

justify the Proposed Access Fees in the First or Second Proposed Rule Change nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that “order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.”⁷⁶ The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

Other SIFMA Assertions

SIFMA’s also challenges or asserts: (i) The substitutability or optionality of 10Gb ULL connections, (ii) whether the Exchange has shown that the fees are equitable and non-discriminatory; (iii) that a tiered pricing structure will impose higher cost on all market participants; (iv) that a tiered pricing structure will encourage market participants to be more economical with the usage; (v) greater number of connections use greater Exchange resources; and (vi) that the Exchange has not provided extensive information regarding its cost data and how it determined its cost analysis. The Exchange believes that these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,⁷⁷ and Rule 19b-4(f)(2)⁷⁸ 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. Please include File Number SR-PEARL-2021-57 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-PEARL-2021-57. 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-PEARL-2021-57 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁷⁹

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93772; File No. SR-EMERALD-2021-43]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt a Tiered-Pricing Structure for Additional Limited Service MIAX Emerald Express Interface Ports

December 14, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 1, 2021, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a 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

The Exchange is filing a proposal to amend the Exchange’s Fee Schedule (the “Fee Schedule”) to amend certain port fees.

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 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

⁷⁶ See SIFMA Letter, *supra* note 9.

⁷⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

⁷⁸ 17 CFR 240.19b-4(f)(2).

⁷⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 the Fee Schedule to adopt a tiered-pricing structure for additional Limited Service MIAX Emerald Express Interface ("MEI") Ports³ available to Market Makers.⁴ The Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient and economical when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.⁵

The Exchange initially filed the proposed fee changes on August 2, 2021, with the changes being immediately effective.⁶ The First Proposed Rule Change was published for comment in the **Federal Register** on August 19, 2021.⁷ The Commission received one comment letter on the First Proposed Rule Change.⁸ The Exchange withdrew the First Proposed Rule Change on September 27, 2021 and resubmitted its proposal ("Second Proposed Rule Change").⁹ On September 28, 2021, the Exchange withdrew the Second Proposed Rule Change and re-submitted the proposal on September 28, 2021, with the proposed fee changes being immediately effective ("Third Proposed Rule Change").¹⁰ The Third Proposed Rule Change was published for comment in the **Federal Register** on October 5,

³ The MIAX Emerald Express Interface ("MEI") is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. See the Definitions Section of the Fee Schedule.

⁴ The term "Market Makers" refers to Lead Market Makers ("LMMs"), Primary Lead Market Makers ("PLMMs"), and Registered Market Makers ("RMMs") collectively. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁵ The term "System" means the automated trading system used by the Exchange for the trading of securities. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁶ See Securities Exchange Act Release No. 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR-EMERALD-2021-25).

⁷ *Id.*

⁸ See Letter from Richard J. McDonald, Susquehanna International Group, LLC ("SIG"), to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 ("SIG Letter 1").

⁹ See SR-EMERALD-2021-30.

¹⁰ See Securities Exchange Act Release No. 93188 (September 29, 2021), 86 FR 55052 (October 5, 2021) (SR-EMERALD-2021-31).

2021.¹¹ The Third Proposed Rule Change provided additional justification for the proposed fee changes and addressed certain points raised in the single comment letter that was submitted on the First Proposed Rule Change. The Commission received four comment letters from three separate commenters on the Third Proposed Rule Change.¹² The Commission suspended the Third Proposed Rule Change on November 22, 2021.¹³ The Exchange withdrew the Third Proposed Rule Change on December 1, 2021 and now submits this proposal for immediate effectiveness ("Fourth Proposed Rule Change"). This Fourth Proposed Rule Change meaningfully attempts to address issues or questions that have been raised by providing additional justification and explanation for the proposed fee changes and directly respond to the points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes,¹⁴ and feedback provided by Commission Staff during a telephone conversation on

¹¹ *Id.*

¹² See letters from Richard J. McDonald, SIG, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 ("SIG Letter 2") and October 26, 2021 ("SIG Letter 3"); and Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association ("SIFMA"), to Vanessa Countryman, Secretary, Commission, dated November 26, 2021 ("SIFMA Letter"). The Exchange notes that the Healthy Markets Association ("HMA") submitted a comment letter on a related filing to amend fees for 10Gb ULL connections, on which SIG Letters 1, 2, and 3 as well as the SIFMA Letter also commented. See letter from Tyler Gellasch, Executive Director, HMA ("HMA"), to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR-CboeEDGA-2021-017, SR-CboeBYX-2021-020, SR-Cboe-BZX-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").

¹³ See Securities Exchange Act Release No. 93644 (November 22, 2021), 86 FR 67745 (November 29, 2021).

