submit about the proposed rule change. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[105]

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, 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–MIAX–2022–10 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–MIAX–2022–10. 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 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–MIAX–2022–10 and should be submitted on or before March 15, 2022. Rebuttal comments should be submitted by March 29, 2022.

VI. Conclusion

It is Therefore Ordered, pursuant to Section 19(b)(3)(C) of the Act,[106] that File Number SR–MIAX–2022–10 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[107]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–03656 Filed 2–18–22; 8:45 am]

BILLING CODE 8011–01–P

[105] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[106] 15 U.S.C. 78s(b)(3)(C).

[107] 17 CFR 200.30–3(a)(12), (57), and (58).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94259; File No. SR–MIAX–2022–08]

Self-Regulatory Organizations; Miami International Securities Exchange, LLC; Notice of Filing of a Proposed Rule Change To Amend Its Fee Schedule To Adopt a Tiered-Pricing Structure for Additional Limited Service MIAX Express Interface Ports; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

February 15, 2022.

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 February 1, 2022, Miami International Securities Exchange, LLC (''MIAX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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 and is, pursuant to Section 19(b)(3)(C) of the Act, hereby: (i) Temporarily suspending the rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

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

[2] 17 CFR 240.19b–4.

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 MIAX Options Fee Schedule (the ''Fee Schedule'') to amend certain port fees.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings,* 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 [sic] 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 the Fee Schedule to adopt a tiered-pricing structure for additional Limited Service MIAX Express Interface (''MEI'') Ports [3] available to Market Makers.[4] The Exchange believes a tiered-pricing structure will encourage Market Makers to be more efficient and economical when determining how to connect to the Exchange. This should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System.[5]

The Exchange initially filed the proposed fee changes on August 2,

[3] MIAX Express Interface is a connection to MIAX systems that enables Market Makers to submit simple and complex electronic quotes to MIAX. *See* Fee Schedule, note 26.

[4] The term ''Market Makers'' refers to Lead Market Makers (''LMMs''), Primary Lead Market Makers (''PLMMs''), and Registered Market Makers (''RMMs'') collectively. *See* Exchange Rule 100.

[5] The term ''System'' means the automated trading system used by the Exchange for the trading of securities. *See* Exchange Rule 100.

2021, with the changes being immediately effective.[6] The First Proposed Rule Change was published for comment in the **Federal Register** on August 19, 2021.[7] The Commission received one comment letter on the First Proposed Rule Change.[8] The Exchange withdrew the First Proposed Rule Change on September 28, 2021 and resubmitted its proposal (''Second Proposed Rule Change'').[9] The Second Proposed Rule Change was published for comment in the **Federal Register** on October 5, 2021.[10] The Second Proposed Rule Change provided additional justification for the proposed fee changes and addressed certain points raised in the single comment letter that was submitted on the First Proposed Rule Change. The Commission received four comment letters from three separate commenters on the Second Proposed Rule Change.[11] The Commission suspended the Second Proposed Rule Change on November 22, 2021.[12] The Exchange withdrew the Second Proposed Rule Change on December 1, 2021 and submitted a revised proposal for immediate effectiveness (''Third Proposed Rule Change'').[13] The Third Proposed Rule Change meaningfully attempted to address issues or questions that have been raised by providing additional justification and explanation for the proposed fee changes and directly respond to the points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes,[14] and feedback provided by Commission Staff during a telephone conversation on November 18, 2021 relating to the Second Proposed Rule Change. The Third Proposed Rule Change was published for comment in the **Federal Register** on December 20, 2021.[15] The Exchange receive no comment letters on the Third Proposed Rule Change. The Commission suspended the Third Proposed Rule Change on January 27, 2022.[16] The Exchange withdrew the Third Proposed Rule Change on February 1, 2022 and now submits this proposal for immediate effectiveness (''Fourth Proposed Rule Change''). This Fourth Proposed Rule Change provides additional justification and explanation for the proposed fee changes.

Additional Limited Service MEI Port Tiered-Pricing Structure

The Exchange proposes to amend the fees for additional Limited Service MEI Ports. Currently, the Exchange allocates two (2) Full Service MEI Ports [17] and two (2) Limited Service MEI Ports [18] per matching engine [19] to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports, Limited Service MEI Ports and the additional Limited Service MEI Ports all include access to the Exchange's primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Prior to the First Proposed Rule Change, Market Makers were assessed a $100 monthly fee for each additional Limited Service MEI Port for each matching engine. This fee was unchanged since 2016.[20]

The Exchange now proposes to move from a flat monthly fee per additional Limited Service MEI Port for each matching engine to a tiered-pricing structure for additional Limited Service MEI Ports for each matching engine under which the monthly fee would vary depending on the number of additional Limited Service MEI Ports the Market Maker elects to purchase. Specifically, the Exchange will continue to provide the first and second additional Limited Service MEI Ports for each matching engine free of charge, as described above, per the initial allocation of Limited Service MEI Ports that Market Makers receive. The Exchange now proposes the following tiered-pricing structure: (i) The third and fourth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $150 per port; (ii) the fifth and sixth additional Limited Service MEI Ports for each matching engine will increase from the current flat monthly fee of $100 to $200 per port; and (iii) the seventh to the twelfth additional Limited Service MEI Ports will increase from the current monthly flat fee of $100 to $250 per port (collectively, the ''Proposed Access Fees'').

The Exchange believes the other exchanges' port fees are a useful example of alternative approaches to providing and charging for port access

[6] *See* Securities Exchange Act Release No. 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR–MIAX–2021–37).

[7] *Id.*

[8] *See* Letter from Richard J. McDonald, Susquehanna International Group, LLC (''SIG''), to Vanessa Countryman, Secretary, Commission, dated September 7, 2021 (''SIG Letter 1'').

[9] *See* Securities Exchange Act Release No. 93185 (September 29, 2021), 86 FR 55093 (October 5, 2021) (SR–MIAX–2021–43).

[10] *Id.*

[11] *See* letters from Richard J. McDonald, SIG, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 (''SIG Letter 2'') and October 26, 2021 (''SIG Letter 3''); *and* Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association (''SIFMA''), to Vanessa Countryman, Secretary, Commission, dated November 26, 2021 (''SIFMA Letter'').

The Exchange notes that the Healthy Markets Association (''HMA'') submitted a comment letter on a related filing to amend fees for 10Gb ULL connections, on which SIG Letters 1, 2, and 3 as well as the SIFMA Letter also commented. *See* letter from Tyler Gellasch, Executive Director, HMA (''HMA''), to Hon. Gary Gensler, Chair, Commission, dated October 29, 2021 (commenting on SR–CboeEDGA–2021–017, SR–CboeBYX–2021–020, SR–Cboe–BZX–2021–047, SR–CboeEDGX–2021–030, SR–MIAX–2021–41, SR–PEARL–2021–45, and SR–EMERALD–2021–29 and stating that ''MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. *Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension*'') (*emphasis added*) (''HMA Letter'').

[12] *See* Securities Exchange Act Release No. 93640 (November 22, 2021), 86 FR 67745 (November 29, 2021).

[13] *See* Securities Exchange Act Release No. 93771 (December 14, 2021), 86 FR 71940 (December 20, 2021) (SR–MIAX–2021–60).

[14] The Exchange notes that while the HMA Letter applauds the level of disclosure the Exchange included in the First and Second Proposed Rule Changes, the HMA Letter does not raise specific issues with the First or Second Proposed Rule Changes. Rather, it references the Exchange's proposals by way of comparison to show the varying levels of transparency in exchange fees filings and recommends changes to the Commission's review process of exchange fee filings generally. Therefore, the Exchange does not feel it is necessary to address the issues raised in the HMA Letter.

[15] *See supra* note 13.

[16] *See* Securities Exchange Act Release No. 94087 (January 27, 2022) (Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend Fee Schedules to Adopt Tiered-Pricing Structures for Additional Limited Service MIAX and MIAX Emerald Express Interface Ports).

[17] Full Service MEI Ports provide Market Makers with the ability to send Market Maker quotes, eQuotes, and quote purge messages to the MIAX System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per matching engine. *See* Fee Schedule, Section (5)(d)(ii), note 27.

[18] Limited Service MEI Ports provide Market Makers with the ability to send eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per matching engine. *See* Fee Schedule, Section 5)d)ii), note 28.

[19] A ''matching engine'' is a part of the MIAX electronic system that processes options quotes and trades on a symbol-by-symbol basis. Some matching engines will process option classes with multiple root symbols, and other matching engines will be dedicated to one single option root symbol (for example, options on SPY will be processed by one single matching engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated matching engine. A particular root symbol may not be assigned to multiple matching engines. *See* Fee Schedule, Section 5)d)ii), note 29.

[20] *See* Securities Exchange Act Release No. 79666 (December 22, 2016), 81 FR 96133 (December 29, 2016) (SR–MIAX–2016–47).

and provides the below table for comparison purposes only to show how its proposed fees compare to fees currently charged by other options exchanges for similar port access. As shown by the below table, the Exchange's proposed highest tier is still less than fees charged for similar port access provided by other options exchanges.

