

exchanges and data vendors are free to lower their prices to better compete with the Exchange's offering. Nasdaq's main competitors, in particular, offer directly competing enterprise licenses for their top-of-book products, and are readily able to lower enterprise license fees in response to Nasdaq. Indeed, the Exchange's decision to lower its enterprise license fee was itself generated by the need to compete with other exchanges. The Proposal may in turn generate competitive responses from other exchanges, enhancing overall competition.

#### Intramarket Competition

The Proposal will not cause any unnecessary or inappropriate burden on intramarket competition. In fact, it will foster competition among broker-dealers by lowering costs for current licensees, while at the same time increasing the number of broker-dealers able to purchase that license. The current enterprise license, just like all of the enterprise licenses offered by Nasdaq's competitors, does not itself impose an unnecessary or inappropriate burden on intramarket competition. Relatively smaller broker-dealers have fewer internal Professional Subscribers and therefore operate with lower fixed costs, helping them compete with the larger broker-dealers. Moreover, the underlying fee of \$26 per Professional Subscriber fee has itself been shown not to place an undue burden on competition, and, if that fee proves to be excessive, broker-dealers would be able to purchase top-of-book data from one of the Exchange's competitors offering a substitute product. For all of these reasons, the Proposal will not place any unnecessary or inappropriate burden on intramarket competition.

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

No written comments were either solicited or received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>54</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) Necessary or appropriate in the public interest; (ii) for the protection

of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

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

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NASDAQ-2020-086 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-NASDAQ-2020-086. 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-NASDAQ-2020-086 and

should be submitted on or before January 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>55</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90612; File No. SR-EMERALD-2020-16]

#### Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Establish Market Data Fees

December 9, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 25, 2020, MIAX Emerald, LLC ("MIAX Emerald" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the "Fee Schedule") to establish market data fees.

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

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The

<sup>54</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.

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 establish market data fees. MIAX Emerald commenced operations as a national securities exchange registered under Section 6 of the Act<sup>3</sup> on March 1, 2019.<sup>4</sup> The Exchange adopted its transaction fees and certain of its non-transaction fees in its filing SR-EMERALD-2019-15.<sup>5</sup> In that filing, the Exchange expressly waived, among others, market data fees to provide an incentive to prospective market participants to become Members<sup>6</sup> of the Exchange. At that time, the Exchange waived market data fees for the Waiver Period<sup>7</sup> and stated that it would provide notice to market participants when the Exchange intended to terminate the Waiver Period.

On September 15, 2020, the Exchange issued a Regulatory Circular which announced, among other things, that the Exchange would be ending the Waiver Period for market data fees, beginning October 1, 2020.<sup>8</sup>

On October 1, 2020, the Exchange filed its proposal to assess fees for its market data products, MIAX Emerald Top of Market ("ToM"), Administrative Information Subscriber ("AIS") feed,

<sup>3</sup> 15 U.S.C. 78f.

<sup>4</sup> See Securities Exchange Act Release No. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (File No. 10-233) (order approving application of MIAX Emerald, LLC for registration as a national securities exchange).

<sup>5</sup> See Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR-EMERALD-2019-15) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the MIAX Emerald Fee Schedule).

<sup>6</sup> "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 and the Definitions Section of the Fee Schedule.

<sup>7</sup> "Waiver Period" means, for each applicable fee, the period of time from the initial effective date of the MIAX Emerald Fee Schedule until such time that the Exchange has an effective fee filing establishing the applicable fee. The Exchange will issue a Regulatory Circular announcing the establishment of an applicable fee that was subject to a Waiver Period at least fifteen (15) days prior to the termination of the Waiver Period and effective date of any such applicable fee. See the Definitions Section of the Fee Schedule.

<sup>8</sup> See MIAX Emerald Regulatory Circular 2020-41 available at [https://www.miaxoptions.com/sites/default/files/circular-files/MIAX\\_Emerald\\_RC\\_2020\\_41.pdf](https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Emerald_RC_2020_41.pdf).

and MIAX Order Feed ("MOR").<sup>9</sup> On October 14, 2020, the Exchange withdrew the First Proposed Rule Change and refiled its proposal in order to provide more description regarding the difference in pricing for internal distributors and external distributors.<sup>10</sup>

On November 25, 2020, the Exchange withdrew the Second Proposed Rule Change and refiled its proposal to assess fees for its ToM, AIS and MOR products in order to provide sufficient information to demonstrate that the Exchange is subject to significant substitution-based competitive forces<sup>11</sup> in setting the terms of its proposal for ToM, AIS and MOR market data fees.<sup>12</sup>

A more detailed description of the ToM, AIS and MOR products can be found in the Exchange's previously filed Market Data Product filings.<sup>13</sup> The Exchange notes that it will not be assessing fees for Complex Top of Market ("cToM")<sup>14</sup> data at this time.

