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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-94087; File Nos. SR-MIAX-2021-60, SR-EMERALD-2021-43]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC, MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend Fee Schedules to Adopt Tiered-Pricing Structures for Additional Limited Service MIAX and MIAX Emerald Express Interface Ports

January 27, 2022.

I. Introduction

On December 1, 2021, Miami International Securities Exchange, LLC ("MIAX") and MIAX Emerald, LLC ("MIAX Emerald") (each an "Exchange"; 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"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change (File Numbers SR-MIAX-2021-60 and SR-EMERALD-2021-43) to amend the MIAX Options Fee Schedule and MIAX Emerald Fee Schedule (collectively, the "Fee Schedules") to adopt a tiered-pricing structure for additional limited service express interface ports. Each proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule changes were published for comment in the Federal Register on December 20, 2021.[4] Under Section 19(b)(3)(C) of the Act,[5] the Commission is hereby: (i) temporarily suspending File Numbers SR-MIAX-2021-60 and SR-EMERALD-2021-43; and (ii) instituting proceedings to determine

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

2 17 CFR 240.19b-4.

3 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).

4 See Securities Exchange Act Release Nos. 93771 (December 14, 2021), 86 FR 71940 (December 20, 2021) (SR-MIAX-2021-60) ("MIAX Notice"); 93772 (December 14, 2021), 86 FR 71965 (December 20, 2021) (SR-EMERALD-2021-43) ("MIAX Emerald Notice"). For ease of reference, citations to statements generally applicable to both notices are to the MIAX Notice.

5 15 U.S.C. 78s(b)(3)(C).

whether to approve or disapprove File Numbers SR-MIAX-2021-60 and SR-EMERALD-2021-43.

II. Background and Description of the Proposed Rule Changes

Limited Service MIAX Express Interface Ports and Limited Service MIAX Emerald Express Interface Ports (collectively, "Limited Service MEI Ports") provide Market Makers[6] with the ability to send eQuotes and quote purge messages, and are also capable of receiving administrative information.[7] Currently, each Exchange allocates two Limited Service MEI Ports, free of charge, per matching engine to which a Market Maker connects. Market Makers may request additional Limited Service MEI Ports for each matching engine to which they connect for an additional monthly fee for each such additional port. Prior to the proposed rule changes, each Exchange charged a flat $100 monthly fee for each such additional port. Each Exchange has proposed to adopt a tiered-pricing structure.[8] For both MIAX and MIAX Emerald, the first and second Limited Service MEI Ports for each matching engine would remain free of charge. For MIAX, the additional Limited Service MEI Port fees for each matching engine would increase from $100 to: (i) $150 for the third and fourth Limited Service MEI Ports; (ii) $200 for the fifth and sixth Limited Service MEI Ports; and (iii) $250 for the seventh or more Limited

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6 Defined at MIAX Rule 100 and MIAX Emerald Rule 100.

7 See, e.g., MIAX Notice, supra note 4, at 71941 n.15.

8 The Exchanges initially filed the proposed fee changes on August 2, 2021. See Securities Exchange Act Release Nos. 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR-MIAX-2021-37); 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR-EMERALD-2021-25). These filings were withdrawn by the Exchanges. The Exchanges filed new proposed fee changes with additional justification (SR-MIAX-2021-43 and SR-EMERALD-2021-31, which were the subject of a Suspension of and Order Instituting Proceedings. See Securities Exchange Act Release No. 93640 (November 22, 2021), 86 FR 67745 (November 29, 2021). The Exchanges subsequently withdrew those filings and replaced them with the instant filings to provide additional information and a revised justification for the proposals, which are discussed herein. See also Securities Exchange Act Release No. 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (MIAX-2021-19) (allowing purchase of any number of additional Limited Service MEI Ports and stating that, at a continued monthly fee of $100 for each additional port, the Exchange anticipates generating an annual loss from the provision).

Service MEI Ports.[9] For MIAX Emerald, the additional Limited Service MEI Port fees for each matching engine would increase from $100 to: (i) $200 for the third and fourth Limited Service MEI Ports; (ii) $300 for the fifth and sixth Limited Service MEI Ports; and (iii) $400 for the seventh to fourteenth Limited Service MEI Ports.[10]

III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,[11] 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,[12] 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 changes is necessary and appropriate to allow for additional analysis of the proposed rule changes' consistency with the Act and the rules thereunder.

