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February 7, 2023

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-2023-50; Rel. No. 34-96629 – (10Gb ULL and MEI Ports)

MIAX Pearl, LLC ("PEARL"):
SR-PEARL-2022-61; Rel. No. 34- 96631 – (10Gb ULL and FIX and MEI Ports)

MIAX Emerald, LLC ("EMERALD"):
SR-EMERALD-2023-01; Rel. No. 34- 96628 – (10Gb ULL and 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 above-referenced exchanges (together, the "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 Section 19(b)(3)(C) of the Securities Exchange Act of 1934, as amended (the "Re-Filing Protest Letter"), (iv) a letter dated October 26, 2021 opposing the re-filed Proposed Fee Increases (the "Third Opposition Letter"),[3] (v) a letter dated March 15, 2022 opposing the again re-filed Proposed Fee Increases (the "Fourth Opposition Letter"),[4] (vi) a letter dated May 9, 2022

[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).
[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] The Fourth Opposition Letter referenced SR-MIAX-2022-07 (Rel. No. 34-94256); SR-MIAX-2022-08 (Rel. No. 34-94259); SR-PEARL-2022-03 (Rel. No. 34-94258); SR-PEARL-2022-04 (Rel. No. 34-94286); SR-PEARL-2022-05 (Rel. No. 34-94287); SR-EMERALD-2022-04 (Rel. No. 34-94257); and SR-EMERALD-2022-05 (Rel. No. 34-94260).

opposing the yet again re-filed Proposed Fee Increases (the "Fifth Opposition Letter")[5] and (vii) a letter dated June 9, 2022 opposing the reformulated Proposed Fee Increases (the "Sixth Opposition Letter"[6] and, together with the Initial Letter, Trading Permit Letter, Re-Filing Protest Letter, Third Opposition Letter, Fourth Opposition Letter, and Fifth Opposition Letter, the "Prior Comment Letters").

The Exchanges' purported support for this seventh round of fee increase proposals is as lacking in substance and marked by errors as its predecessors.[7] Accordingly, we incorporate into this response our Prior Comment Letters, and refer the Commission thereto.[8]

The Exchanges' Complaint of an Uneven Landscape is Unavailing

The Exchanges commenced their fee proposals with a discussion of what led the Securities and Exchange Commission ("SEC" or the "Commission") to initiate a heightened review standard (which the Exchanges called the "Revised Review Process")[9] for exchange filings following the D.C. Circuit's 2017 decision in *Susquehanna International Group, LLP v. Securities and Exchange Commission*, 866 F. 3d 442 (the "Susquehanna Decision"). The Exchanges alleged that certain competing exchanges, through fee filings submitted after the Susquehanna Decision and before the SEC "Staff Guidance on SRO Rule Filings Relating to Fees" ("Staff Guidance") was issued in 2019, established "a baseline set of fees for those exchanges that had the benefit of getting their fees in place before the Commission Staff's fee review process materially changed …."[10]

The Exchanges claim that the practical effect of this is an anti-competitive, discriminatory, and un-level playing field between what they call the "legacy exchanges"[11] and the "non-legacy exchanges".[12] They asserted that the legacy exchanges "…all established a significantly higher baseline for access and market data fees prior to the Revised Review Process."[13] In support of their assertion, the Exchanges noted, "[f]rom 2011 until the issuance of the Staff Guidance in 2019, national securities exchanges filed,

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[5] The Fifth Opposition Letter referenced SR-MIAX2022-14 (Rel. No. 34-94719); SR-MIAX-2022-16 (Rel. No. 34-94720); SR-PEARL-2022-11 (Rel. No. 34-94721); SR-PEARL-2022-12 (Rel. No. 34-94722); SR-PEARL-2022-09 (Rel. No. 34-94696); SR-EMERALD-2022-13 (Rel. No. 34-94717); and SR-EMERALD-2022-15 (Rel. No. 34-94718).

