

broker-dealer can offer sub-penny executions, provided that such executions do not result from impermissible sub-penny orders or quotations. Accordingly, OTC market makers typically select a sub-penny price for a trade without quoting at that exact amount or accepting orders from retail customers seeking that exact price. Exchanges—and exchange member firms that submit orders and quotations to exchanges—cannot compete for marketable retail order flow on the same basis, because it would be impractical for exchange electronic systems to generate sub-penny executions without exchange liquidity providers or retail brokerage firms having first submitted sub-penny orders or quotations, which the Sub-Penny Rule expressly prohibits.

The limited exemption granted today should promote competition between exchanges and OTC market makers in a manner that is reasonably designed to minimize the problems that the Commission identified when adopting the Sub-Penny Rule. Under the Program, sub-penny prices will not be disseminated through the consolidated quotation data stream, which should avoid quote flickering and associated reduced depth at the inside quotation. Furthermore, while the Commission remains concerned about providing enough incentives for market participants to display limit orders, the Commission does not believe that granting this exemption (and approving the accompanying proposed rule change) will reduce such incentives. Market participants that display limit orders currently are not able to interact with marketable retail order flow because it is almost entirely routed to internalizing OTC market makers that offer sub-penny executions.

Consequently, enabling the Exchange to compete for this retail order flow through the Program should not materially detract from the current incentives to display limit orders, while potentially resulting in greater order interaction and price improvement for marketable retail orders. To the extent that the Program may raise Manning and best execution issues for broker-dealers, these issues are already presented by the existing practices of OTC market makers.

The exemption being granted today is limited to a one-year pilot. The Exchange has stated that “sub-penny trading and pricing could potentially result in undesirable market behavior,” and, therefore, it will “monitor the

and that “sub-penny executions due to price improvement are generally beneficial to retail investors.” *Id.* at 37556.

Program in an effort to identify and address any such behavior.”⁴⁶ Furthermore, the Exchange has represented that it “will produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided by the Program, and any effects on the broader market structure.”⁴⁷ The Commission expects to review the data and observations of the Exchange before determining whether and, if so, how to extend the exemption from the Sub-Penny Rule.⁴⁸

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁴⁹ that the proposed rule change (SR–NYSEArca–2013–107) be, and hereby is, approved on a one-year pilot basis.

It is also hereby ordered that, pursuant to Rule 612(c) of Regulation NMS, the Exchange is given a limited exemption from Rule 612 of Regulation NMS to allow it to accept and rank orders priced equal to or greater than \$1.00 per share in increments of \$0.001, in the manner described in the proposed rule changes above, on a one-year pilot basis beginning with the effectiveness of the proposed rule change.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁰

Kevin O'Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–71172; File No. SR–MIAX–2013–58]

Self-Regulatory Organizations; Miami International Securities Exchange LLC; Notice of Filing of a Proposed Rule Change To Amend the Exchange’s By-Laws

December 23, 2013.

Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act

⁴⁶ See Request for Sub-Penny Rule Exemption, *supra* note 5, at 3, n.5.

⁴⁷ See *supra* note 34 and accompanying text.

⁴⁸ In particular, the Commission expects the Exchange to observe how maker/taker transaction charges, whether imposed by the Exchange or by other markets, might impact the use of the Program. Market distortions could arise where the size of a transaction rebate, whether for providing or taking liquidity, is greater than the size of the minimum increment permitted by the Program (\$0.001 per share).

⁴⁹ 15 U.S.C. 78s(b)(2).

⁵⁰ 17 CFR 200.30–3(a)(12); 17 CFR 200.30–3(a)(83).

of 1934 (“Act”)¹ and Rule 19b–4 thereunder,² notice is hereby given that on December 9, 2013, Miami International Securities Exchange LLC (“MIAX” 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 the Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the Exchange’s By-Laws.

The text of the proposed rule change is available on the Exchange’s Web site at http://www.miaxoptions.com/filter/wotitle/rule_filing, 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 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: (i) Amend certain sections of its By-Laws to correspond with an Equity Rights Program (“ERP”) recently established by the Exchange;³ and (ii) make other non-substantive revisions to reflect changes since the Commission granted the Exchange’s registration as a national securities exchange on December 3, 2012.⁴

The filing corresponds with the recently implemented ERP, pursuant to which units representing the right to

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 70498 (September 25, 2013), 78 FR 60348 (October 1, 2013) (SR–MIAX–2013–43).