Exchange	Type of port	Monthly fee (per port)
MIAX (as proposed)	Limited Service MEI Port	1–2 ports. FREE (not changed in this proposal), 3–4 ports. $150, 5–6 ports. $200, 7 or more ports. $250.
NYSE American, LLC (''Amex'') [21]	Order/Quote Entry Port	$450.
NYSE Arca, Inc. (''Arca'') [22]	Order/Quote Entry Port	$450.
The NASDAQ Stock Market LLC (''NASDAQ'') [23].	SQF Port	1–5 ports. $1,500.00, 6–20 ports. $1,000.00, 21 or more ports. $500.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act [24] in general, and furthers the objectives of Section 6(b)(4) of the Act [25] in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Exchange Members and issuers and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act [26] in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

On March 29, 2019, the Commission issued an Order disapproving a proposed fee change by the BOX Market LLC Options Facility to establish connectivity fees for its BOX Network (the ''BOX Order'').[27] On May 21, 2019, the Commission Staff issued guidance ''to assist the national securities exchanges and FINRA . . . in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.'' [28] Based on both the BOX Order and the Guidance, the Exchange believes that the Proposed Access Fees are consistent with the Act because they (i) are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Guidance; (iii) are supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable because they will not result in excessive pricing or supra-competitive profit; and (iv) utilize a cost-based justification framework that is substantially similar to a framework previously used by the Exchange, and its affiliates MIAX Emerald, LLC (''MIAX Emerald'') and MIAX PEARL, LLC (''MIAX Pearl''), to amend other non-transaction fees.[29]

The Proposed Access 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 amendment 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 imposes various access fees for market participants to access an exchange's marketplace. The Exchange deems ports to be access fees. It records these fees as part of its ''Access Fees'' revenue in its financial statements.

In the 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.'' [30] The 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.'' [31] 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.'' [32] The Exchange does not assert that the Proposed Access Fees are constrained by competitive forces. Rather, the Exchange asserts that the Proposed Access Fees are reasonable because they will permit recovery of the Exchange's costs in providing access services to supply additional Limited Service MEI Ports 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.'' [33] 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

[21] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees.

[22] *See* NYSE Arca Options Fee Schedule, Port Fees.

[23] *See* Nasdaq Stock Market, Nasdaq Options 7 Pricing Schedule, Section 3, Nasdaq Options Market—Ports and Other Services.

[24] 15 U.S.C. 78f(b).

[25] 15 U.S.C. 78f(b)(4).

[26] 15 U.S.C. 78f(b)(5).

[27] *See* Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR–BOX–2018–24, SR–BOX–2018–37, and SR–BOX–2019–04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network).

[28] *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'').

[29] *See* Securities Exchange Act Release Nos. 90981 (January 25, 2021), 86 FR 7582 (January 29, 2021) (SR–PEARL–2021–01) (proposal to increase connectivity fees); 91460 (April 2, 2021), 86 FR 18349 (SR–EMERALD–2021–11) (proposal to adopt port fees, increase connectivity fees, and increase additional limited service ports); 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (proposal to adopt trading permit fees).

[30] *See* Guidance, *supra* note 28.

[31] *Id.*

[32] *Id.*

[33] *Id.*

expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question.'' [34] The Exchange provides this analysis below.

Based on this analysis, the Exchange believes the Proposed Access Fees are reasonable and do not result in a ''supra-competitive'' [35] profit. The Exchange believes that it is important to demonstrate that the Proposed Access Fees are based on its costs and reasonable business needs. The Exchange believes the Proposed Access 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 Access Fees. Accordingly, the Exchange provides an analysis of its revenues, costs, and profitability associated with the Proposed Access Fees. This analysis includes information regarding its methodology for determining the costs and revenues associated with the Proposed Access Fees. As a result of this analysis, the Exchange believes the Proposed Access 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 additional Limited Service MEI Port access to the Exchange.

The Proposed Access Fees are based on a cost-plus model. In determining the appropriate fees to charge, the Exchange considered its costs to provide port access, 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 additional Limited Service MEI Ports) to estimate such costs,[36] as well as the relative costs of providing and maintaining additional Limited Service MEI Ports, 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 additional Limited Service MEI Ports because of the uncertainty of forecasting subscriber decision making with respect to firms' additional Limited Service MEI Port needs and the likely potential for increased costs to procure the third-party services described below.

To determine the Exchange's costs to provide access services associated with the Proposed Access 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 Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees. The Exchange conducted a thorough internal analysis to determine the portion (or percentage) of each expense to allocate to the support of access services associated with the Proposed Access Fees. This analysis [37] included discussions with each Exchange department head to determine the expenses that support access services associated with the Proposed Access Fees. This included numerous meetings between the Exchange's Chief Information Officer, Chief Financial Officer, Head of Strategic Planning and Operations, Chief Technology Officer, various members of the Legal Department, and other group leaders. The Exchange reviewed each individual expense to determine if such expense was related to the Proposed Access Fees. Once the expenses were identified, the Exchange department heads, with the assistance of our internal finance department, reviewed such expenses holistically on an Exchange-wide level to determine what portion of that expense supports providing access services for the Proposed Access Fees. The sum of all such portions of expenses represents the total cost to the Exchange to provide access services associated with the Proposed Access Fees. For the avoidance of doubt, no expense amount was allocated twice.

The internal cost analysis conducted by the Exchange is a proprietary process that is designed to make a fair and reasonable assessment of costs and resources allocated to support the provision of access services associated with the Proposed Access Fees. The Exchange acknowledges that this assessment can only capture a moment in time and that costs and resource allocations may change. That is why the Exchange has historically, and on an ongoing basis, periodically revisits its costs and resource allocations to ensure it is appropriately allocating resources to properly provide services to the Exchange's constituents. Any requirement that an exchange should conduct a periodic re-evaluation on a set timeline of its cost justification and amend its fees accordingly should be established by the Commission holistically, applied to all exchanges and not just pending fee proposals such as this filing. In order to be fairly applied, such a mandate should be applied to existing access fees as well.

In accordance with the Guidance, the Exchange has provided sufficient detail to support a finding that the proposed fees are consistent with the Exchange Act. The proposal includes a detailed description of the Exchange's costs and how the Exchange determined to allocate those costs related to the proposed fees. In fact, the detail and analysis provided in this proposed rule change far exceed the level of disclosure provided in other exchange fee filings that have not been suspended by the Commission during its 60-day suspension period. A finding that this proposed rule change is inconsistent with the Exchange Act would run contrary to the Commission Staff's treatment of other recent exchange fee proposals that have not been suspended and remain in effect today.[38] For example, a proposed fee filing that closely resembles the Exchange's current filing was submitted in 2020 by the Cboe Exchange, Inc. (''Cboe'') and

[34] *Id.*

[35] *Id.*

[36] For example, the Exchange only included the costs associated with providing and supporting additional Limited Service MEI Port access and excluded from its cost calculations any cost not directly associated with providing and maintaining such additional Limited Service MEI Port access. Thus, the Exchange notes that this methodology underestimates the total costs of providing and maintaining additional Limited Service MEI Port access.

[37] A description of the Exchange's methodology for determining the portion (or percentage) of each expense to allocate to the Proposed Access Fees is being provide in response to comments from SIG and SIFMA. *See* SIG Letter 3 *and* SIFMA Letter, *supra* note 11.

[38] *See, e.g.,* Securities Exchange Act Release Nos. 91339 (March 17, 2021), 86 FR 15524 (March 23, 2021) (SR–CboeBZX–2021–020) (increasing fees for a market data product while not providing a cost based justification for the increase); 93293 (October 21, 2021), 86 FR 57716 (October 18, 2021) (SR–PHLX–2021–058) (increasing fees for historical market data while not providing a cost based justification for the increase); 92970 (September 14, 2021), 86 FR 52261 (September 20, 2021) (SR–CboeBZX–2021–047) (adopting fees for a market data related product while not providing a cost based justification for the fees); and 89826 (September 10, 2021), 85 FR 57900 (September 16, 2021) (SR–CBOE–2020–086) (increasing connectivity fees without including a cost based justification).

increased fees for Cboe's 10Gb connections.[39] This filing was submitted on September 2, 2020, nearly 15 months after the Staff's Guidance was issued. In that filing, the Cboe stated that the ''proposed changes were not designed with the objective to generate an overall increase in access fee revenue.'' [40] This filing provided no cost based data to support its assertion that the proposal was intended to be revenue neutral. Among other things, Cboe did not provide a description of the costs underlying its provision of 10Gb connections to show that this particular fee did not generate a supra-competitive profit or describe how any potential profit may be offset by increased costs associated with another fee included in its proposal. This filing, nonetheless, was not suspended by the Commission and remains in effect today.

The Exchange believes exchanges, like all businesses, should be provided flexibility when allocating costs and resources they deem necessary to operate their business, including providing market data and access services. The Exchange notes that costs and resource allocations may vary from business to business and, likewise, costs and resource allocations may differ from exchange to exchange when it comes to providing market data and access services. It is a business decision that must be evaluated by each exchange as to how to allocate internal resources and what costs to incur internally or via third parties that it may deem necessary to support its business and its provision of market data and access services to market participants. An exchange's costs may also vary based on fees charged by third parties and periodic increases to those fees that may be outside of the control of an exchange.

