

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99824; File No. SR-EMERALD-2024-12)

March 21, 2024

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule to Modify Certain Connectivity and Port Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 11, 2024, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a 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 proposes to amend the MIAX Emerald Options Exchange Fee Schedule (the “Fee Schedule”) to amend certain connectivity and port fees.

The text of the proposed rule change is available on the Exchange’s website at <https://www.miaxglobal.com/markets/us-options/emerald-options/rule-filings>, at MIAX Emerald’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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

in Item IV below. The 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 as follows: (1) increase the fees for a 10 gigabit (“Gb”) ultra-low latency (“ULL”) fiber connection for Members³ and non-Members; and (2) amend the monthly port fee for additional Limited Service MIAX Emerald Express Interface (“MEI”) Ports⁴ available to Market Makers.⁵ The Exchange has experienced ongoing increases in expenses in recent years. As discussed more fully below, the Exchange recently calculated annual aggregate costs of \$15,469,330 for providing 10Gb ULL connectivity and \$2,506,232 for providing Limited Service MEI Ports.

Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber’s connection with nanosecond granularity, and continuous improvements in network performance with the goal of improving the subscriber’s experience. The costs associated with maintaining and enhancing a state-of-the-art network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those increased costs by amending fees for connectivity services. Subscribers expect

³ 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.

⁴ 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.

⁵ 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 Limit 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 to provide this level of support so they continue to receive the performance they expect. This differentiates the Exchange from its competitors.

The Exchange now proposes to amend the Fee Schedule to amend the fees for 10Gb ULL connectivity and Limited Service MEI Ports in order to recoup ongoing costs and increase in expenses set forth below in the Exchange's cost analysis. While the proposed fee changes are immediately effective, the Exchange notes that a version of the proposed fee changes has been effective since January 1, 2023 pursuant to the Exchange's initially filed this proposal on December 30, 2022 as SR-EMERALD-2022-38. On January 9, 2023, the Exchange withdrew SR-EMERALD-2022-38 to make a minor technical correction and resubmitted the proposal (the "Initial Proposal").⁶ On February 23, 2023, the Exchange withdrew the Initial Proposal and replaced it with a revised proposal (the "Second Proposal").⁷ On April 20, 2023, the Exchange withdrew the Second Proposal and replaced it with a revised proposal (the "Third Proposal").⁸ On June 16, 2023, the Exchange withdrew the Third Proposal and replaced it with a revised proposal (the "Fourth Proposal").⁹ On August 8, 2023, the Exchange withdrew the Fourth

⁶ See Securities Exchange Act Release No. 96628 (January 10, 2023), 88 FR 2651 (January 17, 2023) (SR-EMERALD-2023-01).

⁷ See Securities Exchange Act Release No. 97079 (March 8, 2023), 88 FR 15764 (March 14, 2023) (SR-EMERALD-2023-05).

⁸ See Securities Exchange Act Release No. 97422 (May 2, 2023), 88 FR 29750 (May 8, 2023) (SR-EMERALD-2023-12).

⁹ The Exchange met with Commission Staff to discuss the Third Proposal during which the Commission Staff provided feedback and requested additional information, including, most recently, information about total costs related to certain third party vendors. Such vendor cost information is subject to confidentiality restrictions. The Exchange provided this information to Commission Staff under separate cover with a request for confidentiality. While the Exchange will continue to be responsive to Commission Staff's information requests, the Exchange believes that the Commission should, at this point, issue substantially more detailed guidance for exchanges to follow in the process of pursuing a cost-based approach to fee filings, and that, for the purposes of fair competition, detailed disclosures by exchanges, such as those that the Exchange is providing now, should be consistent across all exchanges, including for those that have resisted a cost-based approach to fee filings, in the interests of fair and even disclosure and fair competition. See Securities Exchange Act Release No. 97813 (June 27, 2023), 88 FR 42785 (July 3, 2023) (SR-EMERALD-2023-14).

Proposal and replaced it with a revised proposal (the “Fifth Proposal”).¹⁰ Since a U.S. government shutdown was avoided, on October 2, 2023, the Exchange withdrew the Fifth Proposal and replaced it with a further revised proposal (the “Sixth Proposal”).¹¹ On November 27, 2023, the Exchange withdrew the Sixth Proposal and replaced it with this further revised proposal (the “Seventh Proposal”).¹² On January 25, 2024, the Exchange withdrew the Seventh Proposal and replaced it with a further revised proposal (the “Eighth Proposal”).¹³ On March 11, 2024, the Exchange withdrew the Eighth Proposal and replaced it with this further revised proposal (the “Ninth Proposal”).

The Exchange previously included a cost analysis in the Initial, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Proposals. As described more fully below, the Exchange provides an updated cost analysis that includes, among other things, additional descriptions of how the Exchange allocated costs among it and its affiliated exchanges (MIAX PEARL, LLC (“MIAX Pearl”) (separately among MIAX Pearl Options and MIAX Pearl Equities) and MIAX¹⁴ (together with MIAX Pearl Options and MIAX Pearl Equities, the “affiliated markets”)) to ensure no cost was allocated more than once, as well as additional detail supporting its cost allocation processes and explanations as to why a cost allocation in this proposal may differ from the same cost allocation in a similar proposal submitted by one of its affiliated markets. The

¹⁰ See Securities Exchange Act Release No. 98176 (August 21, 2023), 88 FR 58341 (August 25, 2023) (SR-EMERALD-2023-19). Due to the prospect of a U.S. government shutdown, the Commission suspended the Fifth Proposal on September 29, 2023. See Securities Exchange Act Release No. 98656 (September 29, 2023) (SR-EMERALD-2023-19).

¹¹ See Securities Exchange Act Release No. 98751 (October 13, 2023), 88 FR 72174 (October 19, 2023) (SR-EMERALD-2023-27).

¹² See Securities Exchange Act Release No. 99138 (December 11, 2023), 88 FR 87020 (December 15, 2023) (SR-EMERALD-2023-30).

¹³ See Securities Exchange Act Release No. 99475 (February 5, 2024), 89 FR 9223 (February 9, 2024) (SR-EMERALD-2024-03).

¹⁴ The term “MIAX” means Miami International Securities Exchange, LLC. See Exchange Rule 100.

Exchange continues to propose fees that are intended to cover the Exchange's cost of providing 10Gb ULL connectivity and Limited Service MEI Ports with a reasonable mark-up over those costs.

The cost analysis included in prior filings was based on the Exchange's 2023 fiscal year of operations and projected expenses. In its Initial Proposal filed on December 30, 2022, the Exchange committed to conduct an annual review after implementation of these fees. The Exchange recently completed its 2024 fiscal year budget process, which included its annual review of these fees and the projected costs to provide these services, based on its approved 2024 expense budget. Therefore, the Cost Analysis included in this proposal is based on the Exchange's 2024 fiscal year of operations and projected expenses. The Exchange believes it reasonable to now use costs from its 2024 fiscal year budget because they reflect the Exchange's current cost base. The Exchange also notes that expenses included in its 2024 fiscal year budget and this proposal are generally higher than its 2023 fiscal year budget and Cost Analysis included in prior filings. As more fully described below and throughout this filing, this is due to a number of factors, such as, critical vendors and suppliers increasing costs they charge the Exchange, significant exchange staff headcount increases, increased data center costs from the Exchange's data center providers in multiple locations and facilities, higher technology and communications costs, planned hardware refreshes, and system capacity upgrades that increase depreciation expense. Specifically, with regard to employee compensation, the 2024 fiscal year budget includes additional expenses related to increased headcount and new hires that are needed to support the Exchange as it continues to grow (the Exchange and its affiliated companies are projected to hire over 60 additional staff in 2024). Hardware and software expenses have also increased primarily due to price increases from critical vendors and equipment suppliers.

Further, the Exchange budgeted for additional hardware and software needs to support the Exchange's continued growth and expansion. Depreciation and amortization have likewise increased due to recent and planned refreshes in Exchange hardware and software. This new equipment and software then becomes depreciable, as described below. Data center costs have also increased due the following: the Exchange expanding its footprint within its data center; and the data center vendor increasing the costs it charges the Exchange. Lastly, allocated shared expenses have increased due to the overall budgeted increase in costs from 2023 to 2024 necessary to operate and support the Exchange as described below.

Consequently, these increased costs included in the 2024 budget result in a lower projected profit margin for 10Gb ULL connectivity and Limited Service MEI Ports than the profit margins included in prior filings that proposed the same fee levels for 10Gb ULL connectivity and Limited Service MEI Ports. The Exchange believes it is reasonable and appropriate to now use expenses from its 2024 budget because those expenses are more recent and more accurately reflect the Exchange's current expenses and projected revenues for the 2024 fiscal year. Continuing to use 2023 budget numbers would result in the Exchange's Cost Analysis to be based on stale data which would not reflect the Exchanges most recent cost estimates and projected margins.

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Starting in 2017, following the United States Court of Appeals for the District of Columbia's Susquehanna Decision¹⁵ and various other developments, the Commission began to undertake a heightened review of exchange filings, including non-transaction fee filings that was

¹⁵ See Susquehanna International Group, LLP v. Securities & Exchange Commission, 866 F.3d 442 (D.C. Circuit 2017) (the "Susquehanna Decision").

substantially and materially different from its prior review process (hereinafter referred to as the “Revised Review Process”). In the Susquehanna Decision, the D.C. Circuit Court stated that the Commission could not maintain a practice of “unquestioning reliance” on claims made by a self-regulatory organization (“SRO”) in the course of filing a rule or fee change with the Commission.¹⁶ Then, on October 16, 2018, the Commission issued an opinion in Securities Industry and Financial Markets Association finding that exchanges failed both to establish that the challenged fees were constrained by significant competitive forces and that these fees were consistent with the Act.¹⁷ On that same day, the Commission issued an order remanding to various exchanges and national market system (“NMS”) plans challenges to over 400 rule changes and plan amendments that were asserted in 57 applications for review (the “Remand Order”).¹⁸ The Remand Order directed the exchanges to “develop a record,” and to “explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.”¹⁹ The Commission denied requests by various exchanges and plan participants for reconsideration of the Remand Order.²⁰ However, the Commission did extend the deadlines in the Remand Order “so that they d[id] not begin to run until the resolution of the appeal of the SIFMA Decision in the D.C. Circuit and the issuance of the court’s mandate.”²¹

¹⁶ Id.

¹⁷ See Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 84432, 2018 WL 5023228 (October 16, 2018) (the “SIFMA Decision”).

¹⁸ See Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). See 15 U.S.C. §§ 78k-1, 78s; see also Rule 608(d) of Regulation NMS, 17 C.F.R. § 242.608(d) (asserted as an alternative basis of jurisdiction in some applications).

¹⁹ Id. at page 2.

²⁰ Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 85802, 2019 WL 2022819 (May 7, 2019) (the “Order Denying Reconsideration”).

²¹ Order Denying Reconsideration, 2019 WL 2022819, at *13.

Both the Remand Order and the Order Denying Reconsideration were appealed to the D.C. Circuit.

While the above appeal to the D.C. Circuit was pending, on March 29, 2019, the Commission issued an order disapproving a proposed fee change by BOX Exchange LLC (“BOX”) to establish connectivity fees (the “BOX Order”), which significantly increased the level of information needed for the Commission to believe that an exchange’s filing satisfied its obligations under the Act with respect to changing a fee.²² Despite approving hundreds of access fee filings in the years prior to the BOX Order (described further below) utilizing a “market-based” test, the Commission changed course and disapproved BOX’s proposal to begin charging connectivity at one-fourth the rate of competing exchanges’ pricing.

Also while the above appeal was pending, on May 21, 2019, the Commission Staff issued guidance “to assist the national securities exchanges and FINRA ... in preparing Fee Filings that meet their burden to demonstrate that proposed fees are consistent with the requirements of the Securities Exchange Act.”²³ In the Staff Guidance, the Commission Staff states that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”²⁴ The Staff Guidance also states that, “... even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee

²² See Securities Exchange Act Release No. 85459 (March 29, 2019), 84 FR 13363 (April 4, 2019) (SR-BOX-2018-24, SR-BOX-2018-37, and SR-BOX-2019-04) (Order Disapproving Proposed Rule Changes to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network) (the “BOX Order”). The Commission noted in the BOX Order that it “historically applied a ‘market-based’ test in its assessment of market data fees, which [the Commission] believe[s] present similar issues as the connectivity fees proposed herein.” *Id.* at page 16. Despite this admission, the Commission disapproved BOX’s proposal to begin charging \$5,000 per month for 10Gb connections (while allowing legacy exchanges to charge rates equal to 3-4 times that amount utilizing “market-based” fee filings from years prior).

²³ See Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019), [available at https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees](https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees) (the “Staff Guidance”).

²⁴ *Id.*

at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”²⁵

Following the BOX Order and Staff Guidance, on August 6, 2020, the D.C. Circuit vacated the Commission’s SIFMA Decision in NASDAQ Stock Market, LLC v. SEC²⁶ and remanded for further proceedings consistent with its opinion.²⁷ That same day, the D.C. Circuit issued an order remanding the Remand Order to the Commission for reconsideration in light of NASDAQ. The court noted that the Remand Order required the exchanges and NMS plan participants to consider the challenges that the Commission had remanded in light of the SIFMA Decision. The D.C. Circuit concluded that because the SIFMA Decision “has now been vacated, the basis for the [Remand Order] has evaporated.”²⁸ Accordingly, on August 7, 2020, the Commission vacated the Remand Order and ordered the parties to file briefs addressing whether the holding in NASDAQ v. SEC that Exchange Act Section 19(d) does not permit challenges to generally applicable fee rules requiring dismissal of the challenges the Commission previously remanded.²⁹ The Commission further invited “the parties to submit briefing stating whether the challenges asserted in the applications for review ... should be dismissed, and specifically identifying any challenge that they contend should not be dismissed pursuant to the holding of

²⁵ Id.

²⁶ NASDAQ Stock Mkt., LLC v. SEC, No 18-1324, --- Fed. App’x ----, 2020 WL 3406123 (D.C. Cir. June 5, 2020). The court’s mandate was issued on August 6, 2020.

