

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90738; File No. SR-EMERALD-2020-20)

December 21, 2020

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

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 December 10, 2020, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing a proposal to amend the MIAX Emerald Fee Schedule (the “Fee Schedule”).

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

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

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 to adopt new section 6)d), Historical Market Data, to describe the production of Exchange historical data and set forth the corresponding fee. The Exchange notes that the description of Historical Market Data and the proposed fee is identical to that currently charged by the Exchange’s affiliates, the Miami International Securities Exchange LLC (“MIAX”) and MIAX PEARL, LLC (“MIAX PEARL”).³

The Exchange proposes to offer Historical Market Data for MIAX Emerald, which is a data product that offers historical market data for orders entered on MIAX Emerald upon request. The Exchange proposes to charge a modest fee for the Historical Market Data, which will be based on the cost incurred by the Exchange in providing that data. Proposed Section 6)d) of the Fee Schedule describes the fee to be charged market participants that request Historical Market Data from MIAX Emerald. Historical Market Data is intended to aid market participants in analyzing trade and volume data, evaluating historical trends in the trading activity of a particular security, and enabling those market participants to test trading models and analytical strategies. Specifically, Historical Market Data includes all data that is captured and disseminated on the MIAX Emerald Top of Market (“ToM”) data feed, MIAX Emerald Complex Top of Market (“cToM”) data feed, MIAX Emerald Administrative Information Subscriber

³ See Section 6)d) of the MIAX Fee Schedule, Section 6)c) of the MIAX PEARL Options Fee Schedule, and Section 3)c) of the MIAX PEARL Equities Fee Schedule

(“AIS”) data feed, and MIAX Emerald Order feed (“MOR”),⁴ and is available on a T+1 basis.⁵

The Exchange proposes to only assess the fee for Historical Market Data on a user (whether Member or non-Member) that specifically requests such Historical Market Data. Historical Market Data will be uploaded onto an Exchange-provided device, which the Exchange will incur a cost to procure and provide to those that request the data.

The Exchange proposed to charge a flat fee of \$500 per device requested. Each device shall have a maximum storage capacity of 8 terabytes. Users may request up to six months of Historical Market Data per device, subject to the device’s storage capacity. Historical Data will be made available on a T+1 basis. Only the most recent six months of Historical Market Data shall be available for purchase from the request date.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act⁶ in general, and furthers the objectives of Section 6(b)(4) of the Act⁷ in particular, in that it is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange also believes the proposal furthers the objectives of Section 6(b)(5) of the Act⁸ in that it is designed to promote

⁴ See Securities Exchange Act Release No. 85207 (February 27, 2019), 84 FR 7963 (March 5, 2019) (SR-EMERALD-2019-09) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish MIAX Emerald Top of Market (“ToM”) Data Feed, MIAX Emerald Complex Top of Market (“cToM”) Data Feed, MIAX Emerald Administrative Information Subscriber (“AIS”) Data Feed, and MIAX Emerald Order Feed (“MOR”)).

⁵ See Fee Schedule, proposed Section 6)d).

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general to protect investors and the public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes the proposed fee for Historical Market Data is a reasonable allocation of its costs and expenses among its Members and other persons using its facilities since it is recovering the costs associated with distributing such data should a Member request Historical Market Data. Access to the Exchange is provided on fair and non-discriminatory terms. The Exchange believes the proposed fee for Historical Market Data is equitable and not unfairly discriminatory because the fee level results in a reasonable and equitable allocation of fees amongst users for similar services. Moreover, the decision as to whether or not to purchase Historical Market Data is entirely optional to all users. Potential purchasers are not required to purchase the Historical Market Data, and the Exchange is not required to make the Historical Market Data available. Purchasers may request the data at any time or may decline to purchase such data. The allocation of fees among users is fair and reasonable because, if the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of this data.

The Exchange believes that the proposed fee for Historical Market Data is consistent with Section 6(b)(4) of the Act because the proposed fee will permit recovery of the Exchange's costs and will not result in excessive or supra-competitive profit. The proposed fee for Historical Market Data will allow the Exchange to recover a portion (less than all) of the costs incurred by the Exchange associated with providing and maintaining the necessary hardware and other infrastructure as well as network monitoring and support services in order to provide Historical

Market Data. The Exchange believes that it is reasonable and appropriate to establish a fee for Historical Market Data at a level that will partially offset the costs to the Exchange associated with maintaining and providing Historical Market Data. For example, Historical Market Data is uploaded onto an Exchange-provided device. Each device shall have a maximum storage capacity of 8 terabytes. The Exchange incurs costs in providing the device, storing the historical data, and utilizing resources to upload the data onto the device. Specifically, the device provided by the Exchange costs approximately \$200 to \$300. Moreover, the Exchange tracks the number of hours spent by Exchange personnel procuring Historical Data. Based on the Exchange's average cost per full-time employee ("FTE"), the Exchange represents that its cost to provide this service is reasonably related to (and often exceeds) the amount of the Historical Market Data fee the Exchange proposes to charge. Accordingly, the proposed fee would enable the Exchange to recover a material portion of such cost.

