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VIA EMAIL AND FEDERAL EXPRESS

October 25, 2013

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington D.C. 20549-1090

Re: Release No. 34-70498; File No. SR-MIAX-2013-43—Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Implement an Equity Rights Program

Dear Ms. Murphy:

NYSE Euronext hereby submits this comment letter in response to the above-referenced Securities and Exchange Commission ("Commission") notice and request for comments. Our comments are focused on the proposal by the Miami International Securities Exchange LLC ("MIAX") to implement an equity rights program ("Program").[1] As described in more detail below, NYSE Euronext believes that the above-referenced filing does not comply with the requirements of Section 19(b)(3)(A)(ii) of the Securities Exchange Act of 1934 ("Act")[2] and Rule 19b-4(f)(2)[3] thereunder, and that its statement on burden of competition does not meet the requirements of Item 4 of Form 19b-4.

Under the proposed Program, MIAX member firms ("Members") may elect to participate in either or both of two options, the "A-Units option" and "B-Units option." In exchange for an initial cash contribution or the prepayment of certain transaction fees, participating Members will receive warrants to purchase common stock of Miami International Holdings ("MIH"), MIAX's parent company. Additionally, participants in the A-Units option are entitled to receive common stock of MIH. The warrants will vest over a 23 month period in various tranches. The vesting warrants will be exercisable by the participating Member if, during the relevant measurement period, such Member meets a specified percentage of the total national average daily volume of options contracts reported to The Options Clearing Corporation ("OCC") ("OCC ADV") on MIAX of all option classes listed on MIAX.[4]

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1 *See* Securities Act Release No. 34-70498 (September 25, 3013); 78 FR 60348 (October 1, 2013) (SR-MIAX-2013-43) (the "MIAX Program Release").

2 15 USC 78s (b)(3)(A)(ii).

3 17 CFR 240.19b-4(f)(2).

4 MIAX Program Release, at 60348-60349. Members that participated in the A-Unit option would receive, per Unit, (a) 101,695 shares of common stock of MIH and (b) warrants to purchase 2,182,639 shares of MIH, in exchange for payment of an initial cash contribution of $508,475 and meeting the applicable OCC ADV on MIAX thresholds. Members that participated in the B-Unit option would receive, per Unit,

1. The Proposed Rule Change Is Not Eligible for Immediate Effectiveness

MIAX designated its proposed rule change as "establishing or changing a due, fee, or other charge imposed on any person, whether or not the person is a member of the self-regulatory organization."[5] Accordingly, pursuant to Section 19(b)(3)(A)(ii) of the Act and Rule 19b-4(f)(2) thereunder, the proposed rule change took effect upon filing with the Commission. Indeed, the timing was such that the transaction closed before the notice of the proposed rule change was published in the Federal Register.

We believe, however, that the present proposed rule change was improperly submitted as a change to the dues, fees or other charges pursuant to Section 19(b)(3)(A)(ii) and Rule 19b-4(f)(2) thereunder. The simple fact that the proposed rule change includes charges for the units does not signify that it should have been submitted pursuant to Section 19(b)(3)(A)(ii) and Rule 19b-4(f)(2) thereunder. As the Commission staff has noted, "a proposal establishing a new service, [or] program . . . cannot be filed as a fee filing under Rule 19b-4(f)(2) even if it includes a fee component." [6]

We believe this is one such case. The exercise of the warrants will lead to participant Members acquiring ownership interests in MIH and, indirectly, MIAX. Over time, the extent of a participant Member's interest will not necessarily be limited by how many Units it acquires, as each participant Member will also have the right to participate pro rata in future offerings of MIH securities for so long as it holds at least 51% of the common shares it purchased upon its exercise of warrants. It will also have secondary right of first refusal if another participant Member decides to transfer or sell common shares or warrant shares.[7] Significantly, some participating Members will be able to appoint a director to one or both of the boards of directors of MIH and MIAX, once they meet certain conditions, including the acquisition of an undisclosed number of units.[8] In other words, the Program goes beyond the scope of setting a due, fee or other charge, and instead may have a potentially significant impact on the ownership and governance of MIAX by its Members. We accordingly believe that the proposed rule should have been filed pursuant to Section 19(b)(2) of the Act.[9]

As the Commission is aware, what section of the Act a proposed rule is filed under is not a minor detail. In the present case, because it was submitted for immediate effectiveness, the public did not have a meaningful opportunity to comment on the rule proposal. Indeed, the transaction closed before the notice of the proposed rule change was published in the Federal Register. Had the proposed rule been filed pursuant to Section 19(b)(2), the comment period would have extended 21 days after publication

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warrants to purchase 1,713,251 shares of common stock of MIH in exchange for prepayment of $500,000 of MIAX fees and meeting the applicable OCC ADV on MIAX thresholds.