[6] The Sixth Opposition Letter referenced SR-MIAX-2022-20 (Rel. No. 34-34890); SR-PEARL-2022-18 (Rel. No. 34-949488) (*this was inadvertently cited as SR-PEARL 2022-21 (Rel. No 34-94929) in the June 9, 2022 letter);* SR-EMERALD-2022-19 (Rel. No. 34-94889).

[7] We noted in our Fifth Opposition Letter that the Exchanges have replaced their previously proposed 10Gb ULL tiered fee structure with a flat 20% increase from a monthly charge of $10,000 per connection per month to $12,000 per connection per month, which is now a 35% increase to $13,500 per month. In connection, we noted that, while SIG's prior arguments specifically regarding tiered pricing, as such, do not apply to the revised 10Gb ULL fee proposals, said proposals still fail for the many remaining reasons we have previously noted.

[8] The three subject fee filings largely mirror each other in language generally, and particularly in the proffered superficial and unavailing descriptions of their collective analyses to arrive at the conclusory assertions made by each Exchange. For convenience's sake in view of the mirrored discussions among the respective Proposed Fee Increases, language citations will reference SR-MIAX-2022-50 (Rel. No. 34-96629, the "MIAX Filing").

[9] MIAX Filing, p. 6.

[10] MIAX Filing, pp. 9-10.

[11] The Exchanges vaguely described "legacy exchanges" as larger, incumbent, entrenched exchanges. *Id.*, p. 10.

[12] The Exchanges vaguely described "non-legacy exchanges" as smaller, nascent exchanges. *Id.*

[13] *Id.*, pp. 10-11.

and the Commission Staff did not abrogate or suspend (allowing such fees to become effective), at least 92 filings to amend exchange connectivity or port fees (or similar access fees)."[14]

The Exchanges' complaint here of unfairness for access and market data fees between so-called "legacy" and "non-legacy" exchanges fails for two reasons. First, each the Exchanges commenced operations within the cited 2011 – 2019 window. Their fee filings during that period enjoyed the benefit of what they allege to be a less strict SEC review standard. Indeed, based on their launch dates, at least MIAX (2012) and PEARL (2017) would seem to qualify as "legacy exchanges".

Moreover, each of the Exchanges successfully increased their 10Gb ULL connectivity and port fees in 2021, *after* the issuance of the Staff Guidance, to the levels they sought. Accordingly, all exchanges, including the subject Exchanges, have established fee levels that they themselves desired post-Guidance, such that there is no unfair and uneven so-called "baseline" for such exchange fees.

We agree with the Exchanges that the same SEC review standard should be applied to every exchange;[15] and we note, as we have previously, that our objections to the subject fee proposals are due to their egregious and unjustified overreach.[16] As we have noted previously, these proposed fee increases would handily make the Exchanges the most expensive connectivity fee charges to our firm across all exchanges, without justification.

The Exchanges' Complaint that the SEC Staff is Impeding "Non-legacy Exchanges" is Unavailing

The Exchanges next complain that the SEC Staff is impeding "non-legacy exchanges" from establishing non-transaction fees commensurate with legacy exchanges. Specifically, they state:

> Commission Staff now require exchange filings, including from non-legacy exchanges such as the Exchange, to provide detailed cost-based analysis in place of competition-based arguments to support such changes. However, even with the added detailed cost and expense disclosures, the Commission Staff continues to either suspend such filings and institute disapproval proceedings, or put the exchanges in the unenviable position of having to repeatedly withdraw and re-file with additional detail in order to continue to charge those fees. By impeding any path forward for non-legacy exchanges to establish commensurate non-transaction fees, or by failing to provide any alternative means for smaller markets to establish "fee parity" with legacy exchanges, the Commission is stifling competition: non-legacy exchanges are, in effect, being deprived of the revenue necessary to compete on a level playing field with legacy exchanges.[17]

The Exchanges' assertion presents a false dichotomy. Rather than being forced to choose between (1) a fee filing suspension or disapproval proceeding, or (2) repeatedly withdrawing and re-filing fee

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[14] *Id.*, p. 11. For the sake of convenience, the lack of Staff abrogation or suspension of a fee filing will henceforth be referred to as approving such filings.

