



January 8, 2021

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE., Washington, DC 20549

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule to Establish Market Data Fees (Release No. 34-90612; File No. SR-EMERALD-2020-016)

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ respectfully submits this letter to the U.S. Securities and Exchange Commission (“Commission” or “SEC”) to comment on the above-referenced proposal (“Proposal”) filed by MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”) to amend its Fee Schedule to establish market data fees. As described in more detail below, we believe the Commission should suspend and subsequently disapprove the Proposal because the Exchange has not met its burden of demonstrating that the Proposal is consistent with the standards under the Securities Exchange Act of 1934 (“Exchange Act”) for proposed fee changes.²

I. The Proposal

MIAX Emerald is proposing to assess fees for the following market data products: MIAX Emerald Top of Market (“ToM”), Administrative Information Subscriber (“AIS”) feed, and MIAX Order Feed (“MOR”). ToM provides market participants with a direct data feed that includes the Exchange’s best bid and offer, with aggregate size, and last sale information, based on displayable order and quoting interest on the Exchange. AIS provides market participants with a direct data feed that allows subscribers to receive real-time updates of products traded on MIAX Emerald, trading status for MIAX Emerald and products traded on MIAX Emerald, and liquidity seeking event notifications. MOR provides market participants with a direct data feed that allows subscribers to receive real-time updates of options orders, products traded on MIAX Emerald, MIAX Emerald Options System status, and MIAX Emerald Options Underlying

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See Exchange Act Release No. 90612 (December 9, 2020), 85 FR 81242 (December 15, 2020). Capitalized terms used in this letter have the same meaning as they do in the Proposal.

trading status. The Exchange proposes to amend its Fee Schedule to charge for the first-time monthly fees to Distributors of the ToM, AIS, and MOR market data products.

II. Discussion

The Exchange is required to demonstrate that the Proposal meets the requirements of the Exchange Act and the rules thereunder, including the requirements of Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Exchange Act. Section 6(b)(4) of the Exchange Act requires that the rules of an exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.” Section 6(b)(5) requires, among other things, that the rules of an exchange “are not designed to permit unfair discrimination between customers, issuers, brokers or dealers.” Section 6(b)(8) of the Exchange Act requires that the rules of the exchange not “impose any burden on competition not necessary or appropriate in furtherance of the purposes” of the Exchange Act. The Exchange has failed to make these showings with respect to the Proposal.

In seeking to demonstrate that the proposed fees are reasonable, the Exchange asserts that it is subject to competition for order flow that constrains the fees it can charge for market data. The Exchange notes, for instance, that there are currently 16 options exchanges competing for order flow with no exchange having more than approximately 16% of the market share for multiple-listed options. The Exchange further notes that as of October 2020, it had a market share of approximately 3.60% of the overall market for multiple-listed options and that its subscribers for its market data feeds increased over time as its market share increased. The Exchange therefore asserts that due to the competition for order flow, the proposed fees are reasonable because in setting them, the Exchange is constrained by the availability of 15 substitute options exchanges offering market data products and trading capabilities.

The Exchange’s “platform competition” argument that competition for order flow constrains pricing for market data does not demonstrate that the fees are reasonable. SIFMA has shown several times over the years that an exchange’s decision to offer multiple products (trading services and market-data products) does not constrain market data prices. A study we have provided previously noted that while trading on various exchanges can be substitutable, trade data from various exchanges cannot.³ Another study we have provided shows that the prices for trading data have in some cases increased significantly in past several years with no apparent competition-based reason.⁴ Moreover, the Commission has expressed its concern that

³ See, e.g., Lawrence R. Glosten, “Economics of the Stock Exchange Business: Proprietary Market Data,” p.4 (Jan. 2020); Tr. of the Roundtable on Market Data Products, Market Access Services and Their Associated Fees, pp. 62-65 (comments of Brad Katsuyama and Mehmet Kinak) (Oct. 25, 2018) (“Market Data Roundtable”).

⁴ See Expand Study, “An Analysis of Market Data Fees” (Aug. 2018) (<https://www.sifma.org/wp-content/uploads/2019/01/Expand-and-SIFMA-An-Analysis-of-Market-Data-Fees-08-2018.pdf>).

proprietary top-of-book data products are not subject to competition.⁵ Similarly, Commission staff has stated that the “platform competition” theory is not an adequate basis to conclude that data prices are competitive.⁶

Based on the Exchange’s argument, one would assume that an exchange that loses trading market share would be incentivized to reduce its market data fees. Along these lines, the Exchange noted in an earlier version of the Proposal that when its affiliate MIAX PEARL LLC filed a rule change in February 2019 to increase its Taker fees, it lost market share. When MIAX PEARL LLC lost this market share, however, there was no corresponding rule filing to reduce the fees for its market data. The inactions of the Exchange affiliate demonstrate that competition for order flow does not constrain the cost of market data because exchanges consistently fail to reduce the cost for their market data after a reduction in trading market share.

The Exchange also relies on the Commission’s rationale found in its approval of the NYSE National Integrated Feed filing (“NYSE National Filing”) to justify that the proposed fee change in the Proposal is consistent with the Exchange Act.⁷ In that filing, the Commission found that NYSE National’s proposed fees were consistent with the Exchange Act in light of NYSE National’s consistently low percentage of market share, the relatively small number of subscribers to the NYSE National Integrated Feed, and the sizeable portion of subscribers that terminated their subscriptions following the proposal of the fees. The Commission reached that conclusion, however, without agreeing with or otherwise relying on the arguments made by NYSE National that exchanges function as platforms between consumers of market data and consumers of trading services, that overall competition between exchanges will limit their overall profitability, and that competition for order flow on the trading side of the platform acts to constrain the pricing of market data on the other side of the platform.

