

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98656; File No. SR-EMERALD-2023-19)

September 29, 2023

Self-Regulatory Organizations; MIAX Emerald, LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Fee Schedule To Modify Certain Connectivity and Port Fees

I. Introduction

On August 8, 2023, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change (File No. SR-EMERALD-2023-19) to amend certain connectivity and port fees. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the Federal Register on August 25, 2023.⁴ Pursuant to Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (1) temporarily suspending the proposed rule change; and (2) 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.

³ 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).

⁴ See Securities Exchange Act Release No. 98176 (August 21, 2023), 88 FR 58342 (SR-EMERALD-2023-19) (“Notice”). Comment on the proposed rule change can be found at: <https://www.sec.gov/comments/sr-emerald-2023-19/sremerald202319.htm>.

⁵ 15 U.S.C. 78s(b)(3)(C).

II. Background and Description of the Proposed Rule Change

As described in more detail in the Notice, the Exchange proposes to: (1) increase fees for a 10 gigabit (“Gb”) ultra-low latency (“ULL”) fiber connection for Members⁶ and non-Members from \$10,000 to \$13,500 per month;⁷ and (2) increase fees for Limited Service MIAX Emerald Express Interface⁸ (“MEI”) Ports available to Market Makers⁹ through implementing a tiered-pricing structure.¹⁰

With respect to Limited Service MEI Ports, the Exchange will continue to provide two Limited Service MEI Ports for each matching engine¹¹ to which a Market Maker connects free of

⁶ 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.

⁷ See Notice, supra note 4, at 58346.

⁸ The MIAX Emerald Express Interface (“MEI”) is a connection to the MIAX Emerald System that enables Market Makers to submit simple and complex electronic quotes to MIAX Emerald. See the Definitions Section of the Fee Schedule.

⁹ The term “Market Makers” refers to Lead Market Makers (“LMMs”), Primary Lead Market Makers (“PLMMs”), and Registered Market Makers (“RMMs”) collectively. See the Definitions Section of the Fee Schedule and Exchange Rule 100. For purposes of Limited Service MEI Ports, Market Makers also include firms that engage in other types of liquidity activity, such as seeking to remove resting liquidity from the Exchange’s Book. The Exchange states that the Limited Service MEI Ports provide Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIAX Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. See Notice, supra note 4, at 58346, n.57.

¹⁰ See Notice, supra note 4, 58342. The Exchange initially filed the proposed fee change (SR-EMERALD-2022-38) on December 30, 2022, with an effective date of January 1, 2023, and, on January 9, 2023, the Exchange withdrew SR-EMERALD-2022-38 and resubmitted this proposal as SR-EMERALD-2023-01. See Securities Exchange Act Release No. 96628 (January 10, 2023), 88 FR 2651 (January 17, 2023). That filing was withdrawn by the Exchange and the Exchange filed a new proposed fee change with additional justification (SR-EMERALD-2023-05) on February 23, 2023. See Securities Exchange Act Release No. 97079 (March 8, 2023), 88 FR 15764 (March 14, 2023). The Exchange subsequently withdrew that filing and replaced it with SR-EMERALD-2023-12 on April 20, 2023. See Securities Exchange Act Release No. 97422 (May 2, 2023), 88 FR 29750 (May 8, 2023). The Exchange subsequently withdrew that filing and replaced it with SR-EMERALD-2023-14 on June 16, 2023. See Securities Exchange Act Release No. 97813 (June 27, 2023), 88 FR 42785 (July 3, 2023). The Exchange subsequently withdrew that filing and replaced it with the instant filing to provide additional information and a revised justification for the proposal, which is discussed herein. See Notice, supra note 4, at 58342.

¹¹ The term “Matching Engine” means a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may 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

charge.¹² Prior to the proposed fee change, Market Makers were assessed a \$100 monthly fee for each additional Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that were included for free.¹³ Now, the Exchange proposes to establish a tiered-pricing structure for the Limited Service MEI Ports pursuant to which: (i) the third and fourth Limited Service MEI Ports for each matching engine will increase to \$200 a month per port; (ii) the fifth and sixth Limited Service MEI Ports for each matching engine will increase to \$300 a month per port; and (iii) the seventh or more Limited Service MEI Ports will increase to \$400 a month per port.¹⁴ Market Makers are limited to twelve additional Limited Service MEI Ports per matching engine, for a total of fourteen Limited Service MEI Ports per matching engine.¹⁵

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹⁶ 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,¹⁷ 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. The Commission believes a temporary suspension of the proposed rule

symbol may not be assigned to multiple Matching Engines. See Notice, supra note 4, at 58346 (citing Definitions Section of the Fee Schedule).

