own fee structures if necessary. The Exchange also utilizes more resources to support External Distributors versus Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of Exchange staff. The Exchange believes the proposed cToM fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst subscribers for similar services, depending on whether the subscriber is an Internal or External Distributor. Moreover, the decision as to whether or not to purchase market data is entirely optional to all market participants. Potential purchasers are not required to purchase the market data, and the Exchange is not required to make the market data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if market participants determine not to subscribe to the data feed, firms can discontinue their use of the cToM data.

Further, the Exchange believes that the proposal is equitable and not unfairly discriminatory because the proposed cToM fees will apply to all market participants of the Exchange on a uniform basis. The Exchange also notes that the proposed monthly cToM fees for Internal and External Distributors are the same prices that the Exchange charges for its ToM data product.

The Exchange believes the proposed change to delete certain text from Section (6)(a) of the Fee Schedule promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system because the proposed change is

a non-substantive edit to the Fee Schedule to remove unnecessary text. The Exchange believes that this proposed change will provide greater clarity to Members and the public regarding the Exchange's Fee Schedule and that it is in the public interest for the Fee Schedule to be accurate and concise so as to eliminate the potential for confusion.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

#### Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing cToM to market participants. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019<sup>68</sup> due to providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry which resulted in lower initial revenues. An example of this is cToM, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Since the Exchange initially launched operations with the cToM data product in 2019, all Exchange Members and non-Members have had the ability to receive the Exchange's cToM data free of charge for the past three years.<sup>69</sup> Since 2019, when the Exchange adopted Complex Order functionality, the Exchange has spent time and resources building out various Complex Order

<sup>64</sup> See Securities Exchange Act Release Nos. 85345 (March 18, 2019), 84 FR 10848 (March 22, 2019) (SR-EMERALD-2019-13) (adopting complex stock-option order functionality); 85346 (March 18, 2019), 84 FR 10854 (March 22, 2019) (SR-EMERALD-2019-14) (adopting additional price protection during a Complex Auction and the Complex Liquidity Exposure Process to provide additional price discovery).

<sup>65</sup> See Exchange Data Agreement, available at [https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAX\\_Exchange\\_Group\\_Data\\_Agreement\\_09032020.pdf](https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAX_Exchange_Group_Data_Agreement_09032020.pdf).

<sup>66</sup> See *id.*

<sup>67</sup> See *id.*

<sup>68</sup> See *supra* note 47.

<sup>69</sup> See *supra* note 15.

functionality in its System to provide better trading strategies and risk functionality for market participants in order to better compete with other exchanges' complex functionality and similar data products focused on complex orders.<sup>70</sup> The Exchange now seeks to recoup its costs for providing cToM to market participants and believes the proposed fees will not result in excessive pricing or supra-competitive profit.

#### Inter-Market Competition

The Exchange also does not believe the proposed fees would cause any unnecessary or in appropriate burden on intermarket competition as other exchanges are free to introduce their own comparable data product and lower their prices to better compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on inter-market competition. Particularly, the proposed product and fees apply uniformly to any purchaser, in that it does not differentiate between subscribers that purchase cToM. The proposed fees are set at a modest level that would allow any interested Member or non-Member to purchase such data based on their business needs.

The Exchange does not believe that the proposed rule change to make a minor, non-substantive edit to Section (6)(a) of the Fee Schedule by deleting unnecessary text will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. This proposed rule change is not being made for competitive reasons, but rather is designed to remedy a minor non-substantive issue and will provide added clarity to the Fee Schedule. The Exchange believes that it is in the public interest for the Fee Schedule to be accurate and concise so as to eliminate the potential for confusion on the part of market participants. In addition, the Exchange does not believe the proposal will impose any burden on inter-market competition as the proposal does not address any competitive issues and is intended to protect investors by providing further transparency regarding the Exchange's Fee Schedule.

