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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92789; File Nos. SR-MIAX-2021-28, SR-EMERALD-2021-21]

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**Self-Regulatory Organizations; Miami International Securities Exchange, LLC and MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Establish Fees for the Exchanges' cToM Market Data Products**

August 27, 2021.

I. Introduction

On June 30, 2021, Miami International Securities Exchange, LLC (“MIAX”) and MIAX Emerald, LLC (“MIAX Emerald”) (each, an “Exchange,” and collectively, the “Exchanges”) each filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to establish fees for, respectively, the MIAX Complex Top of Market (“cToM”) and the MIAX Emerald cToM market data products. The proposed rule changes were immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule changes were published for comment in the Federal Register on July 15, 2021.<sup>4</sup> Pursuant to Section 19(b)(3)(C) of the Act,<sup>5</sup> the Commission is hereby: (1) temporarily suspending the proposed rule changes; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule changes.

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

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

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

<sup>4</sup> See Securities Exchange Act Release Nos. 92359 (July 9, 2021), 86 FR 37393 (SR-MIAX-2021-28); and 92358 (July 9, 2021), 86 FR 37361 (SR-EMERALD-2021-21) (each, a “Notice”). For ease of reference, page citations are to the Notice for SR-MIAX-2021-28, unless otherwise indicated.

<sup>5</sup> 15 U.S.C. 78s(b)(3)(C).

## II. Description of the Proposed Rule Changes

The Exchanges propose to establish fees for their cToM market data products.<sup>6</sup>

According to the Exchanges, the cToM feed provides subscribers with the same information as the Exchanges' respective simple order market Top of Market ("ToM") feeds, but for each Exchange's Strategy Book<sup>7</sup> (i.e., best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on each Exchange), plus additional information specific to complex orders (i.e., identification of the complex strategies currently trading on each Exchange, complex strategy last sale information, and the status of securities underlying the complex strategy).<sup>8</sup>

The Exchanges each propose to assess Internal Distributors<sup>9</sup> \$1,250 per month and External Distributors<sup>10</sup> \$1,750 per month for the cToM data feed.<sup>11</sup> The Exchanges each will assess cToM fees on Internal and External Distributors in each month the Distributor is

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<sup>6</sup> The proposed fee changes became effective on July 1, 2021. See Notice, supra note 4, at 37394.

<sup>7</sup> The "Strategy Book" is each Exchange's electronic book of complex orders and complex quotes. See MIAX and MIAX Emerald Rule 518(a)(17).

<sup>8</sup> The Exchanges state that cToM is a distinct market data product from ToM. They also state that ToM subscribers are not required to subscribe to cToM, and that cToM subscribers are not required to subscribe to ToM. See Notice, supra note 4, at 37394.

<sup>9</sup> A "Distributor" of the Exchanges' data is any entity that receives a feed or file of data either directly from the Exchanges or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). See MIAX and MIAX Emerald Fee Schedule, Section 6(a). All members or non-members that determine to receive any market data feed from the Exchanges must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement ("Exchange Data Agreement"). See Notice, supra note 4, at 37395. Pursuant to the Exchange Data Agreement, "Internal Distributors" are restricted to the "internal use" of any market data they receive, meaning they may only distribute the Exchanges' market data to their officers and employees and their affiliates. See id.

<sup>10</sup> "External Distributors" may distribute the Exchanges' market data to persons who are not their officers, employees, or affiliates, and may charge their own fees for the distribution of such market data. See Notice, supra note 4, at 37395.

<sup>11</sup> See id. at 37394. The Exchanges also propose to make a related change to remove "(as applicable)" from the explanatory paragraph in Section 6(a) of each Exchanges' fee schedule, as the Exchanges will now charge fees for both the ToM and cToM data feeds. See id. at 37394 n.10.

credentialed to use cToM, and will reduce such fees for new Distributors for the first month during which they subscribe to cToM based on the number of trading days that have been held during the month prior to the date on which that subscriber has been credentialed to use cToM.<sup>12</sup>

### III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,<sup>13</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>14</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

The Exchanges generally argue that the proposed fees are consistent with the Act because the Exchanges operate in a highly competitive environment that constrains their pricing of the cToM feeds.<sup>15</sup> In particular, the Exchanges maintain that subscribing to the cToM feeds is optional, as is the use of complex orders themselves.<sup>16</sup> The Exchanges argue that because complex orders are not protected or subject to trade-through requirements, and because market makers are not subject to continuous quoting requirements for complex orders (as they are for simple orders), it is therefore a business decision whether market participants use complex order

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<sup>12</sup> New Distributors will be assessed a pro-rata percentage of the fees described above, which is the percentage of the number of trading days remaining in the affected calendar month as of the date on which they have been credentialed to use cToM, divided by the total number of trading days in the affected calendar month. See id. at 37394.

<sup>13</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>14</sup> 15 U.S.C. 78s(b)(1).

<sup>15</sup> See Notice, supra note 4, at 37395-96. In support, the Exchanges state that MIAX and MIAX Emerald currently represent approximately 6.75% and 3.24% of options market share, respectively. See id. at 37395; Emerald Notice, supra note 4, at 37362.