To determine the Exchange's projected revenue associated with the Proposed Access Fees, the Exchange analyzed the number of Market Makers currently utilizing additional Limited Service MEI Ports and used a recent monthly billing cycle representative of 2021 monthly revenue. The Exchange also provided its baseline by analyzing July 2021, the monthly billing cycle prior to the Proposed Access Fees going into effect, and compared it to its expenses for that month.[41] 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 calculations, given the uncertainty of such projections due to the continually changing access 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 Access 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 Access Fees were not in place in 2020 or for the first seven 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 Access Fees. Accordingly, the Exchange believes it is more appropriate to analyze the Proposed Access 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 Access Fees are reasonable because they will allow the Exchange to recover its costs associated with providing access services related to the Proposed Access Fees and not result in excessive pricing or supra-competitive profit.

As outlined in more detail below, the Exchange projects that the final annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately $1,320,000 per annum or an average of $110,000 per month. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 1,248 additional Limited Service MEI Ports for which the Exchange charged approximately $124,800. This resulted in a gain of $14,800 for that month (a profit margin of approximately 12%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 1,672 additional Limited Service MEI Ports, for which the Exchange charged approximately $248,950 for that month. This resulted in a profit of $138,950 for that month (a profit margin of approximately 56%). The Exchange cautions that this profit margin is likely to fluctuate from month to month based on the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are able to add and drop ports at any time based on their own business decisions. This profit 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.[42] The Exchange has been subject to price increases upwards of 30% during the past year 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 additional Limited Service MEI Ports at a discounted price to attract order flow and encourage market participants to experience the determinism and resiliency of the Exchange's trading systems. This resulted in the Exchange forgoing revenue it could have generated from assessing 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. 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.

As mentioned above, the Exchange projects that its annualized expense for 2021 to provide additional Limited Service MEI Ports to be approximately $1,320,000 per annum or an average of

[39] *See* Securities Exchange Act Release No. 89826 (September 10, 2020), 85 FR 57900 (September 16, 2020) (SR–CBOE–2020–086) (increasing connectivity fees without including a cost based justification).

[40] *See id.* at 57909.

[41] *See supra* note 37.

[42] *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 Hunnicutt, 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).

$110,000 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.[43] The Exchange notes that there are material costs associated with providing the infrastructure and headcount to fully-support access to the Exchange. 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 access services associated with the Proposed Access 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 access to its Members is not fixed. The Exchange believes the Proposed Access Fees are a reasonable attempt to offset a portion of the costs to the Exchange associated with providing access to its network infrastructure.

The Exchange only has four primary sources of revenue and cost recovery mechanisms to fund all of its operations: Transaction fees, access fees (which includes the Proposed 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 2008.[44] 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 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 higher fees.

The Exchange believes that the Proposed Access 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 access services versus the total annual revenue that the Exchange projects to collect in connection with services associated with the Proposed Access Fees. As mentioned above, for 2021,[45] the total annual expense for providing the access services associated with the Proposed Access Fees is projected to be approximately $1,320,000, or approximately $110,000 per month. This projected total annual expense is comprised of the following, all of which are directly related to the access services associated with the Proposed Access 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 Access Fees.[46] As noted above, the Exchange believes it is more appropriate to analyze the Proposed Access 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.[47] The $1,320,000 projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange. 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 access services associated with the Proposed Access 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. In performing this calculation, the Exchange considered other services and to which the expense may be applied and how much of the expense is directly and or indirectly utilized in providing those other services. The sum of all such portions of expenses represents the total cost of the Exchange to provide access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees, is projected to be $0.16 million. 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; (3) SFTI,[48] which supports connectivity and feeds for the entire U.S. options industry; (4) various other services providers (including Thompson Reuters, NYSE, Nasdaq, and Internap), which provide content, connectivity services, and infrastructure services for critical components of options connectivity and network services; and

[43] 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.

[44] The Exchange has incurred a cumulative loss of $175 million since its inception in 2008 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, 2021, *available at https://www.sec.gov/Archives/edgar/vprr/2100/21000460.pdf.*

[45] The Exchange has not yet finalized its 2021 year end results.

[46] 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.

[47] 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. 87875 (December 31, 2019), 85 FR 770 (January 7, 2020) (SR–MIAX–2019–51). 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.

[48] *See supra* note 43.

(5) 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 access services associated with the Proposed Access Fees.

For clarity, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to providing access services in connection with the Proposed Access Fees. Only a portion of all fees paid to such third-parties is included in the third-party expenses described herein, and no expense amount is allocated twice. Accordingly, the Exchange does not allocate its entire information technology and communication costs to the access services associated with the Proposed Access 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 for its options and equities markets and MIAX Emerald, 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 access services associated with the Proposed Access 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 services from Equinix, the Exchange would not be able to operate and support the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the Equinix expense toward the cost of providing the access services associated with the Proposed Access Fees, only that portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees. According to the Exchange's calculations, it allocated approximately 4.95% of the total applicable Equinix expense to providing the access services associated with the Proposed Access Fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[49]

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 Emerald, 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 access services associated with the Proposed Access Fees. The Exchange did not allocate all of the Zayo expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the Proposed Access Fees. According to the Exchange's calculations, it allocated approximately 2.64% of the total applicable Zayo expense to providing the access services associated with the Proposed Access Fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[50]

The Exchange believes it is reasonable to allocate the identified portions of the SFTI expense and various other service providers' (including Thompson Reuters, NYSE, Nasdaq, and Internap) expense because those entities provide connectivity and feeds for the entire U.S. options industry, as well as the content, connectivity services, and infrastructure services for critical components of the network. Without these services from SFTI and various other service providers, the Exchange would not be able to operate and support the network and provide access to its Members and their customers. The Exchange did not allocate all of the SFTI and other service providers' expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees. According to the Exchange's calculations, it allocated approximately 4.95% of the total applicable SFTI and other service providers' expense to providing the access services associated with the Proposed Access Fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[51]

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 access to its Members and their customers. The Exchange did not allocate all of the hardware and software provider expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portions which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees. According to the Exchange's calculations, it allocated approximately

[49] 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.

[50] *Id.*

[51] *Id.*

4.95% of the total applicable hardware and software provider expense to providing the access services associated with the Proposed Access Fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees.[52]

Internal Expense Allocations

For 2021, total projected internal expense, relating to the Exchange providing the access services associated with the Proposed Access Fees, is projected to be $1.16 million. This includes, but is not limited to, costs associated with: (1) Employee compensation and benefits for full-time employees that support the access services associated with the Proposed Access Fees, including staff in network operations, trading operations, development, system operations, and business that support those employees and functions (including an increase as a result of the higher determinism project); (2) depreciation and amortization of hardware and software used to provide the access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees. The breakdown of these costs is more fully-described below.

For clarity, and as stated above, the Exchange took a conservative approach in determining the expense and the percentage of that expense to be allocated to providing access services in connection with the Proposed Access Fees. 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 access services associated with the Proposed Access Fees. This may result in the Exchange under allocating an expense to the provision of access services in connection with the Proposed Access Fees and such expenses may actually be higher or increase above what the Exchange utilizes within this proposal. Further, as part its ongoing assessment of costs and expenses (described above), 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 internal expenses described above towards the total cost to the Exchange to provide the access services associated with the Proposed Access Fees. In particular, the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be approximately $0.91 million, which is only a portion of the $12.6 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 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 each employee on matters relating to the provision of access services associated with the Proposed Access Fees. Without these employees, the Exchange would not be able to provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the employee compensation and benefits expense toward the cost of the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees. According to the Exchange's calculations, it allocated approximately 7.24% of the total applicable employee compensation and benefits expense to providing the access services associated with the Proposed Access Fees. The Exchange believes this allocation is reasonable because it represents the Exchange's actual cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[53]

The Exchange's depreciation and amortization expense relating to providing the services associated with the Proposed Access Fees is projected to be $0.22 million, which is only a portion of the $4.8 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 access services associated with the Proposed Access Fees. Without this equipment, the Exchange would not be able to operate the network and provide the access services associated with the Proposed Access Fees to its Members and their customers. The Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to providing the access services associated with the Proposed Access Fees. According to the Exchange's calculations, it allocated approximately 4.60% of the total applicable depreciation and amortization expense to providing the access services associated with the Proposed Access Fees, as these access services 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 access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[54]

The Exchange's occupancy expense relating to providing the services associated with the Proposed Access Fees is projected to be $0.03 million, 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 access services associated with the Proposed Access Fees. This amount consists primarily of rent for the Exchange's Princeton, NJ 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

[52] *Id.*

[53] *Id.*

[54] *Id.*

network. 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 access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees. The Exchange did not allocate all of the occupancy expense toward the cost of providing the access services associated with the Proposed Access Fees, only the portion which the Exchange identified as being specifically mapped to operating and supporting the network. According to the Exchange's calculations, it allocated approximately 4.69% of the total applicable occupancy expense to providing the access services associated with the Proposed Access Fees. The Exchange believes this allocation is reasonable because it represents the Exchange's cost to provide the access services associated with the Proposed Access Fees, and not any other service, as supported by its cost review.[55]

The Exchange notes that a material portion of its total overall expense is allocated to the provision of access services (including connectivity, ports, and trading permits). The Exchange believes this is reasonable and in line, as the Exchange operates a technology-based business that differentiates itself from its competitors based on its more deterministic and resilient trading systems that rely on access to a high performance network, resulting in significant technology expense. Over two-thirds of Exchange staff are technology-related employees. The majority of the Exchange's expense is technology-based. As described above, the Exchange has only four primary sources of fees to recover their costs; thus, the Exchange believes it is reasonable to allocate a material portion of its total overall expense towards access fees.

