

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93811; File No. SR-EMERALD-2021-44]

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

December 17, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 10, 2021, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing a proposal to amend the Exchange’s Fee Schedule (“Fee Schedule”) to establish fees for the market data product known as MIAX Emerald Complex Top of Market (“cToM”).

The text of the proposed rule change is available on the Exchange’s website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX’s principal office, and at the Commission’s Public Reference Room.

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

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

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

1. Purpose

The Exchange proposes to amend Section (6)(a) of the Fee Schedule to establish fees for the cToM data product. The Exchange initially filed this proposal on June 30, 2021 with the proposed fees to be effective beginning July 1, 2021 (“First Proposed Rule Change”).³ The First Proposed Rule Change was published for comment in the **Federal Register** on July 15, 2021.⁴ Although the Commission did not receive any comment letters on the First Proposed Rule Change, on August 27, 2021, the Commission issued its Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Establish Fees for the Exchanges’ cToM Market Data Products (relating to the First Proposed Rule Change and a similar filing by the Exchange’s affiliate, Miami International Securities Exchange, LLC (“MIAX”), to also adopt cToM fees).⁵ The Exchange withdrew the First Proposed Rule Change on September 30, 2021⁶ and re-submitted the proposal, with the proposed fee changes being immediately effective (“Second Proposed Rule Change”).⁷ The Second Proposed Rule Change provided additional justification for the proposed fee changes and addressed comments provided by the Commission Staff. On October 14, 2021, the Exchange withdrew the Second Proposed Rule Change and submitted its proposal to adopt cToM fees to again provide additional justification for the proposed fee changes and address comments provided by the Commission Staff (“Third Proposed Rule Change”).⁸ The Third Proposed Rule Change was published for comment in the **Federal Register** on November 1, 2021.⁹ Although the Commission did not again receive any comment letters on the Third Proposed Rule Change, the Exchange withdrew the Third Proposed

Rule Change on December 10, 2021 and now submits this proposal for immediate effectiveness (“Fourth Proposed Rule Change”). This Fourth Proposed Rule Change meaningfully attempts to provide additional justification and explanation for the proposed fee changes in response to a telephone conversation with Commission Staff on December 7, 2021 relating to the Third Proposed Rule Change.

Background

The Exchange previously adopted rules governing the trading of Complex Orders¹⁰ on the Emerald System¹¹ in 2018,¹² ahead of the Exchange’s planned launch, which took place on March 1, 2019. Shortly thereafter, the Exchange also adopted the market data product cToM and expressly waived fees for cToM to provide an incentive to prospective market participants to subscribe to that market data feed.¹³ The Exchange has not charged fees to cToM subscribers in the nearly three years since it was first available for subscription.

In summary, cToM provides subscribers with the same information as the MIAX Emerald Top of Market (“ToM”) data product as it relates to the Strategy Book,¹⁴ *i.e.*, the Exchange’s best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange. However, cToM provides subscribers with the following additional information that is not included in ToM: (i) The identification of the complex strategies currently trading on the Exchange; (ii) complex strategy last sale information; and (iii) the status of securities underlying the complex strategy (*e.g.*, halted, open, or resumed). cToM is a distinct market data product from ToM. ToM subscribers are not required to subscribe

¹⁰ See Exchange Rule 518(a)(5) for the definition of Complex Orders.

¹¹ The term “System” means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

¹² See Securities Exchange Act Release Nos. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (In the Matter of the Application of MIAX EMERALD, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission); and 85345 (March 18, 2019), 84 FR 10848 (March 22, 2019) (SR-EMERALD-2019-13) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 518, Complex Orders).

¹³ See Securities Exchange Act Release No. 85207 (February 27, 2019), 84 FR 7963 (March 5, 2019) (SR-EMERALD-2019-09) (providing a complete description of the cToM data feed).

¹⁴ The “Strategy Book” is the Exchange’s electronic book of complex orders and complex quotes. See Exchange Rule 518(a)(17).

³ See Securities Exchange Act Release No. 92358 (July 9, 2021), 86 FR 37361 (July 15, 2021) (SR-EMERALD-2021-21).

⁴ *Id.*

⁵ See Securities Exchange Act Release No. 92789 (August 27, 2021), 86 FR 49364 (September 2, 2021) (SR-MIAX-2021-28, SR-EMERALD-2021-21) (the “Suspension Order”).

⁶ See Securities Exchange Act Release No. 93471 (October 29, 2021), 86 FR 60947 (November 4, 2021).

⁷ See SR-EMERALD-2021-32.

⁸ Securities Exchange Act Release No. 93427 (October 26, 2021), 86 FR 60310 (November 1, 2021) (SR-EMERALD-2021-34).

⁹ *Id.*

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

to cToM, and cToM subscribers are not required to subscribe to ToM.¹⁵

Proposal

The Exchange now proposes to amend Section (6)(a) of the Fee Schedule to charge monthly fees to Distributors¹⁶ of cToM. Specifically, the Exchange proposes to assess Internal Distributors \$1,250 per month and External Distributors \$1,750 per month for the cToM data feed.¹⁷ The Exchange notes that the proposed monthly cToM fees for Internal and External Distributor are the same prices that the Exchange charges for its ToM data product and are identical to the prices the Exchange's affiliate, MIAX, proposes to charge for its cToM product.

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

number of trading days remaining in the affected calendar month as of the date on which they have been credentialed to use cToM in the production environment, divided by the total number of trading days in the affected calendar month.