¹⁴ The Exchange notes that while the HMA Letter applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes, the HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Rather, it references the Exchange's proposals by way of comparison to show the varying levels of transparency in exchange fees filings and recommends changes to the Commission's review process of exchange fee filings generally. Therefore, the Exchange does not feel it is necessary to address the issues raised in the HMA Letter.

November 18, 2021 relating to the Third Proposed Rule Change.

Additional Limited Service MEI Port Tiered-Pricing Structure

The Exchange proposes to amend the fees for additional Limited Service MEI Ports. Currently, the Exchange allocates two (2) Full Service MEI Ports¹⁵ and two (2) Limited Service MEI Ports¹⁶ per matching engine¹⁷ to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports, Limited Service MEI Ports and the additional Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports for which they are assessed a \$100 monthly fee for each additional Limited Service MEI Port for each matching engine.

The Exchange now proposes to move from a flat monthly fee per additional Limited Service MEI Port for each matching engine to a tiered-pricing structure for additional Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of additional Limited Service MEI Ports the Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second additional Limited Service MEI Ports for each matching engine free of charge, as described above, per the initial allocation of Limited Service MEI Ports that Market Makers receive. The Exchange now proposes the following

¹⁵ "Full Service MEI Ports" means a port which provides Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIAX Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. See the Definitions Section of the Fee Schedule.

¹⁶ "Limited Service MEI Ports" means a port which provides Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. See the Definitions Section of the Fee Schedule.

¹⁷ "Matching Engine" means a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. See the Definitions Section of the Fee Schedule.

tiered-pricing structure: (i) The third and fourth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of \$100 to \$200 per port; (ii) the fifth and sixth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of \$100 to \$300 per port; and (iii) the

seventh to the twelfth additional Limited Service MEI Ports will increase from the current monthly flat fee of \$100 to \$400 per port (collectively, the “Proposed Access Fees”).

The Exchange believes the other exchange’s port fees are a useful example of alternative approaches to providing and charging for port access and provides the below table for

comparison purposes only to show how its proposed fees compare to fees currently charged by other options exchanges for similar port access. As shown by the below table, the Exchange’s proposed highest tier is still less than fees charged for similar port access provided by other options exchanges.

Exchange	Type of port	Monthly fee (per port)
MIAX Emerald (as proposed)	Additional Limited Service MEI Port	1–2 ports. FREE (not changed in this proposal). 3–4 ports. \$200. 5–6 ports. \$300. 7–12 ports. \$400.
NYSE American, LLC (“Amex”) ¹⁸	Order/Quote Entry Port	\$450.
NYSE Arca, Inc. (“Arca”) ¹⁹	Order/Quote Entry Port	\$450.
The NASDAQ Stock Market LLC (“NASDAQ”) ²⁰ .	SQF Port	1–5 ports. \$1,500.00. 6–20 ports. \$1,000.00. 21 or more ports. \$500.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act ²¹ in general, and furthers the objectives of Section 6(b)(4) of the Act ²² in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange Members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act ²³ 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”).²⁴ 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.”²⁵

Accordingly, the Exchange believes that the Proposed Access 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 Miami International Securities Exchange, LLC (“MIAX”) and MIAX PEARL, LLC (“MIAX Pearl”), to amend other non-transaction fees.²⁶

The Proposed Access 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 increase 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 imposes various access fees for market participants to access an exchange’s marketplace. The Exchange deems ports to be access fees. It records these fees as part of its “Access Fees” revenue in its financial statements.

In its 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.”²⁷ The Commission Staff 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.”²⁸ In its 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 supracompetitive profit, specific

¹⁸ See NYSE American Options Fee Schedule, Section V.A., Port Fees.

¹⁹ See NYSE Arca Options Fee Schedule, Port Fees.

²⁰ See Nasdaq Stock Market, Nasdaq Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services.

²¹ 15 U.S.C. 78f(b).

²² 15 U.S.C. 78f(b)(4).

²³ 15 U.S.C. 78f(b)(5).

²⁴ 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).

²⁵ 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”).

²⁶ See Securities Exchange Act Release Nos. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR-PEARL–2021–01) (proposal to increase connectivity fees); 90980 (January 25, 2021), 86 FR 7602 (January 29, 2021) (SR-MIAX–2021–02) (proposal to increase connectivity fees).

²⁷ See Guidance, *supra* note 25.

²⁸ *Id.*

information, including quantitative information, should be provided to support that argument.”²⁹ The Exchange does not assert that the Proposed Access Fees are constrained by competitive forces. Rather, the Exchange asserts that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange’s costs in providing access services to supply additional Limited Service MEI Ports 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.”³⁰ 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.”³¹ The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the Proposed Access Fees are reasonable and do not result in a “supra-competitive”³² profit. The Exchange believes that it is important to demonstrate that the Proposed Access Fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access 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 Access Fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees. As a result of this analysis, the Exchange believes the Proposed Access 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 additional Limited Service MEI Port access to the Exchange.