Based on the above, the Exchange believes that its provision of access services associated with the Proposed Access 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 access services associated with the Proposed Access Fees is projected to be approximately $1,320,000, or approximately $110,000 per month on average. The Exchange implemented the Proposed Access Fees on August 1, 2021 in the First Proposed Rule Change. For July 2021, prior to the Proposed Access Fees, the Exchange Members and non-Members purchased a total of 1,248 additional Limited Service MEI Ports, for which the Exchange charged approximately $124,800. This resulted in a gain of $14,800 for that month (a profit margin of approximately 12%). For the month of November 2021, which includes the tiered rates for additional Limited Service MEI Ports for the Proposed Access Fees, Exchange Members and non-Members increased the number of additional Limited Service MEI Ports they purchased resulting in a total of 1,672 additional Limited Service MEI Ports, for which the Exchange charged approximately $248,950 for that month. This resulted in a profit of $138,950 for that month (a profit margin of approximately 56%). The Exchange believes this profit 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 profit margin increase is reasonable because it represents a reasonable rate of return.

Again, the Exchange cautions that this profit margin may fluctuate from month to month based in the uncertainty of predicting how many ports may be purchased from month to month as Members and non-Members are free to add and drop ports at any time based on their own business decisions. Notwithstanding that the revenue (and profit margin) may vary from month to month due to changes in ports and to changes to the Exchange's expenses, the number of ports has not materially changed over the previous months. Consequently, the Exchange believes that the months it has used as a baseline to perform its assessment are representative of reasonably anticipated costs and expenses. This profit 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.[56] Accordingly, the Exchange believes its total projected revenue for the providing the access services associated with the Proposed Access Fees will not result in excessive pricing or supra-competitive profit.

The Exchange believes that conducting the above analysis on a per month basis is reasonable as the revenue generated from access services subject to the proposed fee generally remains static from month to month. The Exchange also conducted the above analysis on a per month basis to comply with the Commission Staff's Guidance, which requires a baseline analysis to assist in determining whether the proposal generates a supra-competitive profit. This monthly analysis was also provided in response to comment received on prior submissions of this proposed rule change.

The Exchange reiterates that it only has four primary sources of revenue and cost recovery mechanisms: Transaction fees, access fees (which includes the Proposed 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. As a result, each of these fees cannot be ''flat'' and cover only the expenses directly related to the fee that is charged. The above revenue and associated profit margin therefore are not solely intended to cover the costs associated with providing access services subject to the Proposed Access Fees.

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 access services associated with the Proposed Access 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 access 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 access services associated with the Proposed Access Fees to its 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 access services. The Proposed Access Fees are intended to recover the costs of providing access to the Exchange's System. Accordingly, the Exchange believes that the Proposed Access 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

[55] *Id.*

[56] *See supra* note 42.

projected annual revenue from the Proposed Access Fees.

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

The Exchange believes the proposed tiered-pricing structure is reasonable, fair, equitable, and not unfairly discriminatory because it will apply to all Members and non-Members in the same manner based on the amount of additional Limited Service MEI Ports they require based on their own business decisions and usage of Exchange resources. All similarly situated Members and non-Members would be subject to the same fees. The fees do not depend on any distinction between Members and non-Members because they are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources.

The proposed tiered-pricing structure is not unfairly discriminatory and provides for the equitable allocation of fees, dues, and other charges because it is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange and the amount of the fees are based on the number of ports a Market Maker utilizes. Charging an incrementally higher fee to a Market Maker that utilizes numerous ports is directly related to the increased costs the Exchange incurs in providing and maintaining those additional ports. The proposed tiered pricing structure should also enable the Exchange to better monitor and provide access to the Exchange's network to ensure sufficient capacity and headroom in the System while still providing the first and second additional Limited Service MEI Ports for each matching engine free of charge.

To achieve a consistent, premium network performance, the Exchange must build out and continue to maintain a network that has the capacity to handle the message rate requirements of not only firms that consume minimal Exchange access resources, but also those firms that most heavily consume Exchange access resources, network consumers, and purchasers of Limited Service MEI Ports. Limited Service MEI Ports are not an unlimited resource as the Exchange needs to purchase additional equipment to satisfy requests for additional ports. The Exchange also needs to provide personnel to set up new ports, service requests related to adding new and/or deleting existing ports, respond to performance queries, and to maintain those ports on behalf of Members and non-Members. Also, those firms that utilize additional Limited Service MEI Ports typically generate a disproportionate amount of messages and order traffic, usually billions per day across the Exchange. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network access expense for storage and network transport capabilities. The Exchange also has to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of it surveillance program and to satisfy its record keeping requirements under the Exchange Act.[57] Thus, as the number of ports an entity has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, port costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase.

The Exchange sought to design the proposed tiered-pricing structure to set the amount of the fee to relate to the number of ports a firm purchases. The Exchange notes that Limited Service MEI Ports are primarily utilized by firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two per matching engine that are currently provided free of charge. Accordingly, the firms engaged in advanced trading strategies generate higher costs by utilizing more of the Exchange's resources. Those firms purchase higher amounts of Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms engaging solely in order routing as part of their best-execution obligations.

The use of such additional Limited Service MEI Ports is a voluntary business decision of each Market Maker. Additional Limited Service MEI Ports are primarily used by Market Makers seeking to remove liquidity and, for competitive reasons, a Market Maker may choose to utilize numerous ports in an attempt to access the market quicker by using one port that may have less latency. The more ports purchased by a Market Maker likely results in greater expenditure of Exchange resources and increased cost to the Exchange. With this in mind, the Exchange will continue to provide the first and second additional Limited Service MEI Ports free of charge. The Exchange notes that firms that primarily route orders seeking best-execution generally do not utilize additional Limited Service MEI Ports. Those firms also generally send less orders and messages over those connections, resulting in less strain on Exchange resources.

On a similar note, the Exchange proposes to increase the fee for those firms that purchase more ports resulting in greater expenditure of Exchange resources and increased cost to the Exchange. The Exchange notes that these firms that purchase numerous additional Limited Service MEI Ports essentially do so for competitive reasons amongst themselves and choose to utilize numerous ports based on their business needs and desire to attempt to access the market quicker by using the connection with the least amount of latency. These firms are generally engaged in sending liquidity removing orders to the Exchange and seek to add more ports so they can access resting liquidity ahead of their competitors. For instance, a Member may have just sent numerous messages and/or orders over one or more of their additional Limited Service MEI Ports that are in queue to be processed. That same Member then seeks to enter an order to remove liquidity from the Exchange's Book. That Member may choose to send that order over one or more of their other additional Limited Service MEI Ports with less message and/or order traffic to ensure that their liquidity taking order accesses the Exchange quicker because that connection's queue is shorter. These firms also tend to frequently add and drop ports mid-month to determine which ports have the least latency, which results in increased costs to the Exchange to constantly make changes in the data center.

The firms that engage in the above-described liquidity removing and advanced trading strategies typically require multiple ports and, therefore, generate higher costs by utilizing more of the Exchange's resources. Those firms may also conduct other latency measurements over their ports and drop and simultaneously add ports mid-month based on their own assessment of their performance. This results in Exchange staff processing such requests, potentially purchasing additional equipment, and performing the necessary network engineering to replace those ports in the data center. Therefore, the Exchange believes it is equitable for these firms to experience increased port costs based on their disproportionate pull on Exchange resources to provide the additional port access.

In addition, the proposed tiered-pricing structure is equitable because it

[57] 17 CFR 240.17a–1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

is designed to encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange. Section 6(b)(5) of the Exchange Act requires the Exchange to provide access on terms that are not unfairly discriminatory.[58] As stated above, additional Limited Service MEI Ports is not an unlimited resource and the Exchange's network is limited in the amount of ports it can provide. However, the Exchange must accommodate requests for additional Limited Service MEI Ports and access to the Exchange's System to ensure that the Exchange is able to provide access on non-discriminatory terms and ensure sufficient capacity and headroom in the System. To accommodate requests for additional Limited Service MEI Ports on top of current network capacity constraints, requires that the Exchange to purchase additional equipment to satisfy these requests. The Exchange also needs to provide personnel to set up new ports and to maintain those ports on behalf of Members and non-Members. The proposed tiered-pricing structure is equitable because it is designed to encourage Market Makers to be more efficient and economical in selecting the amount of Limited Service MEI Ports they request while balancing that against the Exchange's increased expenses when expanding its network to accommodate additional Limited Service MEI Ports.