The Exchange believes that other exchange's fees for complex market data are useful examples and provides the below table for comparison purposes only to show how the Exchange's proposed fees compare to fees currently charged by other options exchanges for similar data. As shown by the below table, the Exchange's proposed fees similar to or less than fees charged for similar data products provided by other options exchanges.

Exchange	Monthly fee
MIAX Emerald (as proposed)	\$1,250—Internal Distributor. \$1,750—External Distributor.
NYSE American, LLC ("Amex") ¹⁸	\$1,500 Access Fee. \$1,000 Redistribution Fee.
NYSE Arca, Inc. ("Arca") ¹⁹	\$1,500 Access Fee. \$1,000 Redistribution Fee.
NASDAQ PHLX LLC ("PHLX") ²⁰	\$3,000—Internal Distributor. \$3,500—External Distributor.

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

cToM Content Is Available From Alternative Sources

cToM is also not the exclusive source for Complex Order information from the Exchange and market participants may choose to subscribe to the Exchange's other data products to receive such information. It is a business decision of market participants whether to subscribe to the cToM data product or not. Market participants that choose not

to subscribe to cToM can derive much, if not all, of the same information provided in the cToM feed from other Exchange sources, including, for example, the MIAX Emerald Order Feed ("MOR").²¹ The following cToM information is provided to subscribers of MOR: The Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange; the identification of the complex strategies currently trading on the Exchange; and the status of securities underlying the complex strategy (e.g., halted, open, or resumed). In addition to the cToM information contained in MOR, complex strategy last sale information can be derived from the Exchange's ToM feed. Specifically, market participants may deduce that last sale information for multiple trades in related options series that are disseminated via the ToM feed

with the same timestamp are likely part of a Complex Order transaction and last sale.

Implementation

The proposed rule change is immediately effective.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act²² in general, and furthers the objectives of Section 6(b)(4) of the Act²³ in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the

¹⁵ See *supra* note 13.

¹⁶ A "Distributor" of MIAX Emerald data is any entity that receives a feed or file of data either directly from MIAX Emerald or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All Distributors are required to execute a MIAX Emerald Distributor Agreement. See Section (6)(a) of the Fee Schedule.

¹⁷ The Exchange also proposes to make a minor related change to remove the phrase "(as applicable)" from the explanatory paragraph in Section (6)(a).

¹⁸ See NYSE American Options Proprietary Market Data Fees, American Options Complex Fees,

at https://www.nyse.com/publicdocs/nyse/data/NYSE_American_Options_Proprietary_Data_Fee_Schedule.pdf.

¹⁹ See NYSE Arca Options Proprietary Market Data Fees, Arca Options Complex Fees, at https://www.nyse.com/publicdocs/nyse/data/NYSE_Arca_Options_Proprietary_Data_Fee_Schedule.pdf.

²⁰ See PHLX Price List—U.S. Derivatives Data, PHLX Orders Fees, at <http://www.nasdaqtrader.com/Trader.aspx?id=DPPriceListOptions#PHLX>.

²¹ See MIAX website, Market Data & Offerings, at <https://www.miaxoptions.com/market-data-offerings> (last visited December 10, 2021). In

general, MOR provides real-time ultra-low [sic] latency updates on the following information: New Simple Orders added to the MIAX Emerald Order Book; updates to Simple Orders resting on the MIAX Emerald Order Book; new Complex Orders added to the Strategy Book (i.e., the book of Complex Orders); updates to Complex Orders resting on the Strategy Book; MIAX Emerald listed series updates; MIAX Emerald Complex Strategy definitions; the state of the MIAX Emerald System; and MIAX Emerald's underlying trading state.

²² 15 U.S.C. 78f(b).

²³ 15 U.S.C. 78f(b)(4) and (5).

mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Proposed Fees Will Not Result in a Supra-Competitive Profit

The Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange sets certain non-transaction fees, including market data fees. The Exchange believes that it is important to demonstrate that these fees are based on its costs to provide these products and reasonable business needs.

In its Guidance, the Commission Staff stated that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”²⁴ The Commission Staff Guidance further states that, “. . . even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”²⁵ In its Guidance, the Commission staff further states that, “[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO’s costs, or will not result in excessive pricing or supracompetitive profit, specific information, including quantitative information, should be provided to support that argument.”²⁶ The Exchange does not assert that the proposed fees are constrained by competitive forces. Rather, the Exchange asserts that the proposed fees are reasonable because they will permit recovery of the Exchange’s costs in providing cToM data and will not result in the Exchange generating a supra-competitive profit.

The Guidance defines “supra-competitive profit” as “profits that exceed the profits that can be obtained

in a competitive market.”²⁷ The Commission Staff further states in the Guidance that “the SRO should provide an analysis of the SRO’s baseline revenues, costs, and profitability (before the proposed fee change) and the SRO’s expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question.”²⁸ The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the proposed fees are reasonable and do not result in a “supra-competitive”²⁹ profit. The Exchange believes that it is important to demonstrate that the proposed fees are based on its costs and reasonable business needs. The Exchange believes the proposed fees will allow the Exchange to offset expenses the Exchange has and will incur, and that the Exchange provides sufficient transparency (described below) into the costs and revenue underlying the proposed fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the proposed fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the proposed fees. As a result of this analysis, the Exchange believes the proposed fees are fair and reasonable as a form of cost recovery plus present the possibility of a reasonable return for the Exchange’s aggregate costs of offering cToM data, which has been offered for free for nearly three years.