To summarize, ToM provides market participants with a direct data feed that includes the Exchange's best bid and offer, with aggregate size, and last sale information, based on displayable order and quoting interest on the Exchange.

<sup>9</sup> See SR-EMERALD-2020-10 (the "First Proposed Rule Change").

<sup>10</sup> See Securities Exchange Act Release No. 90274 (October 27, 2020), 85 FR 69371 (November 2, 2020) (SR-EMERALD-2020-13) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Establish Market Data Fees) (the "Second Proposed Rule Change").

<sup>11</sup> See, e.g., Securities Exchange Act Release No. 90217 (October 16, 2020), 85 FR 67392 (October 22, 2020) (SR-NYSENAT-2020-05) (Order Approving a Proposed Rule Change To Establish Fees for the NYSE National Integrated Feed) (the "Integrated Feed Approval Order").

<sup>12</sup> See Comment Letter from Joseph W. Ferraro III, SVP, Deputy General Counsel, the Exchange, dated November 20, 2020, notifying the Commission that the Exchange will withdraw the Second Proposed Rule Change.

<sup>13</sup> See Securities Exchange Act Release No. 85207 (February 27, 2019), 84 FR 7963 (March 5, 2019) (SR-EMERALD-2019-09) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish MIAX Emerald Top of Market ("ToM") Data Feed, MIAX Emerald Complex Top of Market ("cToM") Data Feed, MIAX Emerald Administrative Information Subscriber ("AIS") Data Feed, and MIAX Emerald Order Feed ("MOR")).

<sup>14</sup> cToM provides subscribers with the same information as the ToM market data product as it relates to the strategy book, i.e., the Exchange's best bid and offer for a complex strategy, with aggregate size, based on displayable order and quoting interest in the complex strategy on the Exchange. cToM also provides subscribers with the identification of the complex strategies currently trading on MIAX Emerald; complex strategy last sale information; and the status of securities underlying the complex strategy (e.g., halted, open, or resumed). cToM is distinct from ToM, and anyone wishing to receive cToM data must subscribe to cToM regardless of whether they are a current ToM subscriber. ToM subscribers are not required to subscribe to cToM, and cToM subscribers are not required to subscribe to ToM. See *id.*

The ToM data feed includes data that is identical to the data sent to the processor for the Options Price Reporting Authority ("OPRA"). ToM also contains a feature that provides the number of Priority Customer<sup>15</sup> contracts that are included in the size associated with the Exchange's best bid and offer.

AIS provides market participants with a direct data feed that allows subscribers to receive real-time updates of products traded on MIAX Emerald, trading status for MIAX Emerald and products traded on MIAX Emerald, and liquidity seeking event notifications. The AIS market data feed includes opening imbalance condition information, opening routing information, expanded quote range information, post-halt notifications, and liquidity refresh condition information. AIS real-time messages are disseminated over multicast to achieve a fair delivery mechanism. AIS notifications provide current electronic system status allowing subscribers to take necessary actions immediately.

MOR provides market participants with a direct data feed that allows subscribers to receive real-time updates of options orders, products traded on MIAX Emerald, MIAX Emerald Options System status, and MIAX Emerald Options Underlying trading status. Subscribers to the data feed will get a list of all options symbols and strategies that will be traded and sourced on that feed at the start of every session.

The Exchange proposes to charge monthly fees to Distributors (defined below) of the ToM, AIS, and MOR market data products. MIAX Emerald will assess market data fees applicable to the market data products on Internal and External Distributors in each month the Distributor is credentialed to use the applicable market data product in the production environment. A "Distributor" of MIAX Emerald data is any entity that receives a feed or file of data either directly from MIAX Emerald or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All Distributors are required to execute a MIAX Emerald Distributor Agreement. Market data fees for ToM, AIS, and MOR will be reduced for new Distributors for the first month during which they subscribe to the applicable market data product, based on the number of trading days that have

<sup>15</sup> The term "Priority Customer" means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). The number of orders shall be counted in accordance with Interpretation and Policy .01 to Exchange Rule 100. See Exchange Rule 100.

been held during the month prior to the date on which they have been credentialed to use the applicable market data product in the production environment. Such new Distributors will be assessed a pro-rata percentage of the fees described above, which is the percentage of the number of trading days remaining in the affected calendar month as of the date on which they have been credentialed to use the applicable market data product in the production environment, divided by the total number of trading days in the affected calendar month.

