

exercise or conversion thereof, pursuant to an executive compensation plan which meets the requirements of section 61(a)(3)(B) of the Act. Applicant submits that the issuance of Restricted Stock pursuant to the Plan poses no greater risk to stockholders than the issuances permitted by section 57(j)(1) of the Act.

#### Section 23(c)

13. Section 23(c) of the Act, which is made applicable to BDCs by section 63 of the Act, generally prohibits a BDC from purchasing any securities of which it is the issuer except in the open market pursuant to tenders, or under other circumstances as the Commission may permit to ensure that the purchases are made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant states that the withholding or purchase of shares of Restricted Stock and common stock in payment of applicable withholding tax obligations or of common stock in payment for the exercise price of an Option might be deemed to be purchases by the Fund of its own securities within the meaning of section 23(c) and therefore prohibited by the Act.

14. Section 23(c)(3) of the Act permits a BDC to purchase securities of which it is the issuer in circumstances in which the repurchase is made in a manner or on a basis that does not unfairly discriminate against any holders of the class or classes of securities to be purchased. Applicant believes that the requested relief meets the standards of section 23(c)(3).

15. Applicant submits that these purchases will be made in a manner that does not unfairly discriminate against Applicant's stockholders because Applicant will use the closing sales price of its shares of common stock on the New York Stock Exchange (or any primary exchange on which its shares of common stock may be traded in the future) as the "fair market value" of its common stock under the Plan (*i.e.*, the public market price on the date of grant of Restricted Stock and the date of grant of Options). Applicant submits that because all transactions with respect to the Plan will take place at the public market price for the Fund's common stock, these transactions will not be significantly different than could be achieved by any stockholder selling in a transaction on the New York Stock Exchange. Applicant represents that no transactions will be conducted pursuant to the requested order on days where there are no reported market transactions involving Applicant's shares.

16. Applicant represents that the withholding provisions in the Plan do not raise concerns about preferential treatment of Applicant's insiders because the Plan is a bona fide compensation plan of the type that is common among corporations generally. Furthermore, the vesting schedule is determined at the time of the initial grant of the Restricted Stock and the option exercise price is determined at the time of the initial grant of the Options. Applicant represents that all purchases may be made only as permitted by the Plan, which has been approved by the Fund's stockholders. Applicant believes that granting the requested relief would be consistent with the policies underlying the provisions of the Act permitting the use of equity compensation as well as prior exemptive relief granted by the Commission under section 23(c) of the Act.

#### Applicant's Conditions

Applicant agrees that the order granting the requested relief will be subject to the following conditions:

1. The Plan will be authorized by the Fund's shareholders.
2. Each issuance of Restricted Stock to a Participant will be approved by the Required Majority on the basis that such grant is in the best interest of the Fund and its shareholders.
3. The amount of voting securities that would result from the exercise of all of the Fund's outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 25% of the outstanding voting securities of the Fund, except that if the amount of voting securities that would result from the exercise of all of the Fund's outstanding warrants, Options and rights issued to the Fund's directors, officers and employees, together with any Restricted Stock issued pursuant to the Plan, would exceed 15% of the outstanding voting securities of the Fund, then the total amount of voting securities that would result from the exercise of all outstanding warrants, Options and rights, together with any Restricted Stock issued pursuant to the Plan, at the time of issuance shall not exceed 20% of the outstanding voting securities of the Fund.
4. The maximum amount of shares of Restricted Stock that may be issued under the Plan will be 10% of the outstanding shares of common stock of the Fund on the effective date of the Plan plus 10% of the number of shares of the Fund's common stock issued or delivered by the Fund (other than

pursuant to compensation plans) during the term of the Plan.

5. The Board will review the Plan at least annually. In addition, the Board will review periodically the potential impact that the issuance of Restricted Stock under the Plan could have on the Fund's earnings and net asset value per share, such review to take place prior to any decisions to grant Restricted Stock under the Plan, but in no event less frequently than annually. Adequate procedures and records will be maintained to permit such review. The Board will be authorized to take appropriate steps to ensure that the issuance of Restricted Stock under the Plan will be in the best interest of the Fund and its shareholders. This authority will include the authority to prevent or limit the granting of additional Restricted Stock under the Plan. All records maintained pursuant to this condition will be subject to examination by the Commission and its staff.

For the Commission, by the Division of Investment Management, under delegated authority.

**Brent J. Fields,**  
Secretary.

[FR Doc. 2016–30539 Filed 12–19–16; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79543; File No. 10–227]

### In the Matter of the Application of MIAx PEARL, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission

December 13, 2016.

#### I. Introduction

On August 12, 2016, MIAx PEARL, LLC ("MIAx PEARL" or "Exchange") submitted to the Securities and Exchange Commission ("Commission") an application for Registration as a National Securities Exchange ("Form 1 Application") under Section 6 of the Securities Exchange Act of 1934 ("Exchange Act"), seeking registration as a national securities exchange under Section 6 of the Exchange Act.<sup>1</sup> Notice of the Form 1 Application was published for comment in the **Federal Register** on September 14, 2016,<sup>2</sup> and the Commission received no comments.

<sup>1</sup> 15 U.S.C. 78f.

<sup>2</sup> See Securities Exchange Act Release No. 78793 (September 8, 2016), 81 FR 63238 ("Notice").

## II. Statutory Standards

Under Sections 6(b) and 19(a) of the Act,<sup>3</sup> the Commission shall by order grant an application for registration as a national securities exchange if the Commission finds, among other things, that the proposed exchange is so organized and has the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

As discussed in greater detail below, the Commission finds that MIAX PEARL's application for exchange registration meets the requirements of the Act and the rules and regulations thereunder. Further, the Commission finds that the proposed rules of MIAX PEARL are consistent with Section 6 of the Act in that, among other things, they assure a fair representation of the Exchange's members in the selection of its directors and administration of its affairs and provide that one or more directors will be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer;<sup>4</sup> and that they are designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, or broker-dealers.<sup>5</sup> Finally, the Commission finds that MIAX PEARL's proposed rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>6</sup>

## III. Discussion

### A. Governance of MIAX PEARL

#### 1. MIAX PEARL Board of Directors

The board of directors of MIAX PEARL ("Exchange Board" or "MIAX PEARL Board") will be its governing body and will possess all of the powers necessary for the management of its

business and affairs, including governance of MIAX PEARL as a self-regulatory organization ("SRO").<sup>7</sup>

Under the By-Laws of MIAX PEARL ("MIAX PEARL By-Laws");<sup>8</sup>

- The Exchange Board will be composed of not less than ten directors;<sup>9</sup>
- One director will be the Chief Executive Officer of MIAX PEARL;<sup>10</sup>
- The number of Non-Industry Directors,<sup>11</sup> including at least one Independent Director,<sup>12</sup> will equal or exceed the sum of the number of Industry Directors<sup>13</sup> and Member Representative Directors;<sup>14</sup> and

<sup>7</sup> See MIAX PEARL By-Laws, Section 2.1. See also MIAX PEARL LLC Agreement, Section 8(b).

<sup>8</sup> The MIAX PEARL By-Laws are included in the Amended and Restated Limited Liability Company Agreement of MIAX PEARL ("MIAX PEARL LLC Agreement").

<sup>9</sup> See MIAX PEARL By-Laws, Article II, Section 2.2(a).

<sup>10</sup> See MIAX PEARL By-Laws, Article II, Section 2.2(b).

<sup>11</sup> "Non-Industry Director" means a Director who is an Independent Director or any other individual who would not be an Industry Director. See MIAX PEARL By-Laws, Article I(aa).

<sup>12</sup> "Independent Director" means a "Director who has no material relationship with [MIAX PEARL] or any affiliate of [MIAX PEARL], or any [MIAX PEARL member] or any affiliate of any such [MIAX PEARL member]; provided, however, that an individual who otherwise qualifies as an Independent Director shall not be disqualified from serving in such capacity solely because such Director is a Director of [MIAX PEARL] or [Miami Holdings]." See MIAX PEARL By-Laws, Article I(p).

<sup>13</sup> An "Industry Director" is, among other things, a Director that is or has served within the prior three years as an officer, director, employee, or owner of a broker or dealer, as well as any Director who has, or has had, a consulting or employment relationship with MIAX PEARL or any affiliate of MIAX PEARL within the prior three years. See MIAX PEARL By-Laws, Article I(r). This definition is consistent with what the Commission has approved for other exchanges. See Securities Exchange Act Release Nos. 68341 (December 3, 2012), 77 FR 73065 (December 7, 2012) (File No. 10-207) (order granting the registration of MIAX Exchange) ("MIAX Order"); 58375 (August 18, 2008), 73 FR 49498 (August 21, 2008) (File No. 10-182) (order granting the registration of BATS Exchange, Inc.) ("BATS Order"); and 66871 (April 27, 2012), 77 FR 26323 (May 3, 2012) (File No. 10-206) (order granting the registration of BOX Options Exchange LLC) ("BOX Order").

<sup>14</sup> See MIAX PEARL By-Laws, Article II, Section 2.2 (b)(i). "Member Representative Director" means a Director who has been appointed by Miami International Holdings, Inc. as an initial Director pursuant to Section 2.5 of the MIAX PEARL By-Laws to serve until the first annual meeting or who "has been elected by the Miami International Holdings, Inc. after having been nominated by the Member Nominating Committee or by an Exchange Member pursuant to [the] By-Laws and confirmed as the nominee of Exchange Members after majority vote of Exchange Members, if applicable. A Member Representative Director may, but is not required to be, an officer, director, employee, or agent of an Exchange Member." See MIAX PEARL By-Laws, Article I(x). See also MIAX PEARL By-Laws Article II, Section 2.5.

- At least 20% of the directors on the Exchange Board will be Member Representative Directors.<sup>15</sup>

For the interim board (discussed below), and subsequently at the first annual meeting and each annual meeting thereafter, Miami International Holdings, Inc. ("Miami Holdings"), as the sole LLC Member of MIAX PEARL, will elect the MIAX PEARL Board pursuant to the MIAX PEARL By-Laws.<sup>16</sup> In addition, Miami Holdings will appoint the initial Nominating Committee<sup>17</sup> and Member Nominating Committee,<sup>18</sup> consistent with each committee's compositional requirements,<sup>19</sup> to nominate candidates for election to the Exchange Board. Each of the Nominating Committee and Member Nominating Committee, after completion of its respective duties for nominating directors for election to the Board for that year, shall nominate candidates to serve on the succeeding year's Nominating Committee or Member Nominating Committee, as applicable. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX PEARL members pursuant to a petition process.<sup>20</sup>

The Nominating Committee will nominate candidates for each director position, and Miami Holdings, as the sole LLC Member, will elect those directors. For Member Representative Director positions, the Nominating Committee will nominate those candidates submitted to it, and approved, by the Member Nominating Committee.<sup>21</sup> Additional candidates,

<sup>15</sup> See MIAX PEARL By-Laws, Article II, Section 2.2(b)(iii).

<sup>16</sup> See MIAX PEARL By-Laws, Article II, Section 2.4. See also MIAX PEARL LLC Agreement, Section 9(a).

<sup>17</sup> The Nominating Committee will be comprised of at least three directors, and the number of Non-Industry members on the Nominating Committee must equal or exceed the number of Industry members. See MIAX PEARL By-Laws, Article V, Section 5.2. See also MIAX PEARL By-Laws, Article IV, Section 4.2(a).

<sup>18</sup> The Member Nominating Committee will be comprised of at least three directors, and each member of the Member Nominating Committee shall be a Member Representative member and shall not be required to be a Director of the Exchange. See MIAX PEARL By-Laws, Article V, Section 5.3. See also MIAX PEARL By-Laws, Article IV, Section 4.2(a). Pursuant to MIAX PEARL By-Laws, Article I(y), a "Member Representative member" is a member of any committee or hearing panel appointed by the Exchange Board who has been elected or appointed after having been nominated by the Member Nominating Committee pursuant to the By-Laws and who is an officer, director, employee, or agent of an Exchange Member.

<sup>19</sup> See MIAX PEARL By-Laws, Article V, Section 5.1.

<sup>20</sup> See *id.*

<sup>21</sup> The Member Nominating Committee will solicit comments from MIAX PEARL members for

<sup>3</sup> 15 U.S.C. 78f(b) and 15 U.S.C. 78s(a), respectively.

<sup>4</sup> See 15 U.S.C. 78f(b)(3).

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

<sup>6</sup> See 15 U.S.C. 78f(b)(8).

however, may be nominated for the Member Representative Director positions by MIAx PEARL members pursuant to a petition process.<sup>22</sup> If no candidates are nominated pursuant to a petition process, then the initial nominees submitted by the Member Nominating Committee will be nominated as Member Representative Directors by the Nominating Committee. If a petition process produces additional candidates, then the candidates nominated pursuant to the petition process, together with those nominated by the Member Nominating Committee, will be presented to MIAx PEARL members for a run-off election to determine the final slate of candidates for the vacant Member Representative Director positions.<sup>23</sup> In the event of a contested run-off election, the candidates who receive the most votes will be nominated as the final slate of Member Representative Director candidates by the Nominating Committee.<sup>24</sup> Miami Holdings, as the sole LLC Member, is obligated to elect the final slate of the Member Representative Director candidates that are nominated by the Nominating Committee.<sup>25</sup>

The Commission believes that the requirement in the MIAx PEARL By-Laws that 20% of the directors be Member Representative Directors and the means by which they will be chosen by MIAx PEARL members provide for the fair representation of members in the selection of directors and the administration of MIAx PEARL and therefore is consistent with Section 6(b)(3) of the Act.<sup>26</sup> The Commission notes that this requirement helps to ensure that members have a voice in the use of self-regulatory authority by MIAx PEARL.<sup>27</sup>

the purpose of approving and submitting names of candidates for election to the position of Member Representative Director. See MIAx PEARL By-Laws, Article II, Section 2.4(b).

<sup>22</sup> See MIAx PEARL By-Laws, Article II, Section 2.4(c). The petition must be signed by executive representatives of 10% or more of the MIAx PEARL members. No MIAx PEARL member, together with its affiliates, may account for more than 50% of the signatures endorsing a particular candidate. See *id.*

<sup>23</sup> See MIAx PEARL By-Laws, Article II, Sections 2.4(e) and (f). Each MIAx PEARL Member shall have the right to cast one vote for each available Member Representative Director nomination, provided that any such vote must be cast for a person on the List of Candidates and that no MIAx PEARL member, together with its affiliates, may account for more than 20% of the votes cast for a candidate. See MIAx PEARL By-Laws, Article II, Section 2.4(f).

