

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93644; File No. SR-EMERALD-2021-29)

November 22, 2021

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 Exchange's Fee Schedule to Adopt a Tiered-Pricing Structure for Certain Connectivity Fees

I. Introduction

On September 24, 2021, 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 ("Exchange Act" or "Act"),¹ and Rule 19b-4 thereunder,² a proposed rule change (File Number SR-EMERALD-2021-29) to amend the Exchange's Fee Schedule ("Fee Schedule") to adopt a tiered pricing structure for certain connectivity 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 October 4, 2021.⁴ Under Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (i) temporarily suspending File Number SR-EMERALD-2021-29; and (ii) instituting

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. 93166 (September 28, 2021), 86 FR 54760 ("Notice"). Comments received on the proposed rule change are available on the Commission's website at: <https://www.sec.gov/comments/sr-emerald-2021-29/sremerald202129.htm>.

⁵ 15 U.S.C. 78s(b)(3)(C).

proceedings to determine whether to approve or disapprove File Number SR-EMERALD-2021-29.

II. Description of the Proposed Rule Change

MIAX Emerald proposes to modify the Exchange's Fee Schedule to adopt a tiered-pricing structure for 10 gigabit ("Gb") ultra-low latency ("ULL") fiber connections to the Exchange's primary and secondary facilities available to both Members⁶ and non-Members. Specifically, the Exchange proposes to modify the pricing structure for 10Gb ULL connections from a flat monthly fee of \$10,000 per 10Gb ULL connection to the following fees (collectively, the "Proposed Access Fees"):⁷

- \$9,000 each for the 1st and 2nd connections;
- \$11,000 each for the 3rd and 4th connections; and
- \$13,000 for each additional connection after the 4th connection.

These fees are assessed in any month the Member or non-Member is credentialed to use any of the Exchange's APIs or market data feeds in the Exchange's production environment, pro-rated when a Member or non-Member makes a change to connectivity by adding or deleting

⁶ The term "Member" means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an "Electronic Exchange Member" or "Market Maker." Members are deemed "members" under the Exchange Act. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁷ The Exchange initially filed the proposed fee change on July 30, 2021. See Securities Exchange Act Release No. 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR-EMERALD-2021-23). That filing was withdrawn by the Exchange and replaced with the instant filing, with additional information.

connections, and assessed in any month during which the Member or non-Member has established connectivity with the Exchange’s disaster recovery facility.⁸

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,⁹ 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,¹⁰ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

The Exchange states that the tiered-pricing structure is reasonable, equitably allocated, and not unfairly discriminatory because it will encourage Members and non-Members to be more efficient and economical when determining how to connect to the Exchange, and also enable the Exchange to better monitor and provide access to the Exchange’s network to ensure sufficient capacity and headroom in the System.¹¹ The Exchange also states that the majority of Members and non-Members that purchase 10Gb ULL connections will either save money or pay the same amount after the tiered-pricing structure is implemented.¹² The Exchange further states that

⁸ See Notice, supra note 4, at 54761.

⁹ 15 U.S.C. 78s(b)(3)(C).

¹⁰ 15 U.S.C. 78s(b)(1).

¹¹ See Notice, supra note 4, at 54761. The term “System” means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

¹² See Notice, supra note 4, at 54761, 54769. The Exchange states that it initially filed this proposed fee change on July 30, 2021 (SR-EMERALD-2021-23) and, after the effective

firms that primarily route orders for best executions generally only need a limited number of connections to fulfill that obligation and connectivity costs will likely to be lower for these firms, while for firms that engaged in advanced trading strategies that typically require multiple connections will generate higher costs by utilizing more of the Exchange's resources.¹³

In further support of the proposed fee changes, the Exchange argues principally that the fees for 10Gb ULL connections are constrained by competitive forces, and that this is supported by its revenue and cost analysis. The Exchange states 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 and the Exchange must continually adjust its fees for services and products, and in addition to order flow, to remain competitive with other exchanges.¹⁴ The Exchange states that it is not aware of any evidence that a market share of approximately 5-6% provides the Exchange with anti-competitive pricing power, and that market participants may look to connect to the Exchange via cheaper alternatives or choose to disconnect from the Exchange or reduce the number of connections to the Exchange as a means to reduce costs.¹⁵ The Exchange states that market participants can and do drop their access to

date of SR-EMERALD-2021-23 on August 1, 2021, approximately 60% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees, while approximately 40% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered-pricing structure when compared to the flat monthly fee structure. See id. at 54761. The Exchange also states that no Member or non-Member has altered its use of 10Gb ULL connectivity since the proposed fees went into effect on August 1, 2021. See id. at 54768.

