



Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish Fees for the cToM Market Data Product

October 26, 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 October 14, 2021, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“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 is filing a proposal to amend the Exchange’s Fee Schedule (“Fee Schedule”) to establish fees for the market data product known as MIAX Emerald Complex Top of Market (“cToM”).

The 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

The Exchange proposes to amend Section 6(a) of the Fee Schedule to establish fees for the cToM data product.

Background

The Exchange previously adopted rules governing the trading of Complex Orders³ on the Emerald System⁴ in 2018,⁵ ahead of the Exchange’s planned launch, which took place on March 1, 2019. Shortly thereafter, the Exchange also adopted the market data product cToM and expressly waived fees for cToM to provide an incentive to prospective market participants to subscribe to that market data feed.⁶ The Exchange has not charged fees to cToM subscribers in the over two and a half years since it was first available for subscription.

In summary, cToM provides subscribers with the same information as the MIAX Emerald Top of Market (“ToM”) data product as it relates to the Strategy Book⁷, i.e., the Exchange’s best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange. However, cToM provides

³ See Exchange Rule 518(a)(5) for the definition of Complex Orders.

⁴ The term “System” means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

⁵ See Securities Exchange Act Release Nos. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (In the Matter of the Application of MIAX EMERALD, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission); and 85345 (March 18, 2019), 84 FR 10848 (March 22, 2019) (SR-EMERALD-2019-13) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 518, Complex Orders).

⁶ See Securities Exchange Act Release No. 85207 (February 27, 2019), 84 FR 7963 (March 5, 2019) (SR-EMERALD-2019-09) (providing a complete description of the cToM data feed).

⁷ The “Strategy Book” is the Exchange’s electronic book of complex orders and complex quotes. See Exchange Rule 518(a)(17).

subscribers with the following additional information that is not included in ToM: (i) the identification of the complex strategies currently trading on the Exchange; (ii) complex strategy last sale information; and (iii) the status of securities underlying the complex strategy (e.g., halted, open, or resumed). cToM is a distinct market data product from ToM. ToM subscribers are not required to subscribe to cToM, and cToM subscribers are not required to subscribe to ToM.⁸

Proposal

The Exchange now proposes to amend Section 6(a) of the Fee Schedule to charge monthly fees to Distributors⁹ of cToM. Specifically, the Exchange proposes to assess Internal Distributors \$1,250 per month and External Distributors \$1,750 per month for the cToM data feed.¹⁰ The Exchange notes that the proposed monthly cToM fees for Internal and External Distributor are the same prices that the Exchange charges for its ToM data product and are identical to the prices the Exchange's affiliate, Miami International Securities Exchange, LLC ("MIAX") proposes to charge for its cToM product. Further, the proposed prices are similar to or less than competing options exchanges' prices for their comparable complex order data feed products.¹¹

⁸ See supra note 6.

⁹ A "Distributor" of MIAX Emerald data is any entity that receives a feed or file of data either directly from MIAX Emerald or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All Distributors are required to execute a MIAX Emerald Distributor Agreement. See Section 6(a) of the Fee Schedule.

¹⁰ The Exchange also proposes to make a minor related change to remove the phrase "(as applicable)" from the explanatory paragraph in Section 6(a).

¹¹ See NYSE American Options Proprietary Market Data Fees, American Options Complex Fees (\$1,500 per month Access Fee and \$1,000 per month Redistribution Fee), at https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Options_Market_Data_Fee_Schedule.pdf; see also NYSE Arca Options Proprietary Market Data Fees, Arca Options Complex Fees (\$1,500 per month Access Fee and \$1,000 per month Redistribution Fee), at https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf; Nasdaq PHLX LLC Price List – U.S. Derivatives Data, PHLX Orders Fees (Internal Distributor fee of \$3,000 per month and External Distributor fee of \$3,500

Like it does today for ToM, the Exchange proposes to assess cToM fees on Internal and External Distributors in each month the Distributor is credentialed to use cToM in the production environment. Also, like the Exchange does today for ToM, market data fees for cToM will be reduced for new Distributors for the first month during which they subscribe to cToM, based on the number of trading days that have been held during the month prior to the date on which that subscriber has been credentialed to use cToM in the production environment. Such new Distributors will be assessed a pro-rata percentage of the fees in the table in Section 6)a) of the Fee Schedule, which is the percentage of the number of trading days remaining in the affected calendar month as of the date on which they have been credentialed to use cToM in the production environment, divided by the total number of trading days in the affected calendar month.

