

March 15, 2022

Vanessa Countryman, Secretary
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0609

Re: Proposed Rule Changes to Amend Multiple Fees

Miami International Securities Exchange LLC ("MIAX"):

SR-MIAX-2022-07; Rel. No. 34-94256 – Connectivity (10Gb ULL)

SR-MIAX-2022-08; Rel. No. 34-94259 – MEI Ports

MIAX Pearl, LLC ("PEARL"):

SR-PEARL-2022-03; Rel. No. 34-94258 – Connectivity (10Gb ULL)

SR-PEARL-2022-04; Rel. No. 34-94286 – MEO Ports

SR-PEARL-2022-05; Rel. No. 34-94287 – Trading Permit Fees

MIAX Emerald, LLC ("EMERALD"):

SR-EMERALD-2022-04; Rel. No. 34-94257 – Connectivity (10Gb ULL)

SR-EMERALD-2022-05; Rel. No. 34-94260 – MEI Ports

Dear Ms. Countryman:

Susquehanna International Group, LLP ("SIG") appreciates the opportunity to comment on the above-noted proposed fee increases (the "Proposed Fee Increases") by the referenced exchanges (together, the "MIAX Exchanges" or "Exchanges"). As you are aware, SIG submitted (i) a comment letter dated September 7, 2021 opposing these fee changes (the "Initial Letter") when the proposals were originally filed,¹ (ii) a letter dated September 28, 2021 regarding the Pearl proposal to Remove Certain Credits and Increase Trading Permit Fees (the "Trading Permit Letter"),² (iii) a letter dated October 1, 2021 protesting the Exchanges' withdrawal of the original rule proposals and re-filing thereof as an inappropriate circumvention of the safeguards contained in the Securities Exchange Act of 1934, as amended (the "Exchange Act" or the "Act") Section 19(b)(3)(C) (the "Re-Filing Protest Letter"), and (iv) a letter dated

¹ The Initial Letter referenced SR-MIAX-2021-35 (Rel. No. 34-92643); SR-MIAX-2021-37 (Rel. No. 34-92661); SR-PEARL-2021-33 (Rel. Nos. 34-92365 and 34-92798); SR-PEARL-2021-36 (Rel. No. 34-92644); SR-EMERALD-2021-23 (Rel. No. 34-92645); and SR-EMERALD-2021-25 (Rel. No. 34-92662).

² SR-PEARL-2021-32 (Rel. No. 34-92797).

October 26, 2021 opposing the re-filed fee change proposals (the “Third Opposition Letter” and, together with the Initial Letter, Trading Permit Letter, and Re-Filing Protest Letter, the “Prior Comment Letters”).³ The Exchanges have, for a fourth time, filed for the same fee increases with submissions that, while somewhat modified, are substantially similar to their predecessors.

The Securities and Exchange Commission (the “SEC” or “Commission”) has issued a Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Fee Increases, in which the Commission requested comments on a number of associated issues. In response, SIG incorporates and re-asserts the arguments contained in the Prior Comment Letters, as we believe they address many of the Commission’s comment requests. By way of further response, we offer the following additional comments.

The Motivation For The Proposed Fee Increases Is not a Proper Justification

In the Prior Comment Letters, SIG challenged the Exchanges’ assertions that by seeking to recoup their initial outlays, fee increases such as the Proposed Fee Increases benefit competition. In response, each new MIAX Exchange filing contains some version of the following:

Nowhere in this proposal or in the First Proposed Rule Change did the Exchange assert that it benefits competition to allow a new exchange entrant to recoup their infrastructure costs. Rather, the Exchange asserts above that its “proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping the initial expenditures from building out their systems while the legacy exchanges have already paid for and built their systems.” The Exchange no longer makes this assertion in this filing and, therefore, does not believe it is *[sic]* necessary to respond to SIG’s assertion here.⁴

The Exchanges’ rejection of SIG’s challenge is without merit. Each Exchange, in a prior rule filing in the matter of the Proposed Fee Increases, represented that the imposition of fees to help the recoupment of infrastructure investments by new exchange entrants benefits competition, as quoted below:

The Exchange further believes its proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange believes that it ***benefits overall competition in the marketplace*** to allow relatively new entrants like the Exchange and its affiliates, ..., to propose fees that may help these new entrants recoup their substantial investment in building out costly infrastructure. (emphasis added)⁵

Although the Exchanges now seek to omit the assertions regarding the recoupment of their investments as arguments supporting their fee increases, they cannot distance themselves from this admitted motivation. Indeed, the Exchanges’ express statement to SIG about their driving motivation for the Proposed Fee Increases is broadly consistent with their public acknowledgment of the same.