The Exchange also notes that the proposed fee is identical to the same fee charged by its affiliate options exchanges, MIAX and MIAX PEARL,⁹ for options historical data and less than that charged by other exchanges for their own historical data. For example, all four of the Cboe equity exchanges charge a fee of \$500 for one month of historical data and \$2,500 for one terabyte drive of data.¹⁰

Further, in adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data

⁹ See supra note 3.

¹⁰ See, e.g., Cboe BZX Exchange, Inc. fee schedule available at https://markets.cboe.com/us/equities/membership/fee_schedule/bzx/.

available to consumers, and also spur innovation and competition for the provision of market data:

“[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.”¹¹

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

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

¹¹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The Exchange believes that these amendments to Section 19 of the Act reflect Congress’s intent to allow the Commission to rely upon the forces of competition to ensure that fees for market data are reasonable and equitably allocated. Although Section 19(b) had formerly authorized immediate effectiveness for a “due, fee or other charge imposed by the self-regulatory organization,” the Commission adopted a policy and subsequently a rule stating that fees for data and other products available to persons that are not members of the self-regulatory organization must be approved by the Commission after first being published for comment. At the time, the Commission supported the adoption of the policy and the rule by pointing out that unlike members, whose representation in self-regulatory organization governance was mandated by the Act, non-members should be given the opportunity to comment on fees before being required to pay them, and that the Commission should specifically approve all such fees. The Exchange believes that the amendment to Section 19 reflects Congress’s conclusion that the evolution of self-regulatory organization governance and competitive market structure have rendered the Commission’s prior policy on non-member fees obsolete. Specifically, many exchanges have evolved from member-owned, not-for-profit corporations into for-profit, investor-owned corporations (or subsidiaries of investor-owned corporations). Accordingly, exchanges no longer have narrow incentives to manage their affairs for the exclusive benefit of their members, but

rather have incentives to maximize the appeal of their products to all customers, whether members or non-members, so as to broaden distribution and grow revenues. Moreover, the Exchange believes that the change also reflects an endorsement of the Commission's determinations that reliance on competitive markets is an appropriate means to ensure equitable and reasonable prices. Simply put, the change reflects a presumption that all fee changes should be permitted to take effect immediately, since the level of all fees are constrained by competitive forces.

Selling proprietary market data, such as Historical Data, is a means by which exchanges compete to attract business. To the extent that exchanges are successful in such competition, they earn trading revenues and also enhance the value of their data products by increasing the amount of data they provide. The need to compete for business places substantial pressure upon exchanges to keep their fees for both executions and data reasonable.¹² The Exchange therefore believes that the fees for Historical Data are properly assessed on Members and Non-Member users.

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

“In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power

¹² See Sec. Indus. Fin. Mkts. Ass'n (SIFMA), Initial Decision Release No. 1015, 2016 SEC LEXIS 2278 (ALJ June 1, 2016) (finding the existence of vigorous competition with respect to non-core market data).

‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’”¹³

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

B. Self-Regulatory Organization’s Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

The Exchange believes that the proposed Historical Market Data fee does not place certain market participants at a relative disadvantage to other market participants because the pricing of the proposed fee will allow the Exchange to recover a portion (less than all) of the costs incurred by the Exchange associated with providing and maintaining the necessary hardware and other infrastructure as well as network monitoring and support services in order to provide Historical Data, and will not impose a barrier to entry to smaller participants. The Exchange believes the proposed fee does not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed fee reflects the Exchange’s costs in providing the device, storing the historical data, and utilizing resources to upload the data onto the device. Specifically, the device provided by the Exchange costs approximately \$200 to \$300 and the proposed fee represents this cost plus the Exchange’s

¹³ NetCoalition, at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

average cost per FTE to procure the Historical Data and send it to the recipient, regardless of the category of market participant.

The Exchange believes the proposed fee does not place an undue burden on competition on other SROs that is not necessary or appropriate. MIAX Emerald launched trading operations on March 1, 2019 and has a market share of approximately 3-4%, with significantly less members than other SROs. The Exchange's affiliate options exchanges, MIAX and MIAX PEARL, charge the same price that the Exchange proposes to charge for their historical data.¹⁴ Additionally, other exchanges have similar historical data products, but with much higher rates.¹⁵ The Exchange is also unaware of any assertion that the proposed fee would somehow unduly impair its competition with other exchanges. To the contrary, if the fees charged are deemed too high by market participants, they can simply not request historical data from the Exchange.

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

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,¹⁶ and Rule 19b-4(f)(2)¹⁷ 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

¹⁴ See supra note 3.

¹⁵ See supra note 10.

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁷ 17 CFR 240.19b-4(f)(2).

Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-EMERALD-2020-20 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-EMERALD-2020-20. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m.

and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EMERALD-2020-20, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

J. Matthew DeLesDernier
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).