5 *See* SR-MIAX-2013-43 (September 13, 2013), at 16.

6 Division of Trading and Markets, "Staff Guidance on SRO Rule Filings" (May 7, 2013).

7 MIAX Program Release, at 60349-60350. MIH will have the first right of refusal.

8 *Id.* Additional requirements must be met as well.

9 15 USC 78s (b)(2).

in the Federal Register. Having such review period prior to effectiveness would have provided market participants opportunity to comment on the proposed Program before the transaction actually closed, and would have provided market participants and the Commission a fuller understanding of the Program, and therefore a more robust and meaningful review process.

More specifically, as a result of the changes that involve or affect the MIAX and MIH boards of directors, MIAX will need to submit a separate proposed rule change to make changes to its corporate governance documents, as the Commission notes.[10] Because the present rule filing went into effect before MIAX submitted such proposed rule changes, rather than being submitted as a 19(b)(2) that included the corporate governance changes, market participants have not been given the opportunity to assess the full scope of the Program. Indeed, significant information for understanding the potential impact of the Program is not included in the present filing. For example, the filing does not indicate how many units a Member must have in order to be entitled to appoint a director. In addition, while the filing states that new directors will be added so the MIAX board of directors will maintain the required ratio of non-industry directors to industry directors and Member representatives,[11] it does not advise whether any similar balance will be struck with relation to the MIH board of directors—leaving open the possibility of individual participating Members having a significant increase in their influence on MIAX's parent company. Finally, if the units are fully subscribed, a maximum of approximately 2.45 million shares of MIH's common stock will be held by the participating Members, but the filing does not indicate what percentage of MIH's common stock that would represent, making it difficult to assess the impact of the Program.

NYSE Euronext recognizes that CBOE Stock Exchange, LLC ("CBSX") and the National Stock Exchange, Inc. ("NSX") have previously submitted immediately effective rule filings for programs that incentivize order flow through equity sharing arrangements pursuant to Section 19(b)(3)(A)(ii) and Rule 19b-4(f)(2) thereunder.[12] We do not, however, believe that these examples are determinative of how the present filing should have been submitted. Neither the CBSX nor the NSX filings included changes to the make-up of their boards of directors, or that of their parent companies, and therefore they did not have the complexity or significance of the present Program. They also were not limited in the number of participants like the present Program, and the CBSX program did not close prior to the publication of notice.[13]

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10 MIAX Program Release, at 60350, fn. 9.

11 *Id.*, at 60350.

12 *See* Securities Exchange Act Release Nos. 62358 (June 22, 2010), 75 FR 37861 (June 30, 2010) (SR-NSX-2010-06); and 69200 (March 21, 2013), 78 FR 18657 (March 27, 2013) (SR-CBOE-2013-31).

13 MIAX offered a total of ten A-Units and ten B-Units. *See* MIAX Program Release, at 60348-60349. Notice of the NSX filing was published in the Federal Register on June 30, 2010, the same day that the minimum cash investment was due. *See* Securities Exchange Act Release Nos. 62358 (June 22, 2010), 75 FR 37861 (June 30, 2010) (SR-NSX-2010-06). However, we note that the NSX filing was made in 2010, before the present robust requirements for rule filings were fully in place.

Rather, although the structure of the arrangement is different, the Program is more similar to a joint venture, in that a limited number of Members will acquire ownership interests in the exchange, rights to participate in future offerings, and, in some cases, the right to name directors. A recent joint venture formed by NYSE Euronext and its affiliates was submitted pursuant to Section 19(b)(2), and therefore market participants had the opportunity to comment on the proposals, leading to a more meaningful comment process.[14] We believe that the same should have been true in the present case as well. The fact that the structure of the present Proposal is different should not lead to such a dramatically different opportunity for members and other market participants to comment on a proposed rule that has such broad implications for the ownership and governance of MIAX as an exchange.

Ultimately, we believe that the disparity in treatment by the Commission of rule proposals involving member ownership of a self-regulatory organization makes it unclear on what basis and timeline the public will have the right to meaningfully review the governance of exchanges.

