

Amendment No. 1, is consistent with the requirements of the Act, and in particular, with the requirements of Sections 17A(b)(3)(F), 17A(b)(3)(G), and 17A(b)(3)(H) of the Act, and Rules 17Ad-22(e)(1), (e)(2)(i), 17Ad-22(e)(6)(ii), 17Ad-22(e)(10), 17Ad-22(e)(13), 17Ad-22(e)(14), 17Ad-22(e)(17)(i), and (e)(18).<sup>69</sup>

It is therefore ordered pursuant to Section 19(b)(2) of the Act<sup>70</sup> that the proposed rule change, as modified by Partial Amendment No. 1 (SR-ICEEU-2021-010), be, and hereby is, approved.<sup>71</sup>

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>72</sup>

**Vanessa A. Countryman,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92792; File Nos. SR-MIAX-2021-29, SR-EMERALD-2021-22, SR-PEARL-2021-30]

### Self-Regulatory Organizations; Miami International Securities Exchange, LLC, MIAX Emerald, LLC, and MIAX PEARL, LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Amend Fees for Purge Ports

August 27, 2021.

#### I. Introduction

On July 1, 2021, Miami International Securities Exchange, LLC (“MIAX”), MIAX Emerald, LLC (“MIAX Emerald”), and MIAX PEARL, LLC (“MIAX Pearl”) (each an “Exchange;” collectively, the “Exchanges”) each filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to increase fees for purge ports. Each proposed rule change was immediately effective upon filing with the Commission pursuant to Section

<sup>69</sup> 15 U.S.C. 78q-1(b)(3)(F); 15 U.S.C. 78q-1(b)(3)(G); 15 U.S.C. 78q-1(b)(3)(H); 17 CFR 240.17Ad-22(e)(1), (e)(2)(i), (e)(6)(ii), (e)(10), (e)(13), (e)(14), (e)(17)(i), and (e)(18).

<sup>70</sup> 15 U.S.C. 78s(b)(2).

<sup>71</sup> In approving the proposed rule change, the Commission considered the proposal’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>72</sup> 17 CFR 200.30-3(a)(12).

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

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

19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule changes were published for comment in the **Federal Register** on July 15, 2021.<sup>4</sup> The Commission has received comment on the proposals.<sup>5</sup> Pursuant to Section 19(b)(3)(C) of the Act,<sup>6</sup> the Commission is hereby: (1) Temporarily suspending File Nos. SR-MIAX-2021-29, SR-EMERALD-2021-22, and SR-PEARL-2021-30; and (2) instituting proceedings to determine whether to approve or disapprove File Nos. SR-MIAX-2021-29, SR-EMERALD-2021-22, and SR-PEARL-2021-30.

#### II. Description of the Proposed Rule Changes

Each Exchange currently provides certain of its members the option to purchase purge ports to assist in their quoting activity.<sup>7</sup> Purge ports provide the ability to send quote purge messages to an Exchange’s system.<sup>8</sup> Each Exchange offers purge ports as a package; a member has the option to receive up to two purge ports per matching engine to which it connects.<sup>9</sup> MIAX has 24 matching engines, and thus a member may receive up to 48 purge ports on MIAX.<sup>10</sup> MIAX Emerald and MIAX Pearl each have 12 matching engines, and thus a member may receive up to 24 purge ports on these Exchanges.<sup>11</sup>

MIAX and MIAX Emerald previously charged a flat fee of \$1,500 per month for purge ports, and MIAX Pearl previously charged a flat fee of \$750 per month for purge ports, regardless of the number of matching engines to which a

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release Nos. 92364 (July 9, 2021), 86 FR 37364 (July 15, 2021) (SR-MIAX-2021-29) (“MIAX Notice”); 92360 (July 9, 2021), 86 FR 37373 (July 15, 2021) (SR-EMERALD-2021-22) (“MIAX Emerald Notice”); 92363 (July 9, 2021), 86 FR 37376 (July 15, 2021) (SR-PEARL-2021-30) (“MIAX Pearl Notice”). For ease of reference, citations to statements generally applicable to all three notices are to the MIAX Notice.

<sup>5</sup> Comment on the proposed rule changes can be found at: <https://www.sec.gov/comments/sr-miax-2021-29/srmiax202129.htm>; <https://www.sec.gov/comments/sr-emerald-2021-22/sremerald202122.htm>; <https://www.sec.gov/comments/sr-pearl-2021-30/srpearl202130.htm>.