<sup>24</sup> See MIAx PEARL By-Laws, Article II, Section 2.4(f).

<sup>25</sup> See *id.*

<sup>26</sup> 15 U.S.C. 78f(b)(3).

<sup>27</sup> See, e.g., MIAx Order, *supra* note 13, at 73067; Securities Exchange Act Release Nos. 76998

In addition, with respect to the requirement that the number of Non-Industry Directors, including at least one Independent Director, will equal or exceed the sum of the number of Industry Directors and Member Representative Directors, the Commission believes that the proposed composition of the Exchange Board satisfies the requirements in Section 6(b)(3) of the Act,<sup>28</sup> which requires in part that one or more directors be representative of issuers and investors and not be associated with a member of the exchange, or with a broker or dealer. The Commission notes that the inclusion of public, non-industry representatives on exchange oversight bodies is an important mechanism to support an exchange's ability to protect the public interest.<sup>29</sup> Further, the presence of public, non-industry representatives can help to ensure that no single group of market participants has the ability to systematically disadvantage other market participants through the exchange governance process. The Commission believes that public, non-industry directors can provide unique, unbiased perspectives, which are designed to enhance the ability of the Exchange Board to address issues in a non-discriminatory fashion and foster the integrity of the Exchange.<sup>30</sup>

## 2. Interim Exchange Board

Prior to commencing operations, Miami Holdings will appoint an interim Exchange board of directors ("Interim Exchange Board"), which will include interim Member Representative Directors.<sup>31</sup> With respect to the selection of the interim Member Representative Directors for the Interim Exchange Board, prior to the commencement of operations as an exchange, Miami Holdings will submit the names of its nominees for the interim Member Representative Directors positions to persons that have begun the process of

(January 29, 2016), 81 FR 6066, 6068 (February 4, 2016) (File No. 10-221) (order granting exchange registration of ISE Mercury, LLC) ("ISE Mercury Order"); 70050 (July 26, 2013), 78 FR 46622, 46624 (August 1, 2013) (File No. 10-209) (order granting the exchange registration of ISE Gemini, LLC) ("ISE Gemini Order"); 53128 (January 13, 2006), 71 FR 3550, 3553 (January 23, 2006) (granting the exchange registration of Nasdaq Stock Market, Inc.) ("Nasdaq Order"); and BATS Order, *supra* note 13.

<sup>28</sup> 15 U.S.C. 78f(b)(3).

<sup>29</sup> See, e.g., Regulation of Exchanges and Alternative Trading Systems, Securities Exchange Act Release No. 40760 (December 8, 1998), 63 FR 70844, 70882 (December 22, 1998) ("Regulation ATS Release").

<sup>30</sup> See MIAx Order, *supra* note 13, at 73067; BATS Order, *supra* note 13, at 49501; and Nasdaq Order, *supra* note 27, at 3553.

<sup>31</sup> See MIAx PEARL By-Laws, Section 2.5.

becoming members in the new Exchange.<sup>32</sup> Such persons and firms will be allowed 14 days to submit the names of alternative candidates.<sup>33</sup> Voting will occur no sooner than 5 days after the interim election notice is delivered to confirm the final slate of candidates to become an interim Member Representative Director.<sup>34</sup> All other interim directors, except for the interim Member Representative Directors, will be appointed and elected by Miami Holdings, and must meet the MIAx PEARL board composition requirements as set forth in the MIAx PEARL By-Laws.<sup>35</sup> Once these interim Member Representative Directors are seated on the Interim Exchange Board, then the Interim Exchange Board will meet the board composition requirements set forth in the governing documents of MIAx PEARL.

The Interim Exchange Board will serve until the first initial Exchange Board is elected pursuant to the full nomination, petition, and voting process set forth in the MIAx PEARL By-Laws.<sup>36</sup> MIAx PEARL will complete such process within 90 days after its application for registration as a national securities exchange is granted by the Commission.<sup>37</sup>

The Commission believes that the process for electing the Interim Exchange Board, as proposed, is consistent with the requirements of the Act, including that the rules of the exchange assure fair representation of the exchange's members in the selection of its directors and administration of its affairs.<sup>38</sup> As noted above, MIAx PEARL represents that the initial members of MIAx PEARL will consist substantially of the current group of persons and firms that have begun the membership

<sup>32</sup> See MIAx PEARL By-Laws, Section 2.5(b). Specifically, Miami Holdings will submit the names of its nominees for the interim Member Representative Director positions to persons who have submitted the initial documents for membership in the Exchange who would meet the qualifications for membership. See MIAx PEARL By-Laws, Section 2.5(b). MIAx PEARL additionally represents that the initial members of MIAx PEARL will consist substantially of the current group of persons and firms that have begun the membership application process with MIAx PEARL. See MIAx PEARL Form 1 Application, Exhibit J.

<sup>33</sup> See MIAx PEARL By-Laws, Section 2.5(b).

<sup>34</sup> See MIAx PEARL By-Laws, Section 2.5(d).

<sup>35</sup> See MIAx PEARL By-Laws, Section 2.5(a).

<sup>36</sup> See MIAx PEARL By-Laws, Sections 2.2(e) and 2.5(a).

<sup>37</sup> See MIAx PEARL By-Laws, Sections 2.5(a). The 90-day period is consistent with what the Commission recently approved for ISE Mercury, LLC. See ISE Mercury Order, *supra* note 27, at 6068 (allowing ISE Mercury, LLC to appoint an initial interim board to enable it to commence operations as a registered exchange). See also MIAx Order, *supra* note 13, at 73067; and BOX Order, *supra* note 13, at 26325.

<sup>38</sup> See 15 U.S.C. 78f(b)(3).

application process with MIAX PEARL.<sup>39</sup> MIAX PEARL will engage these persons and firms in the interim board election process by, prior to the commencement of operations as an exchange, providing each of them with the opportunity to participate in the selection of interim Member Representative Directors consistent with the MIAX PEARL By-Laws. Further, MIAX PEARL represents that it will complete the full nomination, petition, and voting process as set forth in the MIAX PEARL By-Laws, which will provide persons that are approved as members after the effective date of this Order with the opportunity to participate in the selection of the Member Representative Directors, within 90 days of when MIAX PEARL's application for registration as a national securities exchange is granted.<sup>40</sup> Therefore, the Commission believes that MIAX PEARL's initial interim board process is consistent with the Act, including Section 6(b)(3), in that it is designed to provide representation among the persons and firms likely to become members when MIAX PEARL commences operations and is sufficient to allow MIAX PEARL to commence operations for an interim period prior to going through the process to elect a new Exchange Board pursuant to the full nomination, petition, and voting process set forth in the MIAX PEARL By-Laws.

### 3. Exchange Committees

In the MIAX PEARL By-Laws, the Exchange proposed to establish several standing committees, which would be divided into two categories: Committees of the Board (composed of MIAX PEARL directors) and Committees of the Exchange (composed of a mixture of MIAX PEARL directors and persons that are not MIAX PEARL directors).<sup>41</sup> The standing Committees of the Board would be the Audit, Compensation, Appeals, and Regulatory Oversight Committees.<sup>42</sup> In addition, the Exchange Chairman, with approval of the Exchange Board, may appoint an Executive Committee and a Finance Committee, which also would be Committees of the Board.<sup>43</sup>

The Audit Committee will consist of three or more directors, a majority of

which will be Non-Industry Directors.<sup>44</sup> Each of the Compensation and Regulatory Oversight Committees will consist of three or more directors, all of which will be required to be Non-Industry Directors.<sup>45</sup> The Appeals Committee will consist of one Independent Director, one Industry Director, and one Member Representative Director.<sup>46</sup> If established, the Finance Committee will consist of at least three persons (who may, but are not required to, be directors) a majority of whom will be Non-Industry Directors.<sup>47</sup> The Executive Committee, if established, will consist of at least three directors. Because the Executive Committee will have the powers and authority of the Exchange Board in the management of the business and affairs of the Exchange between meetings of the Exchange Board, its composition must reflect that of the Exchange Board. Accordingly, the number of Non-Industry Directors on the Executive Committee must equal or exceed the number of Industry Directors and the percentages of Independent Directors and Member Representative Directors must be at least as great as the corresponding percentages on the Exchange Board as a whole.<sup>48</sup>

With respect to Committees of MIAX PEARL, the Exchange has proposed to establish a Nominating Committee<sup>49</sup> and a Member Nominating Committee.<sup>50</sup> As discussed above, these committees will have responsibility for, among other things, nominating candidates for election to the Exchange Board. On an annual basis, the members of these committees will nominate candidates for the succeeding year's respective committees to be elected by Miami Holdings, as the sole LLC Member.<sup>51</sup> In addition, MIAX PEARL has proposed to establish a Quality of

Markets Committee,<sup>52</sup> which will provide advice and guidance to the Exchange Board on issues related to the fairness, integrity, efficiency and competitiveness of the information, order handling and execution mechanisms of the Exchange from the perspective of individual and institutional investors, retail and market making firms, and other market participants. The Quality of Markets Committee will include a broad representation of participants in the Exchange. Additionally, at least 20% of the members of the committee will be Member Representative members, and the number of Non-Industry members must equal or exceed the total number of Industry and Member Representative members. MIAX PEARL also has proposed to establish a Business Conduct Committee, which shall be appointed by the Chairman of the Exchange Board.<sup>53</sup> Specifically, the Business Conduct Committee, which will not be a Board committee, will have a minimum of three members and will be composed of a number of individuals as determined by the Exchange Chairman, none of whom shall be Directors of MIAX PEARL. In addition, at least one member of the Business Conduct Committee and any panel thereof must be an officer, director or employee of a MIAX PEARL member.

The Commission believes that MIAX PEARL's proposed committees, which are similar to the committees maintained by other exchanges,<sup>54</sup> are designed to help enable MIAX PEARL to carry out its responsibilities under the Act and are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.<sup>55</sup>

### B. Regulation of MIAX PEARL

When MIAX PEARL commences operations as a national securities exchange, the Exchange will have all the attendant regulatory obligations under the Act. In particular, MIAX PEARL will be responsible for the operation and regulation of its trading system and the regulation of its members. Certain provisions in the MIAX PEARL and Miami Holdings governance documents are designed to facilitate the ability of MIAX PEARL and the Commission to fulfill their regulatory obligations. The

<sup>44</sup> See MIAX PEARL By-Laws, Section 4.5(b). A Non-Industry Director shall serve as Chairman of the Committee. *See id.* See also MIAX PEARL By-Laws, Section 4.2(a) (requiring that each committee be comprised of at least three people).

<sup>45</sup> See MIAX PEARL By-Laws, Section 4.5(a) and 4.5(c).

<sup>46</sup> See MIAX PEARL By-Laws, Section 4.5(d).

<sup>47</sup> See MIAX PEARL By-Laws, Section 4.5(f). *See also* MIAX PEARL By-Laws, Section 4.2(a) (providing that except as otherwise provided in the MIAX PEARL By-Laws, committees may include persons who are not members of the Board).

<sup>48</sup> See MIAX PEARL By-Laws, Section 4.5(e).

<sup>49</sup> See MIAX PEARL By-Laws, Article V, Section 5.2, and *supra* note 17.

<sup>50</sup> See MIAX PEARL By-Laws, Article V, Section 5.3, and *supra* note 18.

<sup>51</sup> See MIAX PEARL By-Laws, Article V, Section 5.1, and *supra* note 20. Additional candidates for the Member Nominating Committee may be nominated and elected by MIAX PEARL members pursuant to a petition process. *See supra* note 22 and accompanying text.

<sup>52</sup> See MIAX PEARL By-Laws, Article IV, Section 4.6.

<sup>53</sup> See MIAX PEARL By-Laws, Article IV, Section 4.7.

<sup>54</sup> *See, e.g.,* MIAX Order and BATS Order, *supra* note 13, and ISE Mercury Order, ISE Gemini Order, Nasdaq Order, *supra* note 27.

<sup>55</sup> 15 U.S.C. 78f(b)(1).

<sup>39</sup> *See supra* note 32.

<sup>40</sup> MIAX PEARL's proposed timeline for the interim board process follows a process identical to what the Commission recently approved for ISE Mercury, LLC. *See* ISE Mercury Order, *supra* note 27, at 6068.

<sup>41</sup> *See* MIAX PEARL By-Laws, Section 4.1.

<sup>42</sup> *See* MIAX PEARL By-Laws, Section 4.1(a).

<sup>43</sup> *See* MIAX PEARL By-Laws, Section 4.5(e) and (f), respectively.

discussion below summarizes some of these key provisions.

#### 1. Ownership Structure: Ownership and Voting Limitations

MIAX PEARL will be structured as a Delaware limited liability company, which will be wholly owned by the sole member of the LLC, Miami Holdings. The Miami Holdings' proposed Amended and Restated Certificate of Incorporation ("Miami Holdings Certificate") includes restrictions on the ability to own and vote shares of capital stock of Miami Holdings.<sup>56</sup> These limitations are designed to prevent any Miami Holdings shareholder from exercising undue control over the operation of MIAX PEARL and to assure that MIAX PEARL and the Commission are able to carry out their regulatory obligations under the Act.

In particular, for so long as Miami Holdings (directly or indirectly) controls MIAX PEARL, no person, either alone or together with its related persons,<sup>57</sup> may beneficially own more than 40% of any class of capital stock of Miami Holdings.<sup>58</sup> There would be a more conservative restriction for MIAX PEARL members, wherein MIAX PEARL members, either alone or together with their related persons, are prohibited from beneficially owning more than 20% of shares of any class of capital stock of Miami Holdings.<sup>59</sup> If any stockholder violates these ownership limits, Miami Holdings would redeem the shares in excess of the applicable ownership limit at their par value.<sup>60</sup> In addition, no person, alone or together

with its related persons, may vote or cause the voting of more than 20% of the voting power of the then issued and outstanding capital stock of Miami Holdings.<sup>61</sup> If any stockholder purports to vote, or cause the voting of, shares that would violate this voting limit, Miami Holdings would not honor such vote in excess of the voting limit.<sup>62</sup>

Any person that proposes to own shares of capital stock in excess of the 40% ownership limitation, or vote or grant proxies or consents with respect to shares of capital stock in excess of the 20% voting limitation, must deliver written notice to the Miami Holdings board to notify the Board of its intention.<sup>63</sup> The notice must be delivered to the Board not less than 45 days before the proposed ownership of such shares or proposed exercise of such voting rights or the granting of such proxies or consents.<sup>64</sup> The Miami Holdings board may waive the 40% ownership limitation and the 20% voting limitation, pursuant to a resolution duly adopted by the Board of Directors, if it makes certain findings,<sup>65</sup> except that the Miami Holdings board cannot waive the voting and ownership limits above 20% for MIAX PEARL members and their related persons.<sup>66</sup>

<sup>61</sup> See Miami Holdings Certificate, Article NINTH (b)(i)(C).