The proposed fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs to provide cToM data, using what it believes to be a conservative methodology (*i.e.*, that strictly considers only those costs that are most clearly directly related to the provision and maintenance of cToM data) to estimate such costs,³⁰ as well as the relative costs of providing and maintaining cToM data feeds, and set fees that are designed to cover its costs with a limited return in excess of such costs. However, as discussed more fully below, such fees may also result in the Exchange recouping less than all of its costs of providing and maintaining

cToM data feeds because of the uncertainty of forecasting subscriber decision making with respect to firms’ needs for cToM data and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange’s costs to provide cToM data associated with the proposed fees, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange’s general expense ledger to determine whether each such expense relates to the proposed fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the cToM data product associated with the proposed fees.

The Exchange also provides detailed information regarding the Exchange’s cost allocation methodology—namely, information that explains the Exchange’s rationale for determining that it was reasonable to allocate certain expenses described in this filing towards the cost to the Exchange to provide the services associated with the proposed fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of services associated with the proposed fees. This analysis included discussions with each Exchange department head to determine the expenses that support services associated with the proposed fees. Once the expenses were identified, the Exchange department heads, with the assistance of the Exchange’s internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing services for the proposed fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide services associated with the proposed fees. For the avoidance of doubt, no expense amount was allocated twice.

To determine the Exchange’s projected revenue associated with the proposed fees, the Exchange analyzed the number of Members and non-Members currently subscribing to the cToM data feeds and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing June 2021, the monthly billing cycle prior to the proposed fees going into effect, and compared it to its expenses for that month. As discussed below, the Exchange does not believe it is appropriate to factor into its analysis future revenue growth or decline into its projections for purposes of these

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ For example, the Exchange only included the costs associated with providing and supporting cToM data feeds and excluded from its cost calculations any cost not directly associated with providing and maintaining such cToM data feeds. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining cToM data feeds.

²⁴ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> (the “Guidance”).

²⁵ *Id.*

²⁶ *Id.*

calculations, given the uncertainty of such projections due to the continually changing market data needs of market participants and potential increase in internal and third party expenses. The Exchange is presenting its revenue and expense associated with the proposed fees in this filing in a manner that is consistent with how the Exchange presents its revenue and expense in its Audited Unconsolidated Financial Statements. The Exchange's most recent Audited Unconsolidated Financial Statement is for 2020. However, since the revenue and expense associated with the proposed fees were not in place in 2020 or for the first six months of 2021, the Exchange believes its 2020 Audited Unconsolidated Financial Statement is not representative of its current total annualized revenue and costs associated with the proposed fees. Accordingly, the Exchange believes it is more appropriate to analyze the proposed fees utilizing its 2021 revenue and costs, as described herein, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements. Based on this analysis, the Exchange believes that the proposed fees are reasonable because they will allow the Exchange to recover its costs associated with providing services related to the proposed fees and not result in excessive pricing or supra-competitive profit. Since 2019, when the Exchange launched operations with Complex Order functionality, the Exchange has spent time and resources building out various Complex Order functionality in its System to provide better trading strategies and risk functionality for market participants in order to better compete with other exchanges' complex functionality and similar data products focused on complex orders.³¹ The cToM data product allows market participants to better utilize the Exchange's Complex Order functionality by providing insights into the Exchange's Complex Order flow. The Exchange notes that no market participant ceased subscribing to the cToM feed since July 1, 2021, the

date on which the fees became effective when proposed in the First Proposed Rule Change.

As outlined in more detail below, the Exchange projects that its annualized expense for 2021 to provide cToM data to be approximately \$202,657 per annum or an average of \$16,888 per month. The Exchange implemented the proposed fees on July 1, 2021 in the First Proposed Rule Change. For June 2021, prior to the proposed fees, Exchange Members and non-Members subscribed to a total of 14 cToM data feeds for which the Exchange charged \$0, as it has for the past three years. This resulted in a loss of approximately \$16,888 for that month. For the month of November 2021, which includes the proposed fees, Exchange Members and non-Members purchased 14 cToM data feeds, for which the Exchange charged approximately \$17,500 for that month. This resulted in a profit of \$612 for that month (a margin of approximately 3.5%). The Exchange cautions that this margin may fluctuate from month to month based on the uncertainty of predicting how many cToM data feeds may be purchased from month to month as Members and non-Members are able to add and drop subscriptions at any time based on their own business decisions. This margin may also decrease due to the significant inflationary pressure on capital items that the Exchange needs to purchase to maintain the Exchange's technology and systems.³² The Exchange has been subject to price increases upwards of 30% on network equipment due to supply chain shortages. This, in turn, results in higher overall costs for ongoing system maintenance, but also to purchase the items necessary to ensure ongoing system resiliency, performance, and determinism. These costs are expected to continue to go up as the U.S. economy continues to struggle with supply chain and inflation related issues.

Further, the Exchange chose to provide cToM data for free for the past three years to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems and market data products. This

resulted in the Exchange forgoing revenue it could have generated from assessing any fees. The Exchange could have sought to charge some fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a free exchange product to the options industry, which resulted in no initial revenues, going on three years. The Exchange now proposes to amend its fee structure to enable it to continue to maintain and improve its overall market and systems while also providing a highly reliable and deterministic trading system to the marketplace, complete with robust market data products, including cToM.