The Proposed Access Fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs to provide port access, 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 additional Limited Service MEI Ports) to estimate such costs,³³ as well as the relative costs of providing and maintaining additional Limited Service MEI Ports, 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 additional Limited Service MEI Ports because of the uncertainty of forecasting subscriber decision making with respect to firms’ additional Limited Service MEI Port needs and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange’s costs to provide access services associated with the Proposed Access 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 Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of access services associated with the Proposed Access Fees. This analysis³⁴ included discussions with each Exchange department head to determine the expenses that support access services associated with the Proposed Access

³³ For example, the Exchange only included the costs associated with providing and supporting additional Limited Service MEI Ports and excluded from its cost calculations any cost not directly associated with providing and maintaining such ports. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining additional Limited Service MEI Ports.

³⁴ A description of the Exchange’s methodology for determining the portion (or percentage) of each expense to allocate to the Proposed Access Fee is being provide in response to comments from SIG and SIFMA. See SIG Letter 3 and SIFMA Letter, *supra* note 12.

Fees. Once the expenses were identified, the Exchange department heads, with the assistance of our internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing access services for the Proposed Access Fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

To determine the Exchange’s projected revenue associated with the Proposed Access Fees, the Exchange analyzed the number of Market Makers currently utilizing additional Limited Service MEI Ports and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing July 2021, the monthly billing cycle prior to the Proposed Access Fees going into effect, and compared it to its expenses for that month.³⁵ As discussed below, the Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these calculations, given the uncertainty of such projections due to the continually changing access 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 Access 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 Access Fees were not in place in 2020 or for the first seven 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 Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access 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 Access Fees are reasonable because they will allow the Exchange to recover its costs

³⁵ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Guidance, *supra* note 25.

associated with providing access services related to the Proposed Access Fees and not result in excessive pricing or supra-competitive profit.

As outlined in more detail below, the Exchange projects that its annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately \$880,000 per annum or an average of \$73,333.33 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 625 additional Limited Service MEI Ports for which the Exchange charged approximately \$62,500. This resulted in a loss of \$10,833.33 for that month (a loss margin of approximately 17.3%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 860 additional Limited Service MEI Ports for which the Exchange charged approximately \$216,600 for that month. This resulted in a profit of \$143,266.67 for that month (a profit margin of approximately 66%, after experiencing monthly losses prior to the Proposed Access Fees. The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate a revenue per-month after experiencing monthly losses prior to the Proposed Access Fees. The Exchange cautions that this profit margin may fluctuate from month to month based on the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are able to add and drop ports at any time based on their own business decisions, which they frequently do. This profit 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.³⁶ The Exchange has been subject to price increases upwards of 30% 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 additional Limited Service MEI Ports at a discounted price to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems. This resulted in the Exchange forgoing revenue it could have generated from assessing 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, or in this case, a monthly loss. The Exchange is now trying 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.

As mentioned above, the Exchange projects that its annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately \$880,000 per annum or an average of \$73,333.33 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.³⁷ The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. The Exchange incurs technology expense related to 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 access

services associated with the Proposed Access 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 access to its Members is not fixed. The Exchange believes the Proposed Access Fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees (which includes the Proposed 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 2019.³⁸ 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.³⁹ To do so, the Exchange chose to waive the fees for some non-transaction related services 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 higher fees.

The Exchange believes that the Proposed Access 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 access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. As

³⁶ 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-white-house-officials-warn-2021-10-12/> (October 12, 2021).

³⁷ 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 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.

³⁸ 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/>.

³⁹ The term "System" means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

mentioned above, for 2021,⁴⁰ the total annual expense for providing the access services associated with the Proposed Access Fees is projected to be approximately \$880,000.00, or approximately \$73,333.33 per month. This projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access 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 Access Fees.⁴¹ As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access 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.⁴² The \$880,000 projected total annual expense is directly related to the access services associated with the Proposed Access 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 expense relates to the access services associated with the Proposed Access 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. The sum of all such portions of expenses

⁴⁰ The Exchange has not yet finalized its 2021 year end results.

⁴¹ 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.

⁴² 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.

represents the total cost of the Exchange to provide access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees, is projected to be \$0.05 million. 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; (3) Secure Financial Transaction Infrastructure ("SFTI"),⁴³ which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and (5) 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, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees.

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access Fees. Further, the

⁴³ In fact, on October 22, 2019, the Exchange was notified by SFTI that it is again raising its fees charged to the Exchange by approximately 11%, without having to show that such fee change complies with the Act by being reasonable, equitably allocated, and not unfairly discriminatory. It is unfathomable to the Exchange that, given the critical nature of the infrastructure services provided by SFTI, that its fees are not required to be rule-filed with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b-4 thereunder. See 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4, respectively.