<sup>62</sup> See Miami Holdings Certificate, Article NINTH (d). The Miami Holdings Certificate also prohibits the payment of any stock dividends and conversions that would violate the ownership and voting limitations. See Miami Holdings Certificate, Article FOURTH A.(b) and (e), and D.7.

<sup>63</sup> See Miami Holdings Certificate, Article NINTH (b)(iv).

<sup>64</sup> See *id.*

<sup>65</sup> See Miami Holdings Certificate, Article NINTH (b)(ii)(B). The required findings include determinations that (A) such waiver will not impair the ability of MIAX PEARL to carry out its functions and responsibilities under the Act and the rules and regulations promulgated thereunder, (B) such waiver is otherwise in the best interests of MIAX PEARL and Miami Holdings, (C) such waiver will not impair the ability of the Commission to enforce the Act and (D) the transferee in such transfer and its related persons are not subject to any applicable "statutory disqualification" (within the meaning of Section 3(a)(39) of the Act). See Miami Holdings Certificate, Article NINTH (b)(ii)(B) and (b)(iii). The Commission has previously approved the rules of other exchanges that provide for the ability of the exchange to waive the ownership and voting limitations discussed above for non-members of the exchange. See, e.g., ISE Mercury Order and ISE Gemini Order, *supra* note 27; MIAX Order, *supra* note 13; and Securities Exchange Act Release No. 61698 (March 12, 2010), 75 FR 13151 (March 18, 2010) (order approving DirectEdge exchanges) ("DirectEdge Exchanges Order").

<sup>66</sup> See Miami Holdings Certificate, Article NINTH (b)(ii)(B). These provisions are generally consistent with waiver of ownership and voting limits approved by the Commission for other SROs. See, e.g., ISE Mercury Order, *supra* note 27; MIAX Order, *supra* note 13; BATS Order, *supra* note 13; NSX Demutualization Order, *supra* note 56; CHX Demutualization Order, *supra* note 56; and Securities Exchange Act Release No. 49718 (May

Any such waiver would not be effective unless and until approved by the Commission pursuant to Section 19 of the Act.<sup>67</sup>

The Miami Holdings Certificate also contains provisions that are designed to further safeguard the ownership and voting limitation described above, or are otherwise related to direct and indirect changes in control. Specifically, any person that, either alone or together with its related persons owns, directly or indirectly, of record or beneficially, 5% or more of the capital stock of Miami Holdings will be required to immediately notify Miami Holdings in writing upon acquiring knowledge of such ownership.<sup>68</sup> Thereafter, such persons will be required to update Miami Holdings of any increase or decrease of 1% or more in their previously reported ownership percentage.<sup>69</sup>

The MIAX PEARL LLC Agreement does not include change of control provisions that are similar to those in the Miami Holdings Certificate; however the MIAX PEARL LLC Agreement explicitly provides that Miami Holdings is the sole LLC Member of MIAX PEARL.<sup>70</sup> Thus, if Miami Holdings ever proposes to no longer be the sole LLC Member of MIAX PEARL (and therefore no longer its sole owner), MIAX PEARL would be required to amend the MIAX PEARL LLC Agreement and the MIAX

17, 2004), 69 FR 29611 (May 24, 2004) (SR-PCX-2004-08).

<sup>67</sup> See Miami Holdings Certificate, Article NINTH (b)(ii)(B).

<sup>68</sup> See Miami Holdings Certificate, Article NINTH(c)(i). The notice will require the person's full legal name; the person's title or status; the person's approximate ownership interest in Miami Holdings; and whether the person has power, directly or indirectly, to direct the management or policies of Miami Holdings. See *id.*

<sup>69</sup> See Miami Holdings Certificate, Article NINTH(c)(ii). Changes of less than 1% must also be reported to Miami Holdings if they result in such person crossing a 20% or 40% ownership threshold. See *id.* In addition, the MIAX PEARL rules also impose limits on affiliation between MIAX PEARL and a member of MIAX PEARL. See MIAX PEARL Rule 201(g) ("Without prior Commission approval, the Exchange or any entity with which it is affiliated shall not directly or indirectly through one or more intermediaries acquire or maintain an ownership interest in an Exchange Member. In addition, without prior Commission approval, no Member shall be or become affiliated with (1) the Exchange; or (2) any affiliate of the Exchange. Nothing herein shall prohibit a Member from acquiring or holding an equity interest in (i) Miami International Holdings, Inc. that is permitted by the Certificate of Incorporation of Miami International Holdings, Inc. or (ii) Miami International Securities Exchange, LLC that is permitted by the Amended and Restated Limited Liability Company Agreement of Miami International Securities Exchange, LLC.").

<sup>70</sup> See MIAX PEARL LLC Agreement and MIAX PEARL By-Laws, Article I(v) (both of which define "LLC Member" to mean Miami Holdings, as the sole member of MIAX PEARL).

<sup>56</sup> These provisions are consistent with ownership and voting limits approved by the Commission for other SROs. See, e.g., ISE Mercury Order and ISE Gemini Order, *supra* note 27; MIAX Order and BATS Order, *supra* note 13. See also Securities Exchange Act Release Nos. 62158 (May 24, 2010), 75 FR 30082 (May 28, 2010) (CBOE-2008-88) ("CBOE Demutualization Approval Order"); 53963 (June 8, 2006), 71 FR 34660 (June 15, 2006) (SR-NSX-2006-03) ("NSX Demutualization Order"); 51149 (February 8, 2005), 70 FR 7531 (February 14, 2005) (SR-CHX-2004-26) ("CHX Demutualization Order"); and 49098 (January 16, 2004), 69 FR 3974 (January 27, 2004) (SR-Phlx-2003-73) ("Phlx Demutualization Order").

<sup>57</sup> See Miami Holdings Certificate, Article NINTH (a)(ii) (defining "related persons").

<sup>58</sup> See Miami Holdings Certificate, Article NINTH (b)(i)(A).

<sup>59</sup> See Miami Holdings Certificate, Article NINTH (b)(i)(B).

<sup>60</sup> See Miami Holdings Certificate, Article NINTH (e). Any shares which have been called for redemption shall not be deemed outstanding shares for the purpose of voting or determining the total number of shares entitled to vote. Once redeemed by Miami Holdings, such shares shall become treasury shares and shall no longer be deemed to be outstanding. See *id.* Furthermore, if any redemption results in another stockholder owning shares in violation of the ownership limits described above, Miami Holdings shall redeem such shares. See *id.*

PEARL By-Laws. Any changes to the MIAX PEARL LLC Agreement or the MIAX PEARL By-Laws, including any change in the provisions that identify Miami Holdings as the sole owner of MIAX PEARL, must be filed with, or filed with and approved by, the Commission pursuant to Section 19 of the Act, as the case may be.<sup>71</sup> Further, pursuant to the MIAX PEARL By-Laws, Miami Holdings may not transfer or assign, in whole or in part, its ownership interest in MIAX PEARL, unless such transfer is filed with and approved by the Commission pursuant to Section 19 of the Act.<sup>72</sup>

As described above, the provisions applicable to direct and indirect changes in control of Miami Holdings and MIAX PEARL, as well as the voting limitation imposed on owners of Miami Holdings who also are MIAX PEARL members, are designed to help prevent any owner of Miami Holdings from exercising undue influence or control over the operation of MIAX PEARL. In addition, these limitations are designed to address the conflicts of interests that might result from a member of a national securities exchange owning interests in the exchange. A member's interest in an exchange, including an entity that controls an exchange, could become so large as to cast doubts on whether the exchange may fairly and objectively exercise its self-regulatory responsibilities with respect to such member.<sup>73</sup> A member that is a controlling shareholder of an exchange could seek to exercise that controlling influence by directing the exchange to refrain from, or the exchange may hesitate to, diligently monitor and conduct surveillance of the member's conduct or diligently enforce the exchange's rules and the federal securities laws with respect to conduct by the member that violates such provisions. As such, the Commission believes that these voting and ownership limitations are designed to minimize the potential that a person or entity can improperly interfere with or restrict the ability of MIAX PEARL to effectively carry out its regulatory oversight responsibilities under the Act.

The Commission believes that MIAX PEARL's and Miami Holding's proposed governance provisions are consistent with the Act, including Section 6(b)(1), which requires, in part, an exchange to

be so organized and have the capacity to carry out the purposes of the Act.<sup>74</sup> In particular, these requirements are designed to minimize the potential that a person could improperly interfere with or restrict the ability of the Commission or MIAX PEARL to effectively carry out their regulatory oversight responsibilities under the Act.

## 2. Regulatory Independence and Oversight

Although Miami Holdings will not itself carry out regulatory functions, its activities with respect to the operation of MIAX PEARL must be consistent with, and must not interfere with, MIAX PEARL's self-regulatory obligations. In this regard, MIAX PEARL and Miami Holdings propose to adopt certain provisions in their respective governing documents that are designed to help maintain the independence of the regulatory functions of MIAX PEARL. These proposed provisions are substantially similar to those included in the governing documents of other exchanges that recently have been granted registration.<sup>75</sup> Specifically:

- The directors, officers, employees, and agents of Miami Holdings must give due regard to the preservation of the independence of the self-regulatory function of MIAX PEARL and must not take actions that would interfere with the effectuation of decisions by the MIAX PEARL Board relating to its regulatory functions or that would interfere with MIAX PEARL's ability to carry out its responsibilities under the Act.<sup>76</sup>

<sup>74</sup> 15 U.S.C. 78f(b)(1). See also ISE Mercury Order, *supra* note 27; MIAX Order, *supra* note 13; and BOX Order, *supra* note 13.

<sup>75</sup> See, e.g., DirectEdge Exchanges Order, *supra* note 65, and BATS Order, *supra* note 13. See also Securities Exchange Act Release No. 61152 (December 10, 2009), 74 FR 66699 (December 16, 2009) ("C2 Order").

<sup>76</sup> See Amended and Restated By-Laws of Miami Holdings ("Miami Holdings By-Laws"), Article VII, Section 1.

Similarly, Article II, Section 2.1(d) of the MIAX PEARL By-Laws requires the MIAX PEARL Board to, when managing the business and affairs of MIAX PEARL and evaluating any proposal, consider the requirements of Section 6(b) of the Act. Section 2.1(e) also requires the MIAX PEARL Board, when evaluating any proposal to take into account (among other things and to the extent relevant), the potential impact on the integrity, continuity and stability of the national securities exchange operated by MIAX PEARL and the other operations of MIAX PEARL, on the ability to prevent fraudulent and manipulative acts and practices and on investors and the public, and whether such would promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to and facilitating transactions in securities or assist in the removal of impediments to or perfection of the mechanisms for a free and open market and a national market system. See, e.g., Fourth Amended

- Miami Holdings must comply with federal securities laws and the rules and regulations promulgated thereunder, and agrees to cooperate with the Commission and MIAX PEARL pursuant to, and to the extent of, their respective regulatory authority. In addition, Miami Holdings' officers, directors, employees, and agents must comply with federal securities laws and the rules and regulations promulgated thereunder and agree to cooperate with the Commission and MIAX PEARL in respect of the Commission's oversight responsibilities regarding MIAX PEARL and the self-regulatory functions and responsibilities of MIAX PEARL.<sup>77</sup>

- Miami Holdings, and its officers, directors, employees, and agents are deemed to irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and MIAX PEARL, for purposes of any action, suit, or proceeding pursuant to U.S. federal securities laws, and the rules and regulations thereunder, arising out of, or relating to, MIAX PEARL activities.<sup>78</sup>

- All books and records of MIAX PEARL reflecting confidential information pertaining to the self-regulatory function of MIAX PEARL (including but not limited to disciplinary matters, trading data, trading practices, and audit information) shall be retained in confidence by MIAX PEARL and its personnel and will not be used by MIAX PEARL for any non-regulatory purpose and shall not be made available to persons (including, without limitation, any MIAX PEARL member) other than to personnel of the Commission, and those personnel of MIAX PEARL, members of committees of MIAX PEARL, members of the MIAX PEARL Board, or hearing officers and other agents of MIAX PEARL, to the extent necessary or appropriate to properly discharge the self-regulatory function of MIAX PEARL.<sup>79</sup>

- The books and records of MIAX PEARL and Miami Holdings must be

and Restated By-Laws of BATS, Article III, Section 1.

<sup>77</sup> See Miami Holdings By-Laws, Article VII, Section 4.

<sup>78</sup> See Miami Holdings By-Laws, Article VII, Section 5.

<sup>79</sup> See MIAX PEARL By-Laws Article X, Section 10.4. The Commission notes that the Miami Holdings By-Laws also provide that all books and records of MIAX PEARL reflecting confidential information pertaining to the self-regulatory function of MIAX PEARL will be subject to confidentiality restrictions. See Miami Holdings By-Laws Article VII, Section 2. The requirement to keep such information confidential shall not limit the Commission's ability to access and examine such information or limit the ability of officers, directors, employees, or agent of Miami Holdings to disclose such information to the Commission. See *id.*

<sup>71</sup> See 15 U.S.C. 78s. See also MIAX PEARL LLC Agreement, Section 28(b).

<sup>72</sup> See MIAX PEARL By-Laws, Article III, Section 3.4.