As mentioned above, the Exchange projects that its annualized expense for 2021 to provide cToM data to be approximately \$202,657 per annum or an average of \$16,888 per month and that these costs are expected to increase not only due to anticipated significant inflationary pressure, but also periodic fee increases by third parties.³³ The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange and various Exchange products. The Exchange incurs technology expense related to establishing and maintaining Information Security services, enhanced network monitoring and customer reporting, as well as Regulation SCI mandated processes, associated with its network technology. While some of the expense is fixed, much of the expense is not fixed, and thus increases the cost to the Exchange to provide services associated with the proposed fees. For example, new Members to the Exchange may require the purchase of additional hardware to support those Members as well as enhanced monitoring and reporting of customer performance that the Exchange and its affiliates provide. Further, as the total number Members increases, the Exchange and its affiliates may need to increase their data center footprint and consume more power, resulting in increased costs charged by their third-party data center provider. Accordingly, the cost to the Exchange and its affiliates to provide services and

³¹ See Securities Exchange Act Release Nos. 79405 (November 28, 2016), 81 FR 87086 (December 2, 2016) (SR-MIAX-2016-44) (amendment to clarify the manner in which the System allocates contracts at the end of a Complex Auction); 80089 (February 22, 2017), 82 FR 12153 (February 28, 2017) (SR-MIAX-2017-06) (adopting the Complex MIAX Options Price Collar, an additional price protection feature); 81229 (July 27, 2017), 82 FR 36023 (August 2, 2017) (SR-MIAX-2017-34) (amendment to ensure price and trade protections apply to Complex Orders); 89085 (June 17, 2020), 85 FR 37719 (June 23, 2020) (SR-MIAX-2020-16) (adopting new order type, Complex Attributable Order).

³² See "Supply chain chaos is already hitting global growth. And it's about to get worse", by Holly Ellyatt, CNBC, available at <https://www.cnbc.com/2021/10/18/supply-chain-chaos-is-hitting-global-growth-and-could-get-worse.html> (October 18, 2021); and "There will be things that people can't get, at Christmas, White House warns" by Jarrett Renshaw and Trevor Hunnicut, Reuters, available at <https://www.reuters.com/world/us/americans-may-not-get-some-christmas-treats-white-house-officials-warn-2021-10-12/> (October 12, 2021).

³³ For example, on October 20, 2021, ICE Data Services announced a 3.5% price increase effective January 1, 2022 for most services. The price increase by ICE Data Services includes their Secure Financial Transaction Infrastructure ("SFTI") network, which is relied on by a majority of market participants, including the Exchange. See email from ICE Data Services to the Exchange, dated October 20, 2021. The Exchange further notes that on October 22, 2019, the Exchange was notified by ICE Data Services that it was raising its fees charged to the Exchange by approximately 11% for the SFTI network.

products to its Members is not fixed. The Exchange believes the proposed fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing certain Exchange products.

The Exchange only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover all of its expenses from these four primary sources of revenue and cost recovery mechanisms. Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019.³⁴ This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and market data products or provide them at a very marginal cost, which has not been profitable to the Exchange, but beneficial to the overall options industry. This resulted in the Exchange forgoing revenue it could have generated from assessing any amount of fees.

The Exchange believes that the proposed fees are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total annual expense that the Exchange projects to incur in connection with providing these services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the proposed fees. As mentioned above, for 2021,³⁵ the total annual expense for providing the services associated with the proposed fees is projected to be approximately \$202,657, or approximately \$16,888 per month. This projected total annual expense is comprised of the following, all of which are directly related to the services associated with the proposed fees: (1) Third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the

proposed fees.³⁶ As noted above, the Exchange believes it is more appropriate to analyze the proposed fees utilizing its 2021 revenue and costs, which utilize the same presentation methodology as set forth in the Exchange's previously-issued Audited Unconsolidated Financial Statements.³⁷ The \$202,657 projected total annual expense is directly related to the services associated with the proposed fees, and not any other product or service offered by the Exchange. It does not include general costs of operating matching engines and other trading technology. No expense amount was allocated twice.

As discussed above, the Exchange conducted an extensive cost review in which the Exchange analyzed nearly every expense item in the Exchange's general expense ledger (this includes over 150 separate and distinct expense items) to determine whether each such expense relates to the services associated with the proposed fees, and if such expense did so relate, what portion (or percentage) of such expense actually supports those services, and thus bears a relationship that is, "in nature and closeness," directly related to those services. The sum of all such portions of expenses represents the total cost of the Exchange to provide services associated with the proposed fees.

External Expense Allocations

For 2021, total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the services associated with the proposed fees, is projected to be \$4,160. This includes, but is not limited to, a portion of the fees paid to: (1) Equinix, for data center services, for the primary, secondary, and disaster recovery locations of the Exchange's trading system infrastructure; (2) Zayo Group Holdings, Inc. ("Zayo") for network services (fiber and bandwidth products and services) linking the Exchange's

office locations in Princeton, New Jersey and Miami, Florida, to all data center locations; and (3) various other hardware and software providers (including Dell and Cisco, which support the production environment in which Members connect to the network to trade, receive market data, etc.). For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the services associated with the proposed fees.

For clarity, only a portion of all fees paid to such third-parties is included in the third-party expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the market data product associated with the proposed fees. Further, the Exchange notes that, with respect to the expenses included herein, those expenses only cover the MIAX market; expenses associated with MIAX PEARL, LLC ("MIAX Pearl") for its options and equities markets and MIAX, are accounted for separately and are not included within the scope of this filing. As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Further, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations, which, in turn, resulted in a revised percentage allocations in this filing.