Regrettably, the Exchange believes that the application of the Guidance to date has adversely affected inter-market competition by impeding the ability of smaller, low cost exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services). Since

the adoption of the Guidance, and even more so recently, it has become harder, particularly for smaller, low cost exchanges, to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of the affected exchanges' market participants. Although the Guidance has served an important policy goal of improving disclosures in proposed rule changes and requiring exchanges to more clearly justify that their market data and access fee proposals are fair and reasonable, it has also been inconsistently applied and therefore negatively impacted exchanges, and particularly many smaller, low cost exchanges, that seek to adopt or increase fees despite providing enhanced disclosures and rationale to support their proposed fee changes.

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

Written comments were neither solicited nor received.

#### III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,<sup>71</sup> at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>72</sup> 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.

As the Exchange further details above, the Exchange first filed a proposed rule change proposing fee changes as proposed herein on June 30, 2021, with the proposed fee changes effective beginning July 1, 2021. That proposal, EMERALD-2021-21, was published for comment in the **Federal Register** on July 15, 2021.<sup>73</sup> On August 27, 2021, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change; and (2) instituted proceedings to

determine whether to approve or disapprove the proposal.<sup>74</sup> On September 30, 2021, the Exchange withdrew the proposed rule change,<sup>75</sup> and filed two other proposed rule changes proposing fee changes as proposed herein,<sup>76</sup> which were each also subsequently withdrawn. The instant filing is substantially similar.<sup>77</sup>

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's 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.<sup>78</sup> 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."<sup>79</sup>

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires 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;<sup>80</sup> (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;<sup>81</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>82</sup>

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the proposed fees for the cToM market data feed 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 change satisfies the standards under the

<sup>74</sup> See Securities Exchange Act Release No. 92789, 86 FR 49364 (September 2, 2021) ("OIP").

<sup>75</sup> See Securities Exchange Act Release No. 93471 (October 29, 2021), 86 FR 60947 (November 4, 2021).

<sup>76</sup> See Securities Exchange Act Release Nos. 93427 (October 26, 2021), 86 FR 60310 (November 1, 2021); 93811 (December 17, 2021), 86 FR 73051 (December 23, 2021).

<sup>77</sup> See OIP, *supra* note 74.

<sup>78</sup> 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").

<sup>79</sup> *Id.*

<sup>80</sup> 15 U.S.C. 78f(b)(4).

<sup>81</sup> 15 U.S.C. 78f(b)(5).

<sup>82</sup> 15 U.S.C. 78f(b)(8).

<sup>71</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>72</sup> 15 U.S.C. 78s(b)(1).

<sup>73</sup> See *supra* note 5, and accompanying text.

<sup>70</sup> See *supra* note 62.

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.<sup>83</sup>

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 change.<sup>84</sup>

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

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>85</sup> and 19(b)(2)(B) of the Act<sup>86</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. 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 change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>87</sup> the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchange has sufficiently demonstrated how the proposed rule change is consistent with Sections 6(b)(4),<sup>88</sup> 6(b)(5),<sup>89</sup> and 6(b)(8)<sup>90</sup> of the Act. Section 6(b)(4) of the Act 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. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth above, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following aspects of the proposal and asks commenters to submit data where appropriate to support their views:

1. *Cost Estimates and Allocation.* The Exchange states that it is not asserting that the proposed fees are constrained by competitive forces, but rather sets forth a "cost-plus model," employing a "conservative methodology" that "strictly considers only those costs that are most clearly directly related to the provision and maintenance of cToM data . . . ." <sup>91</sup> Setting forth its costs in providing the cToM data product, and as summarized in greater detail above, MIAX Emerald projects \$202,657 in aggregate annual estimated costs for 2021 as the sum of: (1) \$4,160 in third-party expenses paid in total to Equinix (0.20% of the total applicable expense) for data center services; Zayo Group Holdings for network services (0.20% of the total applicable expense); and various other hardware and software providers (0.20% of the total applicable expense) supporting the production environment, and (2) \$198,497 in internal expenses, allocated to (a) employee compensation and benefit costs (\$185,002, approximately 2.0% of the Exchange's total applicable employee compensation and benefits expense); (b) depreciation and amortization (\$3,635, approximately 0.20% of the Exchange's and total applicable depreciation and amortization expense); and (c)