<sup>73</sup> See, e.g., ISE Mercury Order, *supra* note 27; MIAX Order, *supra* note 13; BATS Order, *supra* note 13; and DirectEdge Exchanges Order, *supra* note 65.

maintained in the United States<sup>80</sup> and, to the extent they are related to the operation or administration of MIAX PEARL, Miami Holdings books and records will be subject at all times to inspection and copying by the Commission.<sup>81</sup>

- Furthermore, to the extent they relate to the activities of MIAX PEARL, the books, records, premises, officers, directors, employees, and agents of Miami Holdings will be deemed to be the books, records, premises, officers, directors, employees, and agents of MIAX PEARL, for purposes of, and subject to oversight pursuant to, the Act.<sup>82</sup>

- Miami Holdings will take necessary steps to cause its officers, directors, employees, and agents, prior to accepting a position as an officer, director, employee or agent (as applicable) to consent in writing to the applicability of provisions regarding books and records, confidentiality, jurisdiction, and regulatory obligations, with respect to their activities related to MIAX PEARL.<sup>83</sup>

- Miami Holdings Certificate and By-Laws require that, so long as Miami Holdings controls MIAX PEARL, any changes to those documents be submitted to the MIAX PEARL Board, and, if such change is required to be filed with the Commission pursuant to Section 19(b) of the Act and the rules and regulations thereunder, such change shall not be effective until filed with, or filed with and approved by, the Commission.<sup>84</sup>

The Commission believes that the provisions discussed in this section, which are designed to help maintain the independence of MIAX PEARL's regulatory function and help facilitate the ability of MIAX PEARL to carry out its regulatory responsibilities and operate in a manner consistent with the Act, are appropriate and consistent with the requirements of the Act, particularly with Section 6(b)(1), which requires, in part, an exchange to be so organized and have the capacity to carry out the purposes of the Act.<sup>85</sup> Whether MIAX PEARL operates in compliance with the Act, however, depends on how it and Miami Holdings in practice implement

the governance and other provisions that are the subject of this Order.

Further, Section 19(h)(1) of the Act<sup>86</sup> provides the Commission with the authority "to suspend for a period not exceeding twelve months or revoke the registration of [an SRO], or to censure or impose limitations upon the activities, functions, and operations of [an SRO], if [the Commission] finds, on the record after notice and opportunity for hearing, that [the SRO] has violated or is unable to comply with any provision of the Act, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance" with any such provision by its members (including associated persons thereof).<sup>87</sup> If Commission staff were to find, or become aware of, through staff review and inspection or otherwise, facts indicating any violations of the Act, including without limitation Sections 6(b)(1) and 19(g)(1), these matters could provide the basis for a disciplinary proceeding under Section 19(h)(1) of the Act.

The Commission also notes that, even in the absence of the governance provisions described above, under Section 20(a) of the Act, any person with a controlling interest in MIAX PEARL would be jointly and severally liable with and to the same extent that MIAX PEARL is liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.<sup>88</sup> In addition, Section 20(e) of the Act creates aiding and abetting liability for any person who knowingly provides substantial assistance to another person in violation of any provision of the Act or rule thereunder.<sup>89</sup> Further, Section 21C of the Act authorizes the Commission to enter a cease-and-desist order against any person who has been "a cause of" a violation of any provision of the Act through an act or omission that the person knew or should have known would contribute to the violation.<sup>90</sup> These provisions are applicable to all entities' dealings with MIAX PEARL, including Miami Holdings.

### 3. Regulation of MIAX PEARL

As a prerequisite to the Commission's granting of an exchange's application for registration, an exchange must be so organized and have the capacity to carry

out the purposes of the Act.<sup>91</sup> Specifically, an exchange must be able to enforce compliance by its members, and persons associated with its members, with the Act and the rules and regulations thereunder and the rules of the exchange.<sup>92</sup> The discussion below summarizes how MIAX PEARL proposes to structure and conduct its regulatory operations.

#### a. Regulatory Oversight Committee

The regulatory operations of MIAX PEARL will be monitored by the Regulatory Oversight Committee of the Exchange Board. The Regulatory Oversight Committee will consist of at least three directors, all of whom will be Non-Industry Directors. The Regulatory Oversight Committee will be responsible for overseeing the adequacy and effectiveness of MIAX PEARL's regulatory and SRO responsibilities, assessing MIAX PEARL's regulatory performance, and assisting the Exchange Board (and committees of the Exchange Board) in reviewing MIAX PEARL's regulatory plan and the overall effectiveness of MIAX PEARL's regulatory functions.<sup>93</sup>

Further, a Chief Regulatory Officer ("CRO") of MIAX PEARL will have general day-to-day supervision over MIAX PEARL's regulatory operations.<sup>94</sup> The Regulatory Oversight Committee also will be responsible for recommending compensation and personnel actions involving the CRO and senior regulatory personnel to the Compensation Committee of MIAX PEARL for action.<sup>95</sup> The CRO will report to the Regulatory Oversight Committee.<sup>96</sup>

#### b. Regulatory Funding

To help assure the Commission that it has and will continue to have adequate funding to be able to meet its responsibilities under the Act, MIAX PEARL represents in its Form 1 Application that, prior to beginning operations as a national securities exchange, Miami Holdings will provide sufficient funding to MIAX PEARL for the exchange to carry out its

<sup>91</sup> See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

<sup>92</sup> See *id.* See also Section 19(g) of the Act, 15 U.S.C. 78s(g).

<sup>93</sup> See MIAX PEARL By-Laws, Article IV, Section 4.5(c). The Regulatory Oversight Committee is responsible for reviewing MIAX PEARL's regulatory budget, and also will meet regularly with the Chief Regulatory Officer. See *id.*

<sup>94</sup> See MIAX PEARL By-Laws, Article VI, Section 6.10.

<sup>95</sup> See MIAX PEARL By-Laws, Article IV, Section 4.5(c).

<sup>96</sup> See MIAX PEARL By-Laws, Article VI, Section 6.10.

<sup>80</sup> See MIAX PEARL By-Laws, Article X, Section 10.4; and Miami Holdings By-Laws, Article VII, Section 3.

<sup>81</sup> See Miami Holdings By-Laws, Article VII, Section 3.

<sup>82</sup> See Miami Holdings By-Laws, Article VII, Section 3.

<sup>83</sup> See Miami Holdings By-Laws, Article VII, Section 6.

<sup>84</sup> See Miami Holdings Certificate, Article VIII; and Miami Holdings By-Laws, Article XII, Section 1.

<sup>85</sup> 15 U.S.C. 78f(b)(1).

<sup>86</sup> See 15 U.S.C. 78s(h)(1).

<sup>87</sup> See *id.*

<sup>88</sup> 15 U.S.C. 78t(a).

<sup>89</sup> 15 U.S.C. 78t(e).

<sup>90</sup> 15 U.S.C. 78u-3.



responsibilities under the Act.<sup>97</sup> Specifically, MIAX PEARL represents that Miami Holdings has allocated sufficient operational assets to enable its operation and that prior to launching operations, Miami Holdings will make a capital contribution of not less than \$5,000,000 into MIAX PEARL's capital account, in addition to any previously-provided in-kind contributions, such as legal, regulatory, and infrastructure-related services.<sup>98</sup> MIAX PEARL represents that such cash and in-kind contributions by Miami Holdings will be adequate to begin operation of the Exchange, including the regulation of the Exchange.

MIAX PEARL also represents in its Form 1 application that there is a written agreement between MIAX PEARL and Miami Holdings that requires Miami Holdings to provide adequate funding for MIAX PEARL's ongoing operations, including the regulation of MIAX PEARL. This agreement provides that MIAX PEARL will receive all fees, including regulatory fees and trading fees, payable by MIAX PEARL's members, as well as any funds received from any applicable market data fees and OPRA tape revenue. The agreement further provides that Miami Holdings will reimburse MIAX PEARL for its costs and expenses to the extent MIAX PEARL's assets are insufficient to meet its costs and expenses.<sup>99</sup>

Further, any revenues received by MIAX PEARL from fees derived from its regulatory function or regulatory penalties will not be used for non-regulatory purposes.<sup>100</sup> Any excess funds, as determined by MIAX PEARL, may be remitted to Miami Holdings, however "Regulatory Funds" will not be remitted to Miami Holdings.<sup>101</sup>

<sup>97</sup> See MIAX PEARL Form 1 Application, Exhibit I.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.*

<sup>100</sup> See MIAX PEARL By-Laws, Article IX, Section 9.4.

<sup>101</sup> See MIAX PEARL Form 1 Application, Exhibit I. See also MIAX PEARL LLC Agreement, Section 16; and MIAX PEARL By-Laws, Article IX, Section 9.4. MIAX PEARL By-Laws, Article 1(gg) defines "Regulatory Funds" as "fees, fines, or penalties derived from the regulatory operations of [MIAX PEARL]", but such term does not include "revenues derived from listing fees, market data revenues, transaction revenues, or any other aspect of the commercial operations of [MIAX PEARL], even if such revenues are used to pay costs associated with the regulatory operations of [MIAX PEARL]." This definition is consistent with the rules of other SROs. See, e.g., By-Laws of MIAX Exchange, Article I(ii); By-Laws of NASDAQ PHLX LLC, Article I(ii); and By-Laws of NASDAQ BX, Inc., Article I(ii).

#### c. Rule 17d-2 Agreements; Regulatory Contract With FINRA

Unless the SRO is relieved of this responsibility pursuant to Section 17(d) or Section 19(g)(2) of the Act,<sup>102</sup> Section 19(g)(1) of the Act, among other things, requires every SRO registered as a national securities exchange, absent reasonable justification or excuse, to enforce compliance by its members and persons associated with its members with the Act, the rules and regulations thereunder, and the SRO's own rules.<sup>103</sup> Section 17(d) of the Act and Rule 17d-2 thereunder permit SROs to propose joint plans to allocate regulatory responsibilities among themselves for their common rules with respect to their common members.<sup>104</sup> These agreements, which must be filed with and declared effective by the Commission, generally cover areas where each SRO's rules substantively overlap, including such regulatory functions as personnel registration and sales practices. Without this relief, the statutory obligation of each individual SRO could result in a pattern of multiple examinations of broker-dealers that maintain memberships in more than one SRO.<sup>105</sup> Such regulatory duplication would add unnecessary expense for common members and their SROs. A 17d-2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.<sup>106</sup> Many SROs have entered into Rule 17d-2 agreements.<sup>107</sup>

<sup>102</sup> 15 U.S.C. 78q(d) and 15 U.S.C. 78s(g)(2), respectively.

<sup>103</sup> 15 U.S.C. 78s(g)(1).

<sup>104</sup> See Section 17(d)(1) of the Act and Rule 17d-2 thereunder, 15 U.S.C. 78q(d)(1) and 17 CFR 240.17d-2. Section 17(d)(1) of the Act allows the Commission to relieve an SRO of certain responsibilities with respect to members of the SRO who are also members of another SRO. Specifically, Section 17(d)(1) allows the Commission to relieve an SRO of its responsibilities to: (i) Receive regulatory reports from such members; (ii) examine such members for compliance with the Act and the rules and regulations thereunder, and the rules of the SRO; or (iii) carry out other specified regulatory responsibilities with respect to such members.

<sup>105</sup> Section 17(d) was intended, in part, to eliminate unnecessary multiple examinations and regulatory duplication with respect to Common Members. See Securities Exchange Act Release No. 12935 (October 28, 1976), 41 FR 49091 (November 8, 1976).

<sup>106</sup> See *id.*

<sup>107</sup> See, e.g., Securities Exchange Act Release Nos. 77321 (March 8, 2016), 81 FR 13434 (March 14, 2016) (File No. 4-697) (Financial Industry Regulatory Authority, Inc. ("FINRA")/ISE Mercury, LLC), 73641 (November 19, 2014), 79 FR 70230 (November 25, 2014) (File No. 4-678) (FINRA/MIAX Exchange); 70053 (July 26, 2013), 78 FR 46656 (August 1, 2013) (File No. 4-663) (FINRA/ISE Gemini, LLC); 59218 (January 8, 2009), 74 FR 2143 (January 14, 2009) (File No. 4-575) (FINRA/Boston Stock Exchange, Inc.); 58818 (October 20, 2008), 73

A 17d-2 plan that is declared effective by the Commission relieves the specified SRO of those regulatory responsibilities allocated by the plan to another SRO.<sup>108</sup> MIAX PEARL has represented to the Commission that it intends to become a party to the existing multiparty options Rule 17d-2 plans concerning sales practice regulation and market surveillance.<sup>109</sup> MIAX PEARL has also represented that it will enter into a bi-lateral 17d-2 agreement to allocate regulatory responsibility to FINRA for common rules of dual members between MIAX PEARL and FINRA. Under these agreements, the examining SROs will examine firms that are common members of MIAX PEARL and the particular examining SRO for compliance with certain provisions of the Act, certain rules and regulations adopted thereunder, and certain MIAX PEARL Rules.

In addition, MIAX PEARL has represented that it will enter into a Regulatory Services Agreement ("RSA") with FINRA, under which FINRA will perform certain regulatory functions on behalf of MIAX PEARL.<sup>110</sup> Pursuant to the RSA, FINRA, in its capacity as service provider to MIAX PEARL, will perform various services on MIAX PEARL's behalf, including assisting MIAX PEARL with member registration and related administrative support services; certain cross-market surveillance services; certain options trading examinations; at MIAX PEARL's request, investigating potential violations of enumerated MIAX PEARL market rules, as well as federal securities laws, and rules and regulations thereunder, related to MIAX PEARL market activity; performing examinations of options, including routine and for cause examinations of

FR 63752 (October 27, 2008) (File No. 4-569) (FINRA/BATS Exchange, Inc.); 55755 (May 14, 2007), 72 FR 28087 (May 18, 2007) (File No. 4-536) (National Association of Securities Dealers, Inc. ("NASD") (n/k/a FINRA) and Chicago Board of Options Exchange, Inc. concerning the CBOE Stock Exchange, LLC); 55367 (February 27, 2007), 72 FR 9983 (March 6, 2007) (File No. 4-529) (NASD/International Securities Exchange, LLC); and 54136 (July 12, 2006), 71 FR 40759 (July 18, 2006) (File No. 4-517) (NASD/The Nasdaq Stock Market LLC).

<sup>108</sup> See *supra* notes 104-105.

<sup>109</sup> See MIAX PEARL Form 1 Application, Exhibit L. See also Securities Exchange Act Release No. 68363 (December 5, 2012), 77 FR 73711 (December 11, 2012) (File No. S7-966) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d-2 plan concerning options-related sales practice matters); and 68362 (December 5, 2012), 77 FR 73719 (December 11, 2012) (File No. 4-551) (notice of filing and order approving and declaring effective an amendment to the multiparty 17d-2 plan concerning options-related market surveillance).

<sup>110</sup> See MIAX PEARL Form 1 Application, Exhibit L.



MIAX PEARL members under certain MIAX PEARL rules and federal securities laws; bringing formal disciplinary actions, including hearing officer services; and providing arbitration, mediation, and other dispute resolution services to MIAX PEARL member firms.<sup>111</sup> Notwithstanding the RSA, MIAX PEARL, as an SRO, has the ultimate legal responsibility for the regulation of its members and market.