³ The Re-Filing Protest Letter and Third Opposition Letter each referenced SR-MIAX-2021-43 (Rel. No. 34-93185); SR-MIAX-2021-41 (Rel. No. 34-93165); SR-PEARL-2021-45 (Rel. No. 34-93162); SR-EMERALD-2021-31 (Rel. No. 34-93188); and SR-EMERALD-2021-29 (Rel. No. 34-93166).

⁴ See, e.g., SR-MIAX-2022-07 (Rel. No. 34-94256), p. 52.

⁵ See, SR-MIAX-2021-35 (Rel. No. 34-92643), p. 27; SR-PEARL-36 (Rel. No. 34-92644), p. 27; SR-EMERALD-2021-25 (Rel. No. 34-92662), p. 24.

Increasing fees for the purpose of enhancing profitability to a desired level in and of itself is not an appropriate justification for exchange fee increases. As we have previously noted in our Prior Comment Letters, exchange fee increases impact investors and the public interest because they add to the cost of providing market liquidity, which costs are then passed on to the public in the form of wider bid-ask spreads. Accordingly, a proper justification for a fee increase is required, but the Exchanges have yet to furnish one. For this reason, SIG continues to oppose the Proposed Fee Increases in principle. Additionally, as discussed in our Prior Comment Letters and further below, we continue to believe that the Exchanges fail to establish that the Proposed Fee Increases are reasonable, equitably allocated, and not unfairly discriminatory.

The Exchanges Omit the Data Necessary to Assess the Proposed Fee Increases under the Exchange Act

Separately, the Exchanges' have not provided adequate disclosure of data from which one may conclude that its Proposed Fee Increases are reasonable, equitably allocated, and not unfairly discriminatory. Despite the Exchanges' complaints of helplessness, the obligation to furnish this data is the Exchanges' and not SIG's.⁶

The Exchanges' disclosure failures are distinct from and in addition to the proposals' inherent flaws, and it is absurd for the Exchanges to complain that SIG did not help them to amend their disclosures to facilitate the promulgation of fee increases that SIG opposes. Moreover, as SIG further advised the Exchanges, it is not SIG's place to divulge to the Exchanges the inner workings of their competitors for the Exchanges' own competitive purposes.⁷

⁶ In multiple filings in relation to the Proposed Fee Increases, the Exchanges state that:

Prior to, and after submitting the First Proposed Rule Change, the Exchange solicited feedback from its Members, including SIG. SIG relayed their concerns regarding the proposed change. The Exchange then sought to work with SIG to address their concerns and gain a better understanding of the access/connectivity/quoting infrastructure of other exchanges. In response, SIG provided no substantive suggestions on how to amend the First Proposed Rule Change to address their concerns and instead chose to submit three comment letters. One could argue that SIG is using the comment letter process not to raise legitimate regulatory concerns regarding the proposal, but to inhibit or delay proposed fee changes by the Exchange.

See, SR-MIAX-2022-07 (Rel. No. 34-94256), p. 47; SR-MIAX-2022-08 (Rel. No. 34-94259), p. 45; SR-PEARL-2022-03 (Rel. No. 34-94258), p. 47; SR-PEARL-2022-04 (Rel. No. 34-94286), pp. 52-52; SR-PEARL-2022-05 (Rel. No. 34-94287), p. 53; SR-EMERALD-2022-04 (Rel. No. 34-94257), p. 46; SR-EMERALD-2022-05 (Rel. No. 34-94260), p. 45. The Exchanges' accusation against SIG is without merit. It is because of SIG's legitimate regulatory concerns that it both opposes the fee proposals in principle and objects to the failures of the fee filings themselves.

⁷ In its Trading Permit Fee filing, Pearl stated, "The SIG Letter states that '[the Exchange] offers no information about the capacity and resources costs of access to the other exchanges or any other basis to support the reasonability of those fees, let alone compare such costs to those of MIAX Pearl. This statement is misleading as SIG should be aware that the Exchange does not have access to this information and when it asked SIG to assist the Exchange in better understanding the access structure of other exchanges, SIG refused.'" SR-PEARL-2022-05 (Rel. No. 34-94287), p. 60. SIG's statement in its prior Comment Letter was not misleading, and Pearl is simply confused. SIG was not taking Pearl to task for not having access to other exchanges' resource costs, but was merely pointing out that in its absence, Pearl could not reasonably compare its fees to the fees of the other exchanges. This statement is still true and not misleading at all.