Specifically, the Exchange proposes to assess Internal Distributors \$1,250 per month and External Distributors \$1,750 per month for the ToM market data feed. The Exchange proposes to assess Internal Distributors \$1,250 per month and External Distributors \$1,750 per month for the AIS market data feed. The Exchange proposes to assess Internal Distributors \$3,000 per month and External Distributors \$3,500 per month for the MOR market data feed. The Exchange notes that its data feed prices are generally lower than other options exchanges' data feed prices for their comparable data feed products.<sup>16</sup>

The Exchange operates in a highly competitive market. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system "has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies."<sup>17</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has more than approximately 16% of the market share of executed volume of multiply-listed equity and exchange-traded fund ("ETF") options trades.<sup>18</sup> Therefore, currently no exchange possesses significant pricing power in the execution of multiply-listed equity & ETF options order flow. More

<sup>16</sup> See Nasdaq PHLX LLC Pricing Schedule, Options 7, Section 10, Proprietary Data Feed Fees; Cboe BXZ Exchange, Inc. Fee Schedule, Market Data Fees; Cboe Data Services, LLC, Fee Schedule.

<sup>17</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (S7-10-04) ("Reg NMS Adopting Release").

<sup>18</sup> The OCC publishes options and futures volume in a variety of formats, including daily and monthly volume by exchange, available here: <https://www.theocc.com/market-data/volume/default.jsp>.

specifically, in October 2020, the Exchange had approximately 3.60% market share of executed volume of multiply-listed equity & ETF options trades.

The recent growth of the Exchange's market share demonstrates this competitive marketplace. Up until February 28, 2019, the Exchange was non-operational, and therefore had a 0% market share. On March 1, 2019, the Exchange launched its current platform as an affiliated exchange of Miami International Securities Exchange, LLC ("MIAX") and MIAX PEARL, LLC ("MIAX PEARL"). Within one month, MIAX Emerald began regularly executing at least 0.70% of trading volume. By September, 2019, MIAX Emerald began executing close to 1% of trading volume on a more regular basis. Beginning March of 2020, the Exchange had a regular market share of approximately 2–4% of executed volume of equity option trades.<sup>19</sup>

As MIAX Emerald's transaction market share has increased, so has the value of its market data. For example, in March 2019, when MIAX Emerald launched operations, the Exchange had only 5 subscribers for its ToM data feed, 3 subscribers for its AIS data feed, and 2 subscribers for its MOR data feed—all such feeds were free during that time. As MIAX Emerald's market share has increased, the number of subscribers of the ToM, AIS and MOR data feeds has steadily increased and as of September 2020, prior to the First Proposed Rule Change, the Exchange had 14 subscribers for its ToM data feed, 13 subscribers for its AIS data feed, and 9 subscribers for its MOR data feed—all such feeds were free during that time. However, notwithstanding this subscriber growth, only a fraction of the total MIAX Emerald Members subscribe to MIAX Emerald data feed products. For example, as of September 2020, MIAX Emerald had 42 Members. However, during that same period, only 14 Members subscribed to MIAX Emerald data feed products. That is only an approximately 30% subscription rate. Accordingly, approximately 70% of the MIAX Emerald Members rely on substitute market data products to satisfy their trading needs on MIAX Emerald.

On September 15, 2020, the Exchange issued a Regulatory Circular to announce that the Exchange would be ending the Waiver Period for its ToM, AIS and MOR data feeds, beginning October 1, 2020, which provided market participants with sufficient advance notice of the proposed fees for those

<sup>19</sup> See *id.*

data feeds. This notice also afforded market participants with reasonable time to consider the value of the MIAX Emerald ToM, AIS and MOR data feeds on their businesses, and make a determination of whether to continue using the products or not, once they were no longer provided for free.<sup>20</sup>

Since the First Proposed Rule Change went into effect, 1 subscriber of the ToM data feed product (*i.e.*, nearly 7% of the prior subscriber base), 2 subscribers of the AIS data feed product (*i.e.*, nearly 16.66% of the prior subscriber base), and 1 subscriber of the MOR data feed product (*i.e.*, nearly 11% of the prior subscriber base) cancelled their subscriptions. In each instance, the subscribers told the Exchange that their reasons for cancelling their subscriptions were the imminent imposition of fees. The total number of subscriptions lost constitute 11.4% of the prior subscriber base.