<sup>16</sup> See Notice, supra note 4, at 37395.

strategies on the Exchanges and whether they purchase cToM data to help effect those strategies.<sup>17</sup> Accordingly, the Exchanges assert that if they priced their complex data products too highly, and market participants wanted to use those data products to trade complex orders, then those market participants would move their complex order flow to a more competitively-priced exchange offering complex order functionality and a comparable data product.<sup>18</sup> The Exchanges argue that this potential to lose both order flow and data subscribers on each of MIAX and/or MIAX Emerald constrains their pricing of the cToM feeds.<sup>19</sup> The Exchanges also argue that the proposed fees are reasonable because they are similar to and generally lower than the fees assessed by other exchanges that provide similar data products, and that proposing fees excessively higher would ultimately reduce demand for the Exchanges' own cToM products.<sup>20</sup>

The Exchanges further argue that the proposals are equitable and not unfairly discriminatory because the proposed cToM fees will apply to all market participants of the Exchanges on a uniform basis.<sup>21</sup> Moreover, the Exchanges assert that it is reasonable, equitable, and not unfairly discriminatory to assess Internal Distributors fees that are lower than the fees assessed for External Distributors for subscriptions to the cToM data feeds, since Internal Distributors have limited, restricted usage rights to the market data, as compared to External

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<sup>17</sup> See id.

<sup>18</sup> See id. at 37395-96.

<sup>19</sup> See id.

<sup>20</sup> See id. In addition, the Exchanges state that the proposed monthly cToM fees for Internal and External Distributors are the same prices that the Exchanges charge for their ToM data products. See id. at 37396. The Exchanges also argue that the proposed fees are reasonable because members have had the ability to receive cToM data free of charge from MIAX for the past five years and from MIAX Emerald for the past two years, since each respective cToM market data product was established on each Exchange. See id. at 37395; Emerald Notice, supra note 4, at 37361, 37363. The Exchanges now assert that it is no longer necessary to provide cToM data for free to attract market participants, as the Exchanges' Strategy Books are now established and the Exchanges no longer need to rely on such fee waivers to attract market participants. See Notice, supra note 4, at 37394, 37396.

<sup>21</sup> See Notice, supra note 4, at 37396.

Distributors, which have more expansive usage rights, including rights to commercialize such market data.<sup>22</sup>

Finally, the Exchanges assert that the proposed fees would not cause any unnecessary or inappropriate burden on inter-market competition, as other exchanges are free to introduce their own comparable data products and lower their prices to better compete with the Exchanges' offerings.<sup>23</sup> In this regard, the Exchanges assert that the proposals will promote competition by permitting the Exchanges to sell data products similar to those offered by other competitor options exchanges.<sup>24</sup> The Exchanges also assert that the proposed rule changes would not cause any unnecessary or inappropriate burden on intra-market competition, as the proposed fees apply uniformly to any purchaser by not differentiating between subscribers that purchase cToM (other than between Internal and External Distributors, as described above), and are set at a modest level allowing any interested member or non-member to purchase such data based on their business needs.<sup>25</sup>

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchanges' present proposals, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.<sup>26</sup> The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."<sup>27</sup>

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<sup>22</sup> See id. at 37395-96. In addition, the Exchanges argue that they use more resources to support External Distributors as compared to Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of the Exchanges' staff. See id. at 37396.

<sup>23</sup> See id.

<sup>24</sup> See id.

<sup>25</sup> See id.

<sup>26</sup> See 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

<sup>27</sup> See id.

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;<sup>28</sup> (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>29</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>30</sup>

In temporarily suspending the Exchanges' proposed rule changes, the Commission intends to further consider whether the proposals to establish fees for the cToM market data feeds are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>31</sup>

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.<sup>32</sup>

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<sup>28</sup> 15 U.S.C. 78f(b)(4).

<sup>29</sup> 15 U.S.C. 78f(b)(5).

<sup>30</sup> 15 U.S.C. 78f(b)(8).

<sup>31</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

<sup>32</sup> For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

In addition to temporarily suspending the proposals, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>33</sup> and 19(b)(2)(B) of the Act<sup>34</sup> to determine whether the Exchanges' proposed rule changes should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>35</sup> the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how their proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”,<sup>36</sup>
- Whether the Exchanges have demonstrated how their proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a

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<sup>33</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>34</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>35</sup> Id. 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.

<sup>36</sup> 15 U.S.C. 78f(b)(4).

national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>37</sup> and

- Whether the Exchanges have demonstrated how their proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”<sup>38</sup>

As discussed in Section III above, the Exchanges made various arguments in support of their proposals. The Commission believes that there are questions as to whether the Exchanges have provided sufficient information to demonstrate that the proposed fees are consistent with the Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”<sup>39</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>40</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>41</sup>

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

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<sup>37</sup> 15 U.S.C. 78f(b)(5).

<sup>38</sup> 15 U.S.C. 78f(b)(8).

<sup>39</sup> 17 CFR 201.700(b)(3).

<sup>40</sup> See id.

<sup>41</sup> See id.

equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>42</sup>

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 AFTER 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 that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>43</sup>

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

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-MIAX-2021-28 or SR-EMERALD-2021-21 on the subject line.

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<sup>42</sup> See 15 U.S.C. 78f(b)(4), (5), and (8).

<sup>43</sup> 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Paper comments:

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

All submissions should refer to File No. SR-MIAX-2021-28 or SR-EMERALD-2021-21. 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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchanges. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make publicly available. All submissions should refer to File No. SR-MIAX-2021-28 or SR-EMERALD-2021-21 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Rebuttal comments should be submitted by **[INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>44</sup> that File Nos. SR-MIAX-2021-28 and SR-EMERALD-2021-21, be and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>45</sup>

**Vanessa A. Countryman,**

*Secretary.*

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<sup>44</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>45</sup> 17 CFR 200.30-3(a)(57) and (58).