The Exchanges claim that in accordance with SEC Staff Guidance on SRO Rule Filings Relating to Fees (“Staff Guidance” or “Guidance”),⁸ the Exchanges have provided sufficient detail to support a finding that the proposed fees are consistent with the Exchange Act. SIG has demonstrated how this claim is inaccurate in its Prior Comment Letters, and the Exchanges’ modifications via their current re-filings do not cure our prior criticisms. The filings still fail to meet the proscribed disclosure requirements.

The Staff Guidance entails that “a Fee Filing proposal should fully and fairly describe the operation of the applicable fee (including its effect on market participants) and do so in sufficient detail so that the public can understand the Fee Filing proposal *sufficiently to provide meaningful comment* and the Commission can determine whether the proposal is consistent with the Exchange Act.”⁹ (emphasis added) As indicated in our Prior Comment Letters and below, SIG and the public do not have a sufficient understanding to provide fully meaningful comments due to the Exchanges’ deficiency of full and fair disclosure.

The Exchanges now rely solely on a cost plus model to support their fee proposals. This approach naturally entails that the Exchanges provide adequate disclosure about their costs and projected profit margins. In connection, the Staff Guidance provides that “specific information, including quantitative information, should be provided.”¹⁰ The Guidance continues that “the SRO should provide an *analysis* of the SRO’s baseline revenues, costs, and profitability (before the proposed fee change) and the SRO’s expected revenues, costs, and profitability (following the proposed fee change) for the product or service in question.”¹¹ (emphasis added)

With respect to costs, the Exchanges suggest that they have met this burden by identifying the sources of costs they assert are associated with the subject fees, and offering conclusory declarations about the portion of each such cost source that is attributable to the subject fees. The Guidance requirement, however, is for the provision of an *analysis*, not a conclusory apportionment claim. Indeed, the Guidance goes on to require that “[a]s part of its analysis, the SRO should describe, among other things, its methodology for determining the baseline costs and revenues for the product or service, as well as its methodology for estimating the expected costs and revenues for the product or service.”¹²

The Exchanges’ attempt to withhold disclosure of its cost analysis, including the methodology thereof, by characterizing it as a “proprietary process” falls well short of meeting the Guidance requirements.¹³ The result is that the SEC and the public are deprived of a fulsome and adequate understanding of the

⁸ <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>

⁹ Staff Guidance, p. 1.

¹⁰ *Id.*, p. 7

¹¹ *Id.*

¹² *Id.*

¹³ This deficiency regards both the Exchanges’ external and internal (e.g., compensation) costs. As pointed out by the Commission, the Exchanges do not even explain the methodology used to determine how much of an employee’s time is devoted to a given activity(ies) that are associated with the subject fees. Indeed, they do not even disclose what relevant activities such employees engage in nor set out any nexus with the subject fees. These are all disclosure failures.

bases of the Exchange's cost assertions, and so have no basis upon which to assess them or approve of the fees based thereon.¹⁴

Similarly, the Exchanges offer no meaningful analysis to justify their various tiered fee levels. The Staff Guidance sets out that "the SRO should address whether there is a consistent relationship between the SRO's costs and fees for similar products or services. For example, if an SRO proposes to assess a fee for a 10Gb connection to the SRO that is five times greater than the fee for a non-10 Gb connection, but the cost for the 10 Gb connection is less than five times greater, the SRO should explain the rationale for the discrepancy."¹⁵ Clearly, the Guidance provides that there should be a disclosure of correlations between cost and fee charges to address whether there is a consistent relationship between them.

This is set out further with respect to tiered pricing levels, as in the Proposed Fee Increases. The Guidance provides, "If a proposed fee includes volume-based tiers or other tiered pricing (including volume-based tiers or tiered pricing that covers multiple types of securities (e.g., both equities and options) on a particular SRO), the SRO should explain why it chose *the specific tier levels* and the rationale for distinguishing among them, and must explain why that structure represents an equitable allocation of fees."¹⁶ (emphasis added)

The Exchanges' general and conclusory assertions that certain firms are "likely" to generate more of a burden on Exchange resources fail to meet this disclosure requirement.¹⁷ These ambiguous descriptions in no way address, let alone explain, why the Exchanges chose the specific tier levels (including the specific fee rate at each level) in their respective fee proposals. They offer no correlation of purported "greater" expenditure levels and associated fee levels. Indeed, the Exchanges have not even provided meaningful identification of the alleged costs that are claimed to be disproportionately imposed by firms with greater amounts of connectivity, let alone the extent and means of such disproportionate imposition.