In support of the proposed tiered-pricing structures and associated fee increases, the Exchanges state that such fees (which they refer to as "Proposed Access Fees") are reasonable because they will permit recovery of the Exchanges' costs in providing access services to supply additional Limited Service MEI Ports and will not result in the Exchanges generating a supra-competitive profit.[13] Specifically, the Exchanges state that the Proposed Access Fees are based on a "cost-plus model," designed to result in "cost recovery plus present the possibility of a

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9 See MIAX Notice, supra note 4, at 71941.

10 See MIAX Emerald Notice, supra note 4, at 71966-67. The MIAX Emerald Fee Schedule states that Market Makers are limited to twelve additional Limited Service MEI Ports per matching engine, for a total of fourteen per matching engine. See MIAX Emerald Fee Schedule 5.d.ii.

11 15 U.S.C. 78s(b)(3)(C).

12 15 U.S.C. 78s(b)(1).

13 See, e.g., MIAX Notice, supra note 4, at 71942.

reasonable return."[14] Each Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees, which they argue employs a "conservative methodology" that "strictly considers only those costs that are most clearly directly related to the provision and maintenance of additional Limited Service MEI Ports."[15] The Exchanges state that this analysis reflects an extensive cost review in which the Exchanges analyzed nearly every expense item in the Exchanges' general expense ledgers 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 the access services associated with the Proposed Access Fees.[16] They state that this process entailed discussions with each Exchange department head to identify the expenses that support the access services associated with the Proposed Access Fees, review of the expenses holistically on an Exchange-wide level with assistance from the internal finance department, and then assessment of the total expense, with no expense allocated twice.[17]

For 2021, the total annual cost for providing the access services associated with the Proposed Access Fees is projected by the Exchanges to be approximately $1.32 million for MIAX (or approximately $110,000 per month on average) and $0.88 million for MIAX Emerald (or approximately $73,333.33 per month on average).[18] As described in more detail in the MIAX Notice and MIAX Emerald Notice, the total annual cost for each Exchange is comprised

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14 See, e.g., id.

15 See, e.g., id.

16 See, e.g., id. at 71943. Each Exchange also states that no expense amount is allocated twice; and the expenses in each Exchange's analysis only cover its own options market, not those of any affiliate. See, e.g., id. at 71945.

17 See, e.g., id. at 71943. Each Exchange also states that its 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," and does not include general costs of operating matching engines and other trading technology. See, e.g., id. at 71944.

18 See MIAX Notice, supra note 4, at 71943; MIAX Emerald Notice, supra note 4, at 71969.

of the following, all of which the Exchanges state are directly related to the access services associated with the Proposed Access Fees:[19]

- third-party expense, relating to fees paid by the Exchanges to third-parties for certain products and services. This included allocating a portion of fees paid to: (1) Equinix for data center services; (2) Zayo Group Holdings, Inc. for network services; (3) Secure Financial Transaction Infrastructure, which supports connectivity and feeds; (4) various other service providers for content, connectivity, and infrastructure services; and (5) various other hardware and software providers; and
- internal expense, relating to the internal costs of the Exchanges to provide the access services associated with the Proposed Access Fees. This included allocating a portion of the Exchanges': (1) employee compensation and benefits expenses for full-time employees that support the access services associated with the Proposed Access Fees; (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access Fees; and (3) occupancy expenses for leased office space for staff that provide the access services associated with the Proposed Access Fees.

MIAX estimated its baseline revenues from additional Limited Service MEI Ports in July 2021 (the month prior to the implementation of the Proposed Access Fees) to be approximately $124,800 (for a baseline profit margin of approximately 12 percent); and estimated its revenues from additional Limited Service MEI Ports in November 2021 to be approximately $248,950 (a profit margin of approximately 56 percent).[20] MIAX Emerald estimated its baseline revenues from additional Limited Services MEI Ports in July 2021 to be approximately $62,500 (for a baseline loss margin of approximately 17.3 percent); and estimated its revenues from additional Limited Service MEI Ports in November 2021 to be approximately $216,600 (a profit margin of

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19 See, e.g., MIAX Notice, supra note 4, at 71944-47.