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 equities exchanges' costs to provide port access or their fee markup over those costs, and therefore cannot use other exchange's port fees as a benchmark to determine a reasonable markup over the costs of providing port access. Nevertheless, the Exchange believes the other exchange's port fees are a useful example of alternative approaches to providing and charging for port access. To that end, the Exchange believes the proposed tiered-pricing structure for Limited Service MEI Ports is reasonable because the proposed highest tier is still less than fees charged for similar port access provided by other options exchanges with comparable market shares. For example, Amex (equity options market share of 5.05% as of November 26, 2021 for the month of November) [59] and Arca (equity options market share of 14.88% as of November 26, 2021 for the month of November) [60] both charge $450 per port for order/quote entry ports 1–40 and $150 per port for ports 41 and greater,[61] all on a per matching engine basis, with Amex and Arca having 17 match engines and 19 match engines, respectively.[62] Similarly, NASDAQ (equity options market share of 8.88% as of November 23, 2021 for the month of November) [63] charges $1,500 per port for SQF ports 1–5, $1,000 per SQF port for ports 6–20, and $500 per SQF port for ports 21 and greater,[64] all on a per matching engine basis, with NASDAQ having multiple matching engines.[65] The NASDAQ SQF Interface Specification provides that PHLX/NOM/BX Options trading infrastructures may consist of multiple matching engines with each matching engine trading only a range of option underlyings. Further, the SQF infrastructure is such that the firms connect to one or more servers residing directly on the matching engine infrastructure. Since there may be multiple matching engines, firms will need to connect to each engine's infrastructure in order to establish the ability to quote the symbols handled by that engine.[66]

In the each of the above cases, the Exchange's highest tier in the proposed tiered-pricing structure is similar to or significantly lower than that of competing options exchanges with similar market share. Despite proposing lower or similar fees to that of competing options exchanges with similar market share, the Exchange believes that it provides a premium network experience to its Members and non-Members via a highly deterministic System, enhanced network monitoring and customer reporting, and a superior network infrastructure than markets with higher market shares and more expensive port alternatives. Each of the port rates in place at competing options exchanges were filed with the Commission for immediate effectiveness and remain in place today.

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

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

With respect to intra-market competition, the Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As stated above, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that the proposed pricing structure is associated with relative usage of the various market participants. Firms that are primarily order routers seeking best-execution do not utilize Limited Service MEI Ports on MIAX and therefore will not pay the fees associated with the tiered-pricing structure. Rather, the fees described in the proposed tiered-pricing structure will only be allocated to Market Making firms that engage in advanced trading strategies and typically request multiple Limited Service MEI Ports, beyond the two that are free. Accordingly, the firms engaged in a Market Making business generate higher costs by utilizing more of the Exchange's resources. Those Market Making firms that purchase higher amounts of additional Limited Service MEI Ports tend to have specific business oriented market making and trading strategies, as opposed to firms engaging solely in best-execution order routing business. Additionally, the use of such additional Limited Service MEI Ports is entirely voluntary.

The Exchange also does not believe that the proposed rule change will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As discussed above, options market participants are not forced to access all options exchanges. The Exchange operates in a highly competitive environment, and as discussed above, its ability to price access and ports is constrained by competition among exchanges and third parties. There are other options markets of which market participants may access in order to trade options. There is also a possible range of alternative strategies, including routing to the exchange through another participant or market center or accessing the Exchange indirectly. For example, there are 15 other U.S. options exchanges, which the Exchange must consider in its pricing

[58] 15 U.S.C. 78f(b)(5).

[59] *See* ''The market at a glance,'' *available at https://www.miaxoptions.com/*(last visited November 26, 2021).

[60] *See id.*

[61] *See* NYSE American Options Fee Schedule, Section V.A., Port Fees; NYSE Arca Options Fee Schedule, Port Fees.

[62] *See* NYSE Technology FAQ and Best Practices: Options, Section 5.1 (How many matching engines are used by each exchange?) (September 2020) (providing a link to an Excel file detailing the number of matching engines per options exchange).

[63] *See supra* note 59.

[64] *See* NASDAQ Stock Market, NASDAQ Options 7 Pricing Schedule, Section 3, NASDAQ Options Market—Ports and Other Services.

[65] *See* NASDAQ Specialized Quote Interface (SQF) Specification, Version 6.4 (October 2017), Section 2, Architecture (the ''NASDAQ SQF Interface Specification'').

[66] *See id.*

discipline in order to compete for market participants. In this competitive environment, market participants are free to choose which competing exchange to use to satisfy their business needs. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Regrettably, the Exchange believes that the application of the Guidance to date has adversely affected inter-market competition by impeding the ability of smaller, low cost exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services). Since the adoption of the Guidance, and even more so recently, it has become harder, particularly for smaller, low cost exchanges, to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading products and solutions, and improve competitive standing to the benefit of the affected exchanges' market participants. Although the Staff Guidance has served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted exchanges, and particularly many smaller, low cost exchanges, that seek to adopt or increase fees despite providing enhanced disclosures and rationale to support their proposed fee changes.

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

As described above, the Exchange received one comment letter on the First Proposed Rule Change[67] and three comment letters on the Second Proposed Rule Change.[68] The Exchange responded to the comment letters in the Third Proposed Rule Change and repeats its response in is filing. No comment letters were received in response to the Third Proposed Rule Change.

SIG Letter 2

SIG Letter 2 argues that the Exchange, in withdrawing the First Proposed Rule Change and refiling the Second Proposed Rule Change, ''improperly circumvent[ed] the procedural protections embedded in Exchange Act Section 19(b)(3)(C), and subvert[ed] the balance of interests upheld therein.''[69] SIG's assertion that the Exchange's entire reason for withdrawing and refiling was to subvert the protections of the Exchange Act are entirely without merit. The Exchange withdrew the First Proposed Rule Change and replaced it with the Second Proposed Rule Change in good faith to provide additional justification and explanation for the proposed fee changes and did so in compliance with the Exchange Act. The same is true in this filing, where the Exchange withdrew the Second Proposed Rule Change and submitted this filing to provide additional justification and explanation for the proposed fee changes and directly responds to certain points raised in SIG Letters 1, 2, and 3, as well as the SIFMA Letter submitted on the First and Second Proposed Rule Changes.

As SIG well knows, exchanges are able withdraw and refile various proposals (including fee changes and other rule changes) with the Commission for a multitude of reasons, not the least of which is to address feedback and comments from market participants and Commission Staff. The Exchange is well within the bounds of the Act and the rules and regulations thereunder to withdraw a proposed rule change and replace it with a new proposed rule change in good faith and to enhance the filing to ensure it complies with the requirements of the Act.

SIG Letters 1 and 3

As an initial matter, SIG Letter 1 cites Rule 700(b)(3) of the Commission's Rules of Fair Practice which places ''the burden to demonstrate that a proposed rule change is consistent with the Act on the self-regulatory organization that proposed the rule change'' and states that a ''mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.''[70] SIG Letter 1's assertion that the Exchange has not met this burden is without merit, especially considering the overwhelming amounts of revenue and cost information the Exchange included in the First and Second Proposed Rule Changes and this filing.

Until recently, the Exchange operated at a net annual loss since it launched operations in 2008.[71] As stated above, 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 imposes various access fees for market participants to access an exchange's marketplace. The Exchange believes it has achieved this standard in this filing and in the First and Second Proposed Rule Changes. Similar justifications for the proposed fee change included in the First and Second Proposed Rule Changes, but also in this filing, were previously included in similar fee changes filed by the Exchange and its affiliates, MIAX Emerald and MIAX Pearl, and SIG did not submit a comment letter on those filings.[72] Those filings were not suspended by the Commission and continue to remain in effect. The justification included in each of the prior filings was the result of numerous withdrawals and re-filings of the proposals to address comments received from Commission Staff over many months. The Exchange and its affiliates have worked diligently with Commission Staff on ensuring the justification included in past fee filings fully support an assertion that those fee changes are consistent with the Act.[73]

[67] *See supra* note 8.

[68] *See supra* note 11.

[69] *See* SIG Letter 2, *supra* note 11, at page 1.

[70] 17 CFR 201.700(b)(3).

[71] *See supra* note 44.

[72] *See* Securities Exchange Act Release Nos. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers); 91460 (April 2, 2021), 86 FR 18349 (April 8, 2021) (SR–EMERALD–2021–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Port Fees, Increase Certain Network Connectivity Fees, and Increase the Number of Additional Limited Service MIAX Emerald Express Interface Ports Available to Market Makers); *and* 91857 (May 12, 2021), 86 FR 26973 (May 18, 2021) (SR–MIAX–2021–19) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Remove the Cap on the Number of Additional Limited Service Ports Available to Market Makers).

[73] *See, e.g.,* Securities Exchange Act Release No. 90196 (October 15, 2020), 85 FR 67064 (October 21, 2020) (SR–EMERALD–2020–11) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt One-Time Membership Application Fees and Monthly Trading Permit Fees). *See* Securities Exchange Act Release Nos. 90601 (December 8, 2020), 85 FR 80864 (December 14, 2020) (SR–EMERALD–2020–18) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–11); *and* 91033 (February 1, 2021), 86 FR 8455 (February 5, 2021) (SR–EMERALD–2021–03) (re-filing with more detail added in response to Commission Staff's feedback and after withdrawing SR–EMERALD–2020–18). The Exchange initially filed a proposal to remove the cap on the number of additional Limited Service MEO Ports available to Members on April

The Exchange leveraged its past work with Commission Staff to ensure the justification provided herein and in the First and Second Proposed Rule Changes include the same level of detail (or more) as the prior fee changes that survived Commission scrutiny. The Exchange's detailed disclosures in fee filings have also been applauded by one industry group which noted, ''[the Exchange's] filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.'' [74] That same commenter also noted their ''worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.'' [75]

Therefore, a finding by the Commission that the Exchange has not met its burden to show that the proposed fee change is consistent with the Act would be different than the Commission's treatment of similar past filings, would create further ambiguity regarding the standards exchange fee filings should satisfy, and is not warranted here.