²⁷ Nasdaq v. SEC, 961 F.3d 421, at 424, 431 (D.C. Cir. 2020). The court’s mandate issued on August 6, 2020. The D.C. Circuit held that Exchange Act “Section 19(d) is not available as a means to challenge the reasonableness of generally-applicable fee rules.” Id. The court held that “for a fee rule to be challengeable under Section 19(d), it must, at a minimum, be targeted at specific individuals or entities.” Id. Thus, the court held that “Section 19(d) is not an available means to challenge the fees at issue” in the SIFMA Decision. Id.

²⁸ Id. at *2; see also id. (“[T]he sole purpose of the challenged remand has disappeared.”).

²⁹ Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 89504, 2020 WL 4569089 (August 7, 2020) (the “Order Vacating Prior Order and Requesting Additional Briefs”).

Nasdaq v. SEC.”³⁰ Without resolving the above issues, on October 5, 2020, the Commission issued an order granting SIFMA and Bloomberg’s request to withdraw their applications for review and dismissed the proceedings.³¹

As a result of the Commission’s loss of the NASDAQ vs. SEC case noted above, the Commission never followed through with its intention to subject the over 400 fee filings to “develop a record,” and to “explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review.”³² As such, all of those fees remained in place and amounted to a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff’s fee review process materially changed. The net result of this history and lack of resolution in the D.C. Circuit Court resulted in an uneven competitive landscape where the Commission subjects all new non-transaction fee filings to the new Revised Review Process, while allowing the previously challenged fee filings, mostly submitted by incumbent exchanges prior to 2019, to remain in effect and not subject to the “record” or “review” earlier intended by the Commission.

While the Exchange appreciates that the Staff Guidance articulates an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, the practical effect of the Revised Review Process, Staff Guidance, and the Commission’s related practice of continuous suspension of new fee filings, is anti-competitive, discriminatory, and has put in place an un-level playing field, which has negatively impacted smaller, nascent, non-legacy exchanges (“non-legacy exchanges”),

³⁰ Id.

³¹ Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 90087 (October 5, 2020).

³² See supra note 27, at page 2.

while favoring larger, incumbent, entrenched, legacy exchanges (“legacy exchanges”).³³ The legacy exchanges all established a significantly higher baseline for access and market data fees prior to the Revised Review Process. From 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed, and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings³⁴ to amend exchange connectivity or port fees (or similar access fees). The support for each of those filings was a simple statement by the relevant exchange that the fees were constrained by competitive forces.³⁵ These fees remain in effect today.

The net result is that the non-legacy exchanges are effectively now blocked by the Commission Staff from adopting or increasing fees to amounts comparable to the legacy exchanges (which were not subject to the Revised Review Process and Staff Guidance), despite providing enhanced disclosures and rationale to support their proposed fee changes that far exceed any such support provided by legacy exchanges. Simply put, legacy exchanges were able

³³ Commission Chair Gary Gensler recently reiterated the Commission’s mandate to ensure competition in the equities markets. See “Statement on Minimum Price Increments, Access Fee Caps, Round Lots, and Odd-Lots”, by Chair Gary Gensler, dated December 14, 2022 (stating “[i]n 1975, Congress tasked the Securities and Exchange Commission with responsibility to facilitate the establishment of the national market system and *enhance competition in the securities markets, including the equity markets*” (*emphasis added*)). In that same statement, Chair Gary Gensler cited the five objectives laid out by Congress in 11A of the Exchange Act (15 U.S.C. 78k-1), including ensuring “fair competition among brokers and dealers, among exchange markets, and *between exchange markets* and markets other than exchange markets...” (*emphasis added*). Id. at note 1. See also Securities Acts Amendments of 1975, available at <https://www.govtrack.us/congress/bills/94/s249>.

³⁴ This timeframe also includes challenges to over 400 rule filings by SIFMA and Bloomberg discussed above. Sec. Indus. & Fin. Mkts. Ass’n, Securities Exchange Act Release No. 84433, 2018 WL 5023230 (Oct. 16, 2018). Those filings were left to stand, while at the same time, blocking newer exchanges from the ability to establish competitive access and market data fees. See The Nasdaq Stock Market, LLC v. SEC, Case No. 18-1292 (D.C. Cir. June 5, 2020). The expectation at the time of the litigation was that the 400 rule filings challenged by SIFMA and Bloomberg would need to be justified under revised review standards.

³⁵ See, e.g., Securities Exchange Act Release Nos. 74417 (March 3, 2015), 80 FR 12534 (March 9, 2015) (SR-ISE-2015-06); 83016 (April 9, 2018), 83 FR 16157 (April 13, 2018) (SR-PHLX-2018-26); 70285 (August 29, 2013), 78 FR 54697 (September 5, 2013) (SR-NYSEMKT-2013-71); 76373 (November 5, 2015), 80 FR 70024 (November 12, 2015) (SR-NYSEMKT-2015-90); 79729 (January 4, 2017), 82 FR 3061 (January 10, 2017) (SR-NYSEARCA-2016-172).

to increase their non-transaction fees during an extended period in which the Commission applied a “market-based” test that only relied upon the assumed presence of significant competitive forces, while exchanges today are subject to a cost-based test requiring extensive cost and revenue disclosures, a process that is complex, inconsistently applied, and rarely results in a successful outcome, i.e., non-suspension. The Revised Review Process and Staff Guidance changed decades-long Commission Staff standards for review, resulting in unfair discrimination and placing an undue burden on inter-market competition between legacy exchanges and non-legacy exchanges.

Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees.³⁶ By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish “fee parity” with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges. This is particularly harmful, given that the costs to maintain exchange systems and operations continue to increase. The Commission Staff’s change in position impedes the ability of non-legacy exchanges to raise revenue to invest in their systems to compete with the legacy

³⁶ The Exchange has filed, and subsequently withdrawn, various forms of this proposed fee numerous times since August 2021 with each proposal containing hundreds of cost and revenue disclosures never previously disclosed by legacy exchanges in their access and market data fee filings prior to 2019.

exchanges who already enjoy disproportionate non-transaction fee based revenue. For example, the Cboe Exchange, Inc. (“Cboe”) reported “access and capacity fee” revenue of \$70,893,000 for 2020³⁷ and \$80,383,000 for 2021³⁸. Cboe C2 Exchange, Inc. (“C2”) reported “access and capacity fee” revenue of \$19,016,000 for 2020³⁹ and \$22,843,000 for 2021⁴⁰. Cboe BZX Exchange, Inc. (“BZX”) reported “access and capacity fee” revenue of \$38,387,000 for 2020⁴¹ and \$44,800,000 for 2021⁴². Cboe EDGX Exchange, Inc. (“EDGX”) reported “access and capacity fee” revenue of \$26,126,000 for 2020⁴³ and \$30,687,000 for 2021⁴⁴. For 2021, the affiliated Cboe, C2, BZX, and EDGX (the four largest exchanges of the Cboe exchange group) reported \$178,712,000 in “access and capacity fees” in 2021. NASDAQ Phlx, LLC (“NASDAQ Phlx”) reported “Trade Management Services” revenue of \$20,817,000 for 2019.⁴⁵ The Exchange notes it is unable to compare “access fee” revenues with NASDAQ Phlx (or other

³⁷ According to Cboe’s 2021 Form 1 Amendment, access and capacity fees represent fees assessed for the opportunity to trade, including fees for trading-related functionality. See Cboe 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2100/21000465.pdf>.

³⁸ See Cboe 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2200/22001155.pdf>.

³⁹ See C2 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2100/21000469.pdf>.

⁴⁰ See C2 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2200/22001156.pdf>.

⁴¹ See BZX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2100/21000465.pdf>.

⁴² See BZX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2200/22001152.pdf>.

⁴³ See EDGX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2100/21000467.pdf>.

⁴⁴ See EDGX 2022 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2200/22001154.pdf>.

⁴⁵ According to PHLX, “Trade Management Services” includes “a wide variety of alternatives for connectivity to and accessing [the PHLX] markets for a fee. These participants are charged monthly fees for connectivity and support in accordance with [PHLX’s] published fee schedules.” See PHLX 2020 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vpr/2001/20012246.pdf>.

affiliated NASDAQ exchanges) because after 2019, the “Trade Management Services” line item was bundled into a much larger line item in PHLX’s Form 1, simply titled “Market services.”⁴⁶

The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages. First, legacy exchanges are able to use their additional non-transaction revenue for investments in infrastructure, vast marketing and advertising on major media outlets,⁴⁷ new products and other innovations. Second, higher non-transaction fees provide the legacy exchanges with greater flexibility to lower their transaction fees (or use the revenue from the higher non-transaction fees to subsidize transaction fee rates),⁴⁸ which are more immediately impactful in competition for order flow and market share, given the variable nature of this cost on member firms. The prohibition of a reasonable path forward denies the Exchange (and other non-legacy exchanges) this flexibility, eliminates the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share with legacy exchanges. There is little doubt that subjecting one exchange to a materially different standard than that historically applied to legacy exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

⁴⁶ See PHLX 2021 Form 1 Amendment, available at <https://www.sec.gov/Archives/edgar/vprr/2100/21000475.pdf>. The Exchange notes that this type of Form 1 accounting appears to be designed to obfuscate the true financials of such exchanges and has the effect of perpetuating fee and revenue advantages of legacy exchanges.

⁴⁷ See, e.g., CNBC Debuts New Set on NYSE Floor, available at <https://www.cnbc.com/id/46517876>.

⁴⁸ See, e.g., Cboe Fee Schedule, Page 4, Affiliate Volume Plan, available at https://cdn.cboe.com/resources/membership/Cboe_FeeSchedule.pdf (providing that if a market maker or its affiliate receives a credit under Cboe’s Volume Incentive Program (“VIP”), the market maker will receive an access credit on their BOE Bulk Ports corresponding to the VIP tier reached and the market maker will receive a transaction fee credit on their sliding scale market maker transaction fees) and NYSE American Options Fee Schedule, Section III, E, Floor Broker Incentive and Rebate Programs, available at https://www.nyse.com/publicdocs/nyse/markets/american-options/NYSE_American_Options_Fee_Schedule.pdf (providing floor brokers the opportunity to prepay certain non-transaction fees for the following calendar year by achieving certain amounts of volume executed on NYSE American).

While the Commission has clearly noted that the Staff Guidance is merely guidance and “is not a rule, regulation or statement of the...Commission...the Commission has neither approved nor disapproved its content...”,⁴⁹ this is not the reality experienced by exchanges such as MIAX Emerald. As such, non-legacy exchanges are forced to rely on an opaque cost-based justification standard. However, because the Staff Guidance is devoid of detail on what must be contained in cost-based justification, this standard is nearly impossible to meet despite repeated good-faith efforts by the Exchange to provide substantial amount of cost-related details. For example, the Exchange has attempted to increase fees using a cost-based justification numerous times, having submitted over six filings.⁵⁰ However, despite providing 100+ page filings describing in extensive detail its costs associated with providing the services described in the filings, Commission Staff continues to suspend such filings, with the rationale that the Exchange has not provided sufficient detail of its costs and without ever being precise about what additional data points are required. The Commission Staff appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act⁵¹ in a manner that is not possible to achieve. This essentially nullifies the cost-based approach for exchanges as a legitimate alternative as laid out in the Staff Guidance. By refusing to accept a reasonable cost-based

⁴⁹ See supra note 23, at note 1.

⁵⁰ See Securities Exchange Act Release Nos. 94889 (May 11, 2022), 87 FR 29928 (May 17, 2022) (SR-EMERALD-2022-19); 94718 (April 14, 2022), 87 FR 23633 (April 20, 2022) (SR-EMERALD-2022-15); 94717 (April 14, 2022), 87 FR 23648 (April 20, 2022) (SR-EMERALD-2022-13); 94260 (February 15, 2022), 87 FR 9695 (February 22, 2022) (SR-EMERALD-2022-05); 94257 (February 15, 2022), 87 FR 9678 (February 22, 2022) (SR-EMERALD-2022-04); 93772 (December 14, 2021), 86 FR 71965 (December 20, 2021) (SR-EMERALD-2021-43); 93776 (December 14, 2021), 86 FR 71983 (December 20, 2021) (SR-EMERALD-2021-42); 93188 (September 29, 2021), 86 FR 55052 (October 5, 2021) (SR-EMERALD-2021-31); (SR-EMERALD-2021-30) (withdrawn without being noticed by the Commission); 93166 (September 28, 2021), 86 FR 54760 (October 4, 2021) (SR-EMERALD-2021-29); 92662 (August 13, 2021), 86 FR 46726 (August 19, 2021) (SR-EMERALD-2021-25); 92645 (August 11, 2021), 86 FR 46048 (August 17, 2021) (SR-EMERALD-2021-23).

⁵¹ 15 U.S.C. 78f(b)(4).

argument to justify non-transaction fees (in addition to refusing to accept a competition-based argument as described above), or by failing to provide the detail required to achieve that standard, the Commission Staff is effectively preventing non-legacy exchanges from making any non-transaction fee changes, which benefits the legacy exchanges and is anticompetitive to the non-legacy exchanges. This does not meet the fairness standard under the Act and is discriminatory.

Because of the un-level playing field created by the Revised Review Process and Staff Guidance, the Exchange believes that the Commission Staff, at this point, should either (a) provide sufficient clarity on how its cost-based standard can be met, including a clear and exhaustive articulation of required data and its views on acceptable margins,⁵² to the extent that this is pertinent; (b) establish a framework to provide for commensurate non-transaction based fees among competing exchanges to ensure fee parity;⁵³ or (c) accept that certain competition-based arguments are applicable given the linkage between non-transaction fees and transaction fees, especially where non-transaction fees among exchanges are based upon disparate standards of review, lack parity, and impede fair competition. Considering the absence of any such framework or clarity, the Exchange believes that the Commission does not have a reasonable basis to deny the Exchange this change in fees, where the proposed change would result in fees

⁵² To the extent that the cost-based standard includes Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Staff should be clear as to what they determine is an appropriate profit margin.

⁵³ In light of the arguments above regarding disparate standards of review for historical legacy non-transaction fees and current non-transaction fees for non-legacy exchanges, a fee parity alternative would be one possible way to avoid the current unfair and discriminatory effect of the Staff Guidance and Revised Review Process. See, e.g., CSA Staff Consultation Paper 21-401, Real-Time Market Data Fees, available at https://www.bpsc.bc.ca/-/media/PWS/Resources/Securities_Law/Policies/Policy2/21401_Market_Data_Fee_CSA_Staff_Consultation_Paper.pdf.

meaningfully lower than comparable fees at competing exchanges and where the associated non-transaction revenue is meaningfully lower than competing exchanges.