¹² See Notice, supra note 4, at 58346.

¹³ See id.

¹⁴ See id.

¹⁵ See Exchange Fee Schedule Section 5)d)ii).

¹⁶ 15 U.S.C. 78s(b)(3)(C).

¹⁷ 15 U.S.C. 78s(b)(1).

change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

In support of the proposal, the Exchange states its belief that the proposed fees overall are reasonable because they promote parity among exchange pricing for access, which promotes competition, while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity and Limited Service MEI Ports.¹⁸ The Exchange further states that the proposed fees are fair and reasonable because they will not result in pricing that deviates from that of other exchanges or a “supra-competitive profit,” when comparing the total expense of the Exchange associated with providing 10Gb ULL connectivity and Limited Service MEI Port services versus the total projected revenue of the Exchange associated with these services.¹⁹ According to the Exchange, employing a methodology that is the “result of an extensive review and analysis,” it estimates the total projected annual cost of providing 10Gb ULL connectivity to be \$11,361,586 and for providing Limited Service MEI Ports to be \$1,779,066.²⁰

To arrive at these figures, the Exchange states that it undertook an extensive cost analysis to analyze every expense in the Exchange's general expense ledger to determine whether each such expense related to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense supported the provision of connectivity and port services.²¹ The Exchange states that it determined the total cost for the Exchange and

¹⁸ See Notice, *supra* note 4, at 58348.

¹⁹ See *id.* at 58359-60.

²⁰ See *id.* at 58352-53, 58356. The Exchange states that its cost analysis is based on the Exchange's 2023 fiscal year of operations and projections. See *id.* at 58359.

²¹ See *id.* at 58352.

its affiliated markets for each cost driver²² through a company-wide process that included discussions with senior management, Exchange department heads, and the Finance Team.²³ The Exchange further states that it determined what portion of the cost allocated to the Exchange pursuant to this methodology is to be allocated to each core service, including the appropriate allocation to connectivity and ports.²⁴ The Exchange states that through this allocation methodology, the Exchange “applied an allocation of each cost driver to each core service” and “[e]ach of the [resulting] cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocation to the Exchange pursuant to the initial allocation.”²⁵

The Exchange states that the \$11,361,586 aggregate annual costs for providing physical dedicated 10Gb ULL connectivity via an unshared network is the sum of the following individual line-item costs: (1) Human Resources at \$3,520,856; (2) Connectivity (external fees, cabling, switches, etc.) at \$71,675; (3) Internet Services and External Market Data at \$373,249; (4) Data Center at \$752,545; (5) Hardware and Software Maintenance and Licenses at \$666,208; (6) Depreciation at \$1,929,118; and (7) Allocated Shared Expenses at \$4,407,935.²⁶ The Exchange represents that it estimates that the proposed fees will result in an annual revenue of

²² The Exchange defines “cost drivers” within the filing as the costs necessary to deliver each of the core services, including infrastructure, software, human resources (i.e., personnel), and certain general and administrative expenses. See Notice, supra note 4, at 58351.

²³ See Notice, supra note 4, at 58351-52. The Exchange states that because the Exchange’s parent company currently owns and operates four separate and distinct marketplaces, the Exchange’s parent company determines an accurate cost for each marketplace, which results in different allocations and amounts across exchanges for the same cost drivers. See id. at 58352. According to the Exchange, its allocation methodology ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. See id.

²⁴ See id. The Exchange describes “core services” as services provided by the Exchange, including transaction execution, market data, membership services, physical connectivity, and port access (which provides order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). See id. at 58351.

²⁵ Id. at 58352.

²⁶ See id. at 58353.

approximately \$16,524,000, which is a potential profit margin of 31% over the cost of providing 10Gb ULL connectivity services.²⁷

The Exchange states that the \$1,779,066 aggregate annual costs for offering Limited Service MEI Ports is the sum of the following individual line-item costs: (1) Human Resources at \$737,784; (2) Connectivity (external fees, cabling, switches, etc.) at \$3,713; (3) Internet Services and External Market Data at \$14,102; (4) Data Center at \$55,686; (5) Hardware and Software Maintenance and Licenses at \$41,951; (6) Depreciation at \$112,694; and (7) Allocated Shared Expenses at \$813,136.²⁸ The Exchange represents that it estimates that the proposed fees will result in an annual revenue of approximately \$2,809,200, which is a potential profit margin of 37% over the cost of providing Limited Service MEI Ports.²⁹

The Exchange states its belief that the proposed fees are reasonable because they allow the Exchange to “recoup the Exchange’s costs of providing dedicated 10Gb ULL connectivity and Limited Service MEI Ports” and that the cost analysis and related projections demonstrate that the Exchange is not earning “supra-competitive profits.”³⁰ In addition, the Exchange states that the proposed fees are comparable to or lower than the fees charged by competing options exchanges for similar products.³¹

In further support of the proposal, the Exchange states its belief that the proposed fees are reasonable, fair, equitable, and not unfairly discriminatory, because they are designed to align fees with services provided and will apply equally to all subscribers.³² Moreover, the Exchange

²⁷ See id. at 58359.