Exchange notes that, with respect to the expenses included herein, those expenses only cover the MIAX Emerald 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 access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 2.05% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.⁴⁴

⁴⁴ 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,

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 MIAX, 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 access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees, approximately 1.64% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.⁴⁵

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 2.05% of the total applicable SFTI and other service providers' expense. The

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 of 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.

⁴⁵ *Id.*

Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.⁴⁶

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 access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 1.23% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.⁴⁷

Internal Expense Allocations

For 2021, total projected internal expense, relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees, is projected to be \$0.83 million. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, and business that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below. For clarity,

⁴⁶ *Id.*

⁴⁷ *Id.*

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 access services associated with the Proposed Access Fees.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be approximately \$0.76 million, 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 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 each employee on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 7.81% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.⁴⁸

The Exchange's depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be \$0.06 million, which is only a

⁴⁸ *Id.*

portion of the \$3.13 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 access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees, approximately 1.92% of the total applicable depreciation and amortization expense, as these access services 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 access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.⁴⁹

The Exchange's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be \$0.01 million, which is only a portion of the \$0.52 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 access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, NJ 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. 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 access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 1.93% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.⁵⁰

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its more deterministic and resilient trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees to recover their costs; thus, the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Based on the above, the Exchange believes that its provision of access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees to be approximately \$880,000 per annum or an average of \$73,333.33 per month. The

Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 625 additional Limited Service MEI Ports for which the Exchange charged approximately \$62,500. This resulted in a loss of \$10,833.33 for that month (a loss margin of approximately 17.3%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 860 additional Limited Service MEI Ports for which the Exchange charged approximately \$216,600 for that month. This resulted in a profit of \$143,266.67 for that month (a profit margin of approximately 66%), after experiencing monthly losses prior to the Proposed Access Fees. The Exchange believes that the Proposed Access Fees are reasonable because they are designed to generate a revenue per-month after experiencing monthly losses prior to the Proposed Access Fees. The Exchange believes this profit 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 profit margin increase is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this profit margin may fluctuate from month to month based in the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are free to add and drop ports at any time based on their own business decisions. This profit 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.⁵¹ Accordingly, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit.

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 access services associated with the Proposed Access Fees because the Exchange performed a line-by-line

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See *supra* note 36.

item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing access 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 access services associated with the Proposed Access Fees to its 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 access services. The Proposed Access Fees are intended to recover the costs of providing access to the Exchange's System. Accordingly, the Exchange believes that the Proposed Access 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 Access Fees.

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

The Exchange believes the proposed tiered-pricing structure is reasonable, fair, equitable, and not unfairly discriminatory because it will apply to all Members and non-Members in the same manner based on the amount of Limited Service MEI Ports they require based on their own business decisions and its usage of Exchange resources. All similarly situated Members and non-Members would be subject to the same fees. The fees do not depend on any distinction between Members and non-Members because they are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources.

The proposed tiered-pricing structure is not unfairly discriminatory and provides for the equitable allocation of fees, dues, and other charges because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and the amount of the fees are based on the number of ports a Market Maker utilizes. Charging a higher fee to a Market Maker that utilizes numerous ports is directly related to the increased costs the Exchange incurs in providing and maintaining those additional ports. The proposed tiered pricing structure should also enable the Exchange to better monitor and provide access to the

Exchange's network to ensure sufficient capacity and headroom in the System while still providing the first and second additional Limited Service MEI Ports for each matching engine free of charge.

To achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange access resources, but also those firms that most heavily consume Exchange access resources, network consumers, and purchasers of Limited Service MEI Ports. Limited Service MEI Ports is not an unlimited resource as the Exchange needs to purchase additional equipment to satisfy requests for additional ports. The Exchange also needs to provide personnel to set up new ports, service requests related to adding new and/or deleting existing ports, respond to performance queries, and to maintain those ports on behalf of Members and non-Members. Also, those firms that utilize additional Limited Service MEI Ports typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network access expense for storage and network transport capabilities. The Exchange also has to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the Exchange Act.⁵²

The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fee to relate to the number of ports a firm purchases. The Exchange notes that Limited Service MEI Ports are primarily utilized by firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two per matching engine that are currently provided free of charge. Accordingly, the firms engaged in advanced trading strategies generate higher costs by utilizing more of the Exchange's resources. Those firms purchase higher amounts of Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms

engaging solely in order routing as part of their best-execution obligations.

The use of such additional Limited Service MEI Ports is a voluntary business decision of each Market Maker. Additional Limited Service MEI Ports are primarily used by Market Makers seeking to remove liquidity and, for competitive reasons, a Market Maker may choose to utilize numerous ports in an attempt to access the market quicker by using one port that may have less latency. The more ports purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange will continue to provide the first and second additional Limited Service MEI Ports free of charge. The Exchange notes that firms that primarily route orders seeking best-execution generally do not utilize additional Limited Service MEI Ports. Those firms also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.