The Exchange believes it is reasonable to allocate such third-party expense described above towards the total cost to the Exchange to provide the services associated with the proposed fees. In particular, the Exchange believes it is reasonable to allocate the identified portion of the Equinix expense because Equinix operates the data centers (primary, secondary, and disaster recovery) that host the Exchange's network infrastructure. This includes, among other things, the necessary storage space, which continues to expand and increase in cost, power to operate the network infrastructure, and cooling apparatuses to ensure the Exchange's network infrastructure maintains stability. Without these

³⁴ The Exchange has incurred a cumulative loss of \$22 million since its inception in 2019 to 2020, the last year for which the Exchange's Form 1 data is available. See Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed July 28 [sic], 2021, available at <https://sec.report/Document/999999997-21-004557/>.

³⁵ The Exchange has not yet finalized its 2021 year end results.

³⁶ The percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates.

³⁷ For example, the Exchange previously noted that all third-party expense described in its prior fee filing was contained in the information technology and communication costs line item under the section titled "Operating Expenses Incurred Directly or Allocated From Parent," in the Exchange's 2019 Form 1 Amendment containing its financial statements for 2018. See Securities Exchange Act Release No. 87877 (December 31, 2019), 85 FR 738 (January 7, 2020) (SR-EMERALD-2019-39). Accordingly, the third-party expense described in this filing is attributed to the same line item for the Exchange's 2021 Form 1 Amendment, which will be filed in 2022.

services from Equinix, the Exchange would not be able to operate and support the network and provide the cToM product associated with the proposed fees to its Members, non-Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the cToM product associated with the proposed fees, only that portion which the Exchange identified as being specifically mapped to providing the cToM product associated with the proposed fees, approximately 0.20% of the total applicable Equinix expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM product associated with the proposed fees, and not any other service, as supported by its cost review.³⁸

The Exchange believes it is reasonable to allocate the identified portion of the Zayo expense because Zayo provides the internet, fiber and bandwidth connections with respect to the network, linking the Exchange with its affiliates, MIAx Pearl and MIAx, as well as the data center and disaster recovery locations. As such, all of the trade data, including the billions of messages each day per exchange, flow through Zayo's infrastructure over the Exchange's network. Without these services from Zayo, the Exchange would not be able to operate and support the network and provide the cToM data associated with the proposed fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the cToM data associated with the proposed fees, only the portion which the Exchange identified as being specifically mapped to providing the cToM data associated with the proposed fees, approximately 0.20% of the total applicable Zayo expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM data associated with the proposed fees, and not any other service, as supported by its cost review.³⁹

The Exchange did not allocate any expense associated with the proposed

fees towards SFTI and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) because the MIAx Emerald architecture takes advantage of an advance in design to eliminate the need for a market data distribution gateway layer. The computation and dissemination via an API is done solely within the match engine environment and is then delivered via the member and non-member connectivity infrastructure. This architecture delivers a market data system that is more efficient both in cost and performance. Accordingly, the Exchange determined not to allocate any expense associated with SFTI and various other service providers.

The Exchange believes it is reasonable to allocate the identified portion of the other hardware and software provider expense because this includes costs for dedicated hardware licenses for switches and servers, as well as dedicated software licenses for security monitoring and reporting across the network. Without this hardware and software, the Exchange would not be able to operate and support the network and provide cToM data to its Members, non-Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the cToM data associated with the proposed fees, only the portions which the Exchange identified as being specifically mapped to providing the cToM data associated with the proposed fees, approximately 0.20% of the total applicable hardware and software provider expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM data associated with the proposed fees.⁴⁰

Internal Expense Allocations

For 2021, total projected internal expense, relating to the internal costs of the Exchange to provide the cToM data associated with the proposed fees, is projected to be \$198,497. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the cToM data associated with the proposed fees, including staff in network operations, trading operations, development, system operations, and business that support those employees and functions; (2) depreciation and amortization of hardware and software used to provide the cToM data associated with the proposed fees, including equipment, servers, cabling, purchased software and internally

developed software used in the production environment to support the network for trading; and (3) occupancy costs for leased office space for staff that provide the cToM data associated with the proposed fees. The breakdown of these costs is more fully-described below. For clarity, only a portion of all such internal expenses are included in the internal expense herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire costs contained in those items to the cToM data associated with the proposed fees.

The Exchange believes it is reasonable to allocate such internal expense described above towards the total cost to the Exchange to provide the cToM data associated with the proposed fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the cToM data associated with the proposed fees is projected to be approximately \$185,002, which is only a portion of the \$9.74 million total projected expense for employee compensation and benefits. The Exchange believes it is reasonable to allocate the identified portion of such expense because this includes the time spent by employees of several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development (who create the business requirement documents that the Technology staff use to develop network features, products and enhancements), and Trade Operations. As part of the extensive cost review conducted by the Exchange, the Exchange reviewed the amount of time spent by nearly every employee on matters relating to cToM. Without these employees, the Exchange would not be able to provide the cToM product to its Members, non-Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the cToM product, only the portion which the Exchange identified as being specifically mapped to providing the cToM product associated with the proposed fees, approximately 2.0% of the total applicable employee compensation and benefits expense. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM data associated with the proposed fees, and not any other service, as supported by its cost review.⁴¹

The Exchange's depreciation and amortization expense relating to providing the cToM data associated