⁴ See Securities Exchange Act Release No. 68341 (December 3, 2012), 77 FR 73089 (December 7, 2012) (File No. 10–207).

acquire equity in the Exchange's parent holding company, Miami International Holdings ("LLM Member"),⁵ were issued to participating Members in exchange for payment of an initial purchase price or the prepayment of certain transaction fees and the achievement of certain liquidity addition volume thresholds on the Exchange over a 23-month period. This filing amends the By-Laws to the extent necessary to incorporate rights to participating Members in an ERP to appoint representation to the MIAx Board.

Article I, Definitions

The Exchange proposes to amend the By-Laws to provide definitions for key terms used to incorporate provisions related to the ERP. Specifically, the Exchange proposes the following definitions:

- "Effective Date" means the date of effectiveness of these Amended and Restated By-Laws.
- "ERP Agreement" means the agreement pursuant to which Units were issued.
- "ERP Director" means an Industry Director who has been nominated by an ERP Member and appointed to the Board of Directors.
- "ERP Member" means an Exchange Member who acquired Units pursuant to an ERP Agreement sufficient to acquire an ERP Director or an Observer position.
- "Exchange Contract" means a contract that is then listed for trading by the Exchange or that is contemplated by the then current business plan of the Company to be listed for trading by the Exchange within ninety (90) days following such date.
- "Measurement Period" means the time period over which Units are vested.
- "Observer" has the meaning set forth in Article II, Section 2.2 of these By-Laws.
- "Performance Criteria" means the trades on MIAx in an amount equal to a percentage of the average daily volume of contracts traded on all options exchanges for all option classes listed on MIAx as reported to The Options Clearing Corporation for a specified Measurement Period in an amount such that the ERP Member earns Units during such specified Measurement Period.
- "Specified Entity" means (i) any U.S. securities option exchange (or facility thereof) or U.S. alternative trading system on which securities

⁵ The Commission notes that the defined term "LLM Member" is a typographical error. The Commission understands that the Exchange meant "LLC Member" here, a term used throughout this notice.

options are traded (other than the Company or any of its affiliates) that lists for trading any option contract that competes with an Exchange Contract, (ii) any person that owns or controls such U.S. securities option exchange or U.S. alternative trading system, and (iii) any affiliate of a person described in clause (i) or (ii) above.⁶

- "Unit" means a combination of securities or types of securities packaged together as one.

The Exchange will renumber the pre-existing definitions accordingly to accommodate the additions.

Article II, Section 2.2, Composition of the Board

The Exchange proposes to amend the Board of Directors composition provisions to provide that ERP Directors will be included in the number of Industry Directors for purposes of calculating the composition of the Board. In addition, the Exchange proposes to specify that Member Representative Directors will not include ERP Directors for purposes of calculating the Board composition.

The Exchange proposes to add a restriction to the qualifications of a Director so that after the effective date of the Amended and Restated By-Laws, in the event a Director becomes a member of the board of directors or similar governing body of a competing options exchange or alternative trading system that trades options, such individual shall immediately cease to be a Director of the Company and the resulting vacancy shall be filled by the standard nominating and appointment procedures.⁷ Existing Directors that may be in violation would be grandfathered in and not subject to the new restriction.

In addition, the Exchange proposes to provide that an ERP Member has a right to nominate a Director or appoint an Observer to the Board of Directors. If the ERP Member is otherwise able to nominate an ERP Director, an Observer appointment would be in lieu of such ERP Director nomination.⁸ As discussed

⁶ The Exchange notes that this definition is nearly identical to that used by another competing options exchange. See Limited Liability Company Agreement of NYSE Amex Options, Article I, 1.1. See also Securities Exchange Act Release No. 64742 (June 24, 2011), 76 FR 38436 (June 30, 2011) (SR-NYSEAmex-2011-018) (Exhibit 5A).

⁷ The Exchange notes that this restriction is nearly identical to that used by another competing options exchange. See Limited Liability Company Agreement of NYSE Amex Options, Article VIII, 8.1(h). See also Securities Exchange Act Release No. 64742 (June 24, 2011), 76 FR 38436 (June 30, 2011) (SR-NYSEAmex-2011-018) (Exhibit 5A).

⁸ At this time, an ERP Member may only have at most a Member Representative Director and an ERP Director, or a Member Representative Director and an Observer, but not an ERP Director and an Observer.

below, the Nominating Committee shall formally nominate only those persons whose names have been approved and submitted by the applicable ERP Members. The LLC Member is then obligated to vote for the nominated ERP Director. The nominee shall be appointed at the first annual meeting of the Company following the effective date of the By-Law amendment.