Accordingly, in response to the Commission's comment requests, we believe the Exchanges should demonstrate how the proposed tiered fee levels precisely correlate with Exchange costs in a manner that justifies the specific tier levels; and we submit that the price differences between the tiers are **not**

¹⁴ By withholding their cost analysis as a "proprietary process", the Exchanges are literally and directly asking the SEC to simply "trust the process", which the Exchanges know the Commission cannot do. See, *Susquehanna Int'l. Grp., LLC v. SEC*, 866 F. 3d 442 (D.C. Cir. 2017).

¹⁵ *Id.*, p. 8.

¹⁶ *Id.*

¹⁷ For example, with regard to the proposed 10 Gb ULL tiered fees, the Exchanges state, "Charging an incrementally higher fee to a Member or non-Member that utilizes numerous connections is directly related to the increased costs the Exchange incurs in providing and maintaining those additional connections. SR-MIAX-20022-07 (Rel No. 34-94256), p. 34; SR-PEARL-2022-03 (Rel. No. 34-94258), p. 34; SR-EMERALD-2022-04 (Rel. No. 34-94257), p. 33. The Exchanges broadly allege that some firms generate a disproportionate amount of messages, but provide no specific information about the claimed direct relationship to costs whatsoever. Similarly, the Exchanges continue to assert that these fees are not unfairly discriminatory and provide for the equitable allocation of fees, dues and other charges because they (1) are designed to encourage more efficient and economical connectivity decisions, and (2) should enable the Exchanges to better monitor and provide access to the Exchanges' networks. *Id.* Despite our prior commentary that no justification for these alleged claims has been provided at all, the Exchanges continue to make such bald claims wholly bereft of support.

supported by the Exchanges' general assertions that they set the level of proposed fees in a manner that is equitable and not unfairly discriminatory.¹⁸

The Exchanges Have Not Established That Their Cost Data Is Reliable

Although the Exchanges have withheld the "proprietary process" by which they conducted their internal cost analyses, they each acknowledged that their assessments "can only capture a moment in time and that costs and resource allocations may change."¹⁹ Similarly, they each stated, "[t]he percentage allocations used in this proposed rule change may differ from past filings from the Exchange or its affiliates due to, among other things, changes in expenses charged by third-parties, adjustment to internal resource allocations, and different system architecture of the Exchange as compared to its affiliates."²⁰

These admissions strongly suggest that the Exchanges should not rely on the assessment method of their "proprietary process", as its conclusions are of such narrow application that they seem not reliably representative of costs that undergird fees to be assessed for an indeterminate future period of time. We believe an averaging of costs over a fairly representative and meaningful period of time is more appropriate for justifying the reasonability of forward looking fees.²¹

Additionally, we note that each of the Exchanges' various cost allocations is "approximate". For example, in the MIAX's fee proposal for its 10 Gb ULL connectivity, MIAX states, "According to the Exchange's calculations, it allocated *approximately* 62% of the total applicable Equinix expense to providing the access services associated with the Proposed Access Fees."²² (emphasis added) The Exchanges make this same "approximate" characterization for each asserted cost allocation. To the extent that such approximations reflect rounding to whole numbers (e.g., 61.8% rounded to 62%), that would be sensible. To the extent, however, that they reflect a more material imprecision, particularly resulting from a subjective allocation methodology in the Exchanges' undisclosed "proprietary process", that would be concerning. Again, the Exchanges' omissions of relevant information preclude a meaningful assessment of their assertions. For this reason, together with their aforementioned disclosure deficiencies, the Exchanges have not demonstrated that their proffered cost data is reliable.

¹⁸ Across their respective rule filings, the Exchanges make repeated references to the laudatory supporting comments of the Healthy Markets Association ("HMA") regarding the level of disclosure by the Exchanges (as well support for a rule filing by the IEX Exchange). See, e.g., SR-MIAX-2022-07 (Rel. No. 34-94256), pp. 3, 4, 43, and 47. It should be noted that, according to the HMA website, MIAX and IEX are both members of HMA, and the only two securities exchange members listed. In fact, of the list of only 20 members indicated on the HMA website, two of them are MIAX and its affiliate, the Minneapolis Grain Exchange ("MGEX").

¹⁹ SR-MIAX-2022-07 (Rel. No. 34-94256), p. 13; SR-MIAX-2022-08 (Rel. No. 34-94259), p. 13; SR-PEARL-2022-03 (Rel. No. 34-94258), p. 13; SR-PEARL-2022-04 (Rel. No. 34-94286), p. 17; SR-PEARL-2022-05 (Rel. No. 34-94287), p. 20; SR-EMERALD-2022-04 (Rel. No. 34-94257), p.12; SR-EMERALD-2022-05 (Rel. No. 34-94260), p. 13. While the Exchanges claim to periodically revisit their costs and resource allocations, they do not undertake to revise their fees accordingly.