³⁸ As noted above, the percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustments to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates. Again, as part its ongoing assessment of costs and expenses, the Exchange recently conducted a periodic thorough review of its expenses and resource allocations which, in turn, resulted in a revised percentage allocations in this filing.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

with the proposed fees is projected to be \$3,635, which is only a portion of the \$1.9 million total projected expense for depreciation and amortization. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network and provide the cToM product. Without this equipment, the Exchange would not be able to operate the network and provide the cToM product to its Members, non-Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the cToM product, only the portion which the Exchange identified as being specifically mapped to providing the cToM product, approximately 0.20% of the total applicable depreciation and amortization expense, as this product would not be possible without relying on such. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the cToM product associated with the proposed fees, and not any other service, as supported by its cost review.⁴²

The Exchange's occupancy expense relating to providing the cToM product associated with the proposed fees is projected to be \$9,860, which is only a portion of the \$0.60 million total projected expense for occupancy. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense represents the portion of the Exchange's cost to rent and maintain a physical location for the Exchange's staff who operate and support the network, including providing the cToM product. This amount consists primarily of rent for the Exchange's Princeton, New Jersey office, as well as various related costs, such as physical security, property management fees, property taxes, and utilities. The Exchange operates its Network Operations Center ("NOC") and Security Operations Center ("SOC") from its Princeton, New Jersey office location. A centralized office space is required to house the staff that operates and supports the network and Exchange products. The Exchange currently has approximately 200 employees. Approximately two-thirds of the Exchange's staff are in the

Technology department, and the majority of those staff have some role in the operation and performance of the services associated with the proposed fees. Accordingly, the Exchange believes it is reasonable to allocate the identified portion of its occupancy expense because such amount represents the Exchange's actual cost to house the equipment and personnel who operate and support the Exchange's network infrastructure and the market data services associated with the proposed fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the market data services associated with the proposed fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network, approximately 2.0% of the total applicable occupancy expense. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the market data services associated with the proposed fees, and not any other service, as supported by its cost review.⁴³

Based on the above, the Exchange believes that its provision of market data services associated with the proposed fees will not result in excessive pricing or supra-competitive profit. As discussed above, the Exchange projects that its annualized expense for 2021 to provide the cToM data associated with the proposed fees is projected to be approximately \$202,657, or approximately \$16,888 per month on average. The Exchange implemented the proposed fees on July 1, 2021 in the First Proposed Rule Change. For June 2021, prior to the proposed fees, Members and non-Members subscribed to a total of 14 cToM data feeds, for which the Exchange charged \$0, for the past three years. This resulted in a month over month loss of \$16,888. For the month of November 2021, which includes the proposed fees, Members and non-Members subscribed to 14 cToM data feeds, for which the Exchange charged approximately \$17,500 for that month. This resulted in a profit of \$612 for that month (a margin of approximately 3.5%). The Exchange believes this margin will allow it to begin to recoup its expenses and continue to invest in its technology infrastructure. Therefore, the Exchange also believes that this proposed margin is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this margin may fluctuate from month to month based in the uncertainty of

predicting how many market data feeds may be purchased from month to month as Members and non-Members are free to add and drop subscriptions at any time based on their own business decisions. This margin may also decrease due to the significant inflationary pressure on capital items that it needs to purchase to maintain the Exchange's technology and systems. Accordingly, the Exchange believes its total projected revenue for the providing the market data services associated with the proposed fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes it is reasonable, equitable and not unfairly discriminatory to allocate the respective percentages of each expense category described above towards the total cost to the Exchange of operating and supporting the network, including providing the market data services associated with the proposed fees because the Exchange performed a line-by-line item analysis of nearly every expense of the Exchange, and has determined the expenses that directly relate to providing market data services to the Exchange. Further, the Exchange notes that, without the specific third-party and internal expense items listed above, the Exchange would not be able to provide the market data services associated with the proposed fees to its Members, non-Members and their customers. Each of these expense items, including physical hardware, software, employee compensation and benefits, occupancy costs, and the depreciation and amortization of equipment, have been identified through a line-by-line item analysis to be integral to providing market data services. The proposed fees are intended to recover the costs of providing cToM data. Accordingly, the Exchange believes that the proposed fees are fair and reasonable because they do not result in excessive pricing or supra-competitive profit, when comparing the actual costs to the Exchange versus the projected annual revenue from the proposed fees.

No market participant is required by any rule or regulation to utilize the Exchange's Complex Order functionality or subscribe to the cToM data feed. Further, unlike orders on the Exchange's Simple Order Book, Complex Orders are not protected and will never trade through Priority Customer⁴⁴ orders,

⁴⁴ The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial accounts(s). The term "Priority Customer Order" means an order

⁴² *Id.*⁴³ *Id.*

thus protecting the priority that is established in the Simple Order Book.⁴⁵ Additionally, unlike the continuous quoting requirements of Market Makers in the simple order market, there are no continuous quoting requirements respecting Complex Orders. It is a business decision whether market participants utilize Complex Order strategies on the Exchange and whether to purchase cToM data to help effect those strategies.

The Proposed Fees Are Reasonable When Compared to the Fees of Other Options Exchanges With Similar Market Share

The Exchange does not have visibility into other options exchanges' costs to provide market data or their fee markup over those costs, and therefore cannot use other exchange's market data fees as a benchmark to determine a reasonable markup over the costs of providing market data. Nevertheless, the Exchange believes the other exchange's market data fees are a useful examples [sic] of alternative approaches to providing and charging for market data. To that end, the Exchange believes the proposed pricing is reasonable because the proposed rates are similar to or less than the fees charged by other options exchanges for similar data products.⁴⁶

Until recently, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019.⁴⁷ This is a result of providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services or Exchange products or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry which resulted in lower initial revenues. An example of this is cToM, for which the Exchange only now seeks to adopt fees at a level similar to or

lower than those of other options exchanges.