The Exchange initially filed this proposal on June 30, 2021 with the proposed fees to be effective beginning July 1, 2021.¹² The First Proposed Rule Change was published for comment in the Federal Register on July 15, 2021.¹³ Although the Commission did not receive any comment letters on the First Proposed Rule Change, on August 27, 2021, the Commission issued its Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Establish Fees for the Exchanges' cToM Market Data Products (relating to the First Proposed Rule Change and a similar filing by the Exchange's affiliate, MIAX, to also adopt cToM fees).¹⁴ On September 30, 2021, the Exchange withdrew the First Proposed Rule Change and resubmitted its proposal to adopt cToM fees.¹⁵ On October 14,

per month), at
<http://www.nasdaqtrader.com/Trader.aspx?id=DPPriceListOptions#PHLX>.

¹² See Securities Exchange Act Release No. 92358 (July 9, 2021), 86 FR 37361 (July 15, 2021) (SR-EMERALD-2021-21) (the "First Proposed Rule Change").

¹³ Id.

¹⁴ See Securities Exchange Act Release No. 92789 (August 27, 2021), 86 FR 49364 (September 2, 2021) (SR-MIAX-2021-28, SR-EMERALD-2021-21) (the "Suspension Order").

¹⁵ See SR-EMERALD-2021-32 (the "Second Proposed Rule Change").

2021, the Exchange withdrew the Second Proposed Rule Change and submitted this proposal to adopt cToM fees.

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

Implementation

The proposed rule change is immediately effective upon filing.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹⁶ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁷ in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. Particularly, cToM further broadens the availability of U.S. option market data to investors

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4) and (5).

consistent with the principles of Regulation NMS. The data product also promotes increased transparency through the dissemination of cToM. Particularly, cToM provides subscribers with the same information as ToM as it relates to the Strategy Book (i.e., the Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange), but includes the following additional information: (i) the identification of the complex strategies currently trading on the Exchange; (ii) complex strategy last sale information; and (iii) the status of securities underlying the complex strategy (e.g., halted, open, or resumed). The Exchange believes cToM provides a valuable tool that subscribers can use to gain substantial insight into the trading activity in Complex Orders, but also emphasizes such data is not necessary for trading and that such information can be derived from other Exchange sources. Moreover, other exchanges offer similar data products for their own complex market data.¹⁸

The Exchange believes that its proposal is reasonable, equitable and not unfairly discriminatory because it is a business decision of each subscriber of cToM whether to subscribe to the feed or not. cToM is also not the exclusive source for Complex Order information from the Exchange and market participants may choose to subscribe to the Exchange's other data products to receive such information. Specifically, market participants that choose not to subscribe to cToM can derive much, if not all, of the same information provided in the cToM feed from other Exchange sources, including, for example, the MIAX Emerald Order Feed ("MOR").¹⁹ The following cToM information is provided to subscribers of MOR: the Exchange's best bid and

¹⁸ See supra note 11.

¹⁹ See MIAX website, Market Data & Offerings, at <https://www.miaxoptions.com/market-data-offerings> (last visited October 13, 2021). In general, MOR provides real-time ultra-low [sic] latency updates on the following information: new Simple Orders added to the MIAX Emerald Order Book; updates to Simple Orders resting on the MIAX Emerald Order Book; new Complex Orders added to the Strategy Book (i.e., the book of Complex Orders); updates to Complex Orders resting on the Strategy Book; MIAX Emerald listed series updates; MIAX Emerald Complex Strategy definitions; the state of the MIAX Emerald System; and MIAX Emerald's underlying trading state.

offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange; the identification of the complex strategies currently trading on the Exchange; and the status of securities underlying the complex strategy (e.g., halted, open, or resumed). In addition to the cToM information contained in MOR, complex strategy last sale information can be derived from the Exchange's ToM feed based [sic]. Specifically, market participants may deduce that last sale information for multiple trades in related options series that are disseminated via the ToM feed with the same timestamp are likely part of a Complex Order transaction and last sale.

