

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93367; File No. SR-EMERALD-2021-33)

October 15, 2021

Self-Regulatory Organizations: MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule to Adjust the Options Regulatory Fee

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 7, 2021, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) filed with the Securities and Exchange Commission (the “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 Exchange’s Fee Schedule (“Fee Schedule”) to adjust the Options Regulatory Fee (“ORF”).

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

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

Currently, the Exchange assesses ORF in the amount of \$0.00060 per contract side. The Exchange proposes to increase the amount of ORF from \$0.00060 per contract side to \$0.0016 per contract side. The Exchange initially filed this proposal on July 30, 2021 (SR-EMERALD-2021-24) and withdrew such filing on August 12, 2021. The Exchange refiled this proposal on August 12, 2021 (SR-EMERALD-2021-27) and withdrew such filing on October 7, 2021. The Exchange proposes to implement this fee change effective October 7, 2021.

In light of historical and projected volume changes and shifts in the industry and on the Exchange, as well as changes to the Exchange's regulatory cost structure, the Exchange proposes to change the amount of ORF that will be collected by the Exchange. The Exchange's proposed change to the ORF should balance the Exchange's regulatory revenue against the anticipated regulatory costs. The Exchange will continue to monitor ORF to ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

The Exchange notes it originally adopted the current ORF amount at a significantly lower rate as the Exchange had just begun operations and that the amount of ORF it collects has remain unchanged since it was first adopted in 2019.³ When the Exchange set the amount of its current ORF (almost 2 ½ years ago), it was a brand new marketplace, and the amount was based on cost

³ See Securities Exchange Act Release No. 85251 (March 6, 2019), 84 FR 8931 (March 12, 2019) (SR-EMERALD-2019-01).

and revenue projections that were applicable to a new market. As such, the Exchange's cost structure, including regulatory costs and projections, were significantly lower. The Exchange's regulatory cost structure has since significantly increased since that time, as the Exchange has had to deploy significant resources and capital as the Exchange's membership base, volume, and market share have grown. The increase in cost structure has outgrown any revenue increase as a result of higher volumes. Therefore, the Exchange believes it is reasonable to increase the amount of ORF assessed to Members,⁴ notwithstanding the fact that ORF revenues have also grown as a result of increased volumes. To illustrate, for the first six months of 2021, the Exchange had market share of 3.50% in multi-listed options.⁵ The Exchange now proposes to adjust the amount of its ORF to be in line with those of more mature, established exchanges, as its regulatory cost structure has shifted from that of a nascent exchange to a more mature exchange.

Collection of ORF

Currently, the Exchange assesses the per-contract ORF to each Member for all options transactions, including Mini Options, cleared or ultimately cleared by the Member, which are cleared by the Options Clearing Corporation ("OCC") in the "customer" range,⁶ regardless of the exchange on which the transaction occurs. The ORF is collected by OCC on behalf of the

⁴ 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. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁵ See https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_07132021.pdf.

⁶ Exchange participants must record the appropriate account origin code on all orders at the time of entry in order. The Exchange represents that it has surveillances in place to verify that Members mark orders with the correct account origin code.

Exchange from either: (1) a Member that was the ultimate clearing firm for the transaction; or (2) a non-Member that was the ultimate clearing firm where a Member was the executing clearing firm for the transaction. The Exchange uses reports from OCC to determine the identity of the executing clearing firm and ultimate clearing firm.

To illustrate how the Exchange assesses and collects ORF, the Exchange provides the following set of examples. For a transaction that is executed on the Exchange and the ORF is assessed, if there is no change to the clearing account of the original transaction, then the ORF is collected from the Member that is the executing clearing firm for the transaction (the Exchange notes that, for purposes of the Fee Schedule, when there is no change to the clearing account of the original transaction, the executing clearing firm is deemed to be the ultimate clearing firm). If there is a change to the clearing account of the original transaction (i.e., the executing clearing firm “gives-up” or “CMTAs”⁷ the transaction to another clearing firm), then the ORF is collected from the clearing firm that ultimately clears the transaction – the “ultimate clearing firm.” The ultimate clearing firm may be either a Member or non-Member of the Exchange. If the transaction is executed on an away exchange and the ORF is assessed, then the ORF is collected from the ultimate clearing firm for the transaction. Again, the ultimate clearing firm may be either a Member or non-Member of the Exchange. The Exchange notes, however, that when the transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is “given-up” or “CMTAed” and then such Member subsequently “gives-up” or “CMTAs” the transaction to another non-Member via a CMTA reversal). Finally, the Exchange does not assess

⁷ “CMTA” or Clearing Member Trade Assignment is a form of “give-up” whereby the position will be assigned to a specific clearing firm at OCC.

the ORF on outbound linkage trades, whether executed at the Exchange or an away exchange. “Linkage trades” are tagged in the Exchange’s system, so the Exchange can readily tell them apart from other trades. A customer order routed to another exchange results in two customer trades, one from the originating exchange and one from the recipient exchange. Charging ORF on both trades could result in double-billing of ORF for a single customer order; thus, the Exchange does not assess ORF on outbound linkage trades in a linkage scenario. This assessment practice is identical to the assessment practice currently utilized by the Exchange’s affiliates, MIAX PEARL, LLC (“MIAX Pearl”) and Miami International Securities Exchange, LLC (“MIAX”).⁸