On a similar note, the Exchange proposes to increase the fee for those firms that purchase more ports resulting in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange notes that these firms that purchase numerous additional Limited Service MEI Ports essentially do so for competitive reasons amongst themselves and choose to utilize numerous ports based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more ports so they can access resting liquidity ahead of their competitors. For instance, a Member may have just sent numerous messages and/or orders over one or more of their additional Limited Service MEI Ports that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over one or more of their other additional Limited Service MEI Ports with less message and/or order traffic to ensure that their liquidity taking order accesses the Exchange quicker because that connection's queue is shorter. These firms also tend to frequently add and drop ports mid-month to determine which ports have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center.

The firms that engage in the above-described liquidity removing and advanced trading strategies typically

⁵² 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

require multiple ports and, therefore, generate higher costs by utilizing more of the Exchange's resources. Those firms may also conduct other latency measurements over their ports and drop and simultaneously add ports mid-month based on their own assessment of their performance. This results in Exchange staff processing such requests, potentially purchasing additional equipment, and performing the necessary network engineering to replace those ports in the data center. Therefore, the Exchange believes it is equitable for these firms to experience increased port costs based on their disproportionate pull on Exchange resources to provide the additional port access.

In addition, the proposed tiered-pricing structure is equitable because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange. Section 6(b)(5) of the Exchange Act requires the Exchange to provide access on terms that are not unfairly discriminatory.⁵³ As stated above, Additional Limited Service MEI Ports are not an unlimited resource and the Exchange's network is limited in the amount of ports it can provide. However, the Exchange must accommodate requests for additional Limited Service MEI Ports and access to the Exchange's System to ensure that the Exchange is able to provide access on non-discriminatory terms and ensure sufficient capacity and headroom in the System. To accommodate requests for additional Limited Service MEI Ports on top of current network capacity constraints, requires that the Exchange to purchase additional equipment to satisfy these requests. The Exchange also needs to provide personnel to set up new ports and to maintain those ports on behalf of Members and non-Members. The proposed tiered-pricing structure is equitable because it is designed to encourage Market Makers to be more efficient and economical in selecting the amount of additional Limited Service MEI Ports they request while balancing that against the Exchange's increased expenses when expanding its network to accommodate additional Limited Service MEI Ports.

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

For example, Amex (equity options market share of 5.05% as of November

26, 2021 for the month of November)⁵⁴ and Arca (equity options market share of 14.88% as of November 26, 2021 for the month of November)⁵⁵ both charge \$450 per port for order/quote entry ports 1–40 and \$150 per port for ports 41 and greater,⁵⁶ all on a per matching engine basis, with Amex and Arca having 17 match engines and 19 match engines, respectively.⁵⁷ Similarly, NASDAQ (equity options market share of 8.88% as of November 23, 2021 for the month of November)⁵⁸ charges \$1,500 per port for SQF ports 1–5, \$1,000 per SQF port for ports 6–20, and \$500 per SQF port for ports 21 and greater,⁵⁹ all on a per matching engine basis, with NASDAQ having multiple matching engines.⁶⁰ The NASDAQ SQF Interface Specification provides that PHLX/NOM/BX Options trading infrastructures may consist of multiple matching engines with each matching engine trading only a range of option underlyings. Further, the SQF infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.⁶¹

In the each of the above cases, the Exchange's highest tier in the proposed tiered-pricing structure is similar to or significantly lower than that of competing options exchanges with similar market share. Despite proposing lower or similar fees to that of competing options exchanges with similar market share, the Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic System, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive port alternatives. Each of the

port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

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

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

With respect to intra-market competition, the Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that the proposed pricing structure is associated with relative usage of the various market participants. Firms that are primarily order routers seeking best-execution do not utilize Limited Service MEI Ports on MIAX Emerald and therefore will not pay the fees associated with the tiered-pricing structure. Rather, the fees described in the proposed tiered-pricing structure will only be allocated to Market Making firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two that are free. Accordingly, the firms engaged in a Market Making business generate higher costs by utilizing more of the Exchange's resources. Those Market Making firms that purchase higher amounts of additional Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms engaging solely in best-execution order routing business. Additionally, the use of such additional Limited Service MEI Ports is entirely voluntary.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to access all options exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and ports is constrained by competition among exchanges and third parties. There are other options markets of which market participants may access in order to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market

⁵⁴ See "The market at a glance," available at <https://www.miaxoptions.com/> (last visited November 26, 2021).

⁵⁵ See *id.*

⁵⁶ See NYSE American Options Fee Schedule, Section V.A., Port Fees; NYSE Arca Options Fee Schedule, Port Fees.