The Exchange also notes that no market participant is required by any rule or regulation to utilize the Exchange's Complex Order functionality or subscribe to the cToM data feed. Further, unlike orders on the Exchange's Simple Order Book, Complex Orders are not protected and will never trade through Priority Customer²⁰ orders, thus protecting the priority that is established in the Simple Order Book.²¹ Additionally, unlike the continuous quoting requirements of Market Makers in the simple order market, there are no continuous quoting requirements respecting Complex Orders. It is a business decision whether market participants utilize Complex Order strategies on the Exchange and whether to purchase cToM data to help effect those strategies.

The Exchange believes the proposed fees are reasonable as the proposed fees are both modest and similar to, or even lower than, the fees assessed by other exchanges that provide similar data products.²² Indeed, proposing fees that are excessively higher than established fees

²⁰ The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). The term "Priority Customer Order" means an order for the account of a Priority Customer. See Exchange Rule 100.

²¹ The "Simple Order Book" is the Exchange's regular electronic book of orders and quotes. See Exchange Rule 518(a)(5) [sic]. See supra note 5.

²² See supra note 11.

for similar data products would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. Like the Exchange's cToM data product, other exchanges offer similar data products and complex order functionality. As such, if a market participant views another exchange's complex order functionality and related data feed(s) as more attractive than what is offered by the Exchange, then such market participant can merely choose not to utilize the Exchange's Complex Order functionality or purchase cToM. Instead, that market participant can utilize similar complex functionality elsewhere and purchase another exchange's complex data product, which likely offers similar data points, albeit based on that other market's complex order trading activity.

Selling market data, such as cToM, is also a means by which exchanges compete to attract business. If the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of the data and/or avail themselves of similar products offered by other exchanges.²³ The Exchange therefore believes that the proposed fees for cToM reflect the competitive environment²⁴ and would be properly assessed on Member or non-Member users. The Exchange also believes the proposed fees are equitable and not unfairly discriminatory as the fees would apply equally to all users who choose to purchase such data. The Exchange's proposed fees would not differentiate between subscribers that purchase cToM and are set at a modest level that would allow any interested Member or non-Member to purchase such data based on their business needs.

The Exchange also believes the proposed cToM fees are reasonable and not unfairly discriminatory because since the Exchange initially established the cToM data product when it launched trading operations on March 1, 2019, all Exchange Members have had the ability to

²³ See id.

²⁴ Currently, 11 of 16 registered options exchanges compete for complex market share. The Exchange had a complex market share of approximately 5.70% for the month of July 2021 and 5.80% for the month of August 2021. For the months of July and August 2021, no single exchange had a complex market share of more than approximately 20%.

receive the Exchange's cToM data free of charge for the past two and a half years.²⁵ Since 2019, when the Exchange launched operations with Complex Order functionality, the Exchange has spent time and resources building out various Complex Order functionality in its System to provide better trading strategies and risk functionality for market participants in order to better compete with other exchanges' complex functionality and similar data products focused on complex orders.²⁶ The cToM data product allows market participants to better utilize the Exchange's Complex Order functionality by providing insights into the Exchange's Complex Order flow. The Exchange currently has 13 subscribers (12 Members and 1 non-Member) for its cToM data product. Each one of these subscribers have not paid any cToM data fees (other than the 2 months in which the First Proposed Rule Change was in effect) but have received the benefit of the Exchange building out its Complex Order functionality to better compete with other exchanges complex functionality. The Exchange notes that no market participant ceased subscribing to the cToM feed since July 1, 2021, the date on which the fees became effective when proposed in the First Proposed Rule Change.

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

²⁵ See supra note 6.