²⁸ See id. at 58356.

²⁹ See Notice, supra note 4, at 58359.

³⁰ Id. at 58360.

³¹ See id.

³² See id. at 58361.

asserts that the proposed fees are equitably allocated among users of the network connectivity and port alternatives, as the “users of 10Gb ULL connections consume substantially more bandwidth and network resources than the users of 1Gb ULL connection.”³³ The Exchange also states that with respect to Limited Service MEI Ports, the tiered-pricing structure is “explicitly designed to link fees to related costs imposed on the [E]xchange” and that “Market Makers that purchase more connections cause significantly greater costs and expenses to the Exchange.”³⁴

Finally, the Exchange asserts that the proposed fees would not cause any unnecessary or inappropriate burden on inter-market competition because if the fee is set too high it would make it easier for other exchanges to compete with the Exchange, and only if the proposed fees were a “substantial fee decrease could this be considered a form of predatory pricing.”³⁵ The Exchange also asserts that the proposed rule change would not cause any unnecessary or inappropriate burden on intra-market competition because the proposed fees will allow the Exchange to recoup some of its costs in providing 10Gb ULL connectivity and Limited Service MEI Ports at below market rates since the Exchange launched operations.³⁶

To date, the Commission has received one comment letter on the revised justifications for the proposed increase in fees for 10Gb ULL connectivity and Limited Service MEI Ports.³⁷ This commenter states that the revisions reflected in the Exchange’s instant proposal as compared to

³³ Id.

³⁴ Id.

³⁵ Id. at 58363.

³⁶ See id. at 58362.

³⁷ See Letter from Gerald D. O’Connell, Executive Director, Susquehanna International Group, LLP, to Vanessa Countryman, Secretary, Commission, dated September 18, 2023 (“SIG Letter”).

its earlier filings “do[] not fundamentally redress the valid critiques that SIG raised in its prior letters objecting to the subject fee increases.”³⁸

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.³⁹ 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.”⁴⁰

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require 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;⁴¹ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;⁴² and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁴³

In temporarily suspending the Exchange’s proposed rule change, the Commission intends to further consider whether the proposal to increase fees for 10Gb ULL connectivity and adopt a tired-pricing structure for Limited Service MEI Ports is consistent with the statutory

³⁸ Id.

³⁹ 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”).

⁴⁰ See id.

⁴¹ 15 U.S.C. 78f(b)(4).

⁴² 15 U.S.C. 78f(b)(5).

⁴³ 15 U.S.C. 78f(b)(8).

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 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.⁴⁴

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.⁴⁵

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

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)⁴⁶ and 19(b)(2)(B) of the Act⁴⁷ to determine whether the Exchange's proposed rule change 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 change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

⁴⁴ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

⁴⁵ 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).

⁴⁶ 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.

⁴⁷ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,⁴⁸ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has 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”;⁴⁹
- Whether the Exchange has 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 not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;⁵⁰ and
- Whether the Exchange has 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].”⁵¹

As discussed in Section III above, the Exchange made various arguments in support of its proposal. The Commission believes that there are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposed fees are consistent with the Act and the rules thereunder.

⁴⁸ Id. 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.

⁴⁹ 15 U.S.C. 78f(b)(4).

⁵⁰ 15 U.S.C. 78f(b)(5).

⁵¹ 15 U.S.C. 78f(b)(8).

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.”⁵² 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,⁵³ 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.⁵⁴

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.⁵⁵

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 [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation

⁵² 17 CFR 201.700(b)(3).

⁵³ See id.

⁵⁴ See id.

⁵⁵ See 15 U.S.C. 78f(b)(4), (5), and (8).

of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵⁶

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.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-EMERALD-2023-19 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-2023-19. 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 (<https://www.sec.gov/rules/sro.shtml>).

⁵⁶ 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).

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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-EMERALD-2023-19 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁵⁷ that File No. SR-EMERALD-2023-19, 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.⁵⁸

Sherry R. Haywood,

Assistant Secretary.

⁵⁷ 15 U.S.C. 78s(b)(3)(C).

⁵⁸ 17 CFR 200.30-3(a)(57).