¹³ See id. at 54762.

¹⁴ See id. at 54761.

¹⁵ See id. at 54763. The Exchange also notes that non-Member third-parties, such as service bureaus and extranets, resell the Exchange's connectivity, which is another viable alternative for market participants to trade on the Exchange. The Exchange notes that it receives no connectivity revenue when connectivity is resold, which the Exchange

exchanges based on non-transaction fee pricing.¹⁶ The Exchange also states that there is no regulatory requirement that any market participant connect to any one options exchange, or connect at a particular connection speed or act in a particular capacity on the Exchange, and that the Exchange is unaware of any one options exchange whose membership includes all registered broker-dealers.¹⁷

The Exchange also states that the proposed fees are reasonable and appropriate to allow the Exchange to offset expenses the Exchange has and will incur in relation to providing the Proposed Access Fees and provides an analysis of its revenues, costs, and profitability associated with these fees.¹⁸ The Exchange states that this analysis reflects an extensive cost review in which the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the Proposed Access Fees, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the access services.¹⁹ The Exchange states that this analysis shows the fee increase will not result in excessive pricing or supra-competitive profits when compared to the Exchange's annual expense associated with providing the 10Gb ULL connections versus the annual revenue for the 10Gb ULL connections.²⁰

believes creates and fosters a competitive environment and subjects the Exchange to competitive forces in pricing its connectivity and access fees. See id. at 54769.

¹⁶ See id. at 54763.

¹⁷ See id. at 54768.

¹⁸ See id. at 54764-67.

¹⁹ See id. at 54762. The Exchange also states that no expense amount is allocated twice and the expenses only cover the Exchange and not its affiliates. Id. at 54762, 54764, 54766.

²⁰ See id. at 54767.

The Exchange states that, for 2021, the total annual expense for providing the access services associated with the Proposed Access Fees for the Exchange is projected to be approximately \$7.2 million.²¹ The \$7.2 million in projected total annual expense is comprised of the following, all of which the Exchange states are directly related to the access services associated with the Proposed Access Fees: (1) third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services; and (2) internal expense, relating to the internal costs of the Exchange to provide the services associated with the Proposed Access Fees. The Exchange states that the \$7.2 million in projected total annual expense is directly related to the access services associated with the Proposed Access Fees, and not any other product or service offered by the Exchange.

The Exchange states that the total third-party expense, relating to fees paid by the Exchange to third-parties for certain products and services for the Exchange to be able to provide the access services associated with the Proposed Access Fees is projected to be \$1.7 million for 2021.²² The Exchange represents that it determined whether third-party expenses related to the access services associated with the Proposed Access Fees, and, if such expense did so relate, determined what portion (or percentage) of such expense represents the cost to the Exchange to provide access services associated with the Proposed Access Fees. This includes allocating a portion of fees paid to: (1) Equinix, for data center services (approximately 62% of the Exchange's total applicable Equinix expense); (2) Zayo Group Holdings, Inc. for network services (approximately 62%); (3) Secure Financial Transaction Infrastructure and various other

²¹ See id. at 54764.

²² See id. at 54764-65.

services providers (approximately 89%);²³ and (4) various other hardware and software providers (approximately 51%).

In addition, the Exchange states that the total internal expense, relating to the internal costs of the Exchange to provide the access services associated with the Proposed Access Fees, is projected to be approximately \$5.5 million for 2021.²⁴ The Exchange represents that: (1) the Exchange's employee compensation and benefits expense relating to providing the access services associated with the Proposed Access Fees is projected to be approximately \$3.2 million, which is a portion of the Exchange's total projected expense of approximately \$9.7 million for employee compensation and benefits; (2) the Exchange's depreciation and amortization expense relating to providing the access services associated with the Proposed Access Fees is projected to be \$2 million, which is a portion of the Exchange's total projected expense of \$3.1 million for depreciation and amortization; and (3) the Exchange's occupancy expense relating to providing the access services associated with the Proposed Access Fees is projected to be \$0.3 million, which is a portion of the Exchange's total projected expense of \$0.5 million for occupancy.