20 See MIAX Notice, supra note 4, at 71943.

approximately 66 percent).[21] Each Exchange believes its profit margin will allow it to begin to recoup its expenses and continue to invest in its technology infrastructure, and believes that the proposed profit margin increase (44 percent increase for MIAX, 83.3 percent increase for MIAX Emerald) is reasonable because it represents a reasonable rate of return.[22] The Exchanges add that the profit margin: (i) may fluctuate from month to month based on the uncertainty of predicting how many ports may be purchased as Members and non-Members add and drop ports at any time based on their own business decisions, which they frequently do; (ii) may decrease due to future increased costs to procure the third-party services; and (iii) may decrease due to inflationary pressure on capital items that the Exchanges need to purchase to maintain their technology and systems, which have resulted in price increases upwards of 30 percent on network equipment due to supply chain shortages, and in turn resulted in higher overall costs associated with ongoing system maintenance.[23]

In addition, although the Exchanges do not assert that competitive forces constrain the Proposed Access Fees, they maintain that the Proposed Access Fees are reasonable when compared to the fees of other options exchanges. The Exchanges provide port fees for competing exchanges which, according to the Exchanges, demonstrate that the Proposed Access Fees are similar to or significantly lower than fees charged by competing options exchanges with similar market share.[24]

The Exchanges also argue that the proposed tiered-pricing structures result in an equitable allocation of fees that are not unfairly discriminatory. The Exchanges state that they sought to design their proposed tiered-pricing structures to set the amount of the fee to relate to the number of ports a firm purchases.[25] The Exchanges state that the fees will "apply to all

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21 See MIAX Emerald Notice, supra note 4, at 71969.

22 See, e.g., MIAX Notice, supra note 4, at 71947.

23 See, e.g., id. at 71943.

24 See, e.g., id. at 71948-49.

25 See, e.g., id. at 71948.

Members and non-Members in the same manner based on the amount of additional Limited Service MEI Ports they require based on their own business decisions and usage of Exchange resources."[26] The Exchanges states that firms that primarily route orders seeking best-execution generally do not utilize additional Limited Service MEI Ports and "also generally send less orders and messages over those connections, resulting in less strain on Exchange resources."[27] By contrast, the Exchanges contend that those firms that purchase higher amounts of Limited Service MEI Ports are primarily those that engage in advanced trading strategies, rather than order-routing firms seeking best execution;[28] that such firms "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;"[29] that such firms typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchanges, which consume the Exchanges' resources and significantly contribute to the overall network access expense for storage and network transport capabilities;[30] that such firms tend to frequently add and drop ports mid-month to determine which ports have the least latency, which results in increased costs to the Exchanges to constantly make changes in their data centers and a "disproportionate pull" on Exchange resources to provide the additional port access;[31] and that the more ports purchased by a Market Maker "likely results in greater expenditures of Exchange resources and increased cost to the Exchange."[32]

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26 See, e.g., id. at 71947.

27 See, e.g., id. at 71948.

28 See, e.g., id.

29 See, e.g., id.

30 See, e.g., id. at 71947-48.

31 See, e.g., id. at 71948.

32 See, e.g., id.

In addition, the Exchanges state that the proposed tiered-pricing structures result in an equitable allocation of fees that are not unfairly discriminatory because they are designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchanges and would enable the Exchanges to better monitor and provide access to the Exchanges' networks to ensure sufficient capacity and headroom in their systems.[33]

To date, the Commission has not received any comment letters on the revised justifications for the Proposed Access Fees.[34]

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 proposals' basis under the Act and the rules and regulations thereunder applicable to the exchanges.[35] 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."[36]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require, among other things, that the rules of an exchange: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[37] (2) be designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers,

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33 See, e.g., id. at 71947.

34 Comments received on the previous filings are available on the Commission's website at: https://www.sec.gov/comments/sr-miax-2021-37/srmiax202137.htm (SR-MIAX-2021-37); https://www.sec.gov/comments/sr-emerald-2021-25/sremerald202125.htm (SR-EMERALD-2021-25); https://www.sec.gov/comments/sr-miax-2021-43/srmiax202143.htm (SR-MIAX-2021-43); https://www.sec.gov/comments/sr-emerald-2021-31/sremerald202131.htm (SR-EMERALD-2021-31).

35 See 17 CFR 240.19b-4 (General Instructions for Form 19b-4 – Information to be Included in the Complete Form – Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

36 See id.

37 15 U.S.C. 78f(b)(4).

issuers, brokers, or dealers;[38] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[39]

In temporarily suspending the Exchanges' proposed rule changes, the Commission intends to further consider whether the proposed additional Limited Service MEI Port fees 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.[40]

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.[41]

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)[42] and 19(b)(2)(B)[43] of the Act to determine whether the Exchanges' proposed rule changes should be approved or disapproved.