Observers appointed by ERP Members will be subject to the same statutory disqualification restrictions as Directors. Similar to Directors, in the event an Observer appointed after the effective date of the Amended and Restated By-Laws becomes a member of the board of directors or similar governing body of a competing options exchange or alternative trading system that trades options, such individual shall immediately cease to be an Observer of the Company.⁹ Observers will have the right to attend all meetings of the Board of Directors in a nonvoting observer capacity and, in this respect, the Company shall give such representative copies of all notices, minutes, consents, and other materials that it provides to its directors at the same time and in the same manner as provided to such Directors; provided, however, that such representative shall agree to hold in confidence and trust and to act in a fiduciary manner with respect to all information so provided; and provided further, that the Company reserves the right to withhold any information and to exclude such representative from any meeting or portion thereof if access to such information or attendance at such meeting could adversely affect the attorney-client privilege between the Company and its counsel or result in disclosure of trade secrets or a conflict of interest.

The Exchange believes these changes are reasonably designed to ensure that the Board of Directors maintains the appropriate composition after the ERP and that Directors and Observers are qualified to represent ERP Members on the Board. The changes will also help to ensure that Directors, ERP Directors, and Observers, are qualified and held to the same restrictions against statutory disqualification and conflicts of interests by being a member of the board of directors or similar body of a competitor. The Exchange notes that no substantive changes are being proposed to the Board's composition; the Board size will increase, but the current composition will remain.

⁹ See *id.*

Article II, Section 2.3, Terms of Office

The Exchange proposes to amend this Section to provide that in the event that an ERP Member who has the right to nominate an ERP Director and which fails to meet its Performance Criteria under the ERP Agreement for three consecutive Measurement Periods such that it only meets the required performance criteria of an ERP Member that may appoint an Observer, then the individual designated by the non-performing ERP Member shall immediately cease to be an ERP Director of the Company and such ERP Member shall cease to have the right to nominate an ERP Director. Such non-performing ERP Member shall continue to maintain Observer rights as set forth in the By-Laws. Notwithstanding the foregoing, in the event that the non-performing ERP Member satisfies the Performance Criteria for a subsequent Measurement Period, then such ERP Member may reappoint an ERP Director at the immediately following annual meeting of the Company. Additionally, in the event that an ERP Member who has the right to appoint an Observer and which fails to meet its Performance Criteria for three consecutive Measurement Periods, then the individual designated by the non-performing ERP Member shall immediately cease to be an Observer and such non-performing ERP Member shall cease to have the right to appoint an Observer. Notwithstanding the foregoing, in the event that the non-performing ERP Member satisfies the Performance Criteria for a subsequent Measurement Period, then such ERP Member may reappoint an Observer. The Exchange believes that it is fair and reasonable to treat non-performing ERP Member's that can nominate an ERP Director differently than non-performing ERP Member's that can only appoint Observers. ERP Members that can nominate ERP Directors have assumed greater performance obligations under the ERP Agreement, and thus even at the non-performing level are entitled to more protections to their representation on the Board than non-performing ERP Members that can only appoint Observers.

The Exchange also proposes to provide that an individual ERP Director or Observer position shall be immediately terminated following the transfer of common stock or warrants of the LLC Member acquired pursuant to the ERP Agreement by an ERP Member which, after giving effect to such transfer, results in such ERP Member holding less than 20% of the aggregate number of shares of common stock of the LLC Member issued or issuable

pursuant to the Units acquired pursuant to the ERP Agreement collectively.

The Exchange believes these changes regarding Terms of Office are reasonably designed to account for the removal of Directors or Observers of non-performing ERP Members and Members that no longer have a controlling interest in the shares that provided them the right to such appointments.

Article II, Section 2.4, Nomination and Election

The Exchange proposes to provide that the Nominating Committee shall nominate to ERP Director positions only those persons whose names have been approved and submitted by the applicable ERP Members having the right to nominate such person. As mentioned above, the LLC Member is then obligated to vote for the nominated ERP Director. The nominee shall be appointed at the first annual meeting of the Company following September 30, 2013, which was the closing date of the ERP Program.

Article II, Section 2.8, Vacancies

The Exchange proposes to provide that in the event that an ERP Director position becomes vacant that the applicable ERP Member will retain the ability to nominate a person to fill the vacant ERP Director position. To eliminate any potential confusion between the treatment of true vacancies and the non-performance provisions in Article II, Section 2.3(c), the Exchange proposes to specify that Section 2.8(c) will not apply for a vacancy resulting from an ERP Director position becoming vacant due to a non-performing ERP Member. In the situation of non-performance of an ERP Member, the provisions of Article II, Section 2.3(c) would apply.

Article II, Section 2.9, Removal and Resignation

The Exchange proposes to provide that ERP Directors may only be removed for cause, which shall include, without limitation, such Director being subject to a statutory disqualification.