As a practical matter, when a transaction that is subject to the ORF is not executed on the Exchange, the Exchange lacks the information necessary to identify the order-entering member for that transaction. There are a multitude of order-entering market participants throughout the industry, and such participants can make changes to the market centers to which they connect, including dropping their connection to one market center and establishing themselves as participants on another. For these reasons, it is not possible for the Exchange to identify, and thus assess fees such as ORF, on order-entering participants on away markets on a given trading day. Clearing members, however, are distinguished from order-entering participants because they remain identified to the Exchange on information the Exchange receives from OCC regardless of the identity of the order-entering participant, their location, and the market center on which they execute transactions. Therefore, the Exchange believes it is more efficient for the

⁸ See Securities Exchange Act Release Nos. 85163 (February 15, 2019), 84 FR 5798 (February 22, 2019) (SR-PEARL-2019-01); 85162 (February 15, 2019), 84 FR 5783 (February 22, 2019) (SR-MIAX-2019-01).

operation of the Exchange and for the marketplace as a whole to collect the ORF from clearing members.

ORF Revenue and Monitoring of ORF

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with other regulatory fees and fines, does not exceed regulatory costs. In determining whether an expense is considered a regulatory cost, the Exchange reviews all costs and makes determinations if there is a nexus between the expense and a regulatory function. The Exchange notes that fines collected by the Exchange in connection with a disciplinary matter offset ORF.

As discussed below, the Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to a Member's activities supports applying the ORF to transactions cleared but not executed by a Member. The Exchange's regulatory responsibilities are the same regardless of whether a Member enters a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activities, including performing surveillance for position limit violations, manipulation, front-running, contrary exercise advice violations and insider trading. These activities span across multiple exchanges.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of Members' customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses in support of the regulatory function. The direct expenses

include in-house and third party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as the Office of the General Counsel, technology, and internal audit. Indirect expenses are estimated to be approximately 53% of the total regulatory costs for 2021. Thus, direct expenses are estimated to be approximately 47% of total regulatory costs for 2021. The Exchange notes that its estimated direct and indirect expense percentages are in the range and similar to those at other options exchanges.⁹

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of its members, including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities.

Proposal

Based on the Exchange's most recent review, the Exchange proposes to increase the amount of ORF that will be collected by the Exchange from \$0.00060 per contract side to \$0.0016 per contract side. The Exchange issued an Options Regulatory Fee Announcement on July 2, 2021, indicating the proposed rate change for August 1, 2021.¹⁰ As described above, when the Exchange set the amount of its current ORF (almost 2 ½ years ago), it was a brand new marketplace, and the amount was based on cost and revenue projections that were applicable to a

⁹ See Securities Exchange Act Release Nos. 91418 (March 26, 2021), 86 FR 17254 (April 1, 2021) (SR-Phlx-2021-16) (reducing the Nasdaq PHLX LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%); 91420 (March 26, 2021), 86 FR 17223 (April 1, 2021) (SR-ISE-2021-04) (reducing the Nasdaq ISE, LLC ORF and estimating direct expenses at 58% and indirect expenses at 42%).

¹⁰ See https://www.miaxoptions.com/sites/default/files/circular-files/MIAX_Emerald_RC_2021_33.pdf.

new market. At that time, the Exchange's cost structure, including regulatory costs and projections, were significantly lower. The Exchange's regulatory cost structure has since significantly increased since that time, as the Exchange has had to deploy significant resources and capital as the Exchange's membership base, volume, and market share have grown. The increase in cost structure has outgrown any revenue increase as a result of higher volumes. The Exchange believes the proposed adjustment will permit the Exchange to cover a material portion of its regulatory costs, while not exceeding regulatory costs; notwithstanding the fact that ORF revenues have also grown as a result of increased volumes. As noted above, the Exchange regularly reviews its ORF to ensure that the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

There can be no assurance that the Exchange's final costs for 2021 will not differ materially from these expectations and prior practice, nor can the Exchange predict with certainty whether options volume will remain at the current level going forward. The Exchange notes however, that when combined with regulatory fees and fines, the revenue being generated utilizing the current ORF rate results in revenue that is running below the Exchange's estimated regulatory costs for the year. Particularly, as noted above, the Exchange initially set its ORF at a substantially lower rate when the Exchange first launched operations.¹¹ The Exchange now believes that it is appropriate to increase the amount of the ORF so that it is in line with the Exchange's cost structure for operating a more established exchange, so that when combined with all of the Exchange's other regulatory fees and fines, it would allow the Exchange to

¹¹ See supra note 3.

recover a material portion of its regulatory costs, while continuing to not generate excess revenue.¹²

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange will continue to monitor MIAX Emerald regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission.