²⁰ SR-MIAX-2022-07 (Rel. No. 34-94256), FN 44; SR-MIAX-2022-08 (Rel. No. 34-94259), FN 46; SR-PEARL-2022-03 (Rel. No. 34-94258), FN47; SR-PEARL-2022-04 (Rel. No. 34-94286), FN 59; SR-PEARL-2022-05 (Rel. No. 34-94287), FN 59; SR-EMERALD-2022-04 (Rel. No. 34-94257), FN 43; SR-EMERALD-2022-05 (Rel. No. 34-94260), FN 46.

²¹ We believe the Exchange should take the same averaging approach for projected profit margins, as a single monthly revenue figure is not meaningfully representative and the Exchanges have not demonstrated otherwise.

²² SR-MIAX-2022-07 (Rel. No. 34-94256), p. 23.

The Exchanges Have Not Shown Their Profit Margins To Be Reasonable

Despite their conclusory pronouncements to the contrary, the Exchanges have not demonstrated that their proffered profit margins are reasonable. Their attempted comparisons of their fees to analogous fees of other exchanges are inherently flawed, because they do not and cannot take into account the various elements that undergird the other exchanges' fees.²³ At the end of the day, the Exchanges' Proposed Fee increases, when they were in effect, increased SIG's net connectivity charges dramatically to become the highest across all exchange families despite no material change in SIG's connectivity usage.

Moreover, the Exchanges have generally failed to demonstrate why an increase in profit margin is necessary, and that (excepting where an Exchange sustains a current loss on a given subject access service) their current profit margins are in any way insufficient. For example, in MIAX's 10 Gb ULL filing, MIAX claimed that its profit margin for October 2021, under the Proposed Fee Increases schedule, was 21.3%, compared to its 14.4% profit margin for July 2021 under the prior flat fee. MIAX called the fees reasonable "because they only generate an additional 6.9% of profit margin per month."²⁴ MIAX called this a "modest increase in profit margin".²⁵

Of course, this is a staggering 48% increase in profit margin. More importantly, MIAX makes no case whatsoever for why a 14.4% profit margin is in any way insufficient. This deficiency generally runs throughout the Proposed Fee Increases.

SIG does not believe that 21.3%, nor any of the other profit margins alleged in the subject rule filings, is a reasonable rate of return for the Exchanges. The de-mutualizing of securities exchanges did not change their essential nature as utilities; and, our view is that their utility profits should generally remain in the single digits to low double digits. Regardless, however, we do not believe that the Exchanges have supported their claims that their proffered profit margins are reasonable.

²³ In its Trading Permit Fee filing, Pearl stated:

The Exchange correctly asserts herein and in the Initial Proposed Fee Change that it's [*sic*] proposed Trading Permit fees "are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other options exchanges." The SIG letter challenges this assertion as an "apples to oranges" comparison because NYSE American and NYSE Arca based their rates on the number of options issued to the member and not trading volume, like the exchange does. In fact, the number of options traded by a member of NYSE American or NYSE Arca is an appropriate proxy for trading volume as the more options issued to the member would result in higher volumes traded by that member. Firms that trade more liquid options generate increased message traffic and greater pull on exchange resources. Therefore, comparing options traded [*sic*] to trading volume is an "apples to apples" comparison.

This is a wholly unsubstantiated twist in logic. Pearl makes no attempt to set out any quantifiable correlation between "options issued" and "options traded". In fact, there are many options issued with little or no trading volume whatsoever. Accordingly, an exchange member may be issued a high number of options and have very low trade volume, or vice versa. It is clear that the counting of "issued options" and the counting of trade volume are entirely separate metrics. Pearl's attempt to twist this into a claimed "apples to apples" comparison falls flat.

²⁴SR-MIAX-2022-07 (Rel. No. 34-94256), p. 31.

²⁵ *Id.*

Conclusion

For these reasons and those included in our Prior Comment Letters, SIG submits that the Proposed Fee Increases should be disapproved. The flaws inherent in the proposals, and the failures in the subject filings, continue to be significant and disqualifying. These filings are not mere incremental increases, but are material and, in some cases, fundamental restructurings. Accordingly, although we have generally refrained from commenting on fee filings even when we felt the given exchanges had not satisfied the requisite standards, the instant filings arise to such a level of concern that we have felt it important to comment. We appreciate the Commission's consideration.

Respectfully,

A handwritten signature in black ink, appearing to read "Richard J. McDonald". The signature is fluid and cursive, with the first name being the most prominent.

Richard J. McDonald