The Exchange is not required to make the ToM, AIS and MOR data feeds available or to offer any specific pricing alternatives to any customers, nor is any firm required to purchase the ToM, AIS and MOR data feeds. Firms that choose to purchase the ToM, AIS and MOR data feeds do so for the primary goals of using them to increase their revenues, reduce their expenses, and in some instances to compete directly with the Exchange (including for order flow). Those firms are able to determine for themselves whether or not the ToM, AIS and MOR data feeds or any other similar products are attractively priced.<sup>21</sup>

The Exchange produces and disseminates the ToM, AIS and MOR data feeds as part of its market data offerings to support its transaction execution services. Since March 2019, when the Exchange launched trading, the Exchange has observed a direct correlation between the steady increase of subscribers to the ToM, AIS and MOR data feeds and the increase in the Exchange's transaction market share volume over the same period.

The Exchange determined the level of fees to charge for the ToM, AIS and MOR data feeds based on the value of the Exchange's transaction services. As noted above, over an initial 12-month period, the Exchange has grown from 0% to approximately 2–4% market share of consolidated trading volume on

<sup>20</sup> See *supra*, note 8.

<sup>21</sup> See Securities Exchange Act Release Nos. 60459 (August 7, 2009), 74 FR 41466 (August 17, 2009) (SR-Phlx-2009-54) (Order Approving a Proposed Rule Change to Establish Fees for the Top of PHLX Options Direct Data Feed Product); 66993 (May 15, 2012), 77 FR 30043 (May 21, 2012) (SR-Phlx-2012-63). See also Nasdaq GEMX Options 7, Pricing Schedule, Section 7, Market Data.

a regular monthly basis. During that same period, the Exchange had a steady increase in the number of subscribers to its ToM, AIS and MOR data feeds. However, as discussed above, only approximately 30% of MIAX Emerald Members subscribe to market data products from the Exchange.

Conversely, approximately 70% of the MIAX Emerald Members rely on substitute market data products to satisfy their trading needs on MIAX Emerald.

The proposed fee structure is not novel as it is based on the fee structure currently in place for the ToM, AIS and MOR data feeds at the Exchange's affiliate, MIAX.<sup>22</sup> Both MIAX and MIAX Emerald trade over approximately 2,700 equity options. The Exchange now proposes fees for its ToM, AIS and MOR data feeds that are based on the existing fee structure and rates that data recipients already pay for the MIAX ToM, AIS and MOR data feeds.

At the time the Exchange filed the First Proposed Rule Change, the Exchange did not know the full impact of the proposed fees on current data recipients because subscribers may choose to reduce or eliminate their use of data. The Exchange anticipated that there might be data recipients of the ToM, AIS and MOR data feeds that subscribed only because they were free and might choose to discontinue using the products once the fees were implemented. The Exchange anticipated that data recipients that choose to discontinue the ToM, AIS and MOR data feeds may also choose to shift order flow away from the Exchange, and that, given the current competitive environment, if data recipients were to both discontinue the product and shift order flow away from the Exchange, the Exchange would reevaluate the fees and potentially file a separate proposed rule change to amend its fees. Prior to the imposition of the First Proposed Rule Change, the Exchange could not estimate the impact of the proposed fees on the Exchange's transaction services business or the number of subscribers for the Exchange's ToM, AIS and MOR data feeds. Since October 1, 2020, when the fees for the ToM, AIS and MOR data feeds took effect, 4 subscribers to the ToM, AIS and MOR data feeds have cancelled their subscriptions. In each instance, the subscribers told the Exchange that the reason for ending their subscriptions was the imminent imposition of fees. Additionally, this data must be considered in the context that only approximately 30% of MIAX

Emerald Members subscribe to market data products from the Exchange. Conversely, approximately 70% of the MIAX Emerald Members rely on substitute market data products to satisfy their trading needs on MIAX Emerald.