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38 15 U.S.C. 78f(b)(5).

39 15 U.S.C. 78f(b)(8).

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

41 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).

42 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.

43 15 U.S.C. 78s(b)(2)(B).

Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule changes. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments 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,[44] the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchanges have sufficiently demonstrated how the proposed rule changes are consistent with Sections 6(b)(4),[45] 6(b)(5),[46] and 6(b)(8)[47] of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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44 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.

45 15 U.S.C. 78f(b)(4).

46 15 U.S.C. 78f(b)(5).

47 15 U.S.C. 78f(b)(8).

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

1. Cost Estimates and Allocation. The Exchanges state that they are not asserting that the Proposed Access Fees are constrained by competitive forces, but rather set forth a "cost-plus model," employing a "conservative methodology" that "strictly considers only those costs that are most clearly directly related to the provision and maintenance of additional Limited Service MEI Ports."[48] As summarized in greater detail above, MIAX and MIAX Emerald project $1.32 million and $0.88 million, respectively, in aggregate annual estimated costs for 2021 for additional Limited Service MEI Ports. Do commenters believe that the Exchanges have provided sufficient detail about how they determined (a) which categories and sub-categories of third-party and internal expenses are most clearly directly associated with providing and maintaining additional Limited Service MEI Ports, (b) the total annual expenses associated with such categories/sub-categories, and (c) what percentage of each such expense should be allocated as actually supporting the additional Limited Service MEI Ports (as opposed to, for example, allocated to the first two "free" Limited Service MEI Ports or other types of ports or connectivity services offered by the Exchanges)? The Exchanges describe a process involving all Exchange department heads, including the finance department, but do not specify further what principles were applied in making these determinations or arriving at particular allocations. Do commenters believe further explanation is necessary? For employee

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48 See, e.g., MIAX Notice, supra note 4, at 71942.

compensation and benefit costs, for example, the Exchanges calculated an allocation of employee time in several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development, and Trade Operations, but do not provide the job titles and salaries of persons whose time was accounted for, or explain the methodology used to determine how much of an employee's time is devoted to providing and maintaining additional Limited Service MEI Ports. What are commenters' views on whether the Exchanges have provided sufficient detail on the identity and nature of services provided by third parties? Across all of the categories and sub-categories of third-party and internal expenses that the Exchanges identified as being clearly directly associated with providing and maintaining additional Limited Service MEI Ports, what are commenters' views on whether the Exchanges have provided sufficient detail on how they selected such categories/sub-categories and how shared costs within or among such categories/sub-categories are allocated to additional Limited Service MEI Ports, to permit an independent review and assessment of the reasonableness of purported cost-based fees and the corresponding profit margin thereon? Should the Exchanges be required to identify the categories/sub-categories of expenses that they deemed not to be clearly directly associated with additional Limited Service MEI Ports, and/or what Exchange products or services account for the un-allocated percentage of those categories/sub-categories of expenses that were deemed to be associated with additional Limited Service MEI Ports (e.g., what products or services are associated with the approximately 95 percent and 98 percent, respectively, of applicable depreciation and amortization expenses that MIAX and MIAX Emerald do not allocate to the Proposed Access Fees)? Do commenters believe that the costs projected for 2021 are generally representative of expected costs going forward (to the extent commenters consider 2021 to be a typical or atypical year), or should an

exchange present an estimated range of costs with an explanation of how profit margins could vary along the range of estimated costs?

2. Revenue Estimates and Profit Margin Range. MIAX and MIAX Emerald use a single monthly revenue figure (November 2021) as the basis for calculating their projected profit margins of 56 percent and 66 percent, respectively. Yet the Exchanges acknowledge that the number of ports purchased fluctuates from month to month as Members and non-Members add and drop ports.[49] Do commenters believe a single month provides a reasonable basis for a revenue projection? If not, why not? The profit margin is also dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. The Exchanges acknowledge that the profit margin may decrease if costs increase,[50] but they do not account for the possibility of cost decreases. What are commenters' views on the extent to which actual costs (or revenues) deviate from projected costs (or revenues)? Do commenters believe that the Exchanges' methodology for estimating the profit margin is reasonable? Should the Exchanges provide a range of profit margins that they believe are reasonably possible, and the reasons therefor?