[15] See, *Id.*, pp. 17-18. The Exchanges also refer to a Cboe Exchange, Inc. ("Cboe") fee filing for connectivity ports, and cited certain arguments asserted by the Cboe in its filing. *See*, MIAX Filing, pp. 67-71. The Exchanges, however, do not – because they cannot – claim that those cited arguments were the bases of SEC approval in that matter.

[16] Indeed, throughout the period of the Exchanges' multiple submissions for the same fee subjects that we have opposed, the Exchanges have submitted immediately effective filings for other fees that we have not opposed.

[17] *Id.*, p. 12.

proposals, the Exchanges could simply provide information sufficient to meet the Staff Guidance. Throughout our Prior Comment Letters, SIG has repeatedly demonstrated the failures of the Exchange disclosures, and the Staff itself has highlighted the same through its requests for comment in its suspension orders.[18]

Astoundingly, the Exchanges continue to omit the data requested and ignore the other flaws that have been repeatedly called out in relation to its filings. Instead, they seek to sidestep these flaws by re-arranging and/or adding to the volume of words in their filings, but add little substance. This needless cycle is as frustrating for SIG as it seems to be for the Exchanges, but this situation is solely of the Exchanges' doing, and not the Staff's. [19]

Indeed, once one cuts through the extraneous word puffery in this seventh attempt at the subject fee increase proposals, the Exchanges' description of their putative "methodology" for their alleged "cost analysis" is comprised of the following:

> - "a detailed analysis of the Exchange's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange ..."[20]
>
> - "an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service."[21]
>
> - "an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below."[22]

This purported "disclosure" is nearly meaningless, and the resultant cost figures the Exchanges present are accordingly without reliable credibility. While the Exchange's earlier attempts sought to withhold disclosure of their cost analysis by characterizing it as a "proprietary process", their more recent attempts, including the instant filings, circumvent substantive disclosure by offering ambiguous generalities that are so high-level as to be almost completely empty. As we have pointed out previously, and as suggested by the Commission's own requests for comment, the Exchange disclosures, or lack thereof, fall well and obviously short of the Staff Guidance. The Proposed Fee Increases are the exact sort of entreaty for "unquestioning reliance" and to "trust the process" that the Commission must reject; and it is meritless for the Exchanges to seek to pin their own failures on the SEC Staff.[23]

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[18] Of course, adequate disclosure itself may not justify the proposed fee levels if the increases themselves are not justifiable. Adequate disclosure merely enables the SEC and public to assess the proposals meaningfully. In fact, as we have noted, SIG does not think the Proposed Fee Increases can be justified.

[19] We note that the Exchanges also change the bases and asserted motivations for the self-same fee increases over the course of their subject seven attempts. For example, they used to assert that a motivation for the proposed fee increases is to recoup their initial investment in the Exchanges, but now assert that the motivation is to recoup the costs of their new network bifurcation. Addressing the Exchanges' shifting asserted bases, as well as purported cost and profit analyses, is likewise a distracting exercise in "whack-a-mole".

[20] *Id.*, pp. 41-42.

[21] *Id.*, p. 42.

[22] Id.

[23] The Staff Guidance is clear, reasonable, and straight-forward. The Exchanges' characterizations of the Guidance as "opaque" and "devoid of detail" (*see*, MIAX Filing, p. 15) are misplaced and instead, ironically, are apt descriptions of the Exchanges' own disclosures. Similarly, the Exchanges' assertion that the Commission Staff "appears to be interpreting the reasonableness standard set forth in Section 6(b)(4) of the Act in a manner that is

What is more, it is outrageous that the Exchanges have repeatedly withdrawn and re-filed their fee increase proposals "in order to continue to charge those fees", as they now admit. For the reasons highlighted in SIG's Prior Comment Letters and the SEC Staff's Suspension Orders, the Exchanges have not substantiated their fee increases. Their admitted withdrawal and re-filing practice "to continue to charge" their unsubstantiated and meritless fee increases is an egregious circumvention of the public protections intended to be afforded by the processes for SEC review and public comment.