Since, the Exchange initially established the cToM data product when it launched trading operations on March 1, 2019, all Exchange Members and non-Members have had the ability to receive the Exchange's cToM data free of charge for the past three years.⁴⁸ Since 2019, when the Exchange launched operations with Complex Order functionality, the Exchange has spent time and resources building out various Complex Order functionality in its System to provide better trading strategies and risk functionality for market participants in order to better compete with other exchanges' complex functionality and similar data products focused on complex orders.⁴⁹ The cToM data product allows market participants to better utilize the Exchange's Complex Order functionality by providing insights into the Exchange's Complex Order flow. The Exchange currently has 14 subscribers (12 Members and 2 non-Members) for its cToM data product. Each one of these subscribers have not paid any cToM data fees (other than the five months in which the First, Second and Third Proposed Rule Changes were in effect) but have received the benefit of the Exchange building out its Complex Order functionality to better compete with other exchanges complex functionality. The Exchange notes that no market participant ceased subscribing to the cToM feed since July 1, 2021, the date on which the fees became effective when proposed in the First Proposed Rule Change.

The Proposed Pricing Is Not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and Other Charges

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess Internal Distributors fees that are less than the fees assessed for External Distributors for subscriptions to the cToM data feed because Internal Distributors have limited, restricted usage rights to the market data, as compared to External Distributors, which have more expansive usage rights. All Members and non-Members that determine to receive any market data feed of the Exchange (or its affiliates, MIAAX Pearl

and MIAAX), must first execute, among other things, the MIAAX Exchange Group Exchange Data Agreement (the "Exchange Data Agreement").⁵⁰ Pursuant to the Exchange Data Agreement, Internal Distributors are restricted to the "internal use" of any market data they receive. This means that Internal Distributors may only distribute the Exchange's market data to the recipient's officers and employees and its affiliates.⁵¹ External Distributors may distribute the Exchange's market data to persons who are not officers, employees or affiliates of the External Distributor,⁵² and may charge their own fees for the distribution of such market data. Accordingly, the Exchange believes it is fair, reasonable and not unfairly discriminatory to assess External Distributors a higher fee for the Exchange's market data products as External Distributors have greater usage rights to commercialize such market data. The Exchange also utilizes more resources to support External Distributors versus Internal Distributors, as External Distributors have reporting and monitoring obligations that Internal Distributors do not have, thus requiring additional time and effort of Exchange staff. The Exchange believes the proposed cToM fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst subscribers for similar services, depending on whether the subscribers is an Internal or External Distributor. Moreover, the decision as to whether or not to purchase market data is entirely optional to all market participants. Potential purchasers are not required to purchase the market data, and the Exchange is not required to make the market data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if market participants deem the proposed fees to be unfair or inequitable, firms can discontinue their use of the cToM data.

Further, the Exchange believes that the proposal is equitable and not unfairly discriminatory because the proposed cToM fees will apply to all market participants of the Exchange on a uniform basis. The Exchange also notes that the proposed monthly cToM fees for Internal and External Distributors are the same prices that the

for the account of a Priority Customer. See Exchange Rule 100.

⁴⁵ The "Simple Order Book" is the Exchange's regular electronic book of orders and quotes. See Exchange Rule 518(a)(5) [sic].

⁴⁶ See *supra* notes 18, 19 and 20.

⁴⁷ See *supra* note 34.

⁴⁸ See *supra* note 13.

⁴⁹ See Securities Exchange Act Release Nos. 85345 (March 18, 2019), 84 FR 10848 (March 22, 2019) (SR-EMERALD-2019-13) (adopting complex stock-option order functionality); 85346 (March 18, 2019), 84 FR 10854 (March 22, 2019) (SR-EMERALD-2019-14) (adopting additional price protection during a Complex Auction and the Complex Liquidity Exposure Process to provide additional price discovery).

⁵⁰ See Exchange Data Agreement, available at https://miaxweb2.pairsite.com/sites/default/files/page-files/MIAAX_Exchange_Group_Data_Agreement_09032020.pdf.

⁵¹ See *id.*

⁵² See *id.*

Exchange charges for its ToM data product.

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

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed fees will allow the Exchange to recoup some of its costs in providing cToM to market participants. As described above, the Exchange has operated at a cumulative net annual loss since it launched operations in 2019⁵³ due to providing a low cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very marginal cost, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low cost exchange alternative to the options industry which resulted in lower initial revenues. An example of this is cToM, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Since the Exchange initially launched operations with the cToM data product in 2019, all Exchange Members and non-Members have had the ability to receive the Exchange's cToM data free of charge for the past three years.⁵⁴ Since 2019, when the Exchange adopted Complex Order functionality, the Exchange has spent time and resources building out various Complex Order functionality in its System to provide better trading strategies and risk functionality for market participants in order to better compete with other exchanges' complex functionality and similar data products focused on complex orders.⁵⁵ The Exchange now seeks to recoup its costs for providing cToM to market participants and believes the proposed fees will not result in excessive pricing or supracompetitive profit.

Inter-Market Competition

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

The Exchange does not believe that the proposed rule change to make a minor, non-substantive edit to Section (6)(a) of the Fee Schedule by deleting unnecessary text will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. This proposed rule change is not being made for competitive reasons, but rather is designed to remedy a minor non-substantive issue and will provide added clarity to the Fee Schedule. The Exchange believes that it is in the public interest for the Fee Schedule to be accurate and concise so as to eliminate the potential for confusion on the part of market participants. In addition, the Exchange does not believe the proposal will impose any burden on inter-market competition as the proposal does not address any competitive issues and is

intended to protect investors by providing further transparency regarding the Exchange's Fee Schedule.