3. Reasonable Rate of Return. The Exchanges state that their Proposed Access Fees are "designed to cover [their] costs with a limited return in excess of such costs," and believe that their 56 percent and 66 percent profit margins are such a limited return over such costs.[51] Do commenters agree with the Exchanges that their expected 56 percent and 66 percent profit margins would constitute reasonable rates of return over costs for additional Limited Service MEI Ports? If not, what would commenters

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49 See, e.g., id. at 71943.

50 See, e.g., id.

51 See, e.g., id. at 71943, 71947.

consider to be a reasonable rate of return and/or what methodology would they consider to be appropriate for determining a reasonable rate of return? The Exchanges state that they chose to initially provide additional Limited Service MEI Ports at a discounted price and to forego revenue that they otherwise could have generated from assessing higher fees.[52] Do commenters believe that this should be considered in the "reasonableness" assessment? Do commenters believe it relevant to an assessment of reasonableness that, according to the Exchanges, the Exchanges' Proposed Access Fees are similar to or lower than fees charged by competing options exchanges with similar market share? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered, and why?

4. Periodic Reevaluation. The Exchanges have not addressed whether they believe a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly. In light of the impact that the number of ports purchased has on profit margins, and the potential for costs to decrease (or increase) over time, what are commenters' views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based connectivity fees to ensure that the fees stay in line with their stated profitability projections and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new connectivity fee change is implemented should an exchange assess whether its revenue and/or cost estimates were accurate and at what

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52 See, e.g., id. at 71943-44.

threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a connectivity fee is implemented? 60 days? 90 days? Some other period?

5. Tiered Structure for Additional Limited Service MEI Ports. The Exchanges state that the proposed tiered fee structures are designed to set the amount of the fees to relate to the number of ports a firm purchases[53] and that "[c]harging a higher fee to a Market Maker that utilizes numerous ports is directly related to the increased costs the [Exchanges incur] in providing and maintaining those additional ports."[54] According to the Exchanges, firms that purchase numerous Limited Service MEI Ports are primarily those that engage in advanced trading strategies, typically generate a disproportionate amount of messages and order traffic, and frequently add or drop ports mid-month, and thus that "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."[55] The Proposed Access Fees would not just increase the previous $100 per additional Limited Service MEI Port fee, but would progressively increase the fee up to 2.5-fold on MIAX (up to $250 per port for seven or more ports), and up to four-fold on MIAX Emerald (up to $400 per port for seven or more ports). However, the Exchanges have not specifically asserted that it is, for example, 2.5 times more costly for MIAX, or four times more costly for MIAX Emerald, to provide the seventh or more ports. Instead, the Exchanges argue generally that the more ports purchased by a Market Maker "likely" results in greater expenditure of Exchange resources and increased cost to the Exchange.[56] Do commenters believe

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53 See, e.g., id. at 71948.

54 See, e.g., id. at 71947.

55 See, e.g., id. at 71947-48.

56 See, e.g., id. at 71948.

that the fees for each tier, as well as the fee differences between the tiers, are supported by the Exchanges' assertions that they set the tiered-pricing structure in a manner that is equitable and not unfairly discriminatory? Do commenters believe that the Exchanges should demonstrate how the proposed tiered fee levels correlate with tiered costs (e.g., by providing cost information broken down by tier, messaging volumes through the additional Limited Service MEI Ports by tier, and/or mid-month add/drop rates by tier) to better substantiate, by tier, the "disproportionate pull" on the Exchanges' resources as a firm increases the number of additional Limited Service MEI Ports that it purchases and to permit an assessment of the Exchanges' statement that the Proposed Access Fees "are solely determined by the individual Member's or non-Member's business needs and its impact on the Exchanges resources"?[57]

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."[58] 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,[59] 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.[60] Moreover, "unquestioning reliance" on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[61]

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57 See, e.g., id. at 71947.

58 17 CFR 201.700(b)(3).

59 See id.

60 See id.

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

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

V. Request for Written Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above, as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchanges' statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes. 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.[62]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposals should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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[62] 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).

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (https://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Nos. SR-MIAX-2021-60 and 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 Numbers SR-MIAX-2021-60 and SR-EMERALD-2021-43. These file numbers 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 (https://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 the filings also will be available for inspection and copying at the principal office of each 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 Numbers SR-MIAX-2021-60 and SR-EMERALD-2021-43 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,[63] that File Numbers SR-MIAX-2021-60 and SR-EMERALD-2021-43 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.[64]

J. Matthew DeLesDernier,
Assistant Secretary.

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63 15 U.S.C. 78s(b)(3)(C).

64 17 CFR 200.30-3(a)(57) and (58).