The Commission believes that it is consistent with the Act for MIAX PEARL to contract with other SROs to perform certain examination, enforcement, and disciplinary functions.<sup>112</sup> This regulatory structure would be consistent with that of other SROs.<sup>113</sup> These functions are fundamental elements of a regulatory program, and constitute core self-regulatory functions. The Commission believes that FINRA, as an SRO that provides contractual services to other SROs, should have the capacity to perform these functions for MIAX PEARL.<sup>114</sup> However, MIAX PEARL, unless relieved by the Commission of its responsibility,<sup>115</sup> bears the ultimate responsibility for self-regulatory responsibilities and primary liability for self-regulatory failures, not the SRO retained to perform regulatory functions on MIAX PEARL's behalf. In performing these regulatory functions, however, the SRO retained to perform regulatory functions may nonetheless bear liability for causing or aiding and abetting the failure of MIAX PEARL to perform its regulatory functions.<sup>116</sup> Accordingly,

although FINRA will not act on its own behalf in carrying out these regulatory services for MIAX PEARL, as the SRO retained to perform certain regulatory functions, FINRA may have secondary liability if, for example, the Commission finds that the contracted functions are being performed so inadequately as to cause a violation of the federal securities laws by MIAX PEARL.

### C. Trading System

#### 1. Access to MIAX PEARL

Access to MIAX PEARL will be granted to individuals or organizations who are approved to become Members.<sup>117</sup> Approved Members will be issued Trading Permits that grant the Member the ability to transact on MIAX PEARL through its electronic systems.<sup>118</sup> Trading Permits will not convey upon Members any ownership interest in MIAX PEARL, and they will not be transferable except in cases where a Member experiences a change in control or corporate reorganization.<sup>119</sup> Membership will be open to any broker-dealer that: (1) Is registered under Section 15 of the Act;<sup>120</sup> and (2) has and maintains membership in another registered options exchange (other than the MIAX Exchange) or FINRA.<sup>121</sup> As explained below, a holder of a MIAX Exchange trading permit will not be required to submit a full application for membership on MIAX PEARL.<sup>122</sup> There will be no limit to the number of Trading Permits that MIAX PEARL can issue, although MIAX PEARL could determine in the future a limit or decrease in the number of Trading

Permits issued.<sup>123</sup> Members of MIAX PEARL may be Market Makers,<sup>124</sup> or they may be EEMs.<sup>125</sup>

A holder of a MIAX Exchange trading permit in good standing will be eligible to receive one MIAX PEARL Trading Permit.<sup>126</sup> MIAX Exchange member applicants will not be required to submit a full application for membership on MIAX PEARL, but rather will only need to complete selected MIAX PEARL forms concerning their election to trade on MIAX PEARL, consent to MIAX PEARL's jurisdiction, and other operational matters.<sup>127</sup> This waive-in application process is similar to arrangements in place at other exchanges.<sup>128</sup>

Non-MIAX Exchange members seeking to become members of MIAX PEARL would submit a full application in accordance with procedures established by the Exchange.<sup>129</sup> Entities that become members, and their associated persons, will be required to meet and maintain certain qualification and registration criteria similar to what is required by other options exchanges.<sup>130</sup> In addition, MIAX PEARL proposes further requirements on members that seek to do business with

<sup>123</sup> See MIAX PEARL Rule 200(a). MIAX PEARL would announce in advance any limitation or decrease it plans to impose pursuant to Rule 200(a). See *id.* In the event that MIAX PEARL imposes a limitation or decrease, MIAX PEARL, in doing so, may not eliminate the ability of an existing member to trade on the Exchange unless MIAX PEARL is permitted to do so pursuant to a rule filing submitted to the Commission under Section 19(b) of the Act. See *id.* In addition, MIAX PEARL's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(c)(4) of the Act. See *id.* See also Chicago Board Options Exchange, Incorporated ("CBOE") Rule 3.1(a)(vi) and MIAX Exchange Rule 200(a) (concerning limiting or reducing the number of trading permits). Further, MIAX PEARL's exercise of authority under proposed Rule 200 would be subject to the provisions of Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or any natural person associated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof. See 15 U.S.C. 78f(b)(2).

<sup>124</sup> See MIAX PEARL Rule 600. Market Maker registration is discussed in greater detail below, *infra* Section III.C.3.

<sup>125</sup> See *supra* note 117.

<sup>126</sup> See MIAX PEARL Rule 200(c)(1).

<sup>127</sup> See *id.*

<sup>128</sup> See, e.g., C2 Options Exchange, Inc. Rule 3.1(c)(1) (containing similar expedited waive-in membership process for members of CBOE) and ISE Mercury, LLC Rule 302(a) (containing similar expedited waive-in membership process for members of the ISE and ISE Gemini, LLC).

<sup>129</sup> See MIAX PEARL Rule 200(c)(2).

<sup>130</sup> See MIAX PEARL Rules Chapter II. Such criteria include, but are not limited to, capital maintenance requirements. See, e.g., MIAX Exchange Rule 200 Series and C2 Options Exchange, Inc. Rules 3.1 and 3.2 (containing similar criteria).

<sup>111</sup> See *id.*

<sup>112</sup> See, e.g., Regulation ATS Release, *supra* note 29. See also Securities Exchange Act Release Nos. 50122 (July 29, 2004), 69 FR 47962 (August 6, 2004) (SR-Amex-2004-32) (order approving rule that allowed Amex to contract with another SRO for regulatory services) ("Amex Regulatory Services Approval Order"); 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004) ("NOM Approval Order"); Nasdaq Order, *supra* note 27; and BATS Order, *supra* note 13.

<sup>113</sup> For example, MIAX Exchange, ISE Mercury, EDGA Exchange, Inc., EDGX Exchange Inc., and BATS have entered into 17d-2 Plans and RSAs with FINRA.

<sup>114</sup> See, e.g., Amex Regulatory Services Approval Order, *supra* note 112; NOM Approval Order, *supra* note 112; and Nasdaq Order, *supra* note 27. The Commission notes that the RSA is not before the Commission and, therefore, the Commission is not acting on them.

<sup>115</sup> See *supra* note 104.

<sup>116</sup> For example, if failings by the SRO retained to perform regulatory functions have the effect of leaving an exchange in violation of any aspect of the exchange's self-regulatory obligations, the exchange will bear direct liability for the violation, while the SRO retained to perform regulatory functions may bear liability for causing or aiding and abetting the violation. See, e.g., Nasdaq Order, *supra* note 27; BATS Order, *supra* note 13; and Release No. 42455 (February 24, 2000), 65 FR 11388

(March 2, 2000) (File No. 10-127) (approval of registration of International Securities Exchange Act, LLC ("ISE") as a national securities exchange).

<sup>117</sup> A "Member" is defined as an individual or organization that is registered with the Exchange pursuant to Chapter II of the MIAX PEARL Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" ("EEM") or "Market Maker." Members are deemed "members" under the Exchange Act. See MIAX PEARL Rule 100.

<sup>118</sup> See MIAX PEARL Rule 200(a). MIAX PEARL represents that it has designed its systems to allow its Members to individually determine the best method for accessing the Exchange, whether by using customized front-end software using protocols determined by the Exchange or through third-party vendors who route orders to MIAX PEARL through a front-end or service bureau configuration. See MIAX PEARL Form 1 Application, Exhibit E.

<sup>119</sup> See MIAX PEARL Rule 200(e).

<sup>120</sup> See MIAX PEARL Rule 200(b).

<sup>121</sup> See MIAX PEARL Rule 200(d). If such other options exchange has not been designated by the Commission to examine Members for compliance with financial responsibility rules, then the broker-dealer must have and maintain a membership in FINRA. *Id.*

<sup>122</sup> See MIAX PEARL Rule 200(c) and *infra* notes 127-128 and accompanying text.

the public.<sup>131</sup> Applicants who are denied membership may appeal MIAx PEARL's decision pursuant to MIAx PEARL's rules governing Hearings, Review, and Arbitration.<sup>132</sup> Every Member will be subject to MIAx PEARL's regulatory jurisdiction, including MIAx PEARL's disciplinary jurisdiction.<sup>133</sup>

The Commission finds that MIAx PEARL's proposed membership rules are consistent with the Act, including Section 6(b)(2) of the Act, which requires the rules of an exchange to provide that any registered broker or dealer or natural person associated with a broker or dealer may become a member of such exchange or associated with a member thereof.<sup>134</sup> MIAx PEARL's proposed rules with respect to exchange membership are substantively similar to the rules of other exchanges.

The Commission notes that pursuant to Section 6(c) of the Act,<sup>135</sup> an exchange must deny membership to any person, other than a natural person, that is not a registered broker or dealer, any natural person that is not, or is not associated with, a registered broker or dealer, and registered broker-dealers that do not satisfy certain standards, such as financial responsibility or operational capacity. As a registered exchange, MIAx PEARL must independently determine if an applicant satisfies the standards set forth in the Act, regardless of whether an applicant is a member of another SRO.<sup>136</sup>

In addition, Members may enter into arrangements with other parties, including non-Members and other Members, to provide "Sponsored Access" to trading on MIAx PEARL.<sup>137</sup> Members who provide such Sponsored Access will be responsible for all trading conducted pursuant to the access agreement, and to the same extent as if the Member were trading directly.<sup>138</sup> Accordingly, Members that provide Sponsored Access must

maintain and implement policies and procedures to supervise and monitor sponsored trading activity.<sup>139</sup> Additionally, non-Members who seek to trade on MIAx PEARL through Sponsored Access agreements will need to agree to comply with all applicable federal securities laws and rules and Exchange rules.<sup>140</sup> MIAx PEARL's rules governing Sponsored Access arrangements are similar to the rules of other exchanges.<sup>141</sup>

## 2. Linkage

MIAx PEARL intends to become a participant in the Plan Relating to Options Order Protection and Locked/Crossed Markets or any successor plan ("Linkage Plan").<sup>142</sup> If admitted as a participant to the Linkage Plan, other plan participants would be able to send orders to MIAx PEARL in accordance with the terms of the plan as applied to the Exchange. The MIAx PEARL Rules include relevant definitions, establish the conditions pursuant to which members may enter orders in accordance with the Linkage Plan, impose obligations on the Exchange regarding how it must process incoming orders, establish a general standard that members and MIAx PEARL should avoid trade-throughs, establish potential regulatory liability for members that engage in a pattern or practice of trading through other exchanges, and establish obligations with respect to locked and crossed markets.

The Commission believes that MIAx PEARL has proposed rules that are designed to comply with the requirements of the Linkage Plan.<sup>143</sup> Further, as provided below, before MIAx PEARL can commence operations as a national securities exchange, it must become a participant in the Linkage Plan.

## 3. Market Makers

### a. Registration of Market Makers

MIAx PEARL Members may register as Market Makers for the purpose of making markets in options contracts

traded on the Exchange.<sup>144</sup> Market Makers are entitled to receive certain benefits and privileges in exchange for fulfilling certain affirmative and negative market-making obligations. To begin the process of registering as a Market Maker, a Member will be required to file a written application with MIAx PEARL.<sup>145</sup> MIAx PEARL will consider an applicant's market making ability and other factors it deems appropriate in determining whether to approve an applicant's registration.<sup>146</sup> All Market Makers will be designated as specialists on MIAx PEARL for all purposes under the Act and rules thereunder.<sup>147</sup> The Exchange will not place any limit on the number of entities that may become Market Makers.<sup>148</sup> The good standing of a Market Maker may be suspended, terminated or otherwise withdrawn if the conditions for approval cease to be maintained or the Market Maker violates any of its agreements with MIAx PEARL or any provisions of the MIAx PEARL Rules.<sup>149</sup> A Member that has qualified as a Market Maker may register to make markets in individual series of options.<sup>150</sup>

The Commission finds that the MIAx PEARL qualification requirements are consistent with the Act. MIAx PEARL's rules provide an objective process by which a Member could become a Market Maker on MIAx PEARL. The Commission notes that MIAx PEARL's proposed Market Maker qualification requirements are similar to those of other options exchanges.<sup>151</sup>

### b. Market Maker Obligations

Pursuant to MIAx PEARL rules, there will be one class of Market Makers. All Market Makers will be subject to a number of general obligations. In particular, the transactions of a Market Maker must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market.<sup>152</sup> Among other things, a Market Maker must: (1)

<sup>131</sup> See MIAx PEARL Rules Chapter XIII (incorporating by reference Chapter XIII of the MIAx Exchange Rules). Chapter XIII of the MIAx Exchange Rules also are similar to the rules of other exchanges. See, e.g., ISE Rules Chapter 6.

<sup>132</sup> See MIAx PEARL Rules Chapter XI (incorporating by reference Chapter XI of the MIAx Exchange Rules).

<sup>133</sup> See MIAx PEARL Rule 200(g). For MIAx PEARL's rules concerning discipline, see Chapter X of the MIAx PEARL Rules.

<sup>134</sup> 15 U.S.C. 78f(b)(2).

<sup>135</sup> 15 U.S.C. 78f(c).

<sup>136</sup> See, e.g., ISE Mercury Order, *supra* note 27, at 6076; ISE Gemini Order, *supra* note 27, at 46633; MIAx Order, *supra* note 13, at 73074; BOX Order, *supra* note 14, at 26337; BATS Order, *supra* note 13, at 49502; and Nasdaq Order, *supra* note 27, at 3555.

<sup>137</sup> See MIAx PEARL Rule 210.

<sup>138</sup> See MIAx PEARL Rule 210(b).

<sup>139</sup> See MIAx PEARL Rule 210(b)-(c).

<sup>140</sup> See MIAx PEARL Rule 210(b). See also, e.g., 17 CFR 240.15c3-5.

<sup>141</sup> See, e.g., MIAx Exchange Rule 210 and NASDAQ Stock Market LLC Rule 4615.

<sup>142</sup> See MIAx PEARL Form 1 Application, Exhibit E. See also Securities Exchange Act Release No. 60405 (July 30, 2009), 74 FR 39362 (August 6, 2009) (File No. 4-546) (order approving the national market system Plan Relating to Options Order Protection and Locked/Crossed Markets Submitted by the Chicago Board Options Exchange, Incorporated, ISE, The NASDAQ Stock Market LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX, Inc., NYSE Amex LLC, and NYSE Arca, Inc.).

<sup>143</sup> See Chapter XIV of the MIAx PEARL Rules (incorporating by reference Chapter XIV of the MIAx Exchange Rules).

<sup>144</sup> See MIAx PEARL Rule 600.

<sup>145</sup> See MIAx PEARL Rule 600(a).

<sup>146</sup> See *id.* The provision permitting MIAx PEARL to consider "such other factors as [it] deems appropriate" must be applied in a manner that is consistent with the Act, including provisions that prohibit an exchange from acting in an unfairly discriminatory manner. See 15 U.S.C. 78f(b)(5); see also C2 Order, *supra* note 75.