In light of the above, disapproval of this would not meet the fairness standard under the Act, would be discriminatory and places a substantial burden on competition. The Exchange would be uniquely disadvantaged by not being able to increase its access fees to comparable levels (or lower levels than current market rates) to those of other options exchanges for connectivity. If the Commission Staff were to disapprove this proposal, that action, and not market forces, would substantially affect whether the Exchange can be successful in its competition with other options exchanges. Disapproval of this filing could also be viewed as an arbitrary and capricious decision should the Commission Staff continue to ignore its past treatment of non-transaction fee filings before implementation of the Revised Review Process and Staff Guidance and refuse to allow such filings to be approved despite significantly enhanced arguments and cost disclosures.⁵⁴

* * * * *

10Gb ULL Connectivity Fee Change

The Exchange proposes to amend the Fee Schedule to increase the fees for Members and non-Members to access the Exchange's system networks⁵⁵ via a 10Gb ULL fiber connection.

Specifically, the Exchange proposes to amend Sections 5)a)-b) of the Fee Schedule to increase

⁵⁴ The Exchange's costs have clearly increased and continue to increase, particularly regarding capital expenditures, as well as employee benefits provided by third parties (e.g., healthcare and insurance). Yet, practically no fee change proposed by the Exchange to cover its ever-increasing costs has been acceptable to the Commission Staff since 2021. The only other fair and reasonable alternative would be to require the numerous fee filings unquestioningly approved before the Staff Guidance and Revised Review Process to "develop a record," and to "explain their conclusions, based on that record, in a written decision that is sufficient to enable us to perform our review," and to ensure a comparable review process with the Exchange's filing.

⁵⁵ The Exchange's system networks consist of the Exchange's extranet, internal network, and external network.

the 10Gb ULL connectivity fee for Members and non-Members from \$10,000 per month to \$13,500 per month (“10Gb ULL Fee”).⁵⁶

The Exchange will continue to assess monthly Member and non-Member network connectivity fees for connectivity to the primary and secondary facilities in any month the Member or non-Member is credentialed to use any of the Exchange APIs or market data feeds in the production environment. The Exchange will continue to pro-rate the fees when a Member or non-Member makes a change to the connectivity (by adding or deleting connections) with such pro-rated fees based on the number of trading days that the Member or non-Member has been credentialed to utilize any of the Exchange APIs or market data feeds in the production environment through such connection, divided by the total number of trading days in such month multiplied by the applicable monthly rate.

Limited Service MEI Ports

Background

The Exchange also proposes to amend Section 5)d) of the Fee Schedule to amend the monthly port fee for Limited Service MEI Ports available to Market Makers.⁵⁷ The Exchange

⁵⁶ Market participants that purchase additional 10Gb ULL connections as a result of this change will not be subject to the Exchange’s Member Network Connectivity Testing and Certification Fee under Section 4)c) of the Fee Schedule. See Fee Schedule, Section 4)c), available at <https://www.miaxglobal.com/markets/us-options/miax-options/fees> (providing that “Network Connectivity Testing and Certification Fees will not be assessed in situations where the Exchange initiates a mandatory change to the Exchange’s system that requires testing and certification. Member Network Connectivity Testing and Certification Fees will not be assessed for testing and certification of connectivity to the Exchange’s Disaster Recovery Facility.”).

⁵⁷ The Exchange notes that in its prior filings (the Initial, Second, Third, Fourth and Fifth Proposals), the Exchange proposed to adopt a tiered-pricing structure for Limited Service MEI Ports.

currently allocates two (2) Full Service MEI Ports⁵⁸ and two (2) Limited Service MEI Ports⁵⁹ per matching engine⁶⁰ to which each Market Maker connects. Market Makers may also request additional Limited Service MEI Ports for each matching engine to which they connect. The Full Service MEI Ports and Limited Service MEI Ports all include access to the Exchange’s primary and secondary data centers and its disaster recovery center. Market Makers may request additional Limited Service MEI Ports. Market Makers were previously assessed a \$100 monthly fee for each Limited Service MEI Port for each matching engine above the first two Limited Service MEI Ports that are included for free (before the proposals to adopt a tiered fee structure).⁶¹

⁵⁸ The term “Full Service MEI Ports” means a port which provides Market Makers with the ability to send Market Maker simple and complex quotes, eQuotes, and quote purge messages to the MIA X Emerald System. Full Service MEI Ports are also capable of receiving administrative information. Market Makers are limited to two Full Service MEI Ports per Matching Engine. See the Definitions Section of the Fee Schedule.

⁵⁹ The term “Limited Service MEI Ports” means a port which provides Market Makers with the ability to send simple and complex eQuotes and quote purge messages only, but not Market Maker Quotes, to the MIA X Emerald System. Limited Service MEI Ports are also capable of receiving administrative information. Market Makers initially receive two Limited Service MEI Ports per Matching Engine. See the Definitions Section of the Fee Schedule.

⁶⁰ The term “Matching Engine” means a part of the MIA X 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 symbol may not be assigned to multiple Matching Engines. See the Definitions Section of the Fee Schedule.

⁶¹ Prior to the Initial Proposal, the Exchange increased the fees for both 10Gb ULL fiber connections and Limited Service MEI Ports beginning with a series of filings on October 1, 2020 (with the final filing made on March 24, 2021). See Securities Exchange Act Release Nos. 91460 (April 1, 2021), 86 FR 18349 (April 8, 2021) (SR-EMERALD-2021-11); 90184 (October 14, 2020), 85 FR 66636 (October 20, 2020) (SR-EMERALD-2020-12); 90600 (December 8, 2020), 85 FR 80831 (December 14, 2020) (SR-EMERALD-2020-17); 91032 (February 1, 2021), 86 FR 8428 (February 5, 2021) (SR-EMERALD-2021-02); and 91200 (February 24, 2021), 86 FR 12221 (March 2, 2021) (SR-EMERALD-2021-07). Prior to that fee change, the Exchange provided Limited Service MEI Ports for \$50 per port, after the first two Limited Service MEI Ports that are provided free of charge, and the Exchange incurred all the costs associated to provide those first two Limited Service MEI Ports since it commenced operations in March 2019. The Exchange then increased the fee to \$100 per Limited Service MEI Port.

Limited Service MEI Port Fee Changes

The Exchange now proposes to amend the monthly fee per Limited Service MEI Port and increase the number of free Limited Service MEI Ports per matching engine from two (2) to four (4). Specifically, the Exchange will now provide the first, second, third and fourth Limited Service MEI Ports for each matching engine free of charge. For additional Limited Service MEI Ports after the first four ports per matching engine that are provided for free (i.e., beginning with the fifth Limited Service MEI Port), the Exchange proposes to increase the monthly fee from \$100 to \$420 per Limited Service MEI Port per matching engine.⁶²

Market Makers that elect to purchase more than the number of Limited Service Ports that are provide for free do so due to the nature of their business and their perceived need for numerous ports to access the Exchange. Meanwhile, Market Makers who utilize the free Limited Service MEI Ports do so based on their business needs.

The Exchange notes that it last proposed to increase its monthly Limited Service MEI Port fees in 2020 (other than the prior proposals to adopt a tiered fee structure for Limited Service MEI Ports),⁶³ and such increase proposed herein is designed to recover a portion of the ever increasing costs associated with directly accessing the Exchange.

The Exchange also proposes to make corresponding changes to the Definitions section of the Fee Schedule and the paragraph describing the cap on the number of Limited Service MEI Ports each Market Maker may receive in Section 5)d)ii) of the Fee Schedule to account for the proposed change to now provide the first four (4) Limited Service MEI Ports for free per

⁶² As noted in the Fee Schedule, Market Makers will continue to be limited to fourteen Limited Service MEI Ports per Matching Engine. The Exchange also proposes to make a ministerial clarifying change to remove the defined term “Additional Limited Service MEI Ports”. The Exchange proposes to make a related change to add the term “Limited Service MEI Ports” after the word “fourteen” in the Fee Schedule.

⁶³ See supra note 61.

matching engine. Accordingly, the Exchange proposes to amend the last sentence of the paragraph describing the fees for Limited Service MEI Ports in Section 5)d)ii) of the Fee Schedule to now state that Market Makers are limited to ten additional Limited Service MEI Ports per matching engine, for a total of fourteen Limited Service MEI Ports per matching engine.

Implementation

The proposed fee changes are immediately effective.

2. Statutory Basis

The Exchange believes that the proposed fees are consistent with Section 6(b) of the Act⁶⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act⁶⁵ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among Members and other persons using any facility or system which the Exchange operates or controls. The Exchange also believes the proposed fees further the objectives of Section 6(b)(5) of the Act⁶⁶ in that they are designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general protect investors and the public interest and are not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that the information provided to justify the proposed fees meets or exceeds the amount of detail required in respect of proposed fee changes under the Revised Review Process and as set forth in recent Staff Guidance. Based on both the BOX Order⁶⁷ and

⁶⁴ 15 U.S.C. 78f(b).

⁶⁵ 15 U.S.C. 78f(b)(4).

⁶⁶ 15 U.S.C. 78f(b)(5).

⁶⁷ See supra note 22.

the Staff Guidance⁶⁸, the Exchange believes that the proposed fees are consistent with the Act because they are: (i) reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition; (ii) comply with the BOX Order and the Staff Guidance; and (iii) supported by evidence (including comprehensive revenue and cost data and analysis) that they are fair and reasonable and will not result in excessive pricing or supra-competitive profit.

The Exchange believes that exchanges, in setting fees of all types, should meet high standards of transparency to demonstrate why each new fee or fee amendment meets the requirements of the Act that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among market participants. The Exchange believes this high standard is especially important when an exchange imposes various fees for market participants to access an exchange's marketplace.

In the Staff Guidance, the Commission Staff states that, “[a]s an initial step in assessing the reasonableness of a fee, staff considers whether the fee is constrained by significant competitive forces.”⁶⁹ The Staff Guidance further states that, “... even where an SRO cannot demonstrate, or does not assert, that significant competitive forces constrain the fee at issue, a cost-based discussion may be an alternative basis upon which to show consistency with the Exchange Act.”⁷⁰ In the Staff Guidance, the Commission Staff further states that, “[i]f an SRO seeks to support its claims that a proposed fee is fair and reasonable because it will permit recovery of the SRO's costs, . . . , specific information, including quantitative information, should be provided to support that argument.”⁷¹

⁶⁸ See supra note 23.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

The proposed fees are reasonable because they promote parity among exchange pricing for access, which promotes competition, including in the Exchanges' ability to competitively price transaction fees, invest in infrastructure, new products and other innovations, all while allowing the Exchange to recover its costs to provide dedicated access via 10Gb ULL connectivity and Limited Service MEI Ports. As discussed above, the Revised Review Process and Staff Guidance have created an uneven playing field between legacy and non-legacy exchanges by severely restricting non-legacy exchanges from being able to increase non-transaction related fees to provide them with additional necessary revenue to better compete with legacy exchanges, which largely set fees prior to the Revised Review Process. The much higher non-transaction fees charged by the legacy exchanges provides them with two significant competitive advantages: (i) additional non-transaction revenue that may be used to fund areas other than the non-transaction service related to the fee, such as investments in infrastructure, advertising, new products and other innovations; and (ii) greater flexibility to lower their transaction fees by using the revenue from the higher non-transaction fees to subsidize transaction fee rates. The latter is more immediately impactful in competition for order flow and market share, given the variable nature of this cost on Member firms. The absence of a reasonable path forward to increase non-transaction fees to comparable (or lower rates) limits the Exchange's flexibility to, among other things, make additional investments in infrastructure and advertising, diminishes the ability to remain competitive on transaction fees, and hinders the ability to compete for order flow and market share. Again, there is little doubt that subjecting one exchange to a materially different standard than that applied to other exchanges for non-transaction fees leaves that exchange at a disadvantage in its ability to compete with its pricing of transaction fees.

Cost Analysis

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity and port services, the Exchange is especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related service, and in carefully and transparently assessing the impact on Members – both generally and in relation to other Members, i.e., to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,⁷² and Rule 19b-4 thereunder,⁷³ with respect to the types of information exchanges should provide when filing fee changes, and Section 6(b) of the Act,⁷⁴ which requires, among other things, that exchange fees be reasonable and equitably allocated,⁷⁵ not designed to permit unfair discrimination,⁷⁶ and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.⁷⁷ This rule change proposal addresses those

⁷² 15 U.S.C. 78s(b)(1).

⁷³ 17 CFR 240.19b-4.

⁷⁴ 15 U.S.C. 78f(b).

⁷⁵ 15 U.S.C. 78f(b)(4).

⁷⁶ 15 U.S.C. 78f(b)(5).

⁷⁷ 15 U.S.C. 78f(b)(8).

requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.⁷⁸ The Exchange reiterates that the legacy exchanges with whom the Exchange vigorously competes for order flow and market share, were not subject to any such diligence or transparency in setting their baseline non-transaction fees, most of which were put in place before the Revised Review Process and Staff Guidance.

As detailed below, the Exchange recently calculated its aggregate annual costs for providing physical 10Gb ULL connectivity to the Exchange at \$15,469,330 (or approximately \$1,289,111 per month, rounded to the nearest dollar when dividing the annual cost by 12 months) and its aggregate annual costs for providing Limited Service MEI Ports at \$2,506,232 (or approximately \$208,853 per month, rounded to the nearest dollar when dividing the annual cost by 12 months). In order to cover the aggregate costs of providing connectivity to its users (both Members and non-Members⁷⁹) going forward and to make a modest profit, as described below, the Exchange proposes to modify its Fee Schedule to charge a fee of \$13,500 per month for each physical 10Gb ULL connection. The Exchange also proposes to modify its Fee Schedule to amend the monthly fee for additional Limited Service MEI Ports and provide two additional ports free of charge for a total of four free Limited Service MEI Ports per matching engine to which each Member connects.