⁵⁷ See NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange).

⁵⁸ See *supra* note 54.

⁵⁹ See NASDAQ Stock Market, NASDAQ Options 7 Pricing Schedule, Section 3, NASDAQ Options Market—Ports and Other Services.

⁶⁰ See NASDAQ Specialized Quote Interface (SQF) Specification, Version 6.4 (October 2017), Section 2, Architecture (the "NASDAQ SQF Interface Specification").

⁶¹ See *id.*

⁵³ 15 U.S.C. 78f(b)(5).

center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

As described above, the Exchange received one comment letter on the First Proposed Rule Change⁶² and three comment letters on the Second Proposed Rule Change.⁶³ The Exchange now responds to the comment letters in this filing.

SIG Letter 2

SIG Letter 2 argues that the Exchange, in withdrawing the First Proposed Rule Change and re-filing the Second Proposed Rule Change, “improperly circumvent[ed] the procedural protections embedded in Exchange Act Section 19(b)(3)(C), and subvert[ed] the balance of interests upheld therein.”⁶⁴ SIG’s assertion that the Exchange’s entire reason for withdrawing and re-filing was to subvert the protections of the Exchange Act are entirely without merit. The Exchange withdrew the First Proposed Rule Change and replaced it with the Second Proposed Rule Change in good faith to provide additional justification and explanation for the proposed fee changes and did so in compliance with the Exchange Act. The same is true in this filing, where the Exchange withdrew the Second Proposed Rule Change and submitted this filing to provide additional justification and explanation for the proposed fee changes and directly responds to certain points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes.

As SIG well knows, exchanges are able to withdraw and refile various proposals (including fee changes and other rule changes) with the

Commission for a multitude of reasons, not the least of which is to address feedback and comments from market participants and Commission Staff. The Exchange is well within the bounds of the Act and the rules and regulations thereunder to withdraw a proposed rule change and replace it with a new proposed rule change in good faith and to enhance the filing to ensure it complies with the requirements of the Act.

SIG Letters 1 and 3

As an initial matter, SIG Letter 1 cites Rule 700(b)(3) of the Commission’s Rules of Fair Practice which places “the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change” and states that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”⁶⁵ SIG Letter 1’s assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the First and Second Proposed Rule Changes and this filing.

Until recently, the Exchange operated at a net annual loss since it launched operations in 2019.⁶⁶ As stated above, 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 increase 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 imposes various access fees for market participants to access an exchange’s marketplace. The Exchange believes it has achieved this standard in this filing and in the First and Second Proposed Rule Changes. Similar justifications for the proposed fee change included in the First and Second Proposed Rule Changes, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX and MIAAX Pearl, and SIG did not submit a comment letter on those filings.⁶⁷ Those

filings were not suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully support an assertion that those fee changes are consistent with the Act.⁶⁸ The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the First and Second Proposed Rule Changes include the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange’s detailed disclosures in fee filings have also been applauded by one industry group which noted, “[the Exchange’s] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect

EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAAX Emerald Express Interface Ports Available to Market Makers); and 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

⁶⁸ See, e.g., Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). See Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff’s feedback and after withdrawing SR–EMERALD–2020–11); and 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff’s feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April 9, 2021. See SR–PEARL–2021–17. On April 22, 2021, the Exchange withdrew SR–PEARL–2021–17 and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange’s revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange’s methodology for determining the costs and revenues for additional Limited Service MEO Ports). See SR–PEARL–2021–20. On May 3, 2021, the Exchange withdrew SR–PEARL–2021–20 and refiled that proposal to further clarify its cost methodology. See SR–PEARL–2021–22. On May 10, 2021, the Exchange withdrew SR–PEARL–2021–22 and refiled SR–PEARL–2021–23. See Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

⁶⁵ 17 CFR 201.700(b)(3).

⁶⁶ See *supra* note 38.

⁶⁷ See Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–

⁶² See *supra* note 8.

⁶³ See *supra* note 12.

⁶⁴ See SIG Letter 2, *supra* note 12, at page 1.

without suspension.”⁶⁹ That same commenter also noted their “worry that the Commission’s process for reviewing and evaluating exchange filings may be inconsistently applied.”⁷⁰

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission’s treatment of similar past filings, would create further ambiguity regarding the standards exchange fee filings should satisfy, and is not warranted here.

In addition, the arguments in SIG Letter 1 do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange. With regards to the First and Second Proposed Rule Changes, the SIG Letter does not directly address the proposed fees or lay out specific arguments as to why the proposal is not consistent with Section 6(b)(4) of the Act. Rather, it simply describes the proposed fee change and flippantly states that its claims concerning the 10Gb ULL fee change proposals by the Exchange, and its affiliates, apply to these changes. Nonetheless, the Exchange submits the below response to the SIG Letter concerning the First Proposed Rule Change.