<sup>147</sup> See MIAx PEARL Rule 600.

<sup>148</sup> See MIAx PEARL Rule 600(c).

<sup>149</sup> See MIAx PEARL Rule 603(b).

<sup>150</sup> See MIAx PEARL Rule 602(a).

<sup>151</sup> See, e.g., Bats BZX Exchange, Inc. ("Bats BZX") Rules 22.2, 22.3 and 22.4, and NASDAQ Options Market Rules, Chapter VII, Sections 2, 3, and 4.

<sup>152</sup> See MIAx PEARL Rule 604(a).

Maintain a two-sided market during trading hours, in a manner that enhances the depth, liquidity, and competitiveness of the market; (2) engage in dealings for its own account when there is a lack of price continuity, a temporary disparity between the supply of (or demand for) a particular option contract, or a temporary distortion of the price relationships between option contracts of the same series; (3) compete with other market makers; (4) make markets that will be honored for the number of contracts entered; (5) update quotations in response to changed market conditions; and (6) maintain active markets.<sup>153</sup>

Market Makers must provide continuous two-sided quotes throughout the trading day 90% of the time in 75% of the series in which the Market Maker is registered.<sup>154</sup> Further, a Market Maker may be called upon by MIAX PEARL to submit a single bid or offer or maintain continuous bid and offers in one or more series to which it is registered whenever, in the judgment of the Exchange, it is necessary to do so in the interest of fair and orderly markets.<sup>155</sup> In addition, Market Makers must maintain minimum net capital in accordance with the federal securities laws.<sup>156</sup> In options classes other than to which it is registered, the total number of contracts executed during a quarter by a Market Maker in series in which it is not registered may not exceed 25% of the total number of all contracts executed by such Market Maker.<sup>157</sup> If MIAX PEARL finds any failure by a Market Maker to properly perform as a Market Maker, such Market Maker may be subject to suspension or termination of registration.<sup>158</sup>

Market Makers will receive certain benefits in return for satisfying their responsibilities.<sup>159</sup> For example, a broker-dealer or other lender may extend “good faith” credit to a member of a national securities exchange or registered broker-dealer to finance its activities as a market maker or

specialist.<sup>160</sup> In addition, market makers are excepted from the prohibition in Section 11(a) of the Act.<sup>161</sup> The Commission believes that a market maker must be subject to sufficient and commensurate affirmative obligations, including the obligation to hold itself out as willing to buy and sell options for its own account on a regular or continuous basis, to justify favorable treatment.<sup>162</sup> The Commission further believes that the rules of all U.S. options markets need not provide the same standards for market maker participation, so long as they impose affirmative obligations that are consistent with the Act.<sup>163</sup> Market Makers on MIAX PEARL will not receive special trading allocations or similar rights vis-à-vis other Members.<sup>164</sup> The Commission believes that MIAX PEARL’s Market Maker participation requirements impose sufficient affirmative obligations on MIAX PEARL’s Market Makers and, accordingly, that MIAX PEARL’s requirements are consistent with the Act. The Commission believes that while Market Makers may become an important source of liquidity on MIAX PEARL, they will likely not be the only source as MIAX PEARL is designed to match buying and selling interest of all MIAX PEARL participants. Therefore, the Commission believes that MIAX PEARL’s proposed structure is consistent with the Exchange Act.

#### 4. Order Display, Execution, and Priority

MIAX PEARL will operate a fully automated electronic options marketplace. Liquidity will be derived from orders to buy and orders to sell, including orders from Market Makers,<sup>165</sup> submitted to MIAX PEARL electronically by its members from remote locations. There will be no physical trading floor. Options traded on the Exchange will be subject to Minimum Price Variations (“MPV”) that will begin at \$0.05 for option contracts trading at less than \$3.00 per option,

and \$1.00 for option contracts trading at \$3.00 per option or higher.<sup>166</sup> In addition, MIAX PEARL will participate in the penny pilot program pursuant to which it will permit certain options with premiums under \$3 (as well as heavily traded options on certain indices) to be quoted and traded in increments as low as \$.01.<sup>167</sup>

Orders submitted to MIAX PEARL will be displayed unless the order is an immediately marketable order or is a contingent order, such as an immediate or cancel order. Additionally, orders may have a non-displayed price that is different than the displayed price, as further described below. Displayed orders and quotes will be displayed on an anonymous basis at a specified price. Non-displayed prices associated with orders will not be displayed to any participant.

Members may submit the following types of orders: Market; Marketable Limit; Cancel-Replacement; Immediate-or-Cancel; Intermarket Sweep; Do Not Route; Day Limit; Good ‘Til Cancelled; and Post-Only.<sup>168</sup> All of these order types are based on similar order types available on other options exchanges.<sup>169</sup> The Commission believes that these order types are substantially similar to order types approved by the Commission on other exchanges and thus raise no new regulatory issues.

After the opening, trades will execute on MIAX PEARL when a buy order and a sell order match one another on the MIAX PEARL order book (“MIAX PEARL Book” or “Book”). The MIAX PEARL system will continuously and automatically match orders pursuant to price-time priority.<sup>170</sup> The highest bid

<sup>166</sup> See MIAX PEARL Rule 510(a).

<sup>167</sup> See MIAX PEARL Rule 510, Interpretations and Policies .01. MIAX PEARL has established a scheduled expiration date of December 31, 2016. However, MIAX PEARL may not be operational before December 31, 2016, thus the Exchange may need to file a proposed rule change under Section 19(b) of the Exchange Act to update this proposed rule.

<sup>168</sup> See MIAX PEARL Rule 516 for a description of each of the order types. MIAX PEARL notes that some of these order types will be valid only during certain portions of the trading day (e.g., after the opening). MIAX PEARL further notes that not all order types will be available for use on each of the MEO interface and the FIX interface, and that the Exchange will issue a Regulatory Circular listing which order types, among the order types listed above, are available for delivery via the MEO interface and which are available for delivery via the FIX interface.

<sup>169</sup> See, e.g., Bats BZX Rule 21.1(d)(8) (Post Only Order); NASDAQ Options Market Rules, Chapter VI, Section 1(e)(8) (Intermarket Sweep Order) and (1)(e)(1) (Cancel-replacement Order); NASDAQ PHLX LLC Rule 1080(m)(iv)(A) (Do Not Route Order and Immediate or Cancel Order); NYSE MKT LLC Rule 900.3NY(m) (Day Order) and (n) (Good-Til-Cancelled Order).

<sup>170</sup> See MIAX PEARL Rule 514(b).

<sup>153</sup> See MIAX PEARL Rule 604(a).

<sup>154</sup> See MIAX PEARL Rule 605(d)(1) and (d)(3). Immediate-or-Cancel Orders from Market Makers will not be counted for the continuous quoting obligations of Market Makers. See MIAX PEARL Rule 605, Interpretations and Policies .01.

<sup>155</sup> See MIAX PEARL Rule 605(d)(2).

<sup>156</sup> See MIAX PEARL Rule 608.

<sup>157</sup> See MIAX PEARL Rule 605(e). See also Bats BZX Rule 22.6(e) and NASDAQ Options Market Rules, Chapter VII, Section 6(e).

<sup>158</sup> See MIAX PEARL Rule 600(b).

<sup>159</sup> See, e.g., NOM Approval Order, *supra* note 112, at 14526 and Securities Exchange Act Release No. 61419 (January 26, 2010), 75 FR 5157, 5159 (February 1, 2010) (“BATS Options Approval Order”) (discussing the benefits and obligations of market makers).

<sup>160</sup> See 12 CFR 221.5 and 12 CFR 220.7; see also 17 CFR 240.15c3–1(a)(6) (capital requirements for market makers).

<sup>161</sup> 15 U.S.C. 78k(a). See also, *infra* Section III.C.5.

<sup>162</sup> See NOM Approval Order, *supra* note 112, at 14526 and BATS Options Approval Order, *supra* note 159, at 5159.

<sup>163</sup> See *id.*

<sup>164</sup> See MIAX PEARL Rule 514; see also MIAX PEARL Form 1 Application, Exhibit E at 2.

<sup>165</sup> The definition of “quote” or “quotation” means a bid or offer entered by a Market Maker as a firm order that updates the Market Maker’s previous bid or offer, if any. An order entered by the Market Maker in the options series to which such Market maker is registered shall, as applicable, constitute a quote or quotation on MIAX PEARL. See MIAX PEARL Rule 100.

and lowest offer shall have priority on the Exchange. Within each price level, if there are two or more orders at the best price, trading interest will be executed in time priority.<sup>171</sup> MIAX PEARL proposes to make available order processing and matching features, which are based on those features available on MIAX Exchange.<sup>172</sup> MIAX PEARL's system will automatically execute incoming orders that are executable against orders in its system, provided that such incoming orders will not be executed at prices inferior to the NBBO.<sup>173</sup> MIAX PEARL Rule 515 sets forth how the MIAX PEARL system will handle incoming orders that cannot be executed in part or in full. In particular, MIAX PEARL Rule 515 specifies a "price protection process," a Managed Interest Process, and a Post Only Process, each discussed more fully below.

The MIAX PEARL system offers a "price protection" process for all orders.<sup>174</sup> Price protection prevents an order from being executed beyond the price designated in the order's price protection instructions ("the price protection limit"). The price protection limit is expressed in units of MPV away from the national best bid and offer ("NBBO") at the time of the order's receipt, or the MIAX PEARL Best Bid and Offer ("PBBO") if the best bid or offer on away markets ("ABBO") is crossing the PBBO.<sup>175</sup> When triggered, price protection will cancel an order or the remaining contracts of an order. The MIAX PEARL system will not execute such orders at prices inferior to the current NBBO.<sup>176</sup>

The MIAX PEARL price protection process is substantially similar to that adopted by MIAX Exchange.<sup>177</sup> The

Commission believes that this price protection functionality can benefit all market participants.

The Exchange's rules also provide for a "Managed Interest Process" that would apply to non-routable orders<sup>178</sup> that would either lock or cross the current opposite side NBBO where the PBBO is inferior to the NBBO.<sup>179</sup> The MIAX PEARL system will not execute such orders at prices inferior to the current NBBO.<sup>180</sup> The managed order would be displayed at one MPV away from the current opposite side NBBO and placed on the MIAX PEARL Book at a price equal to the opposite side NBBO.<sup>181</sup> Should the NBBO price change to an inferior price level, the order's displayed price will continue to re-price so that it is displayed one MPV away from the new NBBO, and the order's Book price will continuously reprice to lock the new NBBO.<sup>182</sup> Such re-pricing will continue until the managed order is fully executed, reaches its limit price, reaches its price protection limit, or is cancelled.<sup>183</sup>

During the Managed Interest Process, if the Exchange receives a new order or quote on the opposite side of the market from the managed order that could be executed, the MIAX PEARL system will immediately execute the remaining contracts to the extent possible at the initiating order's current booked bid or offer price, provided that it does not trade through the current NBBO.<sup>184</sup>

The Commission believes that the MIAX PEARL's Managed Interest Process is consistent with the managed interest process that the Commission approved for MIAX Exchange.<sup>185</sup> With regard to the treatment of Post-Only Orders under MIAX PEARL's Managed Interest Process, the Commission believes that the rules are consistent with rules that have been adopted by other exchanges governing the execution of Post-Only Orders.<sup>186</sup>

MIAX PEARL will have a process for the handling of certain Post-Only Orders ("POP Process").<sup>187</sup> The POP Process

will apply to Post-Only Orders where the limit price of the Post-Only Order locks or crosses the current opposite side PBBO where the PBBO is the NBBO (i.e., locks or crosses an order on the MIAX PEARL Book).<sup>188</sup> The MIAX PEARL system will display and book such Post-Only Orders one MPV away from the current opposite side PBBO.<sup>189</sup> Should the PBBO price change to an inferior price level, the Post-Only Order's Book price and displayed price would continuously re-price to one MPV away from new PBBO until Post-Only Order is fully executed, reaches its limit price, reaches its price protection limit, or is cancelled.<sup>190</sup>

Under the POP Process, if the Exchange receives a new order or quote on the opposite side of the market from the Post-Only Order that could be executed, the MIAX PEARL system will immediately execute the remaining contracts to the extent possible at the Post-Only Order's current booked bid or offer price, provided that it does not trade through the current NBBO.<sup>191</sup> If the Exchange receives a new Post-Only Order on the opposite side of the market from a Post-Only Order being managed under the POP Process, and the new Post-Only Order locks or crosses the book price of the resting Post-Only Order, the Exchange will book and display the new Post-Only Order one MPV away from the current opposite side PBBO.<sup>192</sup>

The POP Process under MIAX PEARL's rules is substantially similar to the Managed Interest Process described above for MIAX PEARL and that the Commission approved for the MIAX Exchange.<sup>193</sup> The primary difference is that, under the POP Process, Post-Only Orders are booked and displayed at the same price—one MPV away from the current opposite side PBBO. This aspect of the POP Process is consistent with the treatment of Post-Only Orders on other exchanges.<sup>194</sup>

<sup>188</sup> Post-Only Orders that lock or cross the current opposite side NBBO and the PBBO is inferior to the NBBO would be handled through the Managed Interest Process under Rule 515(d)(2) as described above.

<sup>189</sup> See MIAX PEARL Rule 515(g)(ii).

<sup>190</sup> *Id.*

<sup>191</sup> See MIAX PEARL Rule 515(g)(iii)(A).

<sup>192</sup> See MIAX PEARL Rule 515(g)(iii)(B).

<sup>193</sup> See MIAX PEARL Rule 515(d)(2) and MIAX Exchange Rule 515(c)(1)(ii).

<sup>194</sup> See, e.g., Bats BZX Rule 21.1(i) (Price Adjust) (providing that an order that, at the time of entry, would lock or cross a protected quotation of another options exchange or Bats BZX will be ranked and displayed by the Bats BZX system at one MPV below the current NBO (for bids) or to one MPV above the current NBB (for offers)); NASDAQ Options Market Rules, Chapter VI, Section 1(e)(11) (providing that if a Post-Only Order would lock or cross an order on the NASDAQ Options Market

<sup>171</sup> See *id.*

<sup>172</sup> See *infra* discussion of MIAX PEARL's proposed price protection process and managed interest process, which are based on substantially similar order processing and matching features on MIAX Exchange.

<sup>173</sup> See MIAX PEARL Rule 515(a) and (b).