In 2020, the Exchange completed a study of its aggregate costs to produce market data and connectivity (the “Cost Analysis”).⁸⁰ The Cost Analysis required a detailed analysis of the

⁷⁸ See *supra* note 23.

⁷⁹ Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services, and thus, may access Limited Service MEI Ports on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

⁸⁰ The Exchange frequently updates its Cost Analysis as strategic initiatives change, costs increase or decrease, and market participant needs and trading activity changes. The Exchange’s most recent Cost Analysis was conducted ahead of this filing.

Exchange’s aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange – transaction execution, market data, membership services, physical connectivity, and port access (which provide order entry, cancellation and modification functionality, risk functionality, the ability to receive drop copies, and other functionality). The Exchange separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (i.e., personnel), and certain general and administrative expenses (“cost drivers”).

As an initial step, the Exchange determined the total cost for the Exchange and the affiliated markets for each cost driver as part of its 2024 budget review process. The 2024 budget review is a company-wide process that occurs over the course of many months, includes meetings among senior management, department heads, and the Finance Team. Each department head is required to send a “bottom up” budget to the Finance Team allocating costs at the profit and loss account and vendor levels for the Exchange and its affiliated markets based on a number of factors, including server counts, additional hardware and software utilization, current or anticipated functional or non-functional development projects, capacity needs, end-of-life or end-of-service intervals, number of members, market model (e.g., price time or pro-rata, simple only or simple and complex markets, auction functionality, etc.), which may impact message traffic, individual system architectures that impact platform size,⁸¹ storage needs, dedicated infrastructure versus shared infrastructure allocated per platform based on the resources required to support each platform, number of available connections, and employees allocated time.

⁸¹ For example, MIAX Emerald maintains 12 matching engines, MIAX Pearl Options maintains 12 matching engines, MIAX Pearl Equities maintains 24 matching engines, and MIAX maintains 24 matching engines.

All of these factors result in different allocation percentages among the Exchange and its affiliated markets, i.e., the different percentages of the overall cost driver allocated to the Exchange and its affiliated markets will cause the dollar amount of the overall cost allocated among the Exchange and its affiliated markets to also differ. Because the Exchange's parent company currently owns and operates four separate and distinct marketplaces, the Exchange must determine the costs associated with each actual market – as opposed to the Exchange's parent company simply concluding that all costs drivers are the same at each individual marketplace and dividing total cost by four (4) (evenly for each marketplace). Rather, 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, due to the unique factors of each marketplace as described above. This allocation methodology also ensures that no cost would be allocated twice or double-counted between the Exchange and its affiliated markets. The Finance Team then consolidates the budget and sends it to senior management, including the Chief Financial Officer and Chief Executive Officer, for review and approval. Next, the budget is presented to the Board of Directors and the Finance and Audit Committees for each exchange for their approval. The above steps encompass the first step of the cost allocation process.

The next step involves determining what portion of the cost allocated to the Exchange pursuant to the above methodology is to be allocated to each core service, e.g., connectivity and ports, market data, and transaction services. The Exchange and its affiliated markets adopted an allocation methodology with thoughtful and consistently applied principles to guide how much of a particular cost amount allocated to the Exchange should be allocated within the Exchange to each core service. This is the final step in the cost allocation process and is applied to each of

the cost drivers set forth below. For instance, fixed costs that are not driven by client activity (e.g., message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (61.9% of total expense amount allocated to 10Gb ULL connectivity), with smaller allocations to additional Limited Service MEI Ports (4.0%), and the remainder to the provision of other connectivity, other ports, transaction execution, membership services and market data services (34.1%). This next level of the allocation methodology at the individual exchange level also took into account factors similar to those set forth under the first step of the allocation methodology process described above, to determine the appropriate allocation to connectivity or market data versus allocations for other services. This allocation methodology was developed through an assessment of costs with senior management intimately familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an allocation of each cost driver to each core service, resulting in the cost allocations described below. Each of the below cost allocations is unique to the Exchange and represents a percentage of overall cost that was allocated to the Exchange pursuant to the initial allocation described above.

By allocating segmented costs to each core service, the Exchange was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity and port services, membership fees, regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and

connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below. While there is no standardized and generally accepted methodology for the allocation of an exchange's costs, the Exchange's methodology is the result of an extensive review and analysis and will be consistently applied going forward for any other potential fee proposals. In the absence of the Commission attempting to specify a methodology for the allocation of exchanges' interdependent costs, the Exchange will continue to be left with its best efforts to attempt to conduct such an allocation in a thoughtful and reasonable manner.

Through the Exchange's extensive updated Cost Analysis, which was again recently further refined, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity and port services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity and port services, and thus bears a relationship that is, "in nature and closeness," directly related to network connectivity and port services. In turn, the Exchange allocated certain costs more to physical connectivity and others to ports, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, the Exchange estimates that the aggregate monthly cost to provide 10Gb ULL connectivity and Limited Service MEI Port services, including both physical 10Gb connections and Limited Service MEI Ports, is

\$1,497,964 (utilizing the rounded numbers when dividing the annual cost for 10Gb ULL connectivity and annual cost for Limited Service MEI Ports by 12 months, then adding both numbers together), as further detailed below.

Costs Related to Offering Physical 10Gb ULL Connectivity

The following chart details the individual line-item costs considered by the Exchange to be related to offering physical dedicated 10Gb ULL connectivity via an unshared network as well as the percentage of the Exchange’s overall costs that such costs represent for each cost driver (e.g., as set forth below, the Exchange allocated approximately 28.9% of its overall Human Resources cost to offering 10Gb ULL physical connectivity).

COST DRIVERS	ALLOCATED ANNUAL COST^a	ALLOCATED MONTHLY COST^b	% OF ALL
Human Resources	\$6,440,638	\$536,720	28.9%
Connectivity (external fees, cabling, switches, etc.)	\$57,736	\$4,811	61.9%
Internet Services and External Market Data	\$448,208	\$37,351	84.8%
Data Center	\$949,073	\$79,089	61.9%
Hardware and Software Maintenance and Licenses	\$890,310	\$74,193	50.9%
Depreciation	\$2,147,438	\$178,953	61.0%
Allocated Shared Expenses	\$4,535,927	\$377,994	51.5%
TOTAL	\$15,469,330	\$1,289,111	40.2%
<p>a. The Annual Cost includes figures rounded to the nearest dollar. b. The Monthly Cost was determined by dividing the Annual Cost for each line item by twelve (12) months and rounding up or down to the nearest dollar.</p>			

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering physical 10Gb ULL connectivity. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers for the Exchange’s affiliated markets in their similar

proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

The Exchange also notes that expenses included in its 2024 fiscal year budget and this proposal are generally higher than its 2023 fiscal year budget and Cost Analysis included in prior filings. As more fully described below and throughout this filing, this is due to a number of factors, such as, critical vendors and suppliers increasing costs they charge the Exchange, significant exchange staff headcount increases, increased data center costs from the Exchange's data center providers in multiple locations and facilities, higher technology and communications costs, planned hardware refreshes, and system capacity upgrades that increase depreciation expense. Specifically, with regard to employee compensation, the 2024 fiscal year budget includes additional expenses related to increased headcount and new hires that are needed to support the Exchange as it continues to grow (the Exchange and its affiliated companies are projected to hire over 60 additional staff in 2024). Hardware and software expenses have also increased primarily due to price increases from critical vendors and equipment suppliers. Further, the Exchange budgeted for additional hardware and software needs to support the Exchange's continued growth and expansion. Depreciation and amortization have likewise increased due to recent and planned refreshes in Exchange hardware and software. This new equipment and software then becomes depreciable, as described below. Data center costs have also increased due the following: the Exchange expanding its footprint within its data center; and

the data center vendor increasing the costs it charges the Exchange. Lastly, allocated shared expenses have increased due to the overall budgeted increase in costs from 2023 to 2024 necessary to operate and support the Exchange as described below.

The updated Cost Analysis using projected 2024 expenses caused some allocation percentages in this filing to differ slightly ($\leq 2.8\%$) from past filings that relied on projected 2023 expenses. This is due to various reasons. For example, the slight differences in allocation percentage for the Human Resources cost driver is due to both changes in headcount in 2024 and also changes to the percentage of employee time allocated to these services based on changing projects and initiatives in 2024 versus 2023. For example, the Exchange recently hired a Head of Data Services whose time is entirely allocated to the market data cost driver. These types of changes in the Human Resources cost driver impact the final percentage amount of total cost allocated towards overall connectivity, including 10Gb ULL connectivity. There are no changes to the overall percentage allocation amounts applied to the product groups (e.g., network connectivity) for each of the non-Human Resources cost drivers in the current filing based on 2024 expense versus the prior 2023 filings. However, within each of those product groups, slight changes to the amount of usage of the individual products within that group (in 2024 versus 2023) will have an impact on the individual product's percentage allocation within that entire product group. For example, a decrease in 1Gb connectivity lines in 2024 versus 2023 will have an impact on the percentage allocation of costs to 1Gb lines in 2024 versus 2023, which will also impact the individual percentage allocation of costs to 10Gb ULL lines, within the entire product group. Despite these minor shifts in product usage and changes in headcount and employee mix which resulted in non-material changes in percentage allocation amounts, the Exchange applied the same rules and principles to its 2024 Cost Analysis versus its 2023 Cost Analysis.

Human Resources

The Exchange notes that it and its affiliated markets anticipate that by year-end 2024, there will be 289 employees (excluding employees at non-options/equities exchange subsidiaries of Miami International Holdings, Inc. (“MIH”), the holding company of the Exchange and its affiliated markets), and each department leader has direct knowledge of the time spent by each employee with respect to the various tasks necessary to operate the Exchange. Specifically, twice a year, and as needed with additional new hires and new project initiatives, in consultation with employees as needed, managers and department heads assign a percentage of time to every employee and then allocate that time amongst the Exchange and its affiliated markets to determine each market’s individual Human Resources expense. Then, managers and department heads assign a percentage of each employee’s time allocated to the Exchange into buckets including network connectivity, ports, market data, and other exchange services. This process ensures that every employee is 100% allocated, ensuring there is no double counting between the Exchange and its affiliated markets.

For personnel costs (Human Resources), the Exchange calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the Exchange’s network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity). As described more fully above, the Exchange’s parent company allocates costs to the Exchange and its affiliated markets and then a portion of the Human Resources costs allocated to the Exchange is then allocated to connectivity. From that portion allocated to the Exchange that applied to connectivity, the Exchange then allocated a weighted average of 48% of each employee’s time from the above group to 10Gb ULL connectivity.

The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security, sales, membership, and finance personnel). The Exchange allocated cost on an employee-by-employee basis (i.e., only including those personnel who support functions related to providing physical connectivity) and then applied a smaller allocation to such employees' time to 10Gb ULL connectivity (less than 18%). This other group of personnel with a smaller allocation of Human Resources costs also have a direct nexus to 10Gb ULL connectivity, whether it is a sales person selling a connection, finance personnel billing for connectivity or providing budget analysis, or information security ensuring that such connectivity is secure and adequately defended from an outside intrusion.

The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of time such employees devote to those tasks. This includes personnel from the Exchange departments that are predominately involved in providing 1Gb and 10Gb ULL connectivity: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. Again, the Exchange allocated 48% of each of their employee's time assigned to the Exchange for 10Gb ULL connectivity, as stated above. Employees from these departments perform numerous functions to support 10Gb ULL connectivity, such as the installation, re-location, configuration, and maintenance of 10Gb ULL connections and the hardware they access. This hardware includes servers, routers, switches, firewalls, and monitoring devices. These employees also perform software upgrades,

vulnerability assessments, remediation and patch installs, equipment configuration and hardening, as well as performance and capacity management. These employees also engage in research and development analysis for equipment and software supporting 10Gb ULL connectivity and design, and support the development and on-going maintenance of internally-developed applications as well as data capture and analysis, and Member and internal Exchange reports related to network and system performance. The above list of employee functions is not exhaustive of all the functions performed by Exchange employees to support 10Gb ULL connectivity, but illustrates the breadth of functions those employees perform in support of the above cost and time allocations.

Lastly, the Exchange notes that senior level executives' time was only allocated to the 10Gb ULL connectivity related Human Resources costs to the extent that they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (external fees, cabling, switches, etc.)

The Connectivity cost driver includes external fees paid to connect to other exchanges and third parties, cabling and switches required to operate the Exchange. The Connectivity cost driver is more narrowly focused on technology used to complete connections to the Exchange and to connect to external markets. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS.

The Exchange relies on various connectivity providers for connectivity to the entire U.S. options industry, and infrastructure services for critical components of the network that are

necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes connectivity providers to connect to other national securities exchanges and the Options Price Reporting Authority (“OPRA”). The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Connectivity provided by these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to connect to other national securities exchanges, market data providers or OPRA and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its connectivity provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Internet Services and External Market Data

The next cost driver consists of Internet Services and external market data. The Internet services cost driver includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange’s networks, primary and secondary data centers, and office locations in Princeton and Miami.

External market data includes fees paid to third parties, including other exchanges, to receive market data. The Exchange includes external market data fee costs towards the provision of 10Gb ULL connectivity because such market data is necessary for certain services related to connectivity, including pre-trade risk checks and checks for other conditions (e.g., re-pricing of orders to avoid locked or crossed markets and trading collars). Since external market data from other exchanges is consumed at the Exchange’s matching engine level, (to which 10Gb ULL connectivity provides access) in order to validate orders before additional orders enter the

matching engine or are executed, the Exchange believes it is reasonable to allocate an amount of such costs to 10Gb ULL connectivity.

The Exchange relies on various content service providers for data feeds for the entire U.S. options industry, as well as content for critical components of the network that are necessary to provide and maintain its System Networks and access to its System Networks via 10Gb ULL connectivity. Specifically, the Exchange utilizes content service providers to receive market data from OPRA, other exchanges and market data providers. The Exchange understands that these service providers provide services to most, if not all, of the other U.S. exchanges and other market participants. Market data provided these service providers is critical to the Exchanges daily operations and performance of its System Networks to which market participants connect to via 10Gb ULL connectivity. Without these services providers, the Exchange would not be able to receive market data and, therefore, would not be able to operate and support its System Networks. The Exchange does not employ a separate fee to cover its content service provider expense and recoups that expense, in part, by charging for 10Gb ULL connectivity.