## 2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>23</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>24</sup> in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act in that it is designed to promote just and equitable principles of trade, 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 is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

### Exchange Market Data Fees Are Constrained by the Availability of Substitute Platforms

The fierce competition for order flow constrains any exchange from pricing its market data at a supracompetitive price, and constrains the Exchange in setting its fees for the ToM, AIS and MOR data feeds. The proposed fees are therefore reasonable because in setting them, the Exchange is constrained by the availability of 15 substitute options exchanges offering market data products and trading capabilities. Such substitutes need not be identical, but only substantially similar to the product at hand.

More specifically, in setting fees for ToM, AIS and MOR data feeds, the Exchange is constrained by the fact that, if its pricing is unattractive to customers, customers have their pick of an increasing number of alternative options exchanges to use instead of the Exchange. To illustrate, MIAX Emerald has 42 Exchange Members. The Cboe Exchange, Inc. ("Cboe") has approximately 229 exchange members.<sup>25</sup> The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fees. The existence of numerous alternative options exchanges

to the Exchange's trading system ensures that the Exchange cannot set unreasonable market data fees without suffering the negative effects of that decision in the fiercely competitive market in which it operates as a platform.

### MIAX Emerald ToM, AIS and MOR Data Feeds Are Optional Market Data Products

The decision to subscribe to the Exchange's ToM, AIS and/or MOR data feeds is entirely optional and is a business decision that is made by each firm. The Exchange is not required to make the ToM, AIS and MOR data feeds available to any customers, nor is any customer required to purchase the ToM, AIS and MOR data feeds. A customer's decision whether to purchase the ToM, AIS and MOR data feeds is entirely discretionary. Most firms that choose to subscribe to the ToM, AIS and MOR data feeds do so for the primary goals of using it to increase their revenues, reduce their expenses, and in some instances to compete directly with the Exchange for order flow. Such firms are able to determine for themselves whether the ToM, AIS and MOR data feeds are necessary for their business needs, and if so, whether or not they are attractively priced. If the ToM, AIS and MOR data feeds do not provide sufficient value to firms based on the uses those firms may have for them, those firms may simply choose to conduct their business operations in ways that do not use the ToM, AIS and MOR data feeds. If they do not choose to use the ToM, AIS and MOR data feeds, they could also choose not to direct order flow to the Exchange.

As noted above, after the First Proposed Rule Change, current subscribers to the ToM, AIS and MOR data feeds began changing their behavior in response to the imposition of fees for those data feed products. Since October 1, 2020, when the First Proposed Rule Change took effect, 4 subscribers to the ToM, AIS and MOR data feeds cancelled their subscriptions. In each instance, the subscriber told the Exchange that the reason for ending its subscription was the imminent imposition of fees. These cancellations are evidence that subscribing to the ToM, AIS and MOR data feeds is discretionary, that each customer makes the decision whether to subscribe based on its own analysis of the benefits and costs to itself, and that customers can and do make those decisions quickly based on reactions to fee changes.

However, only a fraction of total MIAX Emerald Members subscribe to MIAX Emerald data feed products. For

<sup>22</sup> See MIAX Fee Schedule, Section 6, Market Data Fees.

<sup>23</sup> 15 U.S.C. 78f(b).

<sup>24</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>25</sup> See Cboe Form 1 Amendment, Exhibit M (June 26, 2020), available at <https://www.sec.gov/Archives/edgar/vpr/2001/20012232.pdf>.

example, as of September 2020, MIAX Emerald had 42 Members. However, during that same period, only 14 Members subscribed to MIAX Emerald data feed products. That is only an approximately 30% subscription rate. Accordingly, approximately 70% of the MIAX Emerald Members rely on substitute market data products to satisfy their trading needs on MIAX Emerald.

But even if such firms determine that the fees for the ToM, AIS and MOR data feeds are too high, customers can access much of the same data by subscribing to the data feed of the Options Price Reporting Authority (“OPRA”), which consists of: last sale reports (price, volume and related information with respect to completed transactions); quotation information (bids and offers and related information pertaining to quotations in eligible securities available for trading); and other related information with respect to trading and administrative messages. Although not free of charge, the fees for subscribing to OPRA’s substitute data feeds are significantly discounted.<sup>26</sup> Customers can also access much of this same data through one of the numerous OPRA Vendors.<sup>27</sup> In this way, OPRA and OPRA Vendors are substitutes for a significant portion of the data available on the ToM, AIS and MOR data feeds. This is clear evidence that the availability of these substitute products constrains the Exchange’s ability to charge supracompetitive prices for the ToM, AIS and M&R data feeds.