occupancy costs (\$9,860, approximately 2.0% of the Exchange's total applicable occupancy expense). Do commenters believe that the Exchange has provided sufficient detail about how it determined which costs are most clearly directly associated with providing and maintaining the cToM data product? The Exchange describes a "proprietary" process involving all Exchange department heads, including the finance department and numerous meetings between the Exchange's Chief Information Officer, Chief Financial Officer, Head of Strategic Planning and Operations, Chief Technology Officer, various members of the Legal Department, and other group leaders, but does not specify further what principles were applied in making these determinations or arriving at particular allocations. Do commenters believe further explanation is necessary? For employee compensation and benefit costs, for example, the Exchange calculated an allocation of employee time in several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development, and Trade Operations, but does not provide the job titles and salaries of persons whose time was accounted for, nor explain the methodology used to determine how much of an employee's time is devoted to that specific activity. What are commenters' views on whether the Exchange has provided sufficient detail on the identity and nature of services provided by third parties? Across all of the Exchange's projected costs, what are commenters' views on whether the Exchange has provided sufficient detail on the elements that go into market data costs, including how shared costs are allocated and attributed to market data expenses, to permit an independent review and assessment of the reasonableness of purported cost-based fees and the corresponding profit margin thereon? Should the Exchange be required to identify what Exchange products or services the remaining percentage of un-allocated expenses are attributable to (*e.g.*, what products or services are associated with the approximately 99.80% of applicable depreciation and amortization expenses that MIAX Emerald does *not* allocate to the proposed fees)? Do commenters believe that the costs projected for 2021 are generally representative of expected costs going forward (to the extent commenters consider 2021 to be a typical or atypical year), or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along the range of

<sup>83</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

<sup>84</sup> For purposes of temporarily suspending the 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).

<sup>85</sup> 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.

<sup>86</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>87</sup> *Id.*

<sup>88</sup> 15 U.S.C. 78f(b)(4).

<sup>89</sup> 15 U.S.C. 78f(b)(5).

<sup>90</sup> 15 U.S.C. 78f(b)(8).

<sup>91</sup> See *supra* note 37 and accompanying text.

estimated costs? Should the Exchange use cost projections or actual costs estimated for 2021 in a filing made in 2022, or make cost projections for 2022?

2. *Revenue Estimates and Profit Margin Range.* The Exchange provides a single monthly revenue figure as the basis for calculating the profit margin of 3.5%. Do commenters believe this is reasonable? If not, why not? The Exchange states that the proposed fees are “designed to cover its costs with a limited return in excess of such costs,” and that “revenue and associated profit margin . . . are not solely intended to cover the costs associated with providing services subject to the proposed fees.”<sup>92</sup> The profit margin is also dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. The Exchange acknowledges that this margin may fluctuate from month to month as Members and non-Members add and drop subscriptions,<sup>93</sup> and that costs may increase. The Exchange also states that the number of subscriptions has not materially changed over previous months and so the months that the Exchange has used as a baseline to perform its assessment are representative of reasonably anticipated costs and expenses.<sup>94</sup> The Exchange does not account for the possibility of cost decreases, however. What are commenters’ views on the extent to which actual costs (or revenues) deviate from projected costs (or revenues)? Do commenters believe that the Exchange’s methodology for estimating the profit margin is reasonable? Should the Exchange provide a range of profit margins that it believes are reasonably possible, and the reasons therefor?

3. *Reasonable Rate of Return.* Do commenters agree with the Exchange that its expected 3.5% profit margin would constitute a reasonable rate of return over costs for providing the cToM data product? If not, what would commenters consider to be a reasonable rate of return and/or what methodology would they consider to be appropriate for determining a reasonable rate of return? Further, the Exchange states that it chose to initially provide the cToM data product for free and to forego revenue that they otherwise could have generated from assessing any fees.<sup>95</sup> What are commenters’ views regarding what factors should be considered in determining what constitutes a

reasonable rate of return for the cToM market data product? Do commenters believe it relevant to an assessment of reasonableness that, according to the Exchange, the Exchange’s proposed fees are similar to or lower than fees charged by competing options exchanges with similar market share? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered, and why?