2. The Proposed Rule Change Does Not Adequately Address the Burden on Competition

We believe that in its statement on burden of competition MIAX misrepresents the potential impact of the Program on MIAX's share of OCC ADV, and that therefore its statement does not fully specify the way the proposed rule change will affect the options market and market participants and is not sufficiently detailed and specific to support a Commission finding that the proposed rule change does not impose any unnecessary or inappropriate burden on competition.[15]

MIAX presents its Program as "a modest attempt by a small options market to attract order volume away from larger competitors," pointing to the fact that volume thresholds represent "fractions of 1% of OCC ADV." [16] Indeed, the highest volume commitment in the Program is 0.667% of OCC ADV on MIAX per Unit.[17] However, MIAX is pointing to the wrong figure. The volume thresholds for a single unit are not the relevant metric to use to assess the potential burden on competition of the Program as a whole.

More specifically, as noted above, in months 17-23 each Participant will have committed, per Unit, to 0.667% of OCC ADV on MIAX in order to earn the corresponding warrants. If we assume that all 20 Units are subscribed and that all Participants meet the per-Unit threshold, the cumulative Participant trading volume will be 13.3% of OCC ADV on MIAX. Further, this figure assumes that Participants trade exclusively with other Participants in order to meet their volume obligations, which is very unlikely in practice given the interconnected nature of the options markets. Conservatively estimating that non-

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[14] *See* Securities Exchange Act Release No. 64742 (June 24, 2011), 76 FR 38436 (June 30, 2011) (SR-NYSEAmex-2011-018) (approving formation of a joint venture between NYSE Amex LLC, its parent NYSE Euronext, and seven other entities)

[15] *See* Form 19b-4, Item 4.

[16] *See* SR-MIAX-2013-43 (September 13, 2013), at 14. *See also* MIAX Program Release, at 60351.

[17] *Id.*, at 60349. Such commitment is applicable in months 17-23, the final measurement period of the Program.

Participants execute a portion of volume contra to Participants such that they account for just one-third of total contract sides executed on MIAX, total MIAX volume would represent 19.95% of OCC ADV.

We note that MIAX currently lists just over 600 classes of options. Trading in those options on all exchanges represent approximately 90.5% of the national OCC ADV of equity options. If the Participants together with their counterparties reach a cumulative trading volume of 19.95% of OCC ADV on MIAX, cumulative MIAX volume would equal 18.05% of the national OCC ADV.

In its filing, MIAX states that

> if the Program resulted in a modest percentage increase in the average daily trading volume in options executing on MIAX, while such percentage would represent a large volume increase for MIAX, it would represent a minimal reduction in volume of its larger competitors in the industry.[18]

Clearly, this statement misrepresents the intended scope of the Program. We estimate that a 19.95% share of national OCC ADV would be an increase of almost 18 percentage points from MIAX's September 2013 share of OCC ADV. In a market where the largest options exchange has a market share of less than a 21% of equity and ETF option ADV,[19] this shift would represent a massive change in the competitive landscape, and MIAX needs to directly address the impact of that potential change in its filing.

MIAX states that it has a nominal percentage of the average daily trading volume in options, "so it is unlikely that the Program could cause any competitive harm to the options market or to market participants."[20] This statement does not withstand scrutiny: MIAX's current percentage of the average daily trading volume is not evidence that its Program, which is specifically designed to change that percentage volume, is unlikely to cause competitive harm.

Finally, we note that the statement on burden of competition does not address the impact on competition of the changes to the boards of directors of MIAX and MIH. Presumably MIAX intends to do so in the rule filing it will submit regarding corporate governance changes. However, we believe that the right to name a director that some participating Members will acquire along with their units is an integral part of the Program, and that such corporate governance changes should be directly addressed in this filing.

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18 *See* SR-MIAX-2013-43 (September 13, 2013), at 15. *See also* MIAX Program Release, at 60351.

19 *See* theocc.com, "Volume by Exchange" figures for September 2013, accessed on October 21, 2013, at http://theocc.com/webapps/exchange-volume.

20 *See* SR-MIAX-2013-43 (September 13, 2013), at 15. *See also* MIAX Program Release, at 60351.

For the above reasons, NYSE Euronext believes that the above-referenced filing does not comply with the requirements of Section 19(b)(3)(A)(ii) of the Act and Rule 19b-4(f)(2) thereunder, and that its statement on burden of competition does not meet the requirements of Item 4 of Form 19b-4.

Thank you for this opportunity to comment on the proposed rule.

Respectfully yours,

cc: Heather Seidel, Securities & Exchange Commission
Steve Crutchfield, NYSE Euronext