In addition, the arguments in SIG Letter 1 do not support their claim that the Exchange has not met its burden to show the proposed rule change is consistent with the Act. Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange. With regards to the First and Second Proposed Rule Changes, the SIG Letters do not directly address the proposed fees or lay out specific arguments as to why the proposal is not consistent with Section 6(b)(4) of the Act. Rather, SIG simply describes the proposed fee change and flippantly states that its claims concerning the 10Gb ULL fee change proposals by the Exchange, and its affiliates, apply to these changes. Nonetheless, the Exchange submits the below response to the SIG Letter concerning the Initial Proposed Fee Change.

Furthermore, the Exchange has enhanced its cost and revenue analysis and data in this Third [sic] Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Among other things, these enhancements include providing baseline information in the form of data from the month before the Proposed Access Fees became effective.

The Exchange now responds to SIG's remaining claims below. SIG Letter 3 first summarizes its arguments made in SIG Letters 1 and 2 and incorporates those arguments by reference. The Exchange responded to the arguments in SIG Letter 2 above. SIG Letter 3 incorporates the following arguments regarding additional Limited Service MEI Port fees from SIG Letter 1 (while excluding arguments that pertain solely to connectivity), which the Exchange will first respond to in turn, below:

> ''(1) the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable; (2) profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit . . . and comparisons to competing exchanges' overall operating profit margins are an inapt ''apples-to-oranges'' comparison . . . (7) the recoupment of investment for exchange infrastructure has no supporting nexus with the claim that the proposed fees are reasonable, equitably allocated, and not unfairly discriminatory . . . .'' [76]

General

First, the SIG Letter 1 states that additional Limited Service MEI Ports ''are critical to Exchange members to be competitive *and to provide essential protection from adverse market events*'' (*emphasis added*).[77] The Exchange notes that this statement is generally not true for additional Limited Service MEI Ports as those ports are completely voluntary and used primarily for entering liquidity removing orders and not risk protection activities like purging quotes resting on the MIAX Book. Additional Limited Service MEI Ports are essentially used for competitive reasons and Market Makers may choose to utilize one or two Limited Service MEI Ports that are provided for free, or purchase additional Limited Service MEI Ports based on their business needs and desire to attempt to access the market quicker by using one port that may have less latency. For instance, a Market Maker may have just sent numerous messages and/or orders over one of their additional Limited Service MEI Ports that are in queue to be processed. That same Market Maker then seeks to enter an order to remove liquidity from the Exchange's Book. That Market Maker may choose to send that order simultaneously over all of their Limited Service MEI Ports that they elected to purchase to ensure that their liquidity taking order accesses the Exchange as quickly as possible.

If the Exchanges Were To Attempt To Establish Unreasonable Pricing, Then No Market Participant Would Join or Connect to the Exchange, and Existing Market Participants Would Disconnect

SIG asserts that ''the prospect that a member may withdraw from the Exchanges if a fee is too costly is not a basis for asserting that the fee is reasonable.'' [78] SIG misinterprets the Exchange's argument here. The Exchange provided the examples of firms terminating access to certain markets due to fees to support its assertion that firms, including market makers, are not required to connect to all markets and may drop access if fees become too costly for their business models and alternative or substitute forms of access are available to those firms who choose to terminate access. The Commission Staff Guidance also provides that ''[a] statement that substitute products or services are available to market participants in the relevant market (*e.g.,* equities or options) can demonstrate competitive forces if supported by evidence that substitute products or services exist.'' [79] Nonetheless, the Third [sic] Proposed Rule Change no longer makes this assertion as a basis for the proposed fee change and, therefore, the Exchange

9, 2021. *See* SR–PEARL–2021–17. On April 22, 2021, the Exchange withdrew SR–PEARL–2021–17 and refiled that proposal (without increasing the actual fee amounts) to provide further clarification regarding the Exchange's revenues, costs, and profitability any time more Limited Service MEO Ports become available, in general, (including information regarding the Exchange's methodology for determining the costs and revenues for additional Limited Service MEO Ports). *See* SR–PEARL–2021–20. On May 3, 2021, the Exchange withdrew SR–PEARL–2021–20 and refiled that proposal to further clarify its cost methodology. *See* SR–PEARL–2021–22. On May 10, 2021, the Exchange withdrew SR–PEARL–2021–22 and refiled SR–PEARL–2021–23. *See* Securities Exchange Act Release No. 91858 (May 12, 2021), 86 FR 26967 (May 18, 2021) (SR–PEARL–2021–23).

[74] *See* HMA Letter, *supra* note 11.

[75] *Id.* (providing examples where non-transaction fee filings by other exchanges have been permitted to remain effective and not suspended by the Commission despite less disclosure and justification).

[76] *See* SIG Letter 3, *supra* note 11.

[77] *See* SIG Letter 1 at page 2, *supra* note 8.

[78] *Id.*

[79] *See* Guidance, *supra* note 28.

believes it is not necessary to respond to this portion of SIG Letters 1 and 3.

The Proposed Access Fees Will Not Result in Excessive Pricing or Supra-Competitive Profit

Next, SIG asserts that the Exchange's ''profit margin comparisons do not support the Exchanges' claims that they will not realize a supracompetitive profit,'' and ''comparisons to competing exchanges' overall operating profit margins are an inapt 'apples-to-oranges' comparison.'' [80]

The Exchange has provided ample data that the Proposed Access Fees would not result in excessive pricing or a supra-competitive profit. In this Third [sic] Proposed Rule Change, the Exchange no longer utilizes a comparison of its profit margin to that of other options exchanges as a basis that the Proposed Access Fees are reasonable. Rather, the Exchange has enhanced its cost and revenue analysis and data in this Third [sic] Proposed Rule Change to further justify that the Proposed Access Fees are reasonable in accordance with the Commission Staff's Guidance. Therefore, the Exchange believes it is no longer necessary to respond to this portion of SIG Letters 1 and 3.

Recoupment of Exchange Infrastructure Costs

Nowhere in this proposal or in the First or Second Proposed Rule Changes did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its ''proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.'' The Exchange no longer makes this assertion in this filing and, therefore, does not believe is it necessary to respond to SIG's assertion here.

The Proposed Tiered Pricing Structure Is Not Unfairly Discriminatory

SIG challenges the proposed fees by arguing that ''the Exchange[ ] provide[s] no support for [its] claim that [the] proposed tiered pricing structure is needed to encourage efficiency in connectivity usage and the Exchange[ ] provided no support for [the] claim that the tiered pricing structure allows them to better monitor connectivity usage, nor that this is an appropriate basis for the pricing structure in any event.'' The Exchange provided additional justification to support that the Proposed Access Fees are equitable and not unfairly discriminatory above in response to SIG's assertions.

SIFMA Letter

In sum, the SIFMA Letter asserts that the Exchange has failed to demonstrate that the Proposed Access Fees are reasonable for three reasons:

(i) ''The Exchanges' ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.''

(ii) ''. . . order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.''

(iii) ''the Exchanges' argument that the products and services subject to the Proposals are optional does not reflect marketplace reality, nor does it demonstrate that the proposed fees are reasonable.''

The Exchange responds to each of SIFMA's challenges in turn below.

The Exchange Never Set Forth a ''Platform Competition'' Argument

The SIFMA Letter asserts that the Exchange's ''platform competition'' argument that competition for order flow constrains pricing for market data or other products and services exclusively offered by an exchange does not demonstrate that the fees are reasonable.'' The Exchange does not believe it is necessary to respond to this assertion because it has never set forth a ''platform competition'' [81] argument to justify the Proposed Access Fees in the First or Second Proposed Rule Changes nor does it do so in this filing.

The Exchange Is Not Arguing That Order Flow Competition Alone Demonstrates That the Proposed Fees Are Reasonable

The SIFMA Letter asserts that ''order flow competition alone between exchanges does not demonstrate that the fees for the products and services subject to the Proposal are reasonable.'' [82] The Exchange never directly asserted in the First or Second Proposed Rule Changes, nor does it do so in this filing, that order flow competition, alone, demonstrated that the Proposed Access Fees are reasonable and has removed any language that could imply this argument from this filing.

Other SIFMA Assertions

SIFMA also challenges or asserts: (i) Whether the Exchange has shown that the fees are equitable and non-discriminatory; (ii) that a tiered pricing structure will encourage market participants to be more economical with the usage; (iii) greater number of ports use greater Exchange resources; and (iv) that the Exchange has not provided extensive information regarding its cost data and how it determined it cost analysis. The Exchange believes that these assertions by SIFMA basically echo assertions made in SIG Letters 1 and 3 and that it provided a response to these assertions under its response to SIG above or in provided enhanced transparency and justification in this filing.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[83] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,[84] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (''SRO'') if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

As the Exchange further details above, the Exchange first filed a proposed rule change proposing fee changes as proposed herein on August 2, 2021. That proposal, SR–MIAX–2021–37, was published for comment in the **Federal Register** on August 19, 2021.[85] On September 28, 2021 the Exchange withdrew SR–MIAX–2021–37 and filed a proposed rule change proposing fee changes as proposed herein. That proposal, SR–MIAX–2021–43, was published for comment in the **Federal**

[80] *See supra* note 11.

[81] Pursuant to the Guidance, ''platform theory generally asserts that when a business offers facilities that bring together two or more distinct types of customers, it is the overall return of the platform, rather than the return of any particular fees charged to a type of customer, that should be used to assess the competitiveness of the platform's market.'' *See* Guidance, *supra* note 28.