<sup>6</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>7</sup> See, e.g., MIAX Notice, *supra* note 4, at 37365.

<sup>8</sup> See MIAX Options Fee Schedule, Section (5)(d)(ii), footnote 30; MIAX Emerald Options Fee Schedule, Section (5)(d)(ii); MIAX Pearl Options Fee Schedule, Definitions Section.

<sup>9</sup> See, e.g., MIAX Notice, *supra* note 4, at 37365.

<sup>10</sup> See MIAX Notice, *supra* note 4, at 37365.

<sup>11</sup> See MIAX Emerald Notice, *supra* note 4, at 37374; MIAX Pearl Notice, *supra* note 4, at 37377.

member connected and consequently regardless of the number of purge ports allocated to the member. Each Exchange proposes to increase the flat monthly fee to \$7,500.

#### III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,<sup>12</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>13</sup> 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 described below, the Commission believes a temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule changes’ consistency with the Act and the rules thereunder.

When an exchange files a proposed rule change with the Commission, including fee filings, it is required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.<sup>14</sup> 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.”<sup>15</sup>

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), requires, among other things, that the rules of an exchange: (1) Provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;<sup>16</sup> (2) be designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>17</sup> and (3) not impose any burden on competition

<sup>12</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>13</sup> 15 U.S.C. 78s(b)(1).

<sup>14</sup> See 17 CFR 240.19b-4 (General Instructions for Form 19b-4—Information to be Included in the Complete Form—Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

<sup>15</sup> See *id.*

<sup>16</sup> 15 U.S.C. 78f(b)(4).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

not necessary or appropriate in furtherance of the purposes of the Act.<sup>18</sup>

In support of their proposals, the Exchanges state that the use of purge ports is completely optional, and no options market participant is required by rule, regulation, or competitive forces to use them.<sup>19</sup> The Exchanges explain that members can use other protocols to purge or cancel messages, and that purge ports were designed as an optional service to enable firms to manage their quoting risk and meet their heightened quoting obligations.<sup>20</sup> The Exchanges state that they are not aware of any reason why a market participant could not simply drop its purge ports if the Exchanges were to establish unreasonable prices for purge ports that, in the determination of such market participant, did not make business or economic sense for such participant.<sup>21</sup>

The Exchanges also state that they operate in a highly competitive environment, and if an exchange sets non-transaction fees that are too high for its relevant marketplace, market participants can choose to no longer access that particular exchange.<sup>22</sup>

The Exchanges further state that the increased monthly flat fee for purge ports is competitive with fees charged by other exchanges that offer comparable purge port services.<sup>23</sup> The Exchanges state that they have historically undercharged for purge ports as compared to other exchanges, and that the proposed monthly fee increase would bring the Exchanges' fees more in line with that of other options exchanges.<sup>24</sup> The Exchanges argue that, when calculated on a per purge port basis, other exchanges charge higher monthly fees. MIAX states that, assuming a member receives 48 purge ports (two per each of its 24 matching engines), this results in a cost of \$156.25 per purge port (\$7,500 divided by 48).<sup>25</sup> MIAX Emerald and MIAX Pearl state that, assuming a member receives 24 purge ports (two per each of their 12 matching engines), this results in a cost of \$312.50 per purge port (\$7,500 divided by 24).<sup>26</sup> The Exchanges state that Cboe BZX Exchange, Inc. ("BZX"), Cboe EDGX Exchange, Inc. ("EDGX"), Cboe Exchange, Inc. ("Cboe"), and Nasdaq GEMX, LLC ("GEMX") charge

higher monthly per purge port fees of \$750, \$750, \$850, and \$1,250, respectively.<sup>27</sup>

The one comment letter received to date challenges several of the Exchanges' assertions.<sup>28</sup> The commenter states that the Exchanges' argument that the proposed \$7,500 monthly fee is lower on a per purge port basis than the fees assessed by other exchanges (BZX, EDGX, Cboe, GEMX) is disingenuous, because each of these other exchanges has one matching engine, and thus market participants require only two purge ports on each of these exchanges, resulting in significantly lower fees when calculated on a monthly basis.<sup>29</sup> The commenter also states that the Exchanges' argument that purge ports are optional functionality, which members are free to drop if priced too high, is without merit.<sup>30</sup> The commenter asserts that the Exchanges know that market makers have no choice but to absorb these fees so as not to imperil their business with stale quotes.<sup>31</sup> The commenter further states that the Exchanges did not provide any justification for the fee increase itself; and that the Exchanges likely cannot assert that the cost of maintaining purge ports has increased at all, let alone five-fold.<sup>32</sup>