The Exchange states that this cost and revenue analysis shows that the proposed rule change will not result in excessive pricing or supra-competitive profit.²⁵ The Exchange projects that, on a fully-annualized basis, the Proposed Access Fees will have an expense of approximately \$7.2 million per annum and a projected revenue of \$14.6 million per year, and

²³ The Exchange states that on October 22, 2019, the Exchange was notified by Secure Financial Transaction Infrastructure that it was raising its fees charged to the Exchange by approximately 11%, without being required to make a rule filing with the Commission pursuant to Section 19(b)(1) of the Act and Rule 19b-4 thereunder. See id. at 54764 n.29; see also 15 U.S.C. 78s(b)(1) and 17 CFR 240.19b-4.

²⁴ See Notice, supra note 4, at 54765-66.

²⁵ See id. at 54767.

including projected revenue for providing network connectivity for all connectivity alternatives to be approximately \$14.63 million per annum, resulting in a projected profit margin of 51% inclusive of the Proposed Access Fees and all other connectivity alternatives (\$14.63 million in total projected connectivity revenue minus \$7.2 million in projected expense = \$7.43 million profit per year). The Exchange states that this profit margin does not take into account the cost of capital expenditures that the Exchange historically spent or are projected to spend each year going forward.

The Exchange states that the proposed fees for 10Gb ULL connections is equitable and reasonable because the proposed highest tier is still less than fees charged for similar connectivity provided by other options exchanges.²⁶ The Exchange also states that its projected revenue from access fees is less than, or similar to, the access fee revenues generated by access fees charged by other U.S. options exchanges based on the 2020 audited financial statements within their Form 1 filings.²⁷ The Exchange also believes that its overall operating margin is in line with or less than the operating margins of competing options exchanges, including the revenue and expense associated with the Proposed Access Fees.²⁸ The Exchange states that this incremental increase in revenue generated from the 30% profit margin on connectivity will allow

²⁶ See id. at 54763. The Exchange notes that higher connectivity fees for competing exchanges have been in place for years (over 8 years in some cases), which allowed these exchanges to derive significantly more revenue from their access fees. See id. The Exchange states that the Exchange and its affiliates have historically set their fees purposefully low in order to attract business and market share, and that it benefits overall competition in the marketplace to allow relatively new entrants like the Exchange and its affiliates to proposed fees that may help these new entrants recoup their substantial investment in building out costly infrastructure. See id. at 54768.

²⁷ See id. at 54767-68.

²⁸ See id. at 54768.

the Exchange to further invest in its system architecture and matching engine functionality to the benefit of all market participants.²⁹

The Exchange states that the proposed fees are equitably allocated, not unfairly discriminatory, and do not impose an unnecessary or inappropriate burden on competition because the Proposed Access Fees do not favor certain categories of market participants in a manner that would impose a burden on competition because the allocation reflects the network resources consumed by the various usage of market participants, with the lowest bandwidth consuming members paying the least, and highest bandwidth consuming members paying the most, particularly since higher bandwidth consumption translates to higher costs to the Exchange;³⁰ options market participants are not forced to connect to all options exchanges;³¹ and options market participants may choose alternative methods of connecting to the Exchange, including routing through another participant or market center accessing the Exchange indirectly.³²

The Commission received two comment letters from one commenter that opposes the proposed rule change.³³ This commenter states that the Exchange has not sufficiently demonstrated its proposed fees' consistency with the Act or addressed previous concerns with

²⁹ See id. at 54767.

³⁰ See id. at 54769.

³¹ See id.

³² See id.

³³ See letters from Richard J. McDonald, Susquehanna International Group, LLP, to Vanessa Countryman, Secretary, Commission, dated October 1, 2021 ("First SIG Letter") and October 26, 2021 ("Second SIG Letter").

the proposed fees raised by the same commenter.³⁴ Specifically, this commenter argues that there are no reasonable substitutes for the Exchange's 10Gb ULL connectivity lines, particularly for market makers whose business models require them to subscribe to direct connectivity to the Exchange in the highest proposed pricing tier.³⁵ The commenter further argues that the fact that no member or non-member has altered its use of 10Gb ULL connectivity since the fee changes went into effect serves as further support of its claim that there are no reasonable alternatives to the service.³⁶ This commenter also argues that the ability for a member to withdraw from an exchange should not support the reasonableness of any individual proposed fee, as a member would incur significant costs in withdrawing from an exchange in the form of lost infrastructure investments, the cost of withdrawal itself, and other opportunity costs.³⁷ This commenter further objects that the Exchange has not provided sufficient quantitative support for its revenues, costs, and profitability under the current and proposed fees to support an analysis that the proposed fees and the Exchange's profitability are reasonable.³⁸ Moreover, the commenter argues that the