Lastly, the Exchange notes that the actual dollar amounts allocated as part of the second step of the 2024 budget process differ among the Exchange and its affiliated markets for the Internet Services and External Market Data cost driver, even though, but for the Exchange, the allocation percentages are generally consistent across markets (e.g., MIAX Emerald, MIAX, and MIAX Pearl Options allocated 84.8%, 71.3%, and 74.8, respectively, to the same cost driver). This is because: (i) a different percentage of the overall Internet Services and External Market Data cost driver was allocated to the Exchange and its affiliated markets due to the factors set forth under the first step of the 2024 budget review process described above (unique

technical architecture, market structure, and business requirements of each marketplace); and (ii) the Exchange itself allocated a larger portion of this cost driver to 10Gb ULL connectivity because of recent initiatives to improve the latency and determinism of its systems. The Exchange notes while the percentage it allocated to the Internet Services and External Market Data cost driver is greater than its affiliated markets, the overall dollar amount allocated to the Exchange under the initial step of the 2024 budget process is lower than its affiliated markets.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (61.9%) to physical 10Gb ULL connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity by market participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants.

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange.⁸²

⁸² This expense may be less than the Exchange's affiliated markets, specifically MIAX Pearl Options because, unlike the Exchange, MIAX Pearl Options maintains an additional gateway to accommodate its member's access and connectivity needs. This added gateway contributes to the difference in allocations between the Exchange and MIAX Pearl Options. This expense also differs in dollar amount among the

The Exchange notes that this allocation is less than MIAX Pearl Options by a significant amount, but slightly more than MIAX, as MIAX Pearl Options allocated 59.8% of its Hardware and Software Maintenance and License expense towards 10Gb ULL connectivity, while MIAX and MIAX Emerald allocated 48.5% and 50.9%, respectively, to the same category of expense. This is because MIAX Pearl Options is in the process of replacing and upgrading various hardware and software used to operate its options trading platform in order to maintain premium network performance. At the time of this filing, MIAX Pearl Options is undergoing a major hardware refresh, replacing older hardware with new hardware. This hardware includes servers, network switches, cables, optics, protocol data units, and cabinets, to maintain a state-of-the-art technology platform. Because of the timing of the hardware refresh with the timing of this filing, the Exchange has materially higher expense than its affiliates.

Depreciation

All physical assets, software, and hardware used to provide 10Gb ULL connectivity, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, and depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange also included in the Depreciation cost driver certain budgeted improvements that the Exchange intends to capitalize and depreciate with respect to 10Gb ULL connectivity in the near-term. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost was therefore narrowly tailored to

Exchange, MIAX Pearl Options, and MIAX because each market may maintain and utilize a different amount of hardware and software based on its market model and infrastructure needs. The Exchange allocated a percentage of the overall cost based on actual amounts of hardware and software utilized by that market, which resulted in different cost allocations and dollar amounts.

depreciation related to 10Gb ULL connectivity. As noted above, the Exchange allocated 61.0% of its allocated depreciation costs to providing physical 10Gb ULL connectivity.

The Exchange also notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the percentages the Exchange and its affiliate, MIAX, allocated to the depreciation of hardware and software used to provide 10Gb ULL connectivity are similar. However, the Exchange's dollar amount is lower than that of MIAX by approximately \$35,508 per month due to two factors: first, MIAX has undergone a technology refresh since the time MIAX Emerald launched in February 2019, leading MIAX to have more hardware than software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on MIAX.

Allocated Shared Expenses

Finally, as with other exchange products and services, a portion of general shared expenses was allocated to overall physical connectivity costs. These general shared costs are integral to exchange operations, including its ability to provide physical connectivity. Costs included in general shared expenses include office space and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit

expenses), and telecommunications. Similarly, the cost of paying directors to serve on the Exchange's Board of Directors is also included in the Exchange's general shared expense cost driver.⁸³ These general shared expenses are incurred by the Exchange's parent company, MIH, as a direct result of operating the Exchange and its affiliated markets.

The Exchange employed a process to determine a reasonable percentage to allocate general shared expenses to 10Gb ULL connectivity pursuant to its multi-layered allocation process. First, general expenses were allocated among the Exchange and affiliated markets as described above. Then, the general shared expense assigned to the Exchange was allocated across core services of the Exchange, including connectivity. Then, these costs were further allocated to sub-categories within the final categories, i.e., 10Gb ULL connectivity as a sub-category of connectivity. In determining the percentage of general shared expenses allocated to connectivity that ultimately apply to 10Gb ULL connectivity, the Exchange looked at the percentage allocations of each of the cost drivers and determined a reasonable allocation percentage. The Exchange also held meetings with senior management, department heads, and the Finance Team to determine the proper amount of the shared general expense to allocate to 10GBb ULL connectivity. The Exchange, therefore, believes it is reasonable to assign an allocation, in the range of allocations for other cost drivers, while continuing to ensure that this expense is only allocated once. Again, the general shared expenses are incurred by the Exchange's parent company as a result of operating the Exchange and its affiliated markets and it is therefore reasonable to allocate a percentage of those expenses to the Exchange and ultimately to specific product offerings such as 10Gb ULL connectivity.

⁸³ The Exchange notes that MEMX allocated a precise amount of 10% of the overall cost for directors to providing physical connectivity. See Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR-MEMX-2022-26). The Exchange does not calculate its expenses at that granular a level. Instead, director costs are included as part of the overall general allocation.

Again, a portion of all shared expenses were allocated to the Exchange (and its affiliated markets) which, in turn, allocated a portion of that overall allocation to all physical connectivity on the Exchange. The Exchange then allocated 51.5% of the portion allocated to physical connectivity to 10Gb ULL connectivity. The Exchange believes this allocation percentage is reasonable because, while the overall dollar amount may be higher than other cost drivers, the 51.5% is based on and in line with the percentage allocations of each of the Exchange's other cost drivers. The percentage allocated to 10Gb ULL connectivity also reflects its importance to the Exchange's strategy and necessity towards the nature of the Exchange's overall operations, which is to provide a resilient, highly deterministic trading system that relies on faster 10Gb ULL connectivity than the Exchange's competitors to maintain premium performance. This allocation reflects the Exchange's focus on providing and maintaining high performance network connectivity, of which 10Gb ULL connectivity is a main contributor. The Exchange differentiates itself by offering a "premium-product" network experience, as an operator of a high performance, ultra-low latency network with unparalleled system throughput, which system networks can support access to three distinct options markets and multiple competing market-makers having affirmative obligations to continuously quote over 1,100,000 distinct trading products (per exchange), and the capacity to handle approximately 18 million quote messages per second. The "premium-product" network experience enables users of 10Gb ULL connections to receive the network monitoring and reporting services for those approximately 1,100,000 distinct trading products. These value add services are part of the Exchange's strategy for offering a high performance trading system, which utilizes 10Gb ULL connectivity.

The Exchange notes that the 51.5% allocation of general shared expenses for physical 10Gb ULL connectivity is higher than that allocated to general shared expenses for Limited

Service MEI Ports. This is based on its allocation methodology that weighted costs attributable to each core service. While physical connectivity has several areas where certain tangible costs are heavily weighted towards providing such service (e.g., Data Center, as described above), Limited Service MEI Ports do not require as many broad or indirect resources as other core services.

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Approximate Cost Per 10Gb ULL Connection Per Month

After determining the approximate allocated monthly cost related to 10Gb connectivity, the total monthly cost for 10Gb ULL connectivity of \$1,289,111 was divided by the number of physical 10Gb ULL connections the Exchange maintained in December 2023 (102), to arrive at a cost of approximately \$12,638 per month, per physical 10Gb ULL connection. Due to the nature of this particular cost, this allocation methodology results in an allocation among the Exchange and its affiliated markets based on set quantifiable criteria, i.e., actual number of 10Gb ULL connections.

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Costs Related to Offering Limited Service MEI Ports

The following chart details the individual line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports as well as the percentage of the Exchange's overall costs such costs represent for such area (e.g., as set forth below, the Exchange allocated approximately 6.7% of its overall Human Resources cost to offering Limited Service MEI Ports).

COST DRIVERS	ALLOCATED ANNUAL COST^c	ALLOCATED MONTHLY COST^d	% OF ALL
Human Resources	\$1,495,643	\$124,637	6.7%
Connectivity (external fees, cabling, switches, etc.)	\$2,643	\$220	2.8%
Internet Services and External Market Data	\$14,965	\$1,247	2.8%
Data Center	\$62,061	5,172	4.0%
Hardware and Software Maintenance and Licenses	\$49,543	\$4,129	2.8%
Depreciation	\$112,425	\$9,369	3.2%
Allocated Shared Expenses	\$768,952	\$64,079	8.7%
TOTAL	\$2,506,232	\$208,853	6.5%
c. See <u>supra</u> note a (describing rounding of Annual Costs). d. See <u>supra</u> note b (describing rounding of Monthly Costs based on Annual Costs).			

Below are additional details regarding each of the line-item costs considered by the Exchange to be related to offering Limited Service MEI Ports. While some costs were attempted to be allocated as equally as possible among the Exchange and its affiliated markets, the Exchange notes that some of its cost allocation percentages for certain cost drivers differ when compared to the same cost drivers described by the Exchange's affiliated markets in their similar proposed fee changes for connectivity and ports. This is because the Exchange's cost allocation methodology utilizes the actual projected costs of the Exchange (which are specific to the Exchange, and are independent of the costs projected and utilized by the Exchange's affiliated markets) to determine its actual costs, which may vary across the Exchange and its affiliated markets based on factors that are unique to each marketplace. The Exchange provides additional explanation below (including the reason for the deviation) for the significant differences.

The Exchange also notes that expenses included in its 2024 fiscal year budget and this proposal are generally higher than its 2023 fiscal year budget and Cost Analysis included in prior filings. As more fully described below and throughout this filing, this is due to a number of factors, such as, critical vendors and suppliers increasing costs they charge the Exchange,

significant exchange staff headcount increases, increased data center costs from the Exchange's data center providers in multiple locations and facilities, higher technology and communications costs, planned hardware refreshes, and system capacity upgrades that increase depreciation expense. Specifically, with regard to employee compensation, the 2024 fiscal year budget includes additional expenses related to increased headcount and new hires that are needed to support the Exchange as it continues to grow (the Exchange and its affiliated companies are projected to hire over 60 additional staff in 2024). Hardware and software expenses have also increased primarily due to price increases from critical vendors and equipment suppliers. Further, the Exchange budgeted for additional hardware and software needs to support the Exchange's continued growth and expansion. Depreciation and amortization have likewise increased due to recent and planned refreshes in Exchange hardware and software. This new equipment and software then becomes depreciable, as described below. Data center costs have also increased due to the following: the Exchange expanding its footprint within its data center; and the data center vendor increasing the costs it charges the Exchange. Lastly, allocated shared expenses have increased due to the overall budgeted increase in costs from 2023 to 2024 necessary to operate and support the Exchange as described below.

The updated Cost Analysis using projected 2024 expenses caused some allocation percentages in this filing to differ slightly ($\leq 1.6\%$) from past filings that relied on projected 2023 expenses. This is due to various reasons. For example, the slight differences in allocation percentage for the Human Resources cost driver is due to both changes in headcount in 2024 and also changes to the percentage of employee time allocated to these services based on changing projects and initiatives in 2024 versus 2023. For example, the Exchange recently hired a Head of Data Services whose time is entirely allocated to the market data cost driver. These types of

changes in the Human Resources cost driver impact the final percentage amount of total cost allocated towards overall connectivity, including Limited Service MEI Ports. There are no changes to the overall percentage allocation amounts applied to the product groups (e.g., network connectivity) for each of the non-Human Resources cost drivers in the current filing based on 2024 expense versus the prior 2023 filings. However, within each of those product groups, slight changes to the amount of usage of the individual products within that group (in 2024 versus 2023) will have an impact on the individual product's percentage allocation within that entire product group. For example, a decrease in Limited Service MEI Port usage in 2024 versus 2023 will have an impact on the percentage allocation of costs to those same Limited Service MEI Ports in 2024 versus 2023, which will also impact the individual percentage allocation of costs to other ports offered by the Exchange, within the entire product group (e.g., FIX Ports, Full Service MEI Ports, Purge Ports, Clearing Trade Drop Ports, and FIX Drop Copy Ports). Despite these minor shifts in product usage and changes in headcount and employee mix which resulted in non-material changes in percentage allocation amounts, the Exchange applied the same rules and principles to its 2024 Cost Analysis versus its 2023 Cost Analysis.

Human Resources

With respect to Limited Service MEI Ports, the Exchange calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing Limited Service MEI Ports and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). Just as described above for 10Gb ULL connectivity, the estimates of Human Resources cost were again

determined by consulting with department leaders, determining which employees are involved in tasks related to providing Limited Service MEI Ports and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing Limited Service MEI Ports and maintaining performance thereof. This includes personnel from the following Exchange departments that are predominately involved in providing Limited Service MEI Ports: Business Systems Development, Trading Systems Development, Systems Operations and Network Monitoring, Network and Data Center Operations, Listings, Trading Operations, and Project Management. The Exchange notes that senior level executives were allocated Human Resources costs to the extent they are involved in overseeing tasks specifically related to providing Limited Service MEI Ports. Senior level executives were only allocated Human Resources costs to the extent that they are involved in managing personnel responsible for tasks integral to providing and maintaining Limited Service MEI Ports. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

Connectivity (external fees, cabling, switches, etc.)

The Connectivity cost includes external fees paid to connect to other exchanges and cabling and switches, as described above.

Internet Services and External Market Data

The next cost driver consists of internet services and external market data. Internet services includes third-party service providers that provide the internet, fiber and bandwidth connections between the Exchange's networks, primary and secondary data centers, and office locations in Princeton and Miami. For purposes of Limited Service MEI Ports, the Exchange

also includes a portion of its costs related to external market data. External market data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange includes external market data costs towards the provision of Limited Service MEI Ports because such market data is necessary (in addition to physical connectivity) to offer certain services related to such ports, such as validating orders on entry against the NBBO and checking for other conditions (e.g., halted securities).⁸⁴ Thus, since market data from other exchanges is consumed at the Exchange's Limited Service MEI Port level in order to validate orders, before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to Limited Service MEI Ports.