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

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,⁵⁶ and Rule 19b-4(f)(2)⁵⁷ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-EMERALD-2021-44 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.
- All submissions should refer to File Number SR-EMERALD-2021-44. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements

⁵⁴ See *supra* note 13.

⁵⁵ See *supra* note 49.

⁵⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

⁵⁷ 17 CFR 240.19b-4(f)(2).

⁵³ See *supra* note 34.

with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EMERALD-2021-44, and should be submitted on or before January 13, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁸

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-27816 Filed 12-22-21; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93809; File No. SR-NYSE-2021-44]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend NYSE Rules 7.31, 7.35, 7.35B, 7.35C, 98, and 104 Relating to the Closing Auction

December 17, 2021.

I. Introduction

On September 3, 2021, New York Stock Exchange LLC ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Rules 7.31 (Orders and Modifiers), 7.35 (General), 7.35B (DMM-

Facilitated Closing Auctions), 7.35C (Exchange-Facilitated Auctions), 98 (Operation of a DMM Unit), and 104 (Dealings and Responsibilities of DMMs) relating to the Closing Auction. The proposed rule change was published for comment in the **Federal Register** on September 22, 2021.³ The Commission has received one comment letter on the proposal.⁴

On November 1, 2021, the Commission extended the time period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change, to December 21, 2021.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposal.

II. Description of the Proposal⁶

The Exchange has proposed to amend NYSE Rules 7.31 (Orders and Modifiers), 7.35 (General), 7.35B (DMM-Facilitated Closing Auctions), 7.35C (Exchange-Facilitated Auctions), 98 (Operation of a DMM Unit), and 104 (Dealings and Responsibilities of DMMs) relating to the Closing Auction.⁷

Proposed Amendments to NYSE Rules 7.31, 7.35, 7.35B, and 7.35C

The Exchange proposes to amend NYSE Rules 7.31, 7.35, and 7.35B to revise the DMM-facilitated Closing Auction process. According to the Exchange, the proposed changes would modify how the Closing Auction Price would be determined and how DMMs would be able to participate in the Closing Auction, but would not change DMMs' NYSE Rule 104 obligation to facilitate the Closing Auction, including to supply liquidity as needed. The Exchange asserts that the proposed changes would make the Closing Auction more transparent and deterministic, while still retaining the DMMs' unique obligation to facilitate the Closing Auction.⁸

The Exchange also proposes to make conforming changes to NYSE Rule 7.35C to revise the orders eligible to

participate in Exchange-facilitated Closing Auctions.⁹

Proposed Changes to Closing Auction Price. The Exchange proposes to amend NYSE Rule 7.35B(g) to add explicit price parameters to the Closing Auction Price. Under current Exchange rules, the DMM is responsible for determining a Closing Auction Price that is able to satisfy all better-priced orders on the Side of the Imbalance. This requirement would not change. The Exchange proposes to add that the Closing Auction Price determined by the DMM must also be at a price that is at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price. The Exchange asserts that adding this proposed Closing Auction Price parameter is consistent with how the Closing Auction Price has been determined for the vast majority of Closing Auctions and that, in the period January 1, 2021 to July 23, 2021, 96.5% of all Closing Auctions were priced at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price, and, during this same period, 94.9% of closing auction volume priced within these parameters.¹⁰ The Exchange further asserts that this proposed change would eliminate any potential for a Closing Auction Price to be lower (higher) than the last-published Imbalance Reference Price in the case of a Buy (Sell) Imbalance. The Exchange further asserts that this proposed change would also promote transparency and determinism with respect to the Closing Auction because the Closing Auction Price would be required to be within a pre-determined range of prices that have been disseminated via the Closing Auction Imbalance Information and that cannot be changed after the end of Core Trading Hours.¹¹

Proposed Changes to How DMMs Would Participate in the Closing Auction. The Exchange proposes to change how DMMs would be able to enter buy and sell interest to participate in the Closing Auction by limiting the circumstances of when a DMM could enter or cancel interest after the end of Core Trading Hours.¹²

Currently, NYSE Rule 7.35B(a)(2) provides that a DMM may enter or

³ See Securities Exchange Act Release No. 93037 (Sept. 16, 2021), 86 FR 52719 (Sept. 22, 2021) (SR-NYSE-2021-44) ("Notice").

⁴ See Anonymous Letter (Sept. 27, 2021).

⁵ See Securities Exchange Act Release No. 93488 (Nov. 1, 2021), 86 FR 61352 (Nov. 5, 2021).

⁶ For further details about the proposal, see the Notice, *supra* note 3.

⁷ Capitalized terms used in connection with Auctions on the Exchange are defined in NYSE Rule 7.35(a). See Notice, *supra* note 3, 86 FR 52719 n.4.

⁸ See *id.* at 52720.

⁹ See *id.*

¹⁰ See *id.* at 52720.

¹¹ According to the Exchange, the only circumstance in which the Continuous Book Clearing Price could change after the end of Core Trading Hours would be if NYSE Rule 7.35B(j)(2)(A), described below, were invoked and the requirement to enter all order instructions by the end of Core Trading Hours were temporarily suspended for a security. See *id.* at 52721.

¹² See *id.*

⁵⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.