³⁴ See Second SIG Letter, supra note 33, at 2. In the First SIG Letter the commenter requested that the Commission suspend the proposal and institute proceedings to determine whether to approve or disapprove the proposal on the basis that the proposal represents the same fee changes previously proposed by the Exchange for which the commenter expressed concerns. See also letter from Richard J. McDonald, Susquehanna International Group, LLP, to Vanessa Countryman, Secretary, Commission, dated September 7, 2021, available at <https://www.sec.gov/comments/sr-miax-2021-35/srmiax202135-9208444-249989.pdf> (comment letter submitted to File Nos. SR-MIAX-2021-35, SR-MIAX-2021-37, SR-PEARL-2021-33, SR-PEARL-2021-36, SR-EMERALD-2021-23, and SR-EMERALD-2021-25, and expressing similar concerns to those described herein).

³⁵ See Second SIG Letter, supra note 33, at 2-3.

³⁶ See id. at 3.

³⁷ See id.

³⁸ See id. at 4. The commenter further argues that the Exchange has not sufficiently justified the profit margins they would be accruing with the proposed fees by, for

Exchange’s comparison of its projected access fee profit margins to the overall profit margins of competing exchanges is insufficient as it does not appropriately compare the individual components of these other exchange fees to those of the Exchange.³⁹ The commenter also suggests that any comparisons made by the Exchange to the revenues and margins of other exchanges are inapt because they do not account for the circumstances under which other exchanges established their fees, including, for example, whether the services are equivalent or the costs to provide them are similar.⁴⁰ Finally, this commenter claims that the proposed tiers in the new fee structure are unfairly discriminatory because the Exchange has not provided any cost breakdown to support the claim that the use of multiple connections creates higher costs for the Exchange.⁴¹ Instead, the commenter argues that market participants who purchase more units of 10Gb ULL connections use more exchange bandwidth simply due to the fact that they have purchased more units, and that this does not justify the proposal to charge a higher rate per unit, which the commenter claims is unfairly discriminatory towards market maker subscribers.⁴²

Another commenter opposing the proposed rule change states that the Exchange has not met its burden of demonstrating that the proposed fees are consistent with the standards under the Act.⁴³ This commenter states that the Exchange’s argument that competition for order flow

example, explaining specific technological undertakings the Exchange expects to fund with the revenue from the new fees. See id.

³⁹ See id. at 4-5.

⁴⁰ See id.

⁴¹ See id. at 5.

⁴² See id. at 6.

⁴³ See letter from Ellen Green, Managing Director, Equity and Options Market Structure, Securities Industry and Financial Markets Association, to Vanessa Countryman, Secretary, Commission, dated November 16, 2021 (“SIFMA Letter”).

constrains pricing for products and services exclusively offered by the Exchange does not demonstrate that the fees are reasonable.⁴⁴ This commenter also disagrees with the Exchange’s statement that it must continually adjust the fees for these services as a result of competition from other markets, arguing that this does not reflect marketplace reality.⁴⁵ This commenter also states that the Exchange has failed to demonstrate that the proposed fees are equitably allocated and not unfairly discriminatory, claiming that the proposed fee changes directly impact market makers and the burden of the fee increases fall predominantly on market makers operating on the Exchange because 10Gb ULL connections are an essential technology tool for market makers.⁴⁶ The commenter states that the Exchange offers no concrete support for its arguments that the tiered pricing structure would encourage firms to be more economical and efficient in the number of connections they purchase, allowing the Exchange to better monitor and provide access to its network to ensure that it has sufficient capacity and headroom in its system.⁴⁷ This commenter also states that the Exchange provides no support for its position that the use of multiple 10Gb ULL connections generates higher costs for the Exchange, positing that it is likely the Exchange has fixed costs associated with providing connections and any additional connections purchased by users will result in greater Exchange profits.⁴⁸ The commenter also states that the Exchange

⁴⁴ See id. at 3. This commenter asserts that the proposals are similar to proprietary market data products offered by the Exchange, which the commenter states are unique to the Exchange and market participants cannot obtain anywhere else. Id.

⁴⁵ See id. at 4.

⁴⁶ See id. at 4-5. The commenter asserts that without high speed access provided through 10Gb ULL connections, market makers could be exposed to tremendous risk if their quotes become “stale” due to price movements in underlying securities. See id. at 4.

⁴⁷ See id. at 4. The commenter also states that the Exchange fails to provide any discussion of why its current capacity needs are constrained under the current pricing structure.

