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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-87167; File No. SR-PEARL-2019-23]

Self-Regulatory Organizations; MIAX PEARL, LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Modify the Options Regulatory Fee

September 30, 2019.

I. Introduction

On August 1, 2019, MIAX PEARL, LLC ("MIAX PEARL" or "Exchange") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")[1] and Rule 19b-4 thereunder,[2] a proposed rule change (File No. SR-PEARL-2019-23) to modify the amount of its Options Regulatory Fee ("ORF").[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the Federal Register on August 14, 2019.[5] The Commission received one comment letter on the proposal.[6] Pursuant to Section 19(b)(3)(C) of the Act,[7] the Commission is hereby: (1) temporarily suspending File No. SR-PEARL-2019-23; and (2)

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release No. 86607 (August 8, 2019), 84 FR 40441 (August 14, 2019) ("Notice").

4 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as "establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization." 15 U.S.C. 78s(b)(3)(A)(ii).

5 See Notice, supra note 3.

6 See Letter to Vanessa Countryman, Secretary, Commission, from Ellen Greene, Managing Director, Securities Industry and Financial Markets Association ("SIFMA"), dated August 27, 2019 ("SIFMA Letter").

7 15 U.S.C. 78s(b)(3)(C).

instituting proceedings to determine whether to approve or disapprove File No. SR-PEARL-2019-23.

II. Description of the Proposed Rule Change

The Exchange proposes to amend the amount of its ORF from $0.0028 to $0.0020 per contract.[8] The Exchange assesses the ORF to each MIAX PEARL member for all options transactions that are cleared or ultimately cleared by the member which are cleared by the Options Clearing Corporation ("OCC") in the "customer" range, regardless of the exchange on which the transaction occurs.[9] The Exchange noted that its ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of members' customer option business.[10] Noting that it adjusts the ORF amount periodically to ensure that the revenue from the ORF in combination with its other regulatory fees and fines does not exceed its regulatory costs, the Exchange proposed to decrease the amount of its ORF "[i]n light of recent market volumes on the Exchange and changes to the Exchange's regulatory costs."[11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of

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8 See Notice, supra note 3, at 40441.

9 See id. The ORF is collected by OCC on behalf of MIAX PEARL from either (1) a member that was the ultimate clearing firm for the transaction or (2) a non-member that was the ultimate clearing firm where a member was the executing clearing firm for the transaction. See id.

10 Id. at 40442.

11 See id. at 40443.

12 15 U.S.C. 78s(b)(3)(C).

filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[13] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization ("SRO") if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[14] The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements"[15]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[16] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[17] and

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13 15 U.S.C. 78s(b)(1).

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

15 See id.

16 15 U.S.C. 78f(b)(4).

17 15 U.S.C. 78f(b)(5).

(3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[18]

In justifying its proposal, the Exchange stated in its filing that its proposal is reasonable because the proposed adjustment to the amount of its ORF "will serve to balance the Exchange's regulatory revenue against the anticipated regulatory costs."[19] In determining the amount of the proposed ORF, the Exchange said that it considered: (1) historical and projected volume changes and shifts in the industry and on the Exchange, and (2) changes to the Exchange's regulatory cost structure.[20] The Exchange also asserted that the ORF is equitably allocated and not unfairly discriminatory because the fees are imposed on "all members on all their transactions that clear as customer at OCC" and therefore members are charged based on the amount of customer business they conduct.[21] In addition, the Exchange stated that the regulatory costs relating to monitoring members with respect to customer trading activity are generally higher than the regulatory costs associated with monitoring members that do not engage in customer trading activity, which tends to be more automated and less labor-intensive.[22]

As noted above, the Commission received one comment letter on the proposal, in which the commenter argued that the Exchange has not provided sufficient information to satisfy the statutory requirements under the Act.[23] Specifically, the commenter stated that the Exchange should "include quantitative data showing anticipated revenues, costs and profitability" and

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18 15 U.S.C. 78f(b)(8).

19 See Notice, supra note 3, at 40443.

20 See id. at 40441.

21 See id. at 40443.

22 See id. at 40443-44.

23 See SIFMA Letter, supra note 6, at 1-2.

describe the methodology used for any estimations of baseline and expected costs and revenues to support the Exchange's assertions that the proposed ORF is an equitable allocation of reasonable fees among members.[24] The commenter also stated that the Exchange should provide support for its assertions that assessing ORF only on transactions cleared at OCC in the "customer" range represents an equitable allocation that is not unfairly discriminatory.[25] Lastly, the commenter argued that the Exchange should not be permitted to charge ORF for trades occurring on other exchanges unless the Exchange can support its assertion concerning its "authority to act on activities occurring outside its own market."[26]

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to modify the amount of the ORF is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[27]

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[24] See id. at 2.

[25] See id.

[26] See id.

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

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[28]

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

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[29] and 19(b)(2)(B) of the Act[30] to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[31] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities

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28 For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

29 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

30 15 U.S.C. 78s(b)(2)(B).

31 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"[32] (emphasis added);

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers"[33] (emphasis added); and
- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[34]

As noted above, the proposal purports to modify the amount of the ORF in response to changes in options transaction volume in a manner that is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of its options participants. However, the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity.[35] For example, the Exchange provides only a broad general statement regarding options transaction volume and does not provide any information on the Exchange's historic or projected options regulatory costs (including the costs of regulating activity that clears in the "customer" range and the costs of regulating activity that

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32 15 U.S.C. 78f(b)(4).

33 15 U.S.C. 78f(b)(5).

34 15 U.S.C. 78f(b)(8).

35 See, e.g., SIFMA Letter, supra note 6, at 2 (arguing that the Exchange has "not provided enough information …to satisfy the Exchange Act standards").

occurs away from the Exchange), the amount of regulatory revenue it has generated and expects to generate from the ORF as well as other sources, or the "material portion" of options regulatory expenses that it seeks to recover from the ORF. Similarly, the Exchange has not provided information to support its assertion that regulating customer trading activity is "much more labor-intensive" and therefore, more costly.[36]

As the commenter stated, without more information in the filing on the Exchange's regulatory revenues attributable to ORF as well as regulatory revenue from other sources, and more information on the Exchange's regulatory costs to supervise and regulate members, including, e.g., customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks information that can speak to whether the proposed ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the "customer" range and regardless of the exchange on which the transaction occurs, and that the ORF is designed to recover a material portion, but not all, of the Exchange's regulatory costs for the supervision and regulation of activity across all members.[37]

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder…is on the [SRO] that proposed the rule change."[38] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission

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36 See Notice, supra note 3, at 40444. See also SIFMA Letter, supra note 6, at 2.

37 See SIFMA Letter, supra note 6, at 2.

38 17 CFR 201.700(b)(3).

finding,[39] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[40]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated and not be unfairly discriminatory.[41]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[42]

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39 See id.

40 See id.

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

42 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, 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 e-mail to rule-comments@sec.gov. Please include File No. SR-PEARL-2019-23 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 No. SR-PEARL-2019-23. The file number should be included on the subject line if e-mail 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 such 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 publicly available. All submissions should refer to File No. SR-PEARL-2019-23 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,[43] that File No. SR-PEARL-2019-23, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[44]

Jill M. Peterson,
Assistant Secretary.

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[43] 15 U.S.C. 78s(b)(3)(C).

[44] 17 CFR 200.30-3(a)(57) and (58).

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