Further, in the case of data that is redistributed through OPRA Vendors, of which there are numerous firms, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers.

In setting the proposed fees for the ToM, AIS and MOR data feeds, the Exchange considered the competitiveness of the market for

<sup>26</sup> See OPRA Fee Schedule, available at [https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5bf2f4661faec762fa07826a\\_OPRA\\_Fee\\_Schedule.pdf](https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5bf2f4661faec762fa07826a_OPRA_Fee_Schedule.pdf) (charging professional subscriber device-based fees of \$31.50 per display device and non-professional subscriber fees starting at \$1.25 per non-professional subscriber, up to 75,000, for OPRA’s Basis Service).

<sup>27</sup> See the list of OPRA Vendors, available at [https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5c671220ff4c29504e423d0d\\_190215R2\\_OPRA\\_Vendors.pdf](https://assets.website-files.com/5ba40927ac854d8c97bc92d7/5c671220ff4c29504e423d0d_190215R2_OPRA_Vendors.pdf).

proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish reasonable fees. The existence of alternatives to the Exchange’s trading system and the continued availability of the Exchange’s separate data feeds at a steep discount ensure that the Exchange cannot set unreasonable fees when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

Further, the Exchange no longer believes it is necessary to waive its market data fees to attract market participants to the MIAX Emerald market since this market is now established and MIAX Emerald no longer needs to rely on such waivers to attract market participants. The Exchange believes that the proposed change is equitable and not unfairly discriminatory because the elimination of the fee waiver for market data fees will uniformly apply to all market participants and market participants are not required to purchase any market data feed from the Exchange. As described above, the Exchange does not offer trading in any proprietary or singly-list options products. Accordingly, the Exchange is not the sole source of market data for any products listed on the Exchange. Therefore, it is a business decision as to whether a firm purchases the Exchange’s market data feeds. Additionally, the Exchange believes its proposal to establish market data fees is reasonable and well within the range of fees assessed among other exchanges, including the Exchange’s affiliate, MIAX.<sup>28</sup>

The Exchange believes that it is reasonable, equitable and not unfairly discriminatory to assess internal distributors fees that are less than the fees assessed for external distributors for subscriptions to the Exchange’s ToM, AIS and MOR data feeds because internal distributors have limited, restricted usage rights to the market data, as compared to external distributors which have more expansive usage rights. All Members and non-Members that determine to receive any market data feed of the Exchange (or its affiliates, MIAX and MIAX PEARL), must first execute, among other things, the MIAX Exchange Group Exchange Data Agreement (the “Exchange Data

Agreement”).<sup>29</sup> Pursuant to the Exchange Data Agreement, internal distributors are restricted to the “internal use” of any market data they receive. This means that internal distributors may only distribute the Exchange’s market data to the recipient’s officers and employees and its affiliates.<sup>30</sup> External distributors may distribute the Exchange’s market data to persons who are not officers, employees or affiliates of the external distributor,<sup>31</sup> and may charge their own fees for the distribution of such market data. Accordingly, the Exchange believes it is fair, reasonable and not unfairly discriminatory to assess external distributors a higher fee for the Exchange’s market data products as external distributors have greater usage rights to commercialize such market data. The Exchange believes the proposed fees are a reasonable allocation of its costs and expenses among its Members and other persons using its facilities since it is recovering the costs associated with distributing such data. Access to the Exchange is provided on fair and non-discriminatory terms. The Exchange believes the proposed fees are equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst users for similar services. Moreover, the decision as to whether or not to purchase market data is entirely optional to all users. Potential purchasers are not required to purchase the market data, and the Exchange is not required to make the market data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of this data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data:

“[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of

<sup>29</sup> See Exchange Data Agreement, available at [https://miaweb2.pairsite.com/sites/default/files/page-files/MIAX\\_Exchange\\_Group\\_Data\\_Agreement\\_09032020.pdf](https://miaweb2.pairsite.com/sites/default/files/page-files/MIAX_Exchange_Group_Data_Agreement_09032020.pdf).