The Exchange notes that the allocation for the Internet Services and External Market Data cost driver is greater than that of its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 2.8% of its Internet Services and External Market Data expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.1% to its Full Service MEO Ports for the same cost driver. The allocation percentages set forth above differ because they directly correspond with the number of applicable ports utilized on each exchange. For December 2023, MIAX Emerald Market Makers utilized 1,070 Limited Service MEI ports and MIAX Market Makers utilized 1,785 Limited Service MEI ports. When compared to Full Service Port (Bulk and Single) usage, for December 2023, MIAX Pearl Options Members utilized only 360 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX Emerald, thus resulting in a smaller cost

⁸⁴ The Exchange notes that MEMX separately allocated 7.5% of its external market data costs to providing physical connectivity. See Securities Exchange Act Release No. 95936 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR-MEMX-2022-26).

allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure and Internet Service), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Data Center

Data Center costs includes an allocation of the costs the Exchange incurs to provide Limited Service MEI Ports in the third-party data centers where it maintains its equipment as well as related costs for market data to then enter the Exchange's system via Limited Service MEI Ports (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties).

Hardware and Software Maintenance and Licenses

Hardware and Software Licenses includes hardware and software licenses used to monitor the health of the order entry services provided by the Exchange, as described above.

The Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 2.8% of its Hardware and Software Maintenance and License expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 1.1% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For December 2023, MIAX Market Makers utilized 1,785 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,070 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for December 2023, MIAX Pearl Options Members utilized only 260 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX and MIAX

Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options, which has a lower port count.

Depreciation

The vast majority of the software the Exchange uses to provide Limited Service MEI Ports has been developed in-house and the cost of such development, which takes place over an extended period of time and includes not just development work, but also quality assurance and testing to ensure the software works as intended, is depreciated over time once the software is activated in the production environment. Hardware used to provide Limited Service MEI Ports includes equipment used for testing and monitoring of order entry infrastructure and other physical equipment the Exchange purchased and is also depreciated over time.

All hardware and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 3.2% of all depreciation costs to providing Limited Service MEI Ports. The Exchange allocated depreciation costs for depreciated software necessary to operate the Exchange because such software is related to the provision of Limited Service MEI Ports. As with the other allocated costs in the Exchange's updated Cost Analysis, the Depreciation cost driver was therefore narrowly tailored to depreciation related to Limited Service MEI Ports.

The Exchange notes that this allocation differs from its affiliated markets due to a number of factors, such as the age of physical assets and software (e.g., older physical assets and software were previously depreciated and removed from the allocation), or certain system enhancements that required new physical assets and software, thus providing a higher contribution to the depreciated cost. For example, the Exchange notes that the percentages it and its affiliate, MIAX, allocated to the depreciation cost driver for Limited Service MEI Ports differ by only 1.7%. However, MIAX's approximate dollar amount is greater than that of MIAX Emerald by approximately \$8,773er month. This is due to two primary factors. First, MIAX has under gone a technology refresh since the time MIAX Emerald launched in February 2019, leading to it having more hardware that software that is subject to depreciation. Second, MIAX maintains 24 matching engines while MIAX Emerald maintains only 12 matching engines. This also results in more of MIAX's hardware and software being subject to depreciation than MIAX Emerald's hardware and software due to the greater amount of equipment and software necessary to support the greater number of matching engines on the Exchange.

Allocated Shared Expenses

Finally, a portion of general shared expenses was allocated to overall Limited Service MEI Ports costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide Limited Service MEI Ports. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (e.g., occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of

Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 9% of the overall cost for directors was allocated to providing Limited Service MEI Ports. The Exchange notes that the 8.7% allocation of general shared expenses for Limited Service MEI Ports is lower than that allocated to general shared expenses for physical connectivity based on its allocation methodology that weighted costs attributable to each Core Service based on an understanding of each area. While Limited Service MEI Ports have several areas where certain tangible costs are heavily weighted towards providing such service (e.g., Data Center, as described above), 10Gb ULL connectivity requires a broader level of support from Exchange personnel in different areas, which in turn leads to a broader general level of cost to the Exchange.

Lastly, the Exchange notes that this allocation is greater than its affiliate, MIAX Pearl Options, as MIAX Emerald allocated 8.7% of its Allocated Shared Expense towards Limited Service MEI Ports, while MIAX Pearl Options allocated 3.0% to its Full Service MEO Ports (Bulk and Single) for the same category of expense. The allocation percentages set forth above differ because they correspond with the number of applicable ports utilized on each exchange. For December 2023, MIAX Market Makers utilized 1,785 Limited Service MEI ports and MIAX Emerald Market Makers utilized 1,070 Limited Service MEI Ports. When compared to Full Service Port (Bulk and Single) usage, for December 2023, MIAX Pearl Options Members utilized only 360 Full Service MEO Ports (Bulk and Single), far fewer than number of Limited Service MEI Ports utilized by Market Makers on MIAX Emerald, thus resulting in a smaller cost allocation. There is increased cost associated with supporting a higher number of ports (requiring

more hardware and other technical infrastructure), thus the Exchange allocates a higher percentage of expense than MIAX Pearl Options which has a lower port count.⁸⁵

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Approximate Cost Per Limited Service MEI Port Per Month

Based on projected 2024 data, the total monthly cost allocated to Limited Service MEI Ports of \$208,853 was divided by the total number of Limited Service MEI Ports utilized by Members in December, which was 1,070 (and includes free and charged ports), resulting in an approximate cost of \$195 per port per month (when rounding to the nearest dollar). The Exchange used the total number of Limited Service MEI Ports it maintained in December for all Members and included free and charged ports. However, in prior filings, the Exchange did not include the expense of maintaining the two free Limited Service MEI Ports per matching engine that each Member receives when the Exchange discussed the approximate cost per port per month, but did include the two free Limited Service MEI Ports in the total expense amounts. As described herein, the Exchange changed its proposed fee structure since past filings to now offer four free Limited Service MEI Ports per matching engine to which each Member connects. After the first four free Limited Service MEI Ports, the Exchange proposes to charge \$420 per Limited Service MEI Port per matching engine, up to a total of fourteen (14) Limited Service MEI Ports per matching engine.

For the sake of clarity, if a Member wanted to connect to all 12 of the Exchange's matching engines and utilize the maximum number of Limited Service MEI Ports on each

⁸⁵ MIAX allocated a slightly lower amount (7.3%) of this cost as compared to MIAX Emerald (8.7%). This is not a significant difference. However, both allocations resulted in a similar cost amount (approximately \$0.6 million for MIAX and \$0.8 million for MIAX Emerald), despite MIAX having a higher number of Limited Service MEI Ports. MIAX Emerald was allocated a higher cost per Limited Service MEI Port due to the additional resources and expenditures associated with maintaining its recently enhanced low latency network.

matching engine (i.e., 14), that Member would have a total of 168 Limited Service MEI Ports (12 matching engines multiplied by 14 Limited Service MEI Ports per matching engine). With the proposed increase to now provide four Limited Service MEI Ports for free on each matching engine, that particular Member would receive 48 free Limited Service MEI Ports (4 free Limited Service MEI Ports multiplied by 12 matching engines), and be charged for the remaining 120 Limited Service MEI Ports (168 total Limited Service MEI Ports across all matching engines minus 48 free Limited Service MEI Ports across all matching engines).

As mentioned above, Members utilized a total of 1,070 Limited Service MEI Ports in the month of December 2023 (free and charged ports combined). Using December 2023 data to extrapolate out after the proposed changes herein go into effect, the total number of Limited Service MEI Ports that the Exchange would not charge for as a result of this increase in free ports is 494 (meaning the Exchange would charge for only 576 ports) and amounts to a total expense of \$96,330 per month to the Exchange (\$195 per port multiplied by 494 free Limited Service MEI Ports).

* * * * *

Cost Analysis – Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or Limited Service MEI Ports) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filings the Exchange submitted proposing fees for proprietary data feeds offered by the Exchange. For instance, in calculating the Human Resources expenses to be allocated to physical connections based upon the above described methodology, the Exchange has a team of

employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the cost of such personnel (48.1%) given their focus on functions necessary to provide 10Gb ULL physical connections. The salaries of those same personnel were allocated only 7.8% to Limited Service MEI Ports and the remaining 44.1% was allocated to 1Gb connectivity, other port services, transaction services, membership services and market data. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group, outside of a smaller allocation of 17.7% for 10Gb ULL connectivity or 17.7% for the entire network, of the cost associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of costs (4% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing Limited Service MEI Ports. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain Limited Service MEI Ports but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 29% of its personnel costs to providing 10Gb ULL and 1Gb connectivity and 6.7% of its personnel costs to providing Limited Service MEI Ports, for a total allocation of 35.7% Human Resources expense to provide these specific connectivity and port services. In turn, the Exchange allocated the remaining 64.3% of its Human Resources expense to membership services, transaction services, other port services and market data. Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and Limited Service MEI Ports, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 64.2% of the Exchange's overall depreciation and amortization expense to connectivity services (61% attributed to 10Gb ULL physical connections and 3.2% to Limited Service MEI Ports). The Exchange allocated the remaining depreciation and amortization expense (approximately 35.8%) toward the cost of providing transaction services, membership services, other port services, 1Gb connectivity, and market data

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. The Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing clients that wish to maintain physical connectivity and/or Limited Service MEI Ports or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis is based on the Exchange's 2024 fiscal year of operations and projections. It is possible, however, that actual costs may be higher or lower. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases.

However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange may propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (e.g., to monitor for costs increasing/decreasing or subscribers increasing/decreasing, etc. in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

*Projected Revenue*⁸⁶

The proposed fees will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity and port services. Much of the cost relates to monitoring and analysis of data and performance of the network via the subscriber's connection(s). The above cost, namely those associated with hardware, software, and human capital, enable the Exchange to measure network performance with nanosecond granularity. These same costs are also associated with time and money spent seeking to continuously improve the network performance, improving the subscriber's experience, based on monitoring and analysis activity. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by amending fees for connectivity services. Subscribers, particularly those of 10Gb ULL connectivity, expect the Exchange to provide this level of support to connectivity so they continue to receive the performance they expect. This differentiates the Exchange from its competitors. As detailed above, the Exchange has five primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these five primary sources of revenue.

⁸⁶ For purposes of calculating projected 2024 revenue for 10Gb ULL connectivity, the Exchange used revenues for the most recently completed full month.

The Exchange's Cost Analysis estimates the annual cost to provide 10Gb ULL connectivity services will equal \$15,469,330. Based on current 10Gb ULL connectivity services usage, the Exchange would generate annual revenue of approximately \$18,020,568. The Exchange believes this represents a modest profit of 14.2% when compared to the cost of providing 10Gb ULL connectivity services.

The Exchange's Cost Analysis estimates the annual cost to provide Limited Service MEI Port services will equal \$2,506,232. Based on December 2023 data for Limited Service MEI Port usage and counting for the proposed increase in free Limited Service MEI Ports and proposed increase in the monthly fee from \$100 to \$420 per port, the Exchange would generate annual revenue of approximately \$2,903,040. The Exchange believes this would result in an estimated profit margin of 13.7% after calculating the cost of providing Limited Service MEI Port services. The Exchange notes that the cost to provide Limited Service MEI Ports is higher than the cost for the Exchange's affiliate, MIAX Pearl Options, to provide Full Service MEO Ports due to the substantially higher number of Limited Service MEI Ports used by Exchange Members. For example, utilizing December 2023 data, MIAX Emerald Market Makers utilized 1,070 Limited Service MEI Ports compared to only 360 Full Service MEO Ports (Bulk and Single combined) allocated to MIAX Pearl Options members.

Based on the above discussion, the Exchange believes that even if the Exchange earns the above revenue or incrementally more or less, 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 network 10Gb ULL connectivity and Limited Service MEI Port services.

The Exchange also notes that this the resultant profit margin differs slightly from the profit margins set forth in similar fee filings by its affiliated markets. This is not atypical among exchanges and is due to a number of factors that differ between these four markets, including: different market models, market structures, and product offerings (equities, options, price-time, pro-rata, simple, and complex); different pricing models; different number of market participants and connectivity subscribers; different maintenance and operations costs, as described in the cost allocation methodology above; different technical architecture (e.g., the number of matching engines per exchange, i.e., the Exchange maintains only 12 matching engines while MIAX maintains 24 matching engines); and different maturity phase of the Exchange and its affiliated markets (i.e., start-up versus growth versus more mature). All of these factors contribute to a unique and differing level of profit margin per exchange.

Further, the Exchange proposes to charge rates that are comparable to, or lower than, similar fees for similar products charged by competing exchanges. For example, for 10Gb ULL connectivity, the Exchange proposes a lower fee than the fee charged by Nasdaq for its comparable 10Gb Ultra fiber connection (\$13,500 per month for the Exchange vs. \$15,000 per month for Nasdaq).⁸⁷ NYSE American charges even higher fees for its comparable 10GB LX LCN connection than the Exchange's proposed fees (\$13,500 per month for the Exchange vs. \$22,000 per month for NYSE American).⁸⁸ Accordingly, the Exchange believes that comparable and competitive pricing are key factors in determining whether a proposed fee meets the

⁸⁷ See NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services.

⁸⁸ See NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees.

requirements of the Act, regardless of whether that same fee across the Exchange's affiliated markets leads to slightly different profit margins due to factors outside of the Exchange's control (i.e., more subscribers to 10Gb ULL connectivity on the Exchange than its affiliated markets or vice versa).

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The Exchange operated at a cumulative net annual loss from the time it launched operations in 2019 through fiscal year 2021.⁸⁹ This was due to a number of factors, one of which was choosing to forgo revenue by offering certain products, such as low latency connectivity, at lower rates than other options exchanges to attract order flow and encourage market participants to experience the high determinism, low latency, and resiliency of the Exchange's trading systems. The Exchange does not believe that it should now be penalized for seeking to raise its fees as it now needs to upgrade its technology and absorb increased costs. Therefore, the Exchange believes the proposed fees are reasonable because they are based on both relative costs to the Exchange to provide dedicated 10Gb ULL connectivity and Limited Service MEI Ports, the extent to which the product drives the Exchange's overall costs and the relative value of the product, as well as the Exchange's objective to make access to its Systems broadly available to market participants. The Exchange also believes the proposed fees are reasonable because they are designed to generate annual revenue to recoup the Exchange's costs of providing dedicated 10Gb ULL connectivity and Limited Service MEI Ports.