<sup>174</sup> See MIAX PEARL Rule 515(c).

<sup>175</sup> See MIAX PEARL Rule 515(c). The Exchange will publish a Regulatory Circular setting a minimum and maximum number of MPVs away from the NBBO (or PBBO if the ABBO is crossing the PBBO) that a market participant may designate for its price protection limit. The Exchange will also set, and announce by Regulatory Circular, a default price protection limit within 1 to 5 MPVs away from the NBBO (or PBBO if the ABBO is crossing the PBBO).

<sup>176</sup> See MIAX PEARL Rule 515(c).

<sup>177</sup> See MIAX Exchange Rule 515(c)(1). The MIAX Exchange price protection process applies only to non-market maker orders, whereas the MIAX PEARL price protection process applies to all market participants, including market makers. The Commission believes that this is consistent with the price protection rules of other exchanges. See, e.g., NYSE Arca, Inc. Rules 6.60 (Price Protection—Orders) and 6.61 (Price Protection—Quotes).

<sup>178</sup> Non-routable orders would include, for example, orders marked "Do Not Route" or Post-Only orders being handled under the Managed Interest Process.

<sup>179</sup> See MIAX PEARL Rule 515(d)(2).

<sup>180</sup> See MIAX PEARL Rule 515(d)(2).

<sup>181</sup> See MIAX PEARL Rule 515(d)(2)(ii). See also MIAX Exchange Rule 515(c)(1)(ii) (providing for the same Managed Interest Process on MIAX Exchange).

<sup>182</sup> See *id.*

<sup>183</sup> See *id.*

<sup>184</sup> See MIAX PEARL Rule 515(d)(2)(iii)(A). See also MIAX Exchange Rule 515(c)(1)(ii).

<sup>185</sup> See MIAX Exchange Rule 515(c)(1)(ii).

<sup>186</sup> See, e.g., Bats BZX Rule 21.1(h) and Securities Exchange Act Release No. 77818 (May 12, 2016), 81 FR 31283 (May 18, 2016) (SR-BatsBZX-2016-16).

<sup>187</sup> See MIAX PEARL Rule 515(g).

The Commission believes that MIAX PEARL's proposed display, execution, and priority rules discussed above in this section are consistent with the Act. In particular, the Commission finds that the proposed rules are consistent with Section 6(b)(5) of the Act,<sup>195</sup> which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating transactions in securities, 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 to not permit unfair discrimination between customers, issuers, or dealers. The Commission also finds that the proposed rules are consistent with Section 6(b)(8) of the Act,<sup>196</sup> which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The trading rules of MIAX PEARL are substantially similar to the current trading rules of MIAX Exchange and other exchanges, as noted above, which were filed with and approved by the Commission (or otherwise became effective) pursuant to Section 19(b) of the Act.<sup>197</sup> Therefore, the Commission believes that these rules raise no new regulatory issues and are consistent with the Act.

#### 5. Section 11(a) of the Act

Section 11(a)(1) of the Act<sup>198</sup> prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or an account over which it or its associated person exercises investment discretion (collectively, "covered accounts"), unless an exception applies. The Exchange has represented that it has analyzed its rules proposed hereunder, and believes that they are consistent with Section 11(a) of the Act and rules thereunder.<sup>199</sup> For the reasons set forth

below, based on MIAX PEARL's representations, the Commission believes that MIAX PEARL's order execution algorithm will allow members to meet the requirements of Rule 11a2-2(T) for executions on MIAX PEARL.

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Rule 11a2-2(T) under the Act,<sup>200</sup> known as the "effect versus execute" rule, provides exchange members with an exemption from the Section 11(a)(1) prohibition. Rule 11a2-2(T) permits an exchange member, subject to certain conditions, to effect transactions for covered accounts by arranging for an unaffiliated member to execute the transactions on the exchange. To comply with Rule 11a2-2(T)'s conditions, a member: (i) May not be associated with the executing member; (ii) must transmit the order from off the exchange floor; (iii) may not participate in the execution of the transaction once it has been transmitted to the member performing the execution;<sup>201</sup> and (iv) with respect to an account over which the member or an associated person has investment discretion, neither the member nor its associated person may retain any compensation in connection with effecting the transaction except as provided in the Rule.

In a letter to the Commission,<sup>202</sup> MIAX PEARL requested that the Commission concur with its conclusion that MIAX PEARL members that enter orders into the MIAX PEARL trading system satisfy the requirements of Rule 11a2-2(T). For the reasons set forth below, the Commission believes that MIAX PEARL members entering orders into the MIAX PEARL trading system will satisfy the conditions of Rule 11a2-2(T).

First, Rule 11a2-2(T) requires that orders for covered accounts be transmitted from off the exchange floor. MIAX PEARL will not have a physical trading floor, and like other automated systems, the MIAX PEARL trading system will receive orders from members electronically through remote terminals or computer-to-computer interfaces. In the context of other automated trading systems, the Commission has found that the off-floor transmission requirement is met if a

covered account order is transmitted from a remote location directly to an exchange's floor by electronic means.<sup>203</sup> Since the MIAX PEARL trading system receives all orders electronically through remote terminals or computer-to-computer interfaces, the Commission believes that the MIAX PEARL trading system satisfies the off-floor transmission requirement.

Second, Rule 11a2-2(T) requires that the member not participate in the execution of its order once it has been transmitted to the member performing the execution. MIAX PEARL has represented that the MIAX PEARL trading system will at no time following the submission of an order allow a member or an associated person of such member to acquire control or influence over the result or timing of an order's execution.<sup>204</sup> According to MIAX PEARL, the execution of a member's order is determined solely by what orders, bids, or offers are present in the MIAX PEARL trading system at the time the member submits the order and the order priority based on MIAX PEARL rules.<sup>205</sup> Accordingly, the Commission believes that a MIAX PEARL member will not participate in the execution of its order submitted into the trading system.

Rule 11a2-2(T)'s third condition is that the order be executed by an

<sup>203</sup> See, e.g., Securities Exchange Act Release Nos. 59154 (December 23, 2008), 73 FR 80468 (December 31, 2008) (SR-BSE-2008-48) (order approving proposed rules of BX); 49068, (January 13, 2004), 69 FR 2775 (January 20, 2004) (establishing, among other things, BOX as an options trading facility of BSE); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (approving the PCX's use of the Archipelago Exchange as its equity trading facility); 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (regarding NYSE's Off-Hours Trading Facility). See 1978 Release, *supra* note 201. See also Securities Exchange Act Release No. 15533 (January 29, 1979), 44 FR 6084 (January 31, 1979) (regarding the American Stock Exchange ("Amex") Post Execution Reporting System, the Amex Switching System, the Intermarket Trading System, the Multiple Dealer Trading Facility of the Cincinnati Stock Exchange, the PCX Communications and Execution System, and the Philadelphia Stock Exchange Automated Communications and Execution System) ("1979 Release").

<sup>204</sup> See MIAX PEARL 11(a) Request Letter, *supra* note 199. Members may change or cancel an order or quote at any time before the order is executed on the Exchange. See MIAX PEARL Form 1 Application, Exhibit E. The Commission has stated that the non-participation requirement is satisfied under such circumstances, so long as such modifications or cancellations are also transmitted from off the floor. See 1978 Release, *supra* note 201 (stating that the "non-participation requirement does not prevent initiating members from canceling or modifying orders (or the instructions pursuant to which the initiating member wishes orders to be executed) after the orders have been transmitted to the executing member, provided that any such instructions are also transmitted from off the floor").

<sup>205</sup> See MIAX PEARL 11(a) Request Letter, *supra* note 199.

C. Roeser, Associate Director, Office of Market Supervision, Division of Trading and Markets, Commission, dated November 4, 2016 ("MIAX PEARL 11(a) Request Letter").

<sup>200</sup> 17 CFR 240.11a2-2(T).

<sup>201</sup> This prohibition also applies to associated persons. See 15 U.S.C. 78f(b)(8). The member may, however, participate in clearing and settling the transaction. See Securities Exchange Act Release No. 14563 (March 14, 1978), 43 FR 11542 (March 17, 1978) (regarding the NYSE's Designated Order Turnaround System) ("1978 Release").

<sup>202</sup> See MIAX PEARL 11(a) Request Letter, *supra* note 199.

<sup>195</sup> 15 U.S.C. 78f(b)(5).

<sup>196</sup> 15 U.S.C. 78f(b)(8).

<sup>197</sup> Many of MIAX Exchange's rules were approved at the time that MIAX Exchange's registration as a national securities exchange was granted. See MIAX Order, *supra* note 13.

<sup>198</sup> 15 U.S.C. 78k(a)(1).

<sup>199</sup> See Letter from Barbara J. Comly, EVP, General Counsel and Corporate Secretary, Miami Holdings, to Brent J. Fields, Secretary, Commission, and John

exchange member who is unaffiliated with the member initiating the order. The Commission has stated that the requirement is satisfied when automated exchange facilities, such as the MIAX PEARL trading system, are used, as long as the design of these systems ensures that members do not possess any special or unique trading advantages over non-members in handling their orders after transmitting them to the Exchange.<sup>206</sup> MIAX PEARL has represented that the design of its trading system ensures that no member has any special or unique trading advantage over non-members in the handling of its orders after transmitting its orders to MIAX PEARL.<sup>207</sup> Based on MIAX PEARL's representation, the Commission believes that the MIAX PEARL trading system satisfies this requirement.

Fourth, in the case of a transaction effected for an account with respect to which the initiating member or an associated person thereof exercises investment discretion, neither the initiating member nor any associated person thereof may retain any compensation in connection with effecting the transaction, unless the person authorized to transact business for the account has expressly provided otherwise by written contract referring to Section 11(a) of the Act and Rule 11a2-2(T).<sup>208</sup> MIAX PEARL members trading for covered accounts over which they exercise investment discretion

<sup>206</sup> In considering the operation of automated execution systems operated by an exchange, the Commission noted that while there is no independent executing exchange member, the execution of an order is automatic once it has been transmitted into each system. Because the design of these systems ensures that members do not possess any special or unique trading advantages in handling their orders after transmitting them to the exchange, the Commission has stated that executions obtained through these systems satisfy the independent execution requirement of Rule 11a2-2(T). See 1979 Release, *supra* note 203.

<sup>207</sup> See MIAX PEARL 11(a) Request Letter, *supra* note 199.

<sup>208</sup> 17 CFR 240.11a2-2(T)(a)(2)(iv). In addition, Rule 11a2-2(T)(d) requires a member or associated person authorized by written contract to retain compensation, in connection with effecting transactions for covered accounts over which such member or associated person thereof exercises investment discretion, to furnish at least annually to the person authorized to transact business for the account a statement setting forth the total amount of compensation retained by the member in connection with effecting transactions for the account during the period covered by the statement. See 17 CFR 240.11a2-2(T)(d). See also 1978 Release, *supra* note 201 (stating "[t]he contractual and disclosure requirements are designed to assure that accounts electing to permit transaction-related compensation do so only after deciding that such arrangements are suitable to their interests").

must comply with this condition in order to rely on the rule's exemption.<sup>209</sup>

#### D. Discipline and Oversight of Members

As noted above, one prerequisite for the Commission's grant of an exchange's application for registration is that a proposed exchange must be so organized and have the capacity to be able to carry out the purposes of the Act.<sup>210</sup> Specifically, an exchange must be able to enforce compliance by its members and persons associated with its members with the Act and the rules and regulations thereunder and the rules of the exchange.<sup>211</sup>

MIAX PEARL's rules codify MIAX PEARL's disciplinary jurisdiction over its members, thereby facilitating its ability to enforce its members' compliance with its rules and the federal securities laws.<sup>212</sup> MIAX PEARL's rules permit it to sanction members for violations of its rules and violations of any provision of the Exchange Act or the rules and regulations promulgated thereunder, by, among other things, expelling or suspending members; limiting members' activities, functions, or operations; fining or censuring members; suspending or barring a person from being associated with a member; or any other fitting sanction in accordance with MIAX rules.<sup>213</sup>

MIAX PEARL's disciplinary and oversight functions will be administered in accordance with Chapter X of the MIAX PEARL rules, which governs disciplinary actions. Unless delegated to another SRO pursuant to the terms of any effective 17d-2 plan,<sup>214</sup> MIAX PEARL regulatory staff (including regulatory staff of another SRO that may be acting on MIAX PEARL's behalf pursuant to a regulatory services agreement) will, among other things, investigate potential securities laws violations and initiate charges pursuant to MIAX PEARL rules.<sup>215</sup>

Upon a finding of probable cause of a violation within the disciplinary jurisdiction of MIAX PEARL and where further proceedings are warranted,<sup>216</sup>

<sup>209</sup> See MIAX PEARL 11(a) Request Letter, *supra* note 199.

<sup>210</sup> See 15 U.S.C. 78f(b)(1).

<sup>211</sup> See *id.*

<sup>212</sup> See MIAX PEARL Rule 1000.

<sup>213</sup> See *id.* See also MIAX Rule 1000, CBOE Rule 17.1(a), and ISE Rule 1600(a) (containing similar provisions).

<sup>214</sup> See *supra* Section III.B.3.c (concerning the 17d-2 plans to which MIAX PEARL has committed to join).

<sup>215</sup> See MIAX PEARL Rules 1002 and 1004. As noted above, MIAX PEARL has entered into an RSA with FINRA under which FINRA will perform certain regulatory functions on behalf of MIAX PEARL. See MIAX PEARL Rule 1015.

<sup>216</sup> See MIAX PEARL Rule 1004.

MIAX PEARL will conduct a hearing on disciplinary matters before a professional hearing officer<sup>217</sup> and two members of the Business Conduct Committee<sup>218</sup> (the "Panel").<sup>219</sup> The MIAX PEARL member (or their associated person) or the MIAX PEARL regulatory staff may petition for review of the decision of the Panel by the MIAX PEARL Board.<sup>220</sup> Any review would be conducted by the MIAX PEARL Board or a committee thereof composed of at least three Directors of the MIAX PEARL Board<sup>221</sup> (whose decision must be ratified by the MIAX PEARL Board) and such decision will be final.<sup>222</sup> In addition, the MIAX PEARL Board on its own motion may order review of a disciplinary decision.<sup>223</sup>

Appeals from any determination that impacts access to MIAX PEARL, such as termination or suspension of membership, will be instituted under, and governed by, the provisions in the Chapter XI of the MIAX PEARL Rules which incorporates by reference Chapter XI of the MIAX Exchange Rules. MIAX PEARL's Chapter XI applies to persons economically aggrieved by any of the following actions of MIAX PEARL including, but not limited to: (a) Denial of an application to become a Member; (b) barring a person from becoming associated with a Member; (c) limiting or prohibiting services provided by MIAX PEARL or services of any exchange member.<sup>224</sup>

<sup>217</sup> See MIAX PEARL Rule 1015, Interpretation and Policy .01.