⁴⁸ See id. at 5.

has provided no public information on how it derived the cost amounts it determined to allocate to the products and services subject to the proposed fee changes nor any meaningful baseline information regarding the Exchange’s overall costs.⁴⁹ This commenter believes that the Exchange has withdrawn and refiled an essentially identical proposal,⁵⁰ subverting proper consideration of the proposed fee changes under the process set forth in the Act.⁵¹

A different commenter, while not expressing support or opposition for the specific proposed fee changes, applauds the Exchange for the enhanced disclosure it has provided with respect to its proposed fee changes as compared to the information in prior rule filings by other exchanges proposing similar types of market data or connectivity fees.⁵² This commenter states that the proposed fee changes would “materially lower costs for many users, while increasing the costs for some of [the Exchange’s] heaviest of users,” noting that when these fee filing proposals were withdrawn and refiled, they contained “significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.”⁵³

⁴⁹ See id. The commenter believes that such information is needed to allow commenters to judge whether the allocations are supportable. Id. This commenter also believes that the Exchange’s discussion of profit margins are “high-level and conclusory,” and fail to provide sufficient detail to understand whether or not the fees are reasonable. Id.

⁵⁰ See supra note 7.

⁵¹ See SIFMA Letter, supra note 43, at 5-6.

⁵² See letter from Tyler Gellasch, Executive Director, Healthy Markets Association, to Gary Gensler, Chair, Commission, dated October 29, 2021, at 17. This commenter also petitioned the Commission for rulemaking regarding the process for reviewing self-regulatory organization fee filings.

⁵³ See id. The commenter highlights that the Exchange’s proposal details both the projected revenues generated from the proposed fees by user class as well as the percentage of subscribers whose fees increased or decreased as a result of the proposed changes. See id.

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.⁵⁴ 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.”⁵⁵

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;⁵⁶ (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;⁵⁷ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁵⁸

In temporarily suspending the Exchange’s fee change, the Commission intends to further consider whether the proposal to modify fees for certain connectivity options and implement a tiered pricing fee structure is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring,

⁵⁴ 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”).

⁵⁵ Id.

⁵⁶ 15 U.S.C. 78f(b)(4).

⁵⁷ 15 U.S.C. 78f(b)(5).

⁵⁸ 15 U.S.C. 78f(b)(8).

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.⁵⁹

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.⁶⁰

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)⁶¹ and 19(b)(2)(B) of the Act⁶² to determine whether the 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.

⁵⁹ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

⁶⁰ 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).

⁶¹ 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.

⁶² 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,⁶³ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how the proposal is 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;”⁶⁴
- Whether the Exchange has demonstrated how the proposal is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”⁶⁵ and
- Whether the Exchange has demonstrated how the proposal is 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].”⁶⁶

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

⁶⁴ 15 U.S.C. 78f(b)(4).

⁶⁵ 15 U.S.C. 78f(b)(5).

⁶⁶ 15 U.S.C. 78f(b)(8).

As discussed in Section III above, the Exchange makes various arguments in support of the proposal, and the Commission received comment letters disputing the Exchange's arguments and expressing concerns regarding the proposal.⁶⁷ In particular, two commenters argue that the Exchange did not provide sufficient information to establish that the proposed fees are consistent with the Act and the rules thereunder.⁶⁸ The Commission believes that there are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposed 10Gb ULL connectivity fees is consistent with the Act and the rules thereunder.

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."⁶⁹ 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,⁷⁰ 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.⁷¹

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act, specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers,

⁶⁷ See First SIG Letter and Second SIG Letter, supra note 33; SIFMA Letter, supra note 43.

⁶⁸ See supra note 67.

⁶⁹ 17 CFR 201.700(b)(3).

⁷⁰ See id.

⁷¹ See id.

and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act;⁷² as well as any other provision of the Act, or the rules and regulations thereunder.

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from 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 of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁷³

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.

⁷² See 15 U.S.C. 78f(b)(4), (5), and (8).

⁷³ 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).

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposal 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 e-mail to rule-comments@sec.gov. Please include File No. SR-EMERALD-2021-29 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-2021-29. This file number should be included on the subject line if e-mail 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-2021-29 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁷⁴ that File Number SR-EMERALD-2021-29 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.⁷⁵

J. Matthew DeLesDernier
Assistant Secretary

⁷⁴ 15 U.S.C. 78s(b)(3)(C).

⁷⁵ 17 CFR 200.30-3(a)(57) and (58).