[82] *See* SIFMA Letter, *supra* note 11.

[83] 15 U.S.C. 78s(b)(3)(C).

[84] 15 U.S.C. 78s(b)(1).

[85] *See* Securities Exchange Act Release No. 92661 (August 13, 2021), 86 FR 46737 (August 19, 2021) (SR–MIAX–2021–37). The Commission received one comment letter on that proposal. Comment on SR–MIAX–2021–37 can be found at: *https://www.sec.gov/comments/sr-miax-2021-37/srmiax202137.htm*.

Register on October 5, 2021.[86] The Commission received three comment letters from two separate commenters on SR–MIAX–2021–43.[87] On November 22, 2021, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change; and (2) instituted proceedings to determine whether to approve or disapprove the proposed rule change.[88] On December 1, 2021, the Exchange withdrew SR–MIAX–2021–43 and filed a proposed rule change proposing fee changes as proposed herein. That filing, SR–MIAX–2021–60,[89] was published for comment in the **Federal Register** on December 20, 2021.[90] On January 27, 2022, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (1) Temporarily suspended the proposed rule change (SR–MIAX–2021–60); and (2) instituted proceedings to determine whether to approve or disapprove the proposal.[91] On February 1, 2022, the Exchange withdrew SR–MIAX–2021–60 and filed the instant filing, which is substantially similar.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[92] The instructions to Form 19b–4, on which exchanges file their proposed rule changes, specify that such statement ''should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.'' [93]

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; [94] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not permit unfair discrimination between customers, issuers, brokers, or dealers; [95] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[96]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the proposed additional Limited Service MEI Port fees are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[97]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[98]

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C) [99] and 19(b)(2)(B) [100] of the Act to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[101] the Commission is providing notice of the grounds for possible disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of whether the Exchange has sufficiently demonstrated how the proposed rule change is consistent with Sections 6(b)(4),[102] 6(b)(5),[103] and 6(b)(8) [104] of the Act. Section 6(b)(4) of the Act requires that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following aspects of the proposal and asks commenters to submit data where appropriate to support their views:

1. *Cost Estimates and Allocation.* The Exchange states that it is not asserting that the Proposed Access Fees are constrained by

[86] *See* Securities Exchange Act Release No. 93185 (September 29, 2021), 86 FR 55093 (October 5, 2021) (SR–MIAX–2021–43).

[87] Comment on SR–MIAX–2021–43 can be found at: *https://www.sec.gov/comments/sr-miax-2021-43/srmiax202143.htm.*

[88] *See* Securities Exchange Act Release No. 93640 (November 22, 2021), 86 FR 67745 (November 29, 2021).

[89] *See* text accompanying *supra* note 14.

[90] *See* Securities Exchange Act Release No. 93771 (December 14, 2021), 86 FR 71940 (December 20, 2021).

[91] *See* Securities Exchange Act Release No. 94087 (January 27, 2022), 87 FR 5918 (February 2, 2022).

[92] *See* 17 CFR 240.19b–4 (Item 3 entitled ''Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change'').

[93] *See id.*

[94] 15 U.S.C. 78f(b)(4).

[95] 15 U.S.C. 78f(b)(5).

[96] 15 U.S.C. 78f(b)(8).

[97] *See* 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

[98] For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[99] 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

[100] 15 U.S.C. 78s(b)(2)(B).

[101] 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

[102] 15 U.S.C. 78f(b)(4).

[103] 15 U.S.C. 78f(b)(5).

[104] 15 U.S.C. 78f(b)(8).

competitive forces, but rather set forth a ''cost-plus model,'' employing a ''conservative methodology'' that ''strictly considers only those costs that are most clearly directly related to the provision and maintenance of additional Limited Service MEI Ports.'' [105] As described above by the Exchange, MIAX projects $1.32 million in aggregate annual estimated costs for 2021 for additional Limited Service MEI Ports. Do commenters believe that the Exchange has provided sufficient detail about how it determined (a) which categories and sub-categories of third-party and internal expenses are most clearly directly associated with providing and maintaining *additional* Limited Service MEI Ports, (b) the total annual expenses associated with such categories/sub-categories, and (c) what percentage of each such expense should be allocated as actually supporting the *additional* Limited Service MEI Ports (as opposed to, for example, allocated to the first two ''free'' Limited Service MEI Ports or other types of ports or connectivity services offered by the Exchange)? The Exchange describes a ''proprietary'' process involving all Exchange department heads, including the finance department and numerous meetings between the Exchange's Chief Information Officer, Chief Financial Officer, Head of Strategic Planning and Operations, Chief Technology Officer, various members of the Legal Department, and other group leaders, but does not specify further what principles were applied in making these determinations or arriving at particular allocations. Do commenters believe further explanation is necessary? For employee compensation and benefit costs, for example, the Exchange calculated an allocation of employee time in several departments, including Technology, Back Office, Systems Operations, Networking, Business Strategy Development, and Trade Operations, but does not provide the job titles and salaries of persons whose time was accounted for, or explain the methodology used to determine how much of an employee's time is devoted to providing and maintaining additional Limited Service MEI Ports. What are commenters' views on whether the Exchange has provided sufficient detail on the identity and nature of services provided by third parties? Across all of the categories and sub-categories of third-party and internal expenses that the Exchange identified as being clearly directly associated with providing and maintaining additional Limited Service MEI Ports, what are commenters' views on whether the Exchange has provided sufficient detail on how it selected such categories/sub-categories and how shared costs within or among such categories/sub-categories are allocated to additional Limited Service MEI Ports, to permit an independent review and assessment of the reasonableness of purported cost-based fees and the corresponding profit margin thereon? Should the Exchange be required to identify the categories/sub-categories of expenses that it deemed *not* to be clearly directly associated with additional Limited Service MEI Ports, and/or what Exchange products or services account for the *un*-allocated percentage of those categories/sub-categories of expenses that were deemed to be associated with additional Limited Service MEI Ports (*e.g.,* what products or services are associated with the approximately 95 percent of applicable depreciation and amortization expenses that MIAX does *not* allocate to the Proposed Access Fees)? Do commenters believe that the costs projected for 2021 are generally representative of expected costs going forward (to the extent commenters consider 2021 to be a typical or atypical year), or should an exchange present an estimated range of costs with an explanation of how profit margins could vary along the range of estimated costs? Should the Exchange use cost projections or actual cost estimates for 2021 in a filing made in 2022, or make cost projections for 2022?

2. *Revenue Estimates and Profit Margin Range.* The Exchange uses a single monthly revenue figure (November 2021) as the basis for calculating its projected profit margin of 56 percent. The Exchange argues that projecting revenues on a per month basis is reasonable ''as the revenue generated from access services subject to the proposed fee generally remains static from month to month.'' [106] Yet the Exchange also acknowledges that ''the revenue . . . may vary from month to month due to changes in ports.'' [107] Similarly, the Exchange states that ''the number of ports has not materially changed over the previous months,'' yet also states that firms ''frequently add and drop ports mid-month.'' [108] Do commenters believe a single month provides a reasonable basis for a revenue projection? If not, why not? The profit margin is also dependent on the accuracy of the cost projections which, if inflated (intentionally or unintentionally), may render the projected profit margin meaningless. The Exchange acknowledges that this margin may fluctuate from month to month due to changes in the number of ports purchased, and that costs may increase.[109] The Exchange does not account for the possibility of cost decreases, however. What are commenters' views on the extent to which actual costs (or revenues) deviate from projected costs (or revenues)? Do commenters believe that the Exchange's methodology for estimating the profit margin is reasonable? Should the Exchange provide a range of profit margins that it believes are reasonably possible, and the reasons therefor?

3. *Reasonable Rate of Return.* The Exchange states that its Proposed Access Fees are ''designed to cover its costs with a limited return in excess of such costs,'' that ''revenue and associated profit margin . . . are not solely intended to cover the costs associated with providing access services subject to the Proposed Access Fees,'' and that a 56 percent margin is a limited return over such costs.[110] Do commenters agree with the Exchange that its expected 56 percent profit margin would constitute a reasonable rate of return over costs for additional Limited Service MEI Ports? If not, what would commenters consider to be a reasonable rate of return and/or what methodology would they consider to be appropriate for determining a reasonable rate of return? The Exchange states that it chose to initially provide additional Limited Service MEI Ports at a discounted price and to forego revenue that it otherwise could have generated from assessing higher fees.[111] Do commenters believe that this should be considered in the ''reasonableness'' assessment? Do commenters believe it relevant to an assessment of reasonableness that, according to the Exchange, the Proposed Access Fees are similar to or lower than fees charged by competing options exchanges with similar market share? Should an assessment of reasonable rate of return include consideration of factors other than costs; and if so, what factors should be considered, and why?