The Exchange argues that when it first proposed to impose fees for its market data products, it lost subscribers to those products, noting that 4 subscribers to the ToM, AIS and MOR data feeds cancelled their subscriptions in response to the Exchange’s decision to impose fees for the feeds. Similarly, the Exchange also asserts that of the 42 members of MIAX Emerald, only 14 subscribe to its market data feed products. The Exchange then asserts that these facts show that its members can find a substitute for the market data products offered by the Exchange for which it is now proposing to charge fees.

⁵ “Indicia that exchanges may not be subject to robust competition include that many broker-dealers state that even in the face of increasing proprietary data fees they feel compelled to buy proprietary data to be able to provide competitive trading strategies for their clients.” See Exchange Act Release No. 88216 (February 14, 2020), 85 FR 16726 (March 24, 2020).

⁶ See “Staff Guidance on SRO Filings Related to Fees,” Division of Trading and Markets, Commission (May 21, 2019), available at (<https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>).

⁷ See Exchange Act Release No. 90217 (October 16, 2020), 85 FR 67392 (October 22, 2020).

SIFMA is very troubled by the Exchange's substitution-based argument here as well as the one proffered by NYSE National in its filing. There could be a myriad of reasons why member firms may choose not to subscribe to an exchange's proprietary market data feed when the exchange starts to charge for it, none of which relate to the firms finding a substitute for the exchange's feed. For instance, a member firm may choose to subscribe to an exchange's proprietary market data feed when the exchange offers it for free to get a sense of the data being offered but choose to discontinue the subscription when the exchange starts to charge for it because the firm determined that the data being offered was of little or no value to the firm. This scenario is more plausible than the firm finding a substitute for the exchange's market data, particularly in a situation in which the firm is a member of multiple exchanges within an exchange group and is offered a free subscription to the market data of one of the exchanges within the group by the exchange group's sales team because the firm is already set up to receive market data from other exchanges within the exchange group. The choice a firm makes here is no different than the choice an individual makes in signing-up for a subscription-based streaming service such as Disney+ when the subscription is free to see if the individual likes the content and then terminating the subscription when the provider starts charging for it. Such a choice does not demonstrate that the firm found a substitute for the exchange's market data and to suggest otherwise completely ignores the other reasons the firm may have terminated the exchange's proprietary data feed once the exchange starts to charge for it.

Another reason why a member firm may have terminated an exchange's proprietary market data feed once the exchange starts charging for it is due to the acquisition of the firm. For example, a member firm engaged in proprietary trading and/or market making may sign-up for an exchange's free proprietary market data feed and then subsequently be acquired by another member firm. The acquiring firm very likely will terminate the subscription once the exchange starts charging for it to manage costs. This scenario is very plausible as there have been a number of acquisitions in this space over the past few years.⁸ To make the leap that such a choice means that the member firm has found a substitute for the exchange's market data products defies logic and completely ignores the realities of a marketplace in which a member firm could choose to drop (or not subscribe) to a proprietary market data product for a variety of reasons. Thus, the Exchange's argument here as well as the one made by NYSE National do not show that the member firms' actions demonstrate that there are substitutes for the exchanges' proprietary market data products.

Furthermore, the Exchange's self-serving and inaccurate arguments about the changes to Section 19 of the Exchange Act as a result of the Dodd-Frank Act are completely irrelevant to whether the Proposal is consistent with the Exchange Act. For instance, the Exchange asserts that it:

⁸ See, e.g., (<https://www.reuters.com/article/us-sunholdingsllc-m-a-hudsonrivertrading/hudson-river-trading-to-buy-rival-hft-firm-sun-trading-idUSKBN1F52BV>).

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.

This incredible assertion by the Exchange is completely off the mark. The amendments to Section 19 in Dodd Frank were made to "encourage the SEC to employ a more transparent and rapid process for consideration of rule changes," and that "[n]othing in the Section diminishes the SEC's authority to reject an improperly filed rule, disapprove a rule that is not consistent with the Exchange Act, or diminishes the applicable public notice and comment period."⁹ In addition to being factually incorrect, the assertion proffered by the Exchange lacks reason. Rather than exchanges managing fees in a manner consistent with the interests of their members and the overall marketplace as was typically the case in the member-owned model, most exchanges now are incentivized as for-profit companies to maximize profits for their shareholder owners. This profit-maximization incentive is currently seen in the various fees they charge for exchange services but perhaps is seen most acutely in connection with the fees they charge for proprietary market data. The data in SIFMA's Expand study help demonstrate this.¹⁰

Based on the foregoing, we recommend that the Commission suspended and ultimately disapprove the Proposal. We further request that in doing so, the Commission completely reject the Exchange's inaccurate assertions made in connection with its discussion of the changes to Section 19 of the Exchange Act as a result of the Dodd-Frank Act.

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SIFMA greatly appreciates the Commission's consideration of these comments and would be pleased to discuss them in greater detail. If you have any questions or need any additional information, please contact me at [REDACTED] or [REDACTED].

Sincerely,

Ellen Greene

Ellen Greene
Managing Director
Equity and Options Market Structure

⁹ S. Rep No 111-176, at 106 (2010).

¹⁰ See supra note 4.