This is not remedied by the Exchanges' allegation that their repeated re-filings have "additional detail". As noted generally in the Prior Comment Letters and above, what the Exchanges call "additional detail" is simply an increase in the volume of extraneous verbiage that obfuscates the Exchanges' failure to satisfy their basic analysis disclosure requirement (or the fact that there is no such methodological "analysis" at all, but merely subjective Exchange estimates that they entreat the SEC and public to simply trust).

The Exchanges' Fee Filings Fail Critical Review

It is wholly proper that the SEC review proposed fee increases from any securities exchange critically. The provisions in Securities Exchange Act Section 19(b)(3)(A)(ii) and Rule 19b-4(f)(2) thereunder, providing for the immediate effectiveness of exchange fee filings, were implemented at a time when securities exchanges were non-profit membership organizations. That exchange structure afforded an inherent self-policing safeguard on the reasonability of exchange fees, as it was the exchange members themselves – the owners of the exchange – who were bearing those fees.

Now that the exchanges have de-mutualized and operate as for-profit enterprises for the benefit of shareholders rather than the exchange users who are being charged the fees, the case for immediate effectiveness of fee filings has diminished substantially, and the need for critical review has increased to the same degree. It is accordingly fitting that the exchanges be subjected to a critical review process, and that they be called to substantiate their fee increase proposals.

Here, the Proposed Fee Increases fail such critical review. As noted, the Exchanges have not provided an analysis of their costs notwithstanding their verbose circumlocutions around this failure. Likewise, they have not provided *any cost information whatsoever* regarding their bifurcation of 10Gb ULL networks, despite their assertion that the recoupment of such costs was a purpose for the Proposed Fee Increases.[24]

Additionally, in our Prior Comment Letters, SIG detailed numerous failures of the Exchanges' prior filings for the subject fees to comply with specific provisions of the Staff Guidance, as well as the Susquehanna

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not possible to achieve" (*see*, *Id.*) ignores the many obvious failures of the Exchanges to satisfy the clear Staff Guidance that have been highlighted in our Prior Comment Letters.

[24] Indeed, the Exchanges have not even substantiated the case for the necessity of such bifurcation, instead making only high-level, conclusory claims that the same was warranted by capacity limits and usage. For example, the MIAX stated, "Due to the ever increasing connectivity demands, the Exchange found it necessary to bifurcate 10Gb ULL connectivity to the Exchange's and MIAX Pearl's Systems and networks to continue to meet ongoing and future 10Gb ULL connectivity and access demands." (MIAX Filing, p. 38) This conclusory statement provides no information about current capacity, current usage levels, bases for projected increases and levels thereof; and so makes no case for the necessity of bifurcation. Once again, the Exchanges seek the unquestioning reliance of the SEC upon the Exchanges' conclusory claims.

Decision. We again incorporate those detailed descriptions, and summarily note below the Exchanges' repetition of these failures in the instant filings, together with their general failures to satisfy critical review. These include the following.

- The Exchanges' profit projections of 20% for 10Gb ULL connectivity and 35% for MEI Ports are not credible because they are based on unsubstantiated cost assessments.
- Even if the profit projections were credible, they are excessive for a utility business like the Exchanges. This is not remedied by the Exchanges' gratuitous affixing of the adjective "modest" to its profit projections.
- The Exchanges, once again, make no case for why their pre-proposal fee rates are insufficient (and do not even provide current profit levels for the 10Gb ULL connectivity and MEI Ports); nor provide any basis for their determination of the specific new rate levels they have proposed.
- A bald and simple desire for more money is not an adequate basis to support the reasonability of a fee increase.
- Comparisons to the revenues and profit margins of other exchanges are not relevant to determine the reasonability of a given fee rate at a given exchange; nor is it the duty or purview of the SEC to assure that any given exchange is as profitable as its competitors.
- Comparisons of a given fee rate to purportedly analogous rates for similar services at other exchanges are inapt, as they do not account for the number of subject units needed at the other exchanges for the same level of utility. As we have noted, the Exchanges are comparing unit level fees, but in aggregate the Exchanges are now our decisively most expensive connectivity costs over all other exchanges.
- The Exchanges provide no explanation whatsoever for how and why they selected the MEI Port fee tier levels that they set, in contravention of the Staff Guidance. Simply claiming that market makers with more ports generate more messages does not suffice.