Furthermore, the Exchange has enhanced its cost and revenue analysis and data in this Fourth Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff’s Guidance. Among other things, these enhancements include providing baseline information in the form of data

from the month before the Proposed Access Fees became effective.

The Exchange now responds to SIG’s remaining claims below. SIG Letter 3 first summarizes its arguments made in SIG Letters 1 and 2 and incorporates those arguments by reference. The Exchange responded to the arguments in SIG Letter 2 above. SIG Letter 3 incorporates the following arguments regarding additional Limited Service MEI Port fees from SIG Letter 1 (while excluding arguments that pertain solely to connectivity), which the Exchange will first respond to in turn, below:

“(1) The prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable; (2) profit margin comparisons do not support the Exchanges’ claims that they will not realize a supracompetitive profit . . . and comparisons to competing exchanges’ overall operating profit margins are an inapt “apples-to-oranges” comparison . . . (7) the recoupment of investment for exchange infrastructure has no supporting nexus with the claim that the proposed fees are reasonable, equitably allocated, and not unfairly discriminatory”⁷¹

General

First, the SIG Letter 1 states that additional Limited Service MEI Ports “are critical to Exchange members to be competitive *and to provide essential protection from adverse market events*” (emphasis added).⁷² The Exchange notes that this statement is generally not true for additional Limited Service MEI Ports as those ports are completely voluntary and used primarily for entering liquidity removing orders and not risk protection activities like purging quotes resting on the MIAx Emerald Book. Additional Limited Service MEI Ports are essentially used for competitive reasons and Market Makers may choose to utilize one or two Limited Service MEI Ports that are provided for free, or purchase additional Limited Service MEI Ports based on their business needs and desire to attempt to access the market quicker by using one port that may have less latency. For instance, a Market Maker may have just sent numerous messages and/or orders over one of their additional Limited Service MEI Ports that are in queue to be processed. That same Market Maker then seeks to enter an order to remove liquidity from the Exchange’s Book. That Market Maker may choose to send that order simultaneously over all of their Limited Service MEI Ports that they elected to purchase to ensure that their liquidity

taking order accesses the Exchange as quickly as possible.

If the Exchanges Were To Attempt To Establish Unreasonable Pricing, Then No Market Participant Would Join or Connect to the Exchange, and Existing Market Participants Would Disconnect

SIG asserts that “the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable.”⁷³ SIG misinterprets the Exchange’s argument here. The Exchange provided the examples of firms terminating access to certain markets due to fees to support its assertion that firms, including market makers, are not required to connect to all markets and may drop access if fees become too costly for their business models and alternative or substitute forms of access are available to those firms who choose to terminate access. The Commission Staff Guidance also provides that “[a] statement that substitute products or services are available to market participants in the relevant market (e.g., equities or options) can demonstrate competitive forces if supported by evidence that substitute products or services exist.”⁷⁴ Nonetheless, the Fourth Proposed Rule Change no longer makes this assertion as a basis for the proposed fee change and, therefore, the Exchange believes it is not necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Access Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

Next, SIG asserts that the Exchange’s “profit margin comparisons do not support the Exchanges’ claims that they will not realize a supracompetitive profit,” and “comparisons to competing exchanges’ overall operating profit margins are an inapt ‘apples-to-oranges’ comparison.”⁷⁵

The Exchange has provided ample data that the Proposed Access Fees would not result in excessive pricing or a supra-competitive profit. In this

⁷³ *Id.*

⁷⁴ See Guidance, *supra* note 27.

⁷⁵ See *supra* note 12. The Exchange does not have visibility into other equities exchanges’ costs to provide port access or their fee markup over those costs, and therefore cannot use other exchange’s port fees as a benchmark to determine a reasonable markup over the costs of providing port access. Nevertheless, the Exchange believes the other exchange’s port fees are a useful example of alternative approaches to providing and charging for port access. To that end, the Exchange believes the proposed tiered-pricing structure for Limited Service MEI Ports is reasonable because the proposed highest tier is still less than fees charged for similar port access provided by other options exchanges with comparable market shares.

⁶⁹ See HMA Letter, *supra* note 12.

⁷⁰ *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

⁷¹ See SIG Letter 3, *supra* note 10.

⁷² See SIG Letter 1 at page 2, *supra* note 12.

Fourth Proposed Rule Change, the Exchange no longer utilizes a comparison of its profit margin to that of other options exchanges as a basis that the Proposed Access Fees are reasonable. Rather, the Exchange has enhanced its cost and revenue analysis and data in this Fourth Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Therefore, the Exchange believes it is no longer necessary to respond to this portion of SIG Letters 1 and 3.