⁸⁹ Beginning with fiscal year 2022, the Exchange incurred a net gain of approximately \$14 million. See Exchange's Form 1/A, Application for Registration or Exemption from Registration as a National Securities Exchange, filed June 26, 2023, available at <https://www.sec.gov/Archives/edgar/vpr/2300/23007742.pdf>.

The Exchange notes that its revenue estimate is based on projections and will only be realized to the extent customer activity produces the revenue estimated. As a competitor in the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such projections will be realized. For instance, in order to generate the revenue expected from 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange will have to be successful in retaining existing clients that wish to utilize 10Gb ULL connectivity and Limited Service MEI Ports and/or obtaining new clients that will purchase such access. To the extent the Exchange is successful in encouraging new clients to utilize 10Gb ULL connectivity and Limited Service MEI Ports, the Exchange does not believe it should be penalized for such success. To the extent the Exchange has mispriced and experiences a net loss in connectivity clients or in transaction activity, the Exchange could experience a net reduction in revenue. While the Exchange is supportive of transparency around costs and potential margins (applied across all exchanges), as well as periodic review of revenues and applicable costs (as discussed below), the Exchange does not believe that these estimates should form the sole basis of whether or not a proposed fee is reasonable or can be adopted. Instead, the Exchange believes that the information should be used solely to confirm that an Exchange is not earning – or seeking to earn – supra-competitive profits. The Exchange believes the Cost Analysis and related projections in this filing demonstrate this fact.

The Exchange is owned by a holding company that is the parent company of four exchange markets and, therefore, the Exchange and its affiliated markets must allocate shared costs across all of those markets accordingly, pursuant to the above-described allocation methodology. In contrast, the Investors Exchange LLC (“IEX”) and MEMX, which are currently each operating only one exchange, in their recent non-transaction fee filings allocate

the entire amount of that same cost to a single exchange. This can result in lower profit margins for the non-transaction fees proposed by IEX and MEMX because the single allocated cost does not experience the efficiencies and synergies that result from sharing costs across multiple exchanges. The Exchange and its affiliated markets often share a single cost, which results in cost efficiencies that can cause a broader gap between the allocated cost amount and projected revenue, even though the fee levels being proposed are lower or competitive with competing markets (as described above). To the extent that the application of a cost-based standard results in Commission Staff making determinations as to the appropriateness of certain profit margins, the Exchange believes that Commission Staff should also consider whether the proposed fee level is comparable to, or competitive with, the same fee charged by competing exchanges and how different cost allocation methodologies (such as across multiple markets) may result in different profit margins for comparable fee levels. Further, if Commission Staff is making determinations as to appropriate profit margins in their approval of exchange fees, the Exchange believes that the Commission should be clear to all market participants as to what they have determined is an appropriate profit margin and should apply such determinations consistently and, in the case of certain legacy exchanges, retroactively, if such standards are to avoid having a discriminatory effect.

Further, as is reflected in the proposal, the Exchange continuously and aggressively works to control its costs as a matter of good business practice. A potential profit margin should not be evaluated solely on its size; that assessment should also consider cost management and whether the ultimate fee reflects the value of the services provided. For example, a profit margin on one exchange should not be deemed excessive where that exchange has been successful in controlling its costs, but not excessive on another exchange where that exchange is charging

comparable fees but has a lower profit margin due to higher costs. Doing so could have the perverse effect of not incentivizing cost control where higher costs alone could be used to justify fees increases.

The Proposed Pricing is not Unfairly Discriminatory and Provides for the Equitable Allocation of Fees, Dues, and other Charges

The Exchange believes 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.

10Gb ULL Connectivity

The Exchange believes 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 users of 1Gb ULL connection. Specifically, the Exchange notes that 10Gb ULL connection users account for more than 99% of message traffic over the network, driving other costs that are linked to capacity utilization, as described above, while the users of the 1Gb ULL connections account for less than 1% of message traffic over the network. In the Exchange's experience, users of the 1Gb connections do not have the same business needs for the high-performance network as 10Gb ULL users.

The Exchange's high-performance network and supporting infrastructure (including employee support), provides unparalleled system throughput with the network ability to support access to several distinct options markets. To achieve a consistent, premium network performance, the Exchange must build out and maintain a network that has the capacity to handle the message rate requirements of its most heavy network consumers. These billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. The Exchange must also

purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages to satisfy its record keeping requirements under the Exchange Act.⁹⁰ Thus, as the number of messages an entity increases, certain other costs incurred by the Exchange that are correlated to, though not directly affected by, connection costs (e.g., storage costs, surveillance costs, service expenses) also increase. Given this difference in network utilization rate, the Exchange believes that it is reasonable, equitable, and not unfairly discriminatory that the 10Gb ULL users pay for the vast majority of the shared network resources from which all market participants' benefit.

Limited Service MEI Ports

The proposed changes to the monthly fee for Limited Service MEI Ports is not unfairly discriminatory because it would apply to all Market Makers equally. All Market Makers would now be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same monthly rate regardless of the number of additional Limited Service MEI Ports they purchase. Certain market participants choose to purchase additional Limited Service MEI Ports based on their own particular trading/quoting strategies and feel they need a certain number of connections to the Exchange to execute on those strategies. Other market participants may continue to choose to only utilize the free Limited Service MEI Ports to accommodate their own trading or quoting strategies, or other business models. All market participants elect to receive or purchase the amount of Limited Service MEI Ports they require based on their own business decisions and all market participants would be subject to the same fee structure and flat fee. Every market participant may receive up to four

⁹⁰ 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

(4) free Limited Service MEI Ports and those that choose to purchase additional Limited Service MEI Ports may elect to do so based on their own business decisions and would continue to be subject to the same flat fee. The Exchange notes that it filed to amend this fee in 2020 and that filing contained the same fee structure, i.e., a certain number of free Limited Service MEI Ports coupled with a flat fee for additional Limited Service MEI Ports.⁹¹ At that time, the Commission did not find the structure to be unfairly discriminatory by virtue of that proposal surviving the 60-day suspension period. Therefore, the proposed changes to the fees for Limited Service MEI Ports is not unfairly discriminatory because it would continue to apply to all market participants equally and provides a fee structure that includes four free Limited Service MEI Ports for one monthly rate that was previously in place and filed with the Commission.

The Exchange believes that its proposed fee for Limited Service MEI Ports is reasonable, fair and equitable, and not unfairly discriminatory because it is designed to align fees with services provided, will apply equally to all Members that are assigned Limited Service MEI Ports (either directly or through a Service Bureau), and will minimize barriers to entry by now providing all Members with four, instead of the prior two, free Limited Service MEI Ports.⁹² As a result of the proposed fee structure, a significant majority of Members will not be subject to any fee, and only seven Members will potentially be subject to a fee for Limited Service MEI Ports in excess of four per month, based on current usage. In contrast, other exchanges generally charge in excess of \$450 per port without providing any free ports.⁹³ Even for Members that

⁹¹ See supra note 61.

⁹² The following rationale to support providing a certain number of Limited Service MEI Ports for free prior to applying a fee is similar to that used by IEX in 2020 proposal to do the same as proposed herein. See Securities Exchange Act Release No. 86626 (August 9, 2019), 84 FR 41793 (August 15, 2019) (SR-IEX-2019-07).

⁹³ See NASDAQ Pricing Schedule, Options 7, Section 3, Ports and Other Services and NASDAQ Rules, General 8: Connectivity, Section 1. Co-Location Services (similar to the Exchange's MEI Ports, SQF ports are primarily utilized by Market Makers); ISE Pricing Schedule, Options 7, Section 7, Connectivity Fees

choose to maintain more than four Limited Service MEI Ports, the Exchange believes that the cost-based fee proposed herein is low enough that it will not operate to restrain any Member's ability to maintain the number of Limited Service MEI Ports that it determines are consistent with its business objectives. The small number of Members projected to be subject to the highest fees will still pay considerably less than competing exchanges charge.⁹⁴ Further, the number of assigned Limited Service MEI Ports will continue to be based on decisions by each Member, including the ability to reduce fees by discontinuing unused Limited Service MEI Ports.

The Exchange believes that providing four free Limited Service MEI Ports is fair and equitable, and not unfairly discriminatory because it will enable Members (and more Members than when the Exchange previously provided two free Limited Service MEI Ports) to access the Exchange on this basis without having to pay for Limited Service MEI Ports, thereby encouraging order flow and liquidity from a diverse set of market participants, facilitating price discovery and the interaction of orders. The Exchange believes that four Limited Service MEI Ports is an appropriate number to provide for free because it aligns with the maximum number of such ports currently maintained by a substantial majority of Members. Based on a review of Limited Service MEI Port usage, 28 of 35 connected Members are not projected to be subject to any Limited Service MEI Port fees under the proposed fee. In determining the appropriate

and ISE Rules, General 8: Connectivity; NYSE American Options Fee Schedule, Section V.A. Port Fees and Section V.B. Co-Location Fees; GEMX Pricing Schedule, Options 7, Section 6, Connectivity Fees and GEMX Rules, General 8: Connectivity.

⁹⁴ Assuming a Member selects five Limited Service MEI Ports based on their business needs, that Member on MIAX Emerald would be charged only for the fifth Limited Service MEI Port and pay only the \$420 monthly fee, as the first four Limited Service Ports would be free. Meanwhile, a Member that purchases five ports on NYSE Arca Options would pay \$450 per port per month, resulting in a total charge of \$2,250 per month. On Cboe BZX Options, that same member would pay \$750 per port per month, resulting in a total charge of \$3,750 per months for five ports. See NYSE Arca Options Fees and Charges, dated March 1, 2024, available at https://www.nyse.com/publicdocs/nyse/markets/arca-options/NYSE_Arca_Options_Fee_Schedule.pdf and Cboe BZX Options Fee Schedule available at https://www.cboe.com/us/options/membership/fee_schedule/.

number of Limited Service MEI Ports to provide for free, the Exchange considered several factors. First, the Exchange believes that, with respect to Limited Service MEI Port usage, Members prefer at least two Limited Service MEI Ports, for redundancy purposes. Second, from a review of the number of Limited Service MEI Ports currently requested and assigned to each Member, the median number of ports per Member that utilizes Limited Service MEI Ports is four. Thus, the Exchange believes that having four ports appears to be reasonably sufficient for the majority of Members to access the Exchange. On that basis, the Exchange chose four Limited Service MEI Ports as the maximum number of ports for which it will not charge to access the Exchange. The Exchange notes that some Members use more Limited Service MEI Ports than other Members (and the four provided for free), which is driven by the nature and volume of the business they conduct on the Exchange, and the choices they make in segmenting that business across different Limited Service MEI Ports. Allowing for this expansive use of Exchange capacity represents an aggregate cost that the Exchange seeks to recover through charging for ports five and higher.

The proposed change is also designed to encourage Members to be efficient with their Limited Service MEI Port usage, thereby resulting in a corresponding increase in the efficiency that the Exchange would be able to realize in managing its aggregate costs for providing Limited Service MEI Ports. There is no requirement that any Member maintain a specific number of Limited Service MEI Ports and a Member may choose to maintain as many or as few of such ports as each Member deems appropriate.

The Exchange assessed the proposed fee change's impact on all Members. The Exchange believes that the proposed fee change is fair and equitably allocated across all Members. As a threshold matter, the fee does not by design apply differently to different types or sizes of

Members. Nonetheless, the Exchange assessed whether there would be any differences in the amount of the projected fee that correlates to the type and/or size of different Members. This assessment revealed that the number of assigned Limited Service MEI Ports, and thus projected fees, correlates closely to a Member’s inbound message volume to the Exchange. Specifically, as inbound message volume increases per Member, the number of requested and assigned Limited Service MEI Ports increases. The following table presents data from December 2023 evidencing the correlation between a Member’s inbound message volume and the number of Limited Service MEI Port assigned to the Member as of December 31, 2023.

Number of Ports	Average Daily Message Traffic	Total Message Traffic	Overall Percentage of all Message Traffic for Month
1-4	2,096,585,967	41,931,719,332	19.67%
5 or more	8,559,796,282	171,195,925,646	80.33%

Members with relatively higher inbound message volume are projected to pay higher fees because they have requested more Limited Service MEI Ports. For example, the seven Members that subscribe to five or more Limited Service MEI Ports and are subject to the proposed monthly fee on average account for 80.33% of December 2023 inbound messages over Limited Service MEI Ports. The 28 Members that, based on their December 2023 Limited Service MEI Port usage are not projected to be subject to any Limited Service MEI Port fees, on average account for only 19.67% of December 2023 inbound messages over Limited Service MEI Port. Overall, no Member experienced a fee increase as a result of the proposed fee change and increase in the number of free ports. Three Members experienced a modest and proportionate fee decrease. All other Members saw no change in fees as a result of the proposed changes. On balance, based on the above data, the Exchange believes that the proposed fee structure changes

(including moving from two free ports to four free ports) is fair and equitably allocated across all Members, and the impact of such proposed fee structure changes is consistent among Members based on Exchange access and usage.

The Exchange believes that the variance between projected fees and Limited Service MEI Ports usage is not unfairly discriminatory because it is based on objective differences in Limited Service MEI Port usage among different Members. The Exchange notes that the distribution of total inbound message volume is concentrated in relatively few Members, which consume a much larger proportionate share of the Exchange's resources (compared to the majority of Members that send substantially fewer inbound order messages). This distribution of inbound message volume requires the Exchange to maintain sufficient Limited Service MEI Port capacity to accommodate the higher existing and anticipated message volume of higher volume Members. Thus, the Exchange's incremental aggregate costs for all Limited Service MEI Ports are disproportionately related to volume from the highest inbound message volume Members. For these reasons, the Exchange believes it is not unfairly discriminatory for the Members with the highest inbound message volume to pay a higher share of the total Limited Service MEI Ports fees.