4. *Periodic Reevaluation.* The Exchange has addressed whether it believes a material deviation from the anticipated profit margin would warrant the need to make a rule filing pursuant to Section 19(b) of the Act to increase or decrease the fees accordingly, stating that ''[a]ny requirement that an exchange should conduct a periodic re-evaluation on a set timeline of its cost justification and amend its fees accordingly should be established by the Commission holistically, applied to all exchanges and not just pending fee proposals such as this filing,'' and that ''[i]n order to be fairly applied, such a mandate should be applied to existing access fees as well.'' [112] In light of the impact that the number of ports purchased has on profit margins, and the potential for costs to decrease (or increase) over time, what are commenters' views on the need for exchanges to commit to reevaluate, on an ongoing and periodic basis, their cost-based connectivity fees to ensure that the fees stay in line with their stated profitability projections and do not become unreasonable over time, for example, by failing to adjust for efficiency gains, cost increases or decreases, and changes in subscribers? How formal should that process be, how often should that reevaluation occur, and what metrics and thresholds should be considered? How soon after a new connectivity fee change is implemented should an exchange assess whether its revenue and/or cost estimates were accurate and at what threshold should an exchange commit to file a fee change if its estimates were inaccurate? Should an initial review take place within the first 30 days after a connectivity fee is implemented? 60 days? 90 days? Some other period?

5. *Tiered Structure for Additional Limited Service MEI Ports.* The Exchange states that the proposed tiered fee structure is designed to set the amount of the fees to relate to the number of ports a firm purchases [113] and that ''[c]harging an incrementally higher fee to a Market Maker that utilizes numerous ports is directly related to the increased costs the

[105] *See supra* Section II.A.2.

[106] *See id.*

[107] *See id.*

[108] *See id.*

[109] *See id.*

[110] *See id.*

[111] *See id.*

[112] *See id.*

[113] *See id.*

Exchange incurs in providing and maintaining those additional ports.'' [114] According to the Exchange, firms that purchase numerous Limited Service MEI Ports are primarily those that engage in advanced trading strategies, typically generate a disproportionate amount of messages and order traffic, and frequently add or drop ports mid-month, and thus that ''it is equitable for these firms to experience increased port costs based on their disproportionate pull on Exchange resources to provide the additional port access.'' [115] The Proposed Access Fees would not just increase the previous $100 per additional Limited Service MEI Port fee, but would *progressively* increase the fee up to 2.5-fold (up to $250 per port for seven or more ports). However, the Exchange has not specifically asserted that it is, for example, 2.5 times more costly to provide the seventh or more ports. Instead, the Exchange argues generally that the more ports purchased by a Market Maker ''likely'' results in greater expenditure of Exchange resources and increased cost to the Exchange, and that as the number of ports an entity has increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, port costs (*e.g.,* storage costs, surveillance costs, service expenses) also increase.[116] Do commenters believe that the fees for each tier, as well as the fee differences between the tiers, are supported by the Exchange's assertions that it set the tiered-pricing structure in a manner that is equitable and not unfairly discriminatory? Do commenters believe that the Exchange should demonstrate how the proposed tiered fee levels correlate with tiered costs (*e.g.,* by providing cost information broken down by tier, messaging volumes through the additional Limited Service MEI Ports by tier, and/or mid-month add/drop rates by tier) to better substantiate, by tier, the ''disproportionate pull'' on the Exchange's resources as a firm increases the number of additional Limited Service MEI Ports that it purchases and to permit an assessment of the Exchange's statement that the Proposed Access Fees ''are solely determined by the individual Members' or non-Members' business needs and its impact on Exchange resources''?[117]

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.'' [118] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[119] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[120] Moreover, ''unquestioning reliance'' on an SRO's representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.[121]

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

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(4), 6(b)(5), and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[122]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by March 15, 2022. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by March 29, 2022.

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 No. SR–MIAX–2022–08 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 No. SR–MIAX–2022–08. 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 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 No. SR–MIAX–2022–08 and should be submitted on or before March 15, 2022. Rebuttal comments should be submitted by March 29, 2022.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,[123] that File No. SR–MIAX–2022–08 be, and hereby is, temporarily suspended. In addition, the Commission is instituting

[114] *See id.*

[115] *See id.*

[116] *See id.*

[117] *See id.*

[118] 17 CFR 201.700(b)(3).

[119] *See id.*

[120] *See id.*

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

[122] 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. *See* Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[123] 15 U.S.C. 78s(b)(3)(C).

proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[124]

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022–03654 Filed 2–18–22; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94251; File No. SR–MIAX–2022–09]

Self-Regulatory Organizations: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by Miami International Securities Exchange, LLC To Amend Exchange Rule 1308, Supervision of Accounts

February 15, 2022.

Pursuant to the provisions of 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 February 3, 2022, Miami International Securities Exchange, LLC (''MIAX Options'' or the ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') a 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 Exchange Rule 1308, Supervision of Accounts, to extend the temporary remote inspection relief for Members[3] to complete their branch office[4] inspections for the calendar years 2020 and 2021 to include calendar year 2022 through December 31, 2022.

The text of the proposed rule change is available on the Exchange's website at *http://www.miaxoptions.com/rule-filings/* at MIAX Options' 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 Exchange Rule 1308, Supervision of Accounts, to extend the temporary remote inspection relief for Members to complete their branch office inspections for the calendar years 2020 and 2021 to include calendar year 2022 through December 31, 2022.

The COVID–19 pandemic has caused a host of operational disruptions to the securities industry and impacted Members, regulators, investors, and other stakeholders. In response to the pandemic, the Exchange began providing temporary relief to Members from specified Exchange Rules and requirements, including Exchange Rule 1308(d), Annual Branch Office Inspections.

Exchange Rules require Members to conduct branch[5] and non-branch office and location inspections pursuant to certain annual cycles. Specifically, pursuant to Exchange Rule 1308(d), each branch office that supervises one or more non-branch location must be inspected no less often than once each calendar year, unless it qualifies for certain exemptions.[6] Every branch office, without exception, must be inspected at least once every three calendar-years. Members must maintain written reports of such inspections.[7]

In November 2020, the Exchange adopted Exchange Rule 1308(d)(4) and (d)(5), which has expired by its terms, that extended the time by which Members must complete their calendar year 2020 inspection obligations to March 31, 2021, without an on-site visit to the office or location.[8] The Exchange Rule 1308(d)(5) automatically sunset on December 31, 2021, to provide Members the option of satisfying their inspection obligations under Exchange Rule 1308 remotely for calendar years 2020 and 2021, subject to specified conditions,[9] due to the logistical challenges of going on-site while public health and safety concerns related to COVID–19 persisted. The Exchange notes that these temporary rules are substantively identical to the temporary inspection extension and remote relief rules filed by the Financial Industry Regulatory Authority (''FINRA'').[10]

While there are signs of improvement, much uncertainty remains. The emergence of the COVID–19 variants,[11] dissimilar vaccination rates throughout the United States, and the uptick in transmissions in many locations indicate that COVID–19 remains an active and real public health concern.[12]

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[124] 17 CFR 200.30–3(a)(12), (57) and (58).

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

[2] 17 CFR 240.19b–4.

[3] The term ''Member'' means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed ''members'' under the Exchange Act. *See* Exchange Rule 100.

[4] A ''branch office'' is any location where one or more associated persons of a Member regularly conduct the business of effecting any transactions in, or inducing or attempting to induce the purchase or sale of any security, or is held out as such, with such exclusions pursuant to Exchange Rule 1306(c)(1)–(7). *See* Exchange Rule 1306(c).

[5] The Exchange notes that notwithstanding the exclusions in subparagraphs (c)(1)–(7) of Exchange Rule 1306, any location that is responsible for supervising the activities of persons associated with a Member at one or more non-branch locations of such Member is considered to be a branch office. *See* Exchange Rule 1306(d).

[6] A Member may demonstrate to the satisfaction of the Exchange that because of proximity, special reporting or supervisory practice, other arrangements may satisfy Exchange Rule 1308(d)'s requirements for a particular branch office, or that, based upon the written policies and procedures of such Member providing for a systematic risk-based surveillance system, the Member submits a proposal to the Exchange and receives, in writing, an exemption from the requirement in Exchange 1308(d), pursuant to Exchange Rule 1308(e).

[7] *See* Exchange Rule 1308(d)(2).

[8] *See* Securities Exchange Act Release No. 90937 (January 25, 2021), 86 FR 6944 (January 15, 2021) (SR–MIAX–2021–01).

[9] *See id.*

[10] *See* Securities and Exchange Act Release Nos. 89188 (June 30, 2020), 85 FR 40713 (July 7, 2020) (SR–FINRA–2020–019); *and* 90454 (November 18, 2020), 85 FR 75097 (November 24, 2020) (Notice of Filing and Immediate Effectiveness of File No. SR–FINRA–2020–040).

[11] *See* The Centers for Disease Control and Prevention (''CDC''), What You Need to Know About Variants, *https://www.cdc.gov/coronavirus/2019-ncov/variants/variant.html* (stating, in part, that ''the Delta variant causes more infections and spreads faster than earlier forms of the virus that causes COVID19'') (updated September 3, 2021). *See also* CDC, The Possibility of COVID–19 Illness After Vaccination: Breakthrough Infections, *https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/why-measure-effectiveness/breakthrough-cases.html* (stating, in part, that ''COVID–19 vaccines are effective at preventing infection, serious illness, and death. Most people who get COVID–19 are unvaccinated. However, since vaccines are not 100% effective at preventing infection, some people who are fully vaccinated will still get COVID–19 . . . People who get vaccine breakthrough infections can be contagious'') (updated August 23, 2021).

[12] For example, President Joe Biden on July 29, 2021, announced several measures to increase the number of people vaccinated against COVID–19 and to slow the spread of the Delta variant, including strengthening safety protocols for federal