In temporarily suspending the Exchanges' proposed rule changes, the Commission intends to further consider whether the proposed purge port fees are consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule changes satisfy the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; are designed to perfect the mechanism of a free and open market and a national market system and to protect investors and the public interest, and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>33</sup>

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.<sup>34</sup>

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

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>35</sup> and 19(b)(2)(B) of the Act<sup>36</sup> to determine whether the Exchanges' proposed rule changes should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule changes to inform the Commission's analysis of whether to approve or disapprove the proposed rule changes.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>37</sup> the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which 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";<sup>38</sup>

- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to "perfect the mechanism of a free and open market and a national market

<sup>34</sup> For purposes of temporarily suspending the proposed rule changes, the Commission has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>35</sup> 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.

<sup>36</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>37</sup> 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.*

<sup>38</sup> 15 U.S.C. 78f(b)(4).

<sup>18</sup> 15 U.S.C. 78f(b)(8).

<sup>19</sup> See, e.g., MIAX Notice, *supra* note 4, at 37365–66.

<sup>20</sup> See *id.* at 37366.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.* at 37365–66.

<sup>23</sup> See *id.* at 37365.

<sup>24</sup> See *id.*

<sup>25</sup> See MIAX Notice, *supra* note 4, at 37365.

<sup>26</sup> See MIAX Emerald Notice, *supra* note 4, at 37374; MIAX Pearl Notice, *supra* note 4, at 37377.

<sup>27</sup> See, e.g., MIAX Notice, *supra* note 4, at 37365.

<sup>28</sup> See letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP, dated August 5, 2021 ("SIG Letter").

<sup>29</sup> See SIG Letter, *supra* note 28, at 2.

<sup>30</sup> See *id.*

<sup>31</sup> See *id.*

<sup>32</sup> See *id.*

<sup>33</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>39</sup> and

- Whether the Exchanges have demonstrated how the proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”<sup>40</sup>

As discussed in Section III above, the Exchanges made various arguments in support of the proposal, and the Commission received comment disputing the Exchanges’ arguments and expressing concerns regarding the proposal.<sup>41</sup> In particular, the commenter argues that the Exchanges did not provide sufficient information to establish that the proposed fees are consistent with the Act and the rules thereunder.<sup>42</sup>

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”<sup>43</sup> 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,<sup>44</sup> 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.<sup>45</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act, and specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; are designed to perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest; are not designed to

permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act;<sup>46</sup> as well as any other provision of the Act, or the rules and regulations thereunder.

#### 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. Such comments should be submitted by September 23, 2021. Rebuttal comments should be submitted by October 7, 2021. 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.<sup>47</sup>

The Commission asks that commenters address the sufficiency and merit of the Exchanges’ statements in support of the proposals, in addition to any other comments they may wish to submit about the proposed rule changes.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposed rule changes are 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](mailto:rule-comments@sec.gov). Please include File Nos. SR–MIAAX–2021–29, SR–EMERALD–2021–22, and SR–PEARL–2021–30 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 Nos. SR–MIAAX–2021–29, SR–EMERALD–2021–22, and SR–PEARL–2021–30. These file numbers should be

<sup>39</sup> See 15 U.S.C. 78f(b)(4), (5), and (8).

<sup>40</sup> See 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).

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 changes that are filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchanges. 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 Nos. SR–MIAAX–2021–29, SR–EMERALD–2021–22, and SR–PEARL–2021–30 and should be submitted on or before September 23, 2021. Rebuttal comments should be submitted by October 7, 2021.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(3)(C) of the Act,<sup>48</sup> that File Nos. SR–MIAAX–2021–29, SR–EMERALD–2021–22, and SR–PEARL–2021–30 be, and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>49</sup>

**Vanessa A. Countryman,**  
Secretary.

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<sup>41</sup> See 15 U.S.C. 78s(b)(3)(C).

<sup>42</sup> 17 CFR 200.30–3(a)(57) and (58).

<sup>39</sup> 15 U.S.C. 78f(b)(5).

<sup>40</sup> 15 U.S.C. 78f(b)(8).

<sup>41</sup> See SIG Letter, *supra* note 28.

<sup>42</sup> See *id.* at 2.

<sup>43</sup> 17 CFR 201.700(b)(3).

<sup>44</sup> See *id.*

<sup>45</sup> See *id.*