While Limited Service MEI Port usage is concentrated in a few relatively larger Members, the number of such ports requested is not based on the size or type of Member but rather correlates to a Member's inbound message volume to the Exchange. Further, Members with relatively higher inbound message volume also request (and are assigned) more Limited Service MEI Ports than other Members, which in turn means they account for a disproportionate

share of the Exchange's aggregate costs for providing Limited Service MEI Ports.⁹⁵ Therefore, the Exchange believes it is not unfairly discriminatory for the Members with higher inbound message volume to pay a modestly higher proportionate share of the Limited Service MEI Port fees.

To achieve consistent, premium network performance, the Exchange must build and maintain a network that has the capacity to handle the message rate requirements of its heaviest network consumers during anticipated peak market conditions. The resultant need to support billions of messages per day consume the Exchange's resources and significantly contribute to the overall network connectivity expense for storage and network transport capabilities. This need also requires the Exchange to purchase additional storage capacity on an ongoing basis to ensure it has sufficient capacity to store these messages as part of its surveillance program and to satisfy its record keeping requirements under the Exchange Act.⁹⁶ Thus, as the number of connections per Market Maker increases, other costs incurred by the Exchange also increase, e.g., storage costs, surveillance costs, service expenses.

Accordingly, the Exchange believes that the fee will be applied consistently with its specific purpose – to partially recover the Exchange's aggregate costs, encourage the efficient use of Limited Service MEI Ports, and align fees with Members' Limited Service MEI Port and system usage.

The Exchange further believes that the proposed fees are reasonable, fair and equitable, and non-discriminatory because they will apply to all Members in the same manner and are not

⁹⁵ See Securities Exchange Act Release No. 86626 (August 9, 2019), 84 FR 41793 (August 15, 2019) (SR– IEX-2019-07) (justifying providing 5 ports for free and charging a fee for every port purchased in excess of 5 ports based on the higher message traffic of subscribers with increased number of ports).

⁹⁶ 17 CFR 240.17a-1 (recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board).

targeted at a specific type or category of market participant engaged in any particular trading strategy. All Members will receive four free Limited Service MEI Ports and pay the same proposed fee per Limited Service MEI Ports for each additional Limited Service MEI Port. Each Limited Service MEI Port is identical, providing connectivity to the Exchange on identical terms. While the proposed fee will result in a different effective “per unit” rate for different Members after factoring in the four free Limited Service MEI Ports, the Exchange does not believe that this difference is material given the overall low proposed fee per Limited Service MEI Port. Because the first four Limited Service MEI Ports are free of charge, each entity will have a “per unit” rate of less than the proposed fee. Further, the fee is not connected to volume based tiers. All Members will be subject to the same fee schedule, regardless of the volume sent to or executed on the Exchange. The fee also does not depend on any distinctions between Members, customers, broker-dealers, or any other entity. The fee will be assessed solely based on the number of Limited Service MEI Ports an entity selects and not on any other distinction applied by the Exchange. While entities that send relatively more inbound messages to the Exchange may select more Limited Service MEI Ports, thereby resulting in higher fees, that distinction is based on decisions made by each Member and the extent and nature of the Member's business on the Exchange rather than application of the fee by the Exchange. Members can determine how many Limited Service MEI Ports they need to implement their trading strategies effectively. The Exchange proposes to offer additional Limited Service MEI Ports at a low fee to enable all Members to purchase as many Limited Service MEI Ports as their business needs dictate in order to optimize throughput and manage latency across the Exchange.

Notwithstanding that Members with the highest number of Limited Service MEI Ports will pay a greater percentage of the total projected fees than is represented by their Limited

Service MEI Port usage, the Exchange does not believe that the proposed fee is unfairly discriminatory. It is not possible to fully synchronize the Exchange’s objective to provide four free Limited Service MEI Ports to all Members, thereby minimizing barriers to entry and incentivizing liquidity on the Exchange, with an approach that exactly aligns the projected per Member fee with each Member’s number of requested Limited Service MEI Ports. As proposed, the Exchange is providing a reasonable increased number of Limited Service MEI Ports to each Member without charge. In fact, the Exchange proposes to provide more Limited Service MEI Ports for free by increasing the number of available Limited Service MEI Ports that are provided for free from two to four. Any variance between projected fees and Limited Service MEI Port usage is attributable to objective differences among Members in terms of the number of Limited Service MEI Ports they determine are appropriate based on their trading on the Exchange. Further, the Exchange believes that the low amount of the proposed fee (which in the aggregate is projected to only partially recover the Exchange’s directly-related costs as described herein) mitigates any disparate impact.

Further, the fee will help to encourage Limited Service MEI Port usage in a way that aligns with the Exchange’s regulatory obligations. As a national securities exchange, the Exchange is subject to Regulation Systems Compliance and Integrity (“Reg SCI”).⁹⁷ Reg SCI Rule 1001(a) requires that the Exchange establish, maintain, and enforce written policies and procedures reasonably designed to ensure (among other things) that its Reg SCI systems have levels of capacity adequate to maintain the Exchange’s operational capability and promote the maintenance of fair and orderly markets.⁹⁸ By encouraging Members to be efficient with their

⁹⁷ 17 CFR 242.1000-1007.

⁹⁸ 17 CFR 242.1001(a).

Limited Service MEI Ports usage, the proposed fee will support the Exchange's Reg SCI obligations in this regard by ensuring that unused Limited Service MEI Ports are available to be allocated based on individual Members needs and as the Exchange's overall order and trade volumes increase. Additionally, because the Exchange will continue not to charge connectivity testing and certification fees to its Disaster Recovery Facility or where the Exchange requires testing and certification, the proposed fee structure will further support the Exchange's Reg SCI compliance by reducing the potential impact of a disruption should the Exchange be required to switch to its Disaster Recovery Facility and encouraging Members to engage in any necessary system testing without incurring any port fee costs.⁹⁹

Finally, the Exchange believes that the proposed fee is consistent with Section 11A of the Exchange Act in that it is designed to facilitate the economically efficient execution of securities transactions, fair competition among brokers and dealers, exchange markets and markets other than exchange markets, and the practicability of brokers executing investors' orders in the best market. Specifically, the proposed low, cost-based fee will enable a broad range of the Exchange Members to continue to connect to the Exchange, thereby facilitating the economically efficient execution of securities transactions on the Exchange, fair competition between and among such Members, and the practicability of Members that are brokers executing investors' orders on the Exchange when it is the best market.

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 that is not necessary or appropriate in furtherance of the purposes of the Act.

⁹⁹ By comparison, some other exchanges charge less to connect to their disaster recovery facilities, but still charge an amount that could both recoup costs and potentially be a source of profits. See, e.g., Nasdaq Stock Market LLC Equity 7, Section 115 (Ports and other Services).

Intra-Market Competition

The Exchange believes the proposed fees will not result in any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act 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 to market participants since the Exchange launched operations. As described above, the Exchange operated at a cumulative net annual loss since its launch in 2019 through 2021¹⁰⁰ due to providing a low-cost alternative to attract order flow and encourage market participants to experience the high determinism and resiliency of the Exchange's trading Systems. To do so, the Exchange chose to waive the fees for some non-transaction related services and Exchange products or provide them at a very lower fee, which was not profitable to the Exchange. This resulted in the Exchange forgoing revenue it could have generated from assessing any fees or higher fees. The Exchange could have sought to charge higher fees at the outset, but that could have served to discourage participation on the Exchange. Instead, the Exchange chose to provide a low-cost exchange alternative to the options industry, which resulted in lower initial revenues. Examples of this are 10Gb ULL connectivity and Limited Service MEI Ports, for which the Exchange only now seeks to adopt fees at a level similar to or lower than those of other options exchanges.

Further, the Exchange does not believe that the proposed fee increase for the 10Gb ULL connection change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. As is the case with the current proposed flat fee, the proposed fee would apply uniformly to all market participants regardless of the number of connections they choose to

¹⁰⁰ See supra note 89.

purchase. The proposed fee does not favor certain categories of market participants in a manner that would impose an undue burden on competition.

The Exchange does not believe that the proposed rule change would place certain market participants at the Exchange at a relative disadvantage compared to other market participants or affect the ability of such market participants to compete. In particular, Exchange personnel has been informally discussing potential fees for connectivity services with a diverse group of market participants that are connected to the Exchange (including large and small firms, firms with large connectivity service footprints and small connectivity service footprints, as well as extranets and service bureaus) for several months leading up to that time. The Exchange does not believe the proposed fees for connectivity services would negatively impact the ability of Members, non-Members (extranets or service bureaus), third-parties that purchase the Exchange's connectivity and resell it, and customers of those resellers to compete with other market participants or that they are placed at a disadvantage.

The Exchange does anticipate, however, that some market participants may reduce or discontinue use of connectivity services provided directly by the Exchange in response to the proposed fees. In fact, as mentioned above, one MIAX Pearl Options Market Maker terminated their MIAX Pearl Options membership on January 1, 2023 as a direct result of the similar proposed fee changes by MIAX Pearl Options.¹⁰¹ The Exchange does not believe that the proposed fees for connectivity services place certain market participants at a relative

¹⁰¹ The Exchange acknowledges that IEX included in its proposal to adopt market data fees after offering market data for free an analysis of what its projected revenue would be if all of its existing customers continued to subscribe versus what its projected revenue would be if a limited number of customers subscribed due to the new fees. *See* Securities Exchange Act Release No. 94630 (April 7, 2022), 87 FR 21945 (April 13, 2022) (SR-IEX-2022-02). MEMX did not include a similar analysis in either of its recent non-transaction fee proposals. *See supra* notes 83-84. The Exchange does not believe a similar analysis would be useful here because it is amending existing fees, not proposing to charge a new fee where existing subscribers may terminate connections because they are no longer enjoying the service at no cost.

disadvantage to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. The Exchange believes its proposed pricing is reasonable and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed connectivity fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

Lastly, the Exchange does not believe its proposed changes to the monthly rate for Limited Service MEI Ports will place certain market participants at a relative disadvantage to other market participants. All market participants would be eligible to receive four (4) free Limited Service MEI Ports and those that elect to purchase more would be subject to the same flat fee regardless of the number of additional Limited Service MEI Ports they purchase. All firms purchase the amount of Limited Service MEI Ports they require based on their own business decisions and similarly situated firms are subject to the same fees.

Inter-Market Competition

The Exchange also does not believe that the proposed rule change and price increase will result in any burden on inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. As this is a fee increase, arguably if set too high, this fee would make it easier for other exchanges to compete with the Exchange. Only if this were a substantial fee decrease could this be considered a form of predatory pricing. In contrast, the Exchange believes that, without this fee increase, we are potentially at a competitive disadvantage to certain other exchanges that have in place higher fees for similar services. As we have noted, the Exchange believes that connectivity fees can be used to foster more competitive transaction pricing and additional infrastructure investment and there are other options markets of which market participants may connect to trade options at higher rates than the Exchange's. Accordingly, the Exchange does not believe its proposed fee changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

* * * * *

In conclusion, as discussed thoroughly above, the Exchange regrettably believes that the application of the Revised Review Process and Staff Guidance has adversely affected inter-market competition among legacy and non-legacy exchanges by impeding the ability of non-legacy exchanges to adopt or increase fees for their market data and access services (including connectivity and port products and services) that are on parity or commensurate with fee levels previously established by legacy exchanges. Since the adoption of the Revised Review Process and Staff Guidance, and even more so recently, it has become extraordinarily difficult to adopt or increase fees to generate revenue necessary to invest in systems, provide innovative trading

products and solutions, and improve competitive standing to the benefit of non-legacy exchanges' market participants. Although the Staff Guidance served an important policy goal of improving disclosures and requiring exchanges to justify that their market data and access fee proposals are fair and reasonable, it has also negatively impacted non-legacy exchanges in particular in their efforts to adopt or increase fees that would enable them to more fairly compete with legacy exchanges, despite providing enhanced disclosures and rationale under both competitive and cost basis approaches provided for by the Revised Review Process and Staff Guidance to support their proposed fee changes.

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

The Exchange received one comment letter on the Initial Proposal, one comment letter on the Second Proposal, one comment letter on the Third Proposal, one comment letter on the Fourth Proposal, one comment letter on the Fifth Proposal, one comment letter on the Sixth Proposal, one comment letter on the Seventh Proposal, and one comment letter on the Eighth Proposal all from the same commenter.¹⁰² In their letters, the commenters from SIG seek to incorporate comments submitted on previous Exchange proposals to which the Exchange has previously responded. In addition, one commenter states in their latest letter that “the Exchanges are misleading in stating that their last increase in the 10Gb ULL connection was in 2021 while fully aware that the Exchanges have been charging members this increased rate since January 2023.”¹⁰³ The Exchange has clarified the references to the 2021 fee increase, and acknowledges

¹⁰² See letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (“SIG”), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, letters from Gerald D. O’Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023, July 24, 2023 and September 18, 2023, and letters from John C. Pickford, SIG, to Vanessa Countryman, Secretary, Commission, dated January 4, 2024, and March 1, 2024.

¹⁰³ See letter from John C. Pickford, SIG, to Vanessa Countryman, Secretary, Commission, dated March 1, 2024.

that a version of this proposed fee change has been in effect since January 2023, all legally pursuant to the currently effective process set forth in Section 19(b) of the Exchange Act. The Exchange also received comment letters from a separate commenter on the Sixth and Seventh Proposals.¹⁰⁴ The Exchange believes issues raised by each commenter are not germane to this proposal in particular, but rather raise larger issues with the current environment surrounding exchange non-transaction fee proposals that should be addressed by the Commission through rule making, or Congress, more holistically and not through an individual exchange fee filings. Among other things, the commenters are requesting additional data and information that is both opaque and a moving target and would constitute a level of disclosure materially over and above that provided by any competitor exchanges.

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,¹⁰⁵ and Rule 19b-4(f)(2)¹⁰⁶ 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.

¹⁰⁴ See letters from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (“Virtu”), to Vanessa Countryman, Secretary, Commission, dated November 8, 2023 and January 2, 2024.

¹⁰⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁰⁶ 17 CFR 240.19b-4(f)(2).

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-EMERALD-2024-12 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-2024-12. 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>).

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-2024-12 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰⁷

Sherry R. Haywood,

Assistant Secretary.

¹⁰⁷ 17 CFR 200.30-3(a)(12).