4. *Periodic Reevaluation.* The Exchange addresses whether it believes a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly, stating that “[a]ny requirement that an exchange should conduct a periodic reevaluation on a set timeline of its cost justification and amend its fees accordingly should be established by the Commission holistically, applied to all exchanges and not just through pending fee proposals, such as this filing,” and that “[i]n order to be fairly applied, such a mandate should be applied to existing access fees as well.”<sup>96</sup> In light of the impact that the number of subscriptions has on profit margins, and the potential for costs to decrease (or increase) over time, what are commenters’ views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based data fees to ensure that the fees stay in line with their stated profitability projections and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new data fee change is implemented should an exchange assess whether its revenue and/or cost estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a data fee is implemented? 60 days? 90 days? Some other period?

5. *Fees for Internal Distributors versus External Distributors.* The Exchange argues that it is reasonable, equitable, and not unfairly discriminatory to assess Internal Distributors fees that are lower than the fees assessed for External Distributors for subscriptions to the cToM data feed (\$1,250 per month for Internal Distributors versus \$1,750 per month for External Distributors), since

Internal Distributors have limited, restricted usage rights to the market data, as compared to External Distributors, which have more expansive usage rights, including rights to commercialize such market data.<sup>97</sup> In addition, the Exchange states that it “utilizes more resources” to support External Distributors as compared to Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring “additional time and effort” of the Exchange’s staff.<sup>98</sup> What are commenters’ views on the adequacy of the information the Exchange provides regarding the differential between the Internal Distributor and External Distributor fees? Do commenters believe that the fees for Internal Distributors and External Distributors, as well as the fee differences between Distributors, are supported by the Exchange’s assertions that it sets the differentiated pricing structure in a manner that is equitable and not unfairly discriminatory? Do commenters believe that the Exchange should demonstrate how the proposed Distributor fee levels correlate with different costs to better substantiate how the Exchange “utilizes more resources” to support External Distributors versus Internal Distributors and permit an assessment of the Exchange’s statement that “External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of Exchange staff”?<sup>99</sup>

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.”<sup>100</sup> 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,<sup>101</sup> 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.<sup>102</sup> Moreover, “unquestioning reliance” on an SRO’s

<sup>97</sup> See text accompanying *supra* notes 65–67.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

<sup>92</sup> See *supra* Section II.A.2.

<sup>93</sup> See text accompanying *supra* note 47.

<sup>94</sup> See *supra* Section II.A.2.

<sup>95</sup> See text accompanying *supra* notes 69–70.

<sup>96</sup> See *supra* Section II.A.2.

representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.<sup>103</sup>

The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act, any potential comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission.

#### V. Request for Written Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above, as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. 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.<sup>104</sup>

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

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-EMERALD-2022-06 on the subject line.

<sup>103</sup> See *Susquehanna Int'l Group, LLP v. Securities and Exchange Commission*, 866 F.3d 442, 446-47 (D.C. Cir. 2017) (rejecting the Commission's reliance on an SRO's own determinations without sufficient evidence of the basis for such determinations).

<sup>104</sup> 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).

##### *Paper Comments*

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

All submissions should refer to File Number SR-EMERALD-2022-06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EMERALD-2022-06 and should be submitted on or before March 15, 2022. Rebuttal comments should be submitted by March 29, 2022.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(3)(C) of the Act,<sup>105</sup> that File Number SR-EMERALD-2022-06 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>106</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2022-03657 Filed 2-18-22; 8:45 am]

**BILLING CODE 8011-01-P**

<sup>105</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>106</sup> 17 CFR 200.30-3(a)(12), (57), and (58).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94252; File No. SR-CboeBZX-2022-008]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

February 15, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 7, 2022, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the Securities and Exchange Commission (the "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. (the "Exchange" or "BZX" or "BZX Equities") proposes to amend its Fee Schedule. 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/](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.

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

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