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

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

<sup>28</sup> See the MIAX Options Fee Schedule.

the NBBO and consolidated last sale information are not required to receive (and pay for) such data when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.”<sup>32</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

In July, 2010, Congress adopted H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees or other charges are immediately effective upon filing regardless of whether such dues, fees or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The Exchange believes that these amendments to Section 19 of the Act reflect Congress’s intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a “due, fee or other charge imposed by the self-

regulatory organization,” the Commission adopted a policy and subsequently a rule stating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. The Exchange believes that the amendment to Section 19 reflects Congress’s conclusion that the evolution of self-regulatory organization governance and competitive market structure have rendered the Commission’s prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned, not-for-profit corporations into for-profit, investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but rather have incentives to maximize the appeal of their products to all customers, whether members or non-members, so as to broaden distribution and grow revenues. Moreover, the Exchange believes that the change also reflects an endorsement of the Commission’s determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive forces.

Selling proprietary market data is a means by which exchanges compete to attract business. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they provide. The need to compete for business places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.<sup>33</sup> The Exchange therefore believes that the fees for market data are properly

assessed on Members and Non-Member users.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, No. 09-1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data:

“In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’”<sup>34</sup>

The court’s conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually adjust its fees for services and products, in addition to order flow, to remain competitive with other exchanges. The Exchange believes that the proposed changes reflect this competitive environment.

#### *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 not necessary or appropriate in furtherance of the purposes of the Act.

#### *Intra-Market Competition*

The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants.

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<sup>32</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>33</sup> See Sec. Indus. Fin. Mkts. Ass’n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

<sup>34</sup> *NetCoalition*, at 15 (quoting H.R. Rep. No. 94-229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

As noted above, the proposed fee schedule would apply to all subscribers of the ToM, AIS and MOR data feeds, and customers may choose whether to subscribe to any or all of the feeds. The Exchange also believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue market on competition. Further, the Exchange's proposed market data fee levels, as described herein, are comparable to fee levels charged by other options exchanges for the same or similar services, including those fees assessed by the Exchange's affiliate, MIAX.<sup>35</sup>

The Exchange believes that the proposed market data fees do not place certain market participants at a relative disadvantage to other market participants because the fees do not apply unequally to different size market participants, but instead would allow the Exchange charge for the time and resource necessary for providing market data to the market participants that request such data. Accordingly, the Exchange believes that the proposed market data fees do not favor certain categories of market participants in a manner that would impose a burden on competition.

#### Inter-Market Competition

The Exchange believes that the proposed fees do not impose a burden on competition or on other SROs that is not necessary or appropriate. In setting the proposed fees, the Exchange was constrained by the availability of numerous substitute trading platforms and services also offering market data products and trading capabilities, and low barriers to entry mean new exchanges are frequently introduced. In addition, the Exchange believes that the proposed fees do not impose a burden on competition or on other exchanges that is not necessary or appropriate because of the availability of numerous substitute market data products. Many other exchanges offer proprietary data feeds similar to the Exchange's ToM, AIS and MOR data feeds. Because market data users can find suitable substitute feeds, an exchange that overprices its market data products stands a high risk that users may substitute another platform, in which case the platform would stand to lose both market data and trading fees. These competitive pressures ensure that no one exchange's market data fees can impose an unnecessary burden on competition, and the Exchange's proposed fees do not do so here.

<sup>35</sup> See the MIAX Options Fee Schedule.

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

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>36</sup> and Rule 19b-4(f)(2)<sup>37</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

#### IV. Solicitation of Comments

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

##### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-EMERALD-2020-16 on the subject line.

##### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-EMERALD-2020-16. 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-EMERALD-2020-16, and should be submitted on or before January 5, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

[FR Doc. 2020-27488 Filed 12-14-20; 8:45 am]

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-90611; File No. SR-MSRB-2020-08]

#### Self-Regulatory Organizations; Municipal Securities Rulemaking Board; Order Granting Approval of a Proposed Rule Change To Amend MSRB Form G-32

December 9, 2020.

#### I. Introduction

On October 13, 2020, the Municipal Securities Rulemaking Board (the "MSRB" or "Board") filed with the Securities and Exchange Commission (the "SEC" or "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 amend MSRB Form G-32 to clarify that brokers, dealers, and municipal securities dealers (collectively, "dealers" and, individually, each a "dealer") acting as underwriters in the primary offering of municipal securities are obligated to manually complete three data fields (collectively, the "Amended Data

<sup>38</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.

<sup>36</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>37</sup> 17 CFR 240.19b-4(f)(2).