Article IV, Section 4.2, Board Committees

The Exchange proposes to provide that committee members will be subject to the same statutory disqualification restrictions as Directors and Observers. Similar to Directors and Observers, in the event a committee member appointed after the effective date of the Amended and Restated By-Laws becomes a member of the board of directors or similar governing body of a competing options exchange or

alternative trading system that trades options, such individual shall immediately cease to be a committee member of the Company.¹⁰ The Exchange believes these changes are reasonably designed to ensure that committee members are qualified and held to the same standards as Directors and Observers.

Article X, Sections 10.3 and 10.4

The Exchange proposes to provide that Observers will be subject to the same participation rights on the Board during meetings pertaining to the self-regulatory function of the Company as other members of the Board. In addition, Observers will be subject to the same requirements to maintain the confidentiality of all books and records of the Company reflecting confidential information pertaining to the self-regulatory function of the Company.

Miscellaneous Non-Substantive Changes.

In addition to the changes set forth above, the Exchange proposes to make the following non-substantive changes to the current By-Laws. The Exchange proposes to delete dated references to time periods and events that have expired since the proposal of the New By-Laws. Specifically, the Exchange proposes to delete provisions in Article II, Section 2.5, and Article III, Section 3.1(b), regarding Interim Directors and Interim Member Representative Directors since these appointments have already occurred. Consistent with this change, the Exchange proposes to remove references to Article II, Section 2.5 and Interim Directors and Interim Member Representative Directors from Article I(bb) and Article II, Section 2.2(b)(i).

2. Statutory Basis

MIAX believes that its proposed rule change is consistent with Section 6(b) of the Act¹¹ in general, and furthers the objectives of Sections 6(b)(1) and 6(b)(5) of the Act¹² in particular, in that it enables the Exchange to be so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations

¹⁰ The Exchange notes that this restriction is nearly identical to that used by another competing options exchange. See Limited Liability Company Agreement of NYSE Amex Options, Article VIII, 8.3(d). See also Securities Exchange Act Release No. 64742 (June 24, 2011), 76 FR 38436 (June 30, 2011) (SR-NYSEAmex-2011-018) (Exhibit 5A).

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

thereunder, and the rules of the Exchange; and that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest. In addition, the proposed change is consistent with Section 6(b)(3) of the Act,¹³ in that it enables the Exchange to assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

Specifically, the proposed amendments to the By-Laws are reasonably designed to incorporate provisions related to the ERP in a manner that ensures that the Exchange will remain so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. The changes will also help to ensure that Directors, ERP Directors, Observers, and committee members are qualified and held to the same restrictions against statutory disqualification and conflicts of interests by being a member of the board of directors or similar body of a competitor. The proposed ERP Directors will be subject to the same restrictions as current Directors including evaluating proposals with the Company's self-regulatory status in mind, restricting participation in activities where there is a conflict of interest, and [sic] requirement to maintain the confidentiality of information related to the Company's self-regulatory function. The proposed Observers will be subject to the same restrictions as current Directors regarding maintain [sic] the confidentiality of information related to the Company's self-regulatory function. However, Observers will not be subject to the same restrictions as current Directors regarding evaluating proposals with the Company's self-regulatory status in mind and restricting participation in activities where there is a conflict of interest. The Exchange believes that treating Observers

differently than Directors in these circumstances is reasonable because Observers will not be affirmatively voting on any such proposals in their non-voting observer capacity.

In addition, the Exchange's proposed amendments address other non-substantive revisions to reflect changes since the Commission granted the Exchange's registration as a national securities exchange.

The proposal will continue to assure a fair representation of its Members in that ERP Directors will not affect the current Member Representation Director calculation or process in any way. The Exchange notes that no substantive changes are being proposed to the Board's composition; the Board size will increase, but the current composition will remain.

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 proposed changes to the Exchange By-Laws are designed to enable the Exchange to be so organized as to have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its Members and persons associated with its Members, with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange. As such, this is not a competitive filing and thus should not impose any burden on competition.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission shall: (a) By order approve or disapprove such proposed rule change, or (b) institute proceedings to determine whether the proposed rule change should be 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 email to rule-comments@sec.gov. Please include File Number SR-MIAX-2013-58 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR-MIAX-2013-58. 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 Web site (<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 Web site 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 such filing also will be available for inspection and copying at the principal offices of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MIAX-2013-58, and should be submitted on or before January 21, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Kevin M. O'Neill,
Deputy Secretary.

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¹³ 15 U.S.C. 78f(b)(3).

¹⁴ 17 CFR 200.30-3(a)(12).