<sup>218</sup> See MIAX PEARL By-Laws, Article IV, Section 4.7.

<sup>219</sup> See MIAX PEARL Rule 1006.

<sup>220</sup> See MIAX PEARL Rule 1010.

<sup>221</sup> Specifically, the Chairman of the MIAX PEARL Board, with the approval of the Board, shall appoint an Appeals Committee to preside over all appeals related to disciplinary and adverse action determinations. See note 46 and accompanying text (detailing the composition of the Appeals Committee). If the Independent Director serving on the Appeals Committee recuses himself or herself from an appeal, due to conflict of interest or otherwise, the Independent Director may be replaced by a Non-Industry Director for purposes of the applicable appeal if there is no other Independent Director able to serve as the replacement. See MIAX PEARL By-Laws, Article IV, Section 4.5(d). See also MIAX Exchange Amended and Restated By-Laws, Article IV, Section 4.5(d).

<sup>222</sup> See MIAX PEARL Rule 1010.

<sup>223</sup> See *id.*

<sup>224</sup> See MIAX PEARL Rule 1100 (which incorporates by reference MIAX Exchange Rule 1100). As noted above, MIAX PEARL has entered into a RSA with FINRA under which FINRA will perform certain regulatory functions on behalf of MIAX PEARL. MIAX PEARL may perform some or all of the functions specified in the Chapter XI of the MIAX PEARL Rules, which incorporates by reference Chapter XI of the MIAX Exchange Rules. See *supra* note 110. See also MIAX PEARL Rule 1106 (which incorporates by reference MIAX Exchange Rule 1106).



Any person aggrieved by an action of MIAX PEARL within the scope of Chapter XI may file a written application to be heard within thirty days<sup>225</sup> after such action has been taken.<sup>226</sup> Applications for hearing and review will be referred to the Business Conduct Committee, which will appoint a hearing panel of no less than three members of such Committee.<sup>227</sup> The decision of the hearing panel made pursuant to Chapter XI of the MIAX PEARL rules is subject to review by the MIAX PEARL Board, either on its own motion within 30 days after issuance of the decision, or upon written request submitted by the applicant or the President of MIAX PEARL within 15 days after issuance of the decision.<sup>228</sup> The review would be conducted by the MIAX PEARL Board or a committee of the MIAX PEARL Board composed of at least three directors.<sup>229</sup>

The Commission finds that MIAX PEARL's proposed disciplinary and oversight rules and structure, as well as its proposed process for persons economically aggrieved by certain MIAX PEARL actions, are consistent with the requirements of Sections 6(b)(6) and 6(b)(7) of the Act<sup>230</sup> in that they provide fair procedures for the disciplining of members and persons

associated with members. The Commission further finds that the proposed MIAX PEARL rules are designed to provide MIAX PEARL with the ability to comply, and with the authority to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations thereunder, and the rules of MIAX PEARL.<sup>231</sup> The Commission notes that MIAX PEARL's proposed disciplinary and oversight rules and structures are similar to the rules of other exchanges.<sup>232</sup>

#### E. Listing Requirements

MIAX PEARL does not intend to initially list or trade common stock or non-option securities of operating companies but rather intends to initially only trade option contracts that meet the options listing standards of the Exchange.<sup>233</sup>

The Commission finds that MIAX PEARL's proposed initial and continued listing rules are consistent with the Act, including Section 6(b)(5),<sup>234</sup> in that they are designed to protect investors and the public interest, prevent fraudulent and manipulative acts and practices, and promote just and equitable principles of trade. Before beginning operation, MIAX PEARL will need to become a participant in the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act of 1934 ("OLPP").<sup>235</sup> In addition, before beginning operation, MIAX PEARL will need to become a participant in the Options Clearing Corporation.

#### IV. Exemption From Section 19(b) of the Act With Regard to MIAX Exchange, CBOE, New York Stock Exchange ("NYSE") and FINRA Rules Incorporated by Reference

MIAX PEARL proposes to incorporate by reference certain MIAX Exchange,

CBOE, NYSE and FINRA rules.<sup>236</sup> Thus, for certain MIAX PEARL rules, MIAX PEARL members will comply with a MIAX PEARL rule by complying with the referenced MIAX Exchange, CBOE, NYSE and FINRA rules.

In connection with the proposal to incorporate MIAX Exchange, CBOE, NYSE and FINRA rules by reference, MIAX PEARL requests, pursuant to Rule 240.0-12 under the Act,<sup>237</sup> an exemption under Section 36 of the Act from the rule filing requirements of Section 19(b) of the Act for changes to the MIAX PEARL rules that are effected solely by virtue of a change to a cross-referenced MIAX Exchange, CBOE, NYSE or FINRA rule.<sup>238</sup> MIAX PEARL proposes to incorporate by reference categories of rules, rather than individual rules within a category, that are not trading rules. In addition, MIAX PEARL agrees to provide written notice to its members whenever MIAX Exchange, CBOE, NYSE or FINRA proposes a change to a cross-referenced rule<sup>239</sup> and whenever any such proposed changes are approved by the Commission or otherwise become effective.<sup>240</sup>

Using the authority under Section 36 of the Act, the Commission previously exempted certain SROs from the requirement to file proposed rule changes under Section 19(b) of the Act.<sup>241</sup> The Commission is hereby

<sup>236</sup> Specifically, MIAX PEARL proposes to incorporate by reference the following MIAX Exchange Rules: Chapter III (Business Conduct), Chapter VII (Exercises and Deliveries), Chapter VIII (Records, Reports and Audits), Chapter IX (Summary Suspension), Chapter XI (Hearings, Review and Arbitration), Chapter XIII (Doing Business With the Public), Chapter XIV (Order Protection, Locked and Crossed Markets), Chapter XV (Margins), Chapter XVI (Net Capital Requirements). The following rules are cross-referenced in the MIAX Exchange rules: MIAX Exchange Rule 1107 (Arbitration) incorporates by reference the Rule 12000 Series and Rule 13000 Series of the FINRA Manual and FINRA Rule 2268; MIAX Exchange Rule 1321 (Transfer of Accounts) cross-references FINRA Rule 11870; MIAX Exchange Rule 1502 (Margin Requirements) cross-references the CBOE and NYSE rules concerning initial and maintenance margin requirements that may be in effect from time to time.

<sup>237</sup> 17 CFR 240.0-12.

<sup>238</sup> See Letter from Barbara J. Comly, EVP, General Counsel and Corporate Secretary, Miami Holdings, to Brent J. Fields, Secretary, Commission, dated November 4, 2016.

<sup>239</sup> See *id.*

<sup>240</sup> MIAX PEARL will provide such notice through a posting on the same Web site location where MIAX PEARL posts its own rule filings pursuant to Rule 19b-4 under the Act, within the required time frame. The Web site posting will include a link to the location on the MIAX Exchange, CBOE, NYSE or FINRA Web site where MIAX Exchange, CBOE, NYSE or FINRA's proposed rule change is posted. See *id.*

<sup>241</sup> See, e.g., Mercury Order, *supra* note 27, BATS Order, *supra* note 13, C2 Order, *supra* note 75,

<sup>225</sup> An applicant may file for an extension of time as allowed by the Chairman of the Business Conduct Committee within thirty days of MIAX PEARL's action. An application for an extension will be ruled upon by the Chairman of the Business Conduct Committee, and his ruling will be given in writing. Rulings on applications for extensions of time are not subject to appeal. See MIAX PEARL Rule 1101 (which incorporates by reference MIAX Exchange Rule 1101).

<sup>226</sup> The application must include: (1) The action for which review is sought; (2) the specific reasons for the applicant's exception to such action; (3) the relief sought; and (4) whether the applicant intends to submit any documents, statements, arguments or other material in support of the application, with a description of any such materials. See MIAX PEARL Rule 1101(a) (which incorporates by reference MIAX Exchange Rule 1101(a)).

<sup>227</sup> See MIAX PEARL Rule 1102 (which incorporates by reference MIAX Exchange Rule 1102). The decision of the hearing panel will be made in writing and sent to the parties to the proceedings. See MIAX PEARL Rule 1103(d) (which incorporates by reference MIAX Exchange Rule 1103(d)).

<sup>228</sup> See MIAX PEARL Rule 1104(a) (which incorporates by reference MIAX Exchange Rule 1104(a)). The MIAX PEARL Board, or a committee of the MIAX PEARL Board, will have sole discretion to grant or deny either request. See *id.*

<sup>229</sup> See MIAX PEARL Rule 1104(b) (which incorporates by reference MIAX Exchange Rule 1104(b)). The MIAX PEARL Board or its designated committee may affirm, reverse, or modify in whole or in part, the decision of the hearing panel. The decision of the MIAX PEARL Board or its designated committee would be final, and must be in writing and would be sent to the parties to the proceeding. See MIAX PEARL Rule 1104(c) (which incorporates by reference MIAX Exchange Rule 1104(c)).

<sup>230</sup> 15 U.S.C. 78f(b)(6) and (b)(7), respectively.

<sup>231</sup> See Section 6(b)(1) of the Act, 15 U.S.C. 78f(b)(1).

<sup>232</sup> See, e.g., ISE Mercury Order, *supra* note 27, ISE Gemini Order, *supra* note 27 and MIAX Order, *supra* note 13.

<sup>233</sup> See MIAX PEARL Form 1 Application, Exhibit H. MIAX PEARL's listing rules, including the criteria for the underlying securities of the options to be traded, are substantially similar to the listing rules of MIAX Exchange. See MIAX PEARL Rules Chapter IV (Option Contracts Traded on the Exchange); MIAX Exchange Rules Chapter IV. See also ISE Gemini LLC Rule 500 Series and BOX Options Exchange LLC Rule 5000 Series.

<sup>234</sup> 15 U.S.C. 78f(b)(5).

<sup>235</sup> 15 U.S.C. 78k-1(a)(3)(B).



granting MIAX PEARL's request for exemption, pursuant to Section 36 of the Act, from the rule filing requirements of Section 19(b) of the Act with respect to the rules that MIAX PEARL proposes to incorporate by reference. The exemption is conditioned upon MIAX PEARL providing written notice to MIAX PEARL members whenever MIAX Exchange, CBOE, NYSE or FINRA proposes to change an incorporated by reference rule and when the Commission approves any such changes. The Commission believes that the exemption is appropriate in the public interest and consistent with the protection of investors because it will promote more efficient use of Commission's and SROs' resources by avoiding duplicative rule filings based on simultaneous changes to identical rule text sought to be implemented by more than one SRO.

## V. Conclusion

*It is ordered* that the application of MIAX PEARL for registration as a national securities exchange be, and it hereby is, granted.

*It is furthered ordered* that operation of MIAX PEARL is conditioned on the satisfaction of the requirements below:

A. *Participation in National Market System Plans Relating to Options Trading.* MIAX PEARL must join: (1) The Plan for the Reporting of Consolidated Options Last Sale Reports and Quotation Information (Options Price Reporting Authority); (2) the OLPP; (3) the Linkage Plan; (4) the Plan of the Options Regulatory Surveillance Authority; and (5) the Plan Governing the Consolidated Audit Trail;

B. *Participation in Multiparty Rule 17d-2 Plans.* MIAX PEARL must become a party to the multiparty Rule 17d-2 agreements concerning options sales practice regulation and market surveillance, and covered Regulation NMS rules;

C. *Participation in the Options Clearing Corporation.* MIAX PEARL must become an Options Clearing Corporation participant exchange; and

D. *Participation in the Intermarket Surveillance Group.* MIAX PEARL must join the Intermarket Surveillance Group.

*It is further ordered*, pursuant to Section 36 of the Act,<sup>242</sup> that MIAX PEARL shall be exempted from the rule filing requirements of Section 19(b) of the Act with respect to the MIAX Exchange, CBOE, NYSE and FINRA rules that MIAX PEARL proposes to incorporate by reference, subject to the

conditions specified in this order that MIAX PEARL provide written notice to MIAX PEARL members whenever MIAX Exchange, CBOE, NYSE or FINRA proposes to change an incorporated by reference rule and when the Commission approves any such changes.

By the Commission.

**Brent J. Fields,**

*Secretary.*

[FR Doc. 2016-30538 Filed 12-19-16; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79545; File No. SR-Phlx-2016-118]

### Self-Regulatory Organizations; NASDAQ PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 3317 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

December 14, 2016.

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> notice is hereby given that on November 30, 2016, NASDAQ PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Phlx Rule 3317 to modify the Web site data publication requirements relating to the Regulation NMS Plan to Implement a Tick Size Pilot Program ("Plan") and to clarify a provision related to the reporting of certain Market Maker profitability data. Phlx also proposes to amend Rule 3317(b)(5) to clarify the timing and format of publication of data related to Market Maker registration.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqphlx.cchwallstreet.com/>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

##### 1. Purpose

On August 25, 2014, Phlx and several other self-regulatory organizations (the "Participants") filed with the Commission, pursuant to Section 11A of the Act<sup>3</sup> and Rule 608 of Regulation NMS thereunder,<sup>4</sup> the Plan to Implement a Tick Size Pilot Program.<sup>5</sup> The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.<sup>6</sup> The Plan was published for comment in the **Federal Register** on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.<sup>7</sup> The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.<sup>8</sup> On November 6, 2015, the SEC exempted the Participants from implementing the Pilot until October 3, 2016.<sup>9</sup> Under the revised Pilot implementation date, the Pre-Pilot data collection period commenced on April 4, 2016. On September 13, 2016, the SEC exempted the Participants from the requirement to fully implement the Pilot on October 3, 2016, to permit the Participants to implement the pilot on a phased-in basis, as described in the Participants' exemptive request.<sup>10</sup>

<sup>3</sup> 15 U.S.C. 78k-1.

<sup>4</sup> 17 CFR 242.608.

<sup>5</sup> See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

<sup>6</sup> See Securities Exchange Act Release No. 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

<sup>7</sup> See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) ("Approval Order").

<sup>8</sup> See Approval Order at 27533 and 27545.

<sup>9</sup> See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

<sup>10</sup> See Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Eric Swanson, EVP, General

Nasdaq Order, *supra* note 27, and NOM Approval Order, *supra* note 112.

<sup>242</sup> 15 U.S.C. 78mm.

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

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