Recoupment of Exchange Infrastructure Costs

Nowhere in this proposal or in the First, Second, or Third Proposed Rule Changes did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its "proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems." The Exchange no longer makes this assertion in this filing and, therefore, does not believe it is necessary to respond to SIG's assertion here.

The Proposed Tiered Pricing Structure is Not Unfairly Discriminatory

SIG challenges the proposed fees by arguing that "the Exchange[] provide[s] no support for [its] claim that [the] proposed tiered pricing structure is needed to encourage efficiency in connectivity usage and the Exchange[] provided no support for [the] claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event." The Exchange provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

SIFMA Letter

In sum, the SIFMA Letter asserts that the Exchange has failed to demonstrate that the Proposed Access Fees are reasonable for three reasons:

(i) "The Exchanges' "platform competition" argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable."

(ii) ". . . order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable."

(iii) "the Exchanges' argument that the products and services subject to the Proposals are optional does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable."

The Exchange responds to each of SIFMA's challenges in turn below.

The Exchange Never Set Forth a "Platform Competition" Argument

The SIFMA Letter asserts that the Exchange's "platform competition" argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable." The Exchange does not believe it is necessary to respond to this assertion because it has never set forth a "platform competition" ⁷⁶ argument to justify the Proposed Access Fees in the First or Second Proposed Rule Change nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that "order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable." ⁷⁷ The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

Other SIFMA Assertions

SIFMA's also challenges or asserts: (i) Whether the Exchange has shown that the fees are equitable and non-discriminatory; (ii) that a tiered pricing structure will encourage market participants to be more economical with the usage; (iii) greater number of ports use greater Exchange resources; and (iv) that the Exchange has not provided extensive information regarding its cost data and how it determined its cost analysis. The Exchange believes that

⁷⁶ Pursuant to the Guidance, "platform theory generally asserts that when a business offers facilities that bring together two or more distinct types of customers, it is the overall return of the platform, rather than the return of any particular fees charged to a type of customer, that should be used to assess the competitiveness of the platform's market." See Guidance, *supra* note 25.

⁷⁷ See SIFMA Letter, *supra* note 12.

these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,⁷⁸ and Rule 19b-4(f)(2)⁷⁹ 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. Please include File Number SR-EMERALD-2021-43 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-EMERALD-2021-43. 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

⁷⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

⁷⁹ 17 CFR 240.19b-4(f)(2).

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-2021-43 and should be submitted on or before January 10, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁸⁰

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93779; File No. SR-MRX-2021-12]

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX's Pricing Schedule at Options 7, Section 1, General Provisions

December 14, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 1, 2021, Nasdaq MRX, LLC ("MRX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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

The Exchange proposes to amend MRX's Pricing Schedule at Options 7, Section 1, General Provisions.

While the changes proposed herein are effective upon filing, the Exchange has designated the amendments become operative on December 1, 2021.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

MRX proposes to amend its Pricing Schedule at Options 7, Section 1, General Provisions. Specifically, MRX proposes to amend the way an Exchange Member indicates its participation in the Affiliated Entity Program. Specifically, the Exchange proposes to amend the description of "Affiliated Entity" within Options 7, Section 1, General Provisions. Currently, the term "Affiliated Entity" is described as,

a relationship between an Appointed Market Maker and an Appointed OFF for purposes of qualifying for certain pricing specified in the Pricing Schedule. Market Makers and OFFs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will terminate after a one (1) year period, unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business

days prior to the last day of the month to terminate for the next month. Affiliated Entity relationships must be renewed annually by each party sending an email to the Exchange. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time.

Today, Members are required to annually renew their Affiliate Entity relationship at the end of one year if they desire to continue the relationship. The parties must both send an email to the Exchange to avoid termination of the relationship, provided the relationship was not terminated earlier in the year. The Exchange believes that this process is burdensome for Members that desire to remain in the program. The consequence of not renewing is termination. The Exchange desires to remove the administrative burden associated with the requirement to annually renew and instead provide that the Affiliated Entity relationship will automatically renew each month, unless otherwise terminated. The proposed new rule text would provide,

An "Affiliated Entity" is a relationship between an Appointed Market Maker and an Appointed OFF for purposes of qualifying for certain pricing specified in the Pricing Schedule. Market Makers and OFFs are required to send an email to the Exchange to appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will automatically renew each month until or unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Members may not qualify as a counterparty comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time.

As is the case today, parties to the Affiliated Entity relationship may decide to terminate the relationship during any month by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Cboe Exchange, Inc. ("Cboe") has a similar automatic renewal process for its Appointed OFF and Appointed Market-Maker Program.³ The Exchange believes

³ See Cboe's Fees Schedule at footnote 23 "A Market-Maker may designate an Order Flow Provider ("OFF") as its "Appointed OFF" and an OFF may designate a Market-Maker to be its "Appointed Market-Maker" for purposes of

⁸⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.