²⁶ See Securities Exchange Act Release Nos. 85345 (March 18, 2019), 84 FR 10848 (March 22, 2019) (SR-EMERALD-2019-13) (adopting complex stock-option order functionality); 85346 (March 18, 2019), 84 FR 10854 (March 22, 2019) (SR-EMERALD-2019-14) (adopting additional price protection during a Complex Auction and the Complex Liquidity Exposure Process to provide additional price discovery).

Agreement”).²⁷ Pursuant to the Exchange Data Agreement, Internal Distributors are restricted to the “internal use” of any market data they receive. This means that Internal Distributors may only distribute the Exchange’s market data to the recipient’s officers and employees and its affiliates.²⁸ External Distributors may distribute the Exchange’s market data to persons who are not officers, employees or affiliates of the External Distributor,²⁹ and may charge their own fees for the distribution of such market data. Accordingly, the Exchange believes it is fair, reasonable and not unfairly discriminatory to assess External Distributors a higher fee for the Exchange’s market data products as External Distributors have greater usage rights to commercialize such market data. The Exchange also utilizes more resources to support External Distributors versus Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of Exchange staff. The Exchange believes the proposed cToM fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst subscribers for similar services, depending on whether the subscribers is an Internal or External Distributor. Moreover, the decision as to whether or not to purchase market data is entirely optional to all market participants. Potential purchasers are not required to purchase the market data, and the Exchange is not required to make the market data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if market participants deem the proposed fees to be unfair or inequitable, firms can discontinue their use of the cToM data.

Further, the Exchange no longer believes it is necessary to provide cToM data for free to attract market participants since the Exchange’s Strategy Book is now established and the

²⁷ See Exchange Data Agreement, available at https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAX_Exchange_Group_Data_Agreement_09032020.pdf.

²⁸ See *id.*

²⁹ See *id.*

Exchange no longer needs to rely on such waivers to attract market participants to its Complex Order market or cToM subscribers. The Exchange believes that the proposal is equitable and not unfairly discriminatory because the proposed cToM fees will apply to all market participants of the Exchange on a uniform basis. The Exchange also notes that the proposed monthly cToM fees for Internal and External Distributors are the same prices that the Exchange charges for its ToM data product, and are generally lower than other options exchanges' data feed prices for their comparable data feed products.³⁰

The Exchange believes the proposed change to delete certain text from Section 6)a) of the Fee Schedule promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system because the proposed change is a non-substantive edit to the Fee Schedule to remove unnecessary text. The Exchange believes that this proposed change will provide greater clarity to Members and the public regarding the Exchange's Fee Schedule and that it is in the public interest for the Fee Schedule to be accurate and concise so as to eliminate the potential for confusion.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to sell a data product similar to those offered by other competitor options exchanges.³¹ The Exchange made Complex Order functionality and cToM available in order to keep pace with changes in the U.S. options industry and evolving customer needs, and believes the data product will continue to contribute to robust competition among national securities exchanges. Other U.S. options exchanges offer complex order functionality and market data products that are

³⁰ See supra note 11.

³¹ Id.

substantially similar to that offered by the Exchange. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Furthermore, the Exchange operates in a highly competitive environment, and its ability to price cToM is constrained by competition among exchanges that offer similar data products and complex order functionality to their customers. As discussed, there are currently a number of similar products available to market participants and investors. Other U.S. options exchanges offer market data products that are substantially similar to cToM, which the Exchange must consider in its pricing discipline in order to compete for the market data.³² For example, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as discussed, market participants are under no obligation to utilize. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

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

The Exchange does not believe that the proposed rule change to make a minor, non-substantive edit to Section 6)a) of the Fee Schedule by deleting unnecessary text will result in

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

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

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,³³ and Rule 19b-4(f)(2)³⁴ 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:

³³ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁴ 17 CFR 240.19b-4(f)(2).

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 Number SR-EMERALD-2021-34 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-2021-34. This 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 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-2021-34, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁵

J. Matthew DeLesDernier,
Assistant Secretary.

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³⁵ 17 CFR 200.30-3(a)(12).