Singly and collectively, these failures, and the above-noted disclosure failures, once again disqualify the Exchanges' Proposed Fee Increases.

The Competitive Need to Remain on The Exchanges

The Exchanges argue for the reasonability of their Proposed Fee Increases by their contention that "broker-dealers choose if and how to access a particular exchange and because it is a choice, the Exchange must set reasonable pricing, otherwise prospective members would not connect and existing members would disconnect from the Exchange."[25] This argument is inapt.

To begin, the Exchanges' contention is overbroad, as the subject fees will primarily impact market makers, not broker-dealers in general.[26] Notwithstanding the Exchanges protestations that there are

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[25] MIAX Filing, p. 35.

[26] The Exchanges have admitted that "... the firms that purchase a higher amount of 10Gb ULL connections tend to have specific business oriented market making and taking strategies, as opposed to firms simply engaging in best-execution order routing business." (SR-MIAX-2021-35; Rel. No. 34-92643, p. 7.) Moreover, in the instant MIAX Filing, the Exchange's discussion of alternatives to connecting directly with the Exchange (i.e., join one options exchange and elect to have orders routed away to another market, use the port of a third-party broker to submit orders, or use the connectivity of non-member third parties like service bureaus and extranets) all regard order entry market participants, as opposed to market makers. *See*, MIAX Filing, pp. 35-37.

neither regulatory nor "de-facto" practical requirements to connect to every options exchange, this is not the case for substantial liquidity-providing market makers, like SIG.

The Exchanges themselves concede that a small number of market participants are members of all sixteen options exchanges. These market participants are largely, if not completely, comprised of a group of market makers that collectively account for approximately 90% of the displayed liquidity in the options market, including on the subject Exchanges. They likewise account for the vast majority of the trade volume that is the main revenue source for the Exchanges.[27]

The reason that these market maker firms account for such a high level of options liquidity is that they are the most competitive and so provide the best prices to the investing public overall. In order to remain competitive and provide such high-quality pricing to the public, these firms have a compelling practical need to be on every options exchange. Indeed, SIG thinks that there are far too many options exchanges and would prefer that there be much fewer. The overall effect of the existence of so many exchanges is to diffuse liquidity rather than add to it; and worse, to reduce liquidity by adding to overall costs for market makers, which costs (including, for example, the instant subject fees) are ultimately passed on to the investing public. Market makers like SIG would prefer to not be connected to so many exchanges, but we cannot afford to not be connected to each exchange.

Accordingly, for the firms that account for the vast majority of the Exchanges' volume and will bear most of the burden of the Proposed Fee Increases, it is not the case that the Exchanges "must set reasonable pricing, otherwise ..... [such firms] would disconnect from the Exchange[s]." Hence, the Exchanges Proposed Fee Increases are NOT subject to significant competitive forces, so this argument is not a basis for the Exchanges' claim of reasonability.

Conclusion

For the reasons noted above and in our Prior Comment Letters, we respectfully request that the Proposed Fee Increases by disapproved. Thank you for your consideration.

Respectfully,

Brian Sopinsky
General Counsel

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[27] The Exchanges do not identify the "one MIAX Pearl Member [who] will terminate their MIAX Pearl membership .... as a direct result of the proposed connectivity and port fee changes on MIAX Pearl ..." (MIAX Filing, p. 35), but it is likely an order entry firm, and in any event not likely one of the firms in the substantial liquidity market maker group.