In connection with this filing, the Exchange notes that its affiliates, MIAX Pearl and MIAX, will also be adjusting the ORF fees that each of those exchanges charge.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹³ in general, and furthers the objectives of Section 6(b)(4) of the Act¹⁴ 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 Act¹⁵ in that it is designed to promote 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

¹² The Exchange notes that its regulatory responsibilities with respect to Member compliance with options sales practice rules have been allocated to the Financial Industry Regulatory Authority (“FINRA”) under a 17d-2 Agreement. The ORF is not designed to cover the cost of options sales practice regulation.

¹³ 15 U.S.C. 78f(b).

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78f(b)(5).

public interest and is not designed to permit unfair discrimination between customers, issuers, brokers and dealers.

The Exchange believes that increasing the ORF from \$0.00060 to \$0.0016 per contract side is equitable and not unfairly discriminatory because it is objectively allocated to Members in that it is charged to all Members on all their transactions that clear as customer at the OCC, with an exception.¹⁶ Moreover, the Exchange believes the ORF ensures fairness by assessing fees to Members such that the ORF assessment is directly based on the amount of customer options business each Member conducts. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., Member proprietary transactions) of its regulatory program.

The Exchange notes it originally adopted the current ORF amount at a significantly lower rate as the Exchange had just begun operations and that the amount of ORF it collects has remain unchanged since it was first adopted in 2019.¹⁷ When the Exchange set the amount of its current ORF (almost 2 ½ years ago), it was a brand new marketplace, and the amount was based on cost and revenue projections that were applicable to a new market. As such, the Exchange's cost structure, including regulatory costs and projections, were significantly lower. The Exchange's

¹⁶ When a transaction is executed on an away exchange, the Exchange does not assess the ORF when neither the executing clearing firm nor the ultimate clearing firm is a Member (even if a Member is "given-up" or "CMTAed" and then such Member subsequently "gives-up" or "CMTAs" the transaction to another non-Member via a CMTA reversal).

¹⁷ See supra note 3.

regulatory cost structure has since significantly increased since that time, as the Exchange has had to deploy significant resources and capital as the Exchange's membership base, volume, and market share have grown. The increase in cost structure has outgrown any revenue increase as a result of higher volumes. Therefore, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to increase the amount of ORF assessed to Members, notwithstanding the fact that ORF revenues have also grown as a result of increased volumes.

The ORF is designed to recover a material portion of the costs of supervising and regulating Members' customer options business including performing routine surveillances and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange will monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange has designed the ORF to generate revenues that, when combined with all of the Exchange's other regulatory fees, will be less than or equal to the Exchange's regulatory costs, which is consistent with the Commission's view that regulatory fees be used for regulatory purposes and not to support the Exchange's business side. In this regard, the Exchange believes that the proposed increase to the fee is reasonable.

The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates with advance notice is reasonable because it gives participants certainty on the timing of changes, if any, and better enables them to properly account for ORF charges among their customers. The Exchange believes that continuing to limit changes to the ORF to twice a year on specific dates is equitable and not unfairly discriminatory because it will apply in the same manner to all Members that are subject to the ORF and provide them with additional advance notice of changes to that fee.

The Exchange believes that collecting the ORF from non-Members when such non-Members ultimately clear the transaction (that is, when the non-Member is the “ultimate clearing firm” for a transaction in which a Member was assessed the ORF) is an equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities. The Exchange notes that there is a material distinction between “assessing” the ORF and “collecting” the ORF. The ORF is only assessed to a Member with respect to a particular transaction in which it is either the executing clearing firm or ultimate clearing firm. The Exchange does not assess the ORF to non-Members. Once, however, the ORF is assessed to a Member for a particular transaction, the ORF may be collected from the Member or a non-Member, depending on how the transaction is cleared at OCC. If there was no change to the clearing account of the original transaction, the ORF would be collected from the Member. If there was a change to the clearing account of the original transaction and a non-Member becomes the ultimate clearing firm for that transaction, then the ORF will be collected from that non-Member. The Exchange believes that this collection practice continues to be reasonable and appropriate, and was originally instituted for the benefit of clearing firms that desired to have the ORF be collected from the clearing firm that ultimately clears the transaction.

The Exchange designed the ORF so that revenue generated from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs, which is consistent with the view of the Commission that regulatory fees be used for regulatory purposes and not to support the Exchange’s business operations.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all Members on all their transactions that clear in the

customer range at the OCC, with an exception.¹⁸ The Exchange believes the ORF ensures fairness by assessing higher fees to those members that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff expenses), as well as investigations into customer complaints and the terminations of registered persons. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., member proprietary transactions) of its regulatory program. Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to activities of its Members, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG")¹⁹ the Exchange shares information and coordinates

¹⁸ See supra note 16.

¹⁹ ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is a strong nexus between the ORF and the Exchange's regulatory activities with respect to customer trading activity of its Members.

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. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed regulatory costs.

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,²⁰ and Rule 19b-4(f)(2)²¹ thereunder. At any time within 60 days of the filing of the proposed

²⁰ 15 U.S.C. 78s(b)(3)(A)(ii).

²¹ 17 CFR 240.19b-4(f)(2).

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.

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 No. SR-EMERALD-2021-33 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 No. SR-EMERALD-2021-33. 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 No. SR-EMERALD-2021-33, 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.²²

J. Matthew DeLesDernier
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).