

October 29, 2021

Via Electronic Mail (rule-comments@sec.gov)
Hon. Gary Gensler, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Rulemaking Petition; File No. SR-CboeEDGA-2021-017; File No. SR-CboeBYX-2021-020; File No. SR-CboeBZX-2021-047; File No. SR-CboeEDGX-2021-030;¹ and File No. SR-MIAX-2021-41; File No. SR-PEARL-2021-45; File No. SR-EMERALD-2021-29.²

Dear Chair Gensler:

The Healthy Markets Association³ writes to petition the Commission for rulemaking regarding the process for reviewing fee filings submitted by self-regulatory organizations (SROs), and to comment on the above-referenced immediately effective rule filings.

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 13.8 to Introduce a Product to be known as “Cboe Premium Exchange Tools” and to Amend its Fee Schedule to Establish a Fee for a User Login that Elects to Subscribe to the Cboe Premium Exchange Tools*, SEC, Exch. Act Rel. No. 92965, Sept. 13, 2021, available at <https://www.sec.gov/rules/sro/cboeedga/2021/34-92965.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 11.22 to Introduce a Product to be known as Cboe Premium Exchange Tools and to Amend its Fee Schedule to Establish a Fee for a User Login that Elects to Subscribe to the Cboe Premium Exchange Tools*, SEC, Exch. Act Rel. No. 34-92984, Sept. 14, 2021, available at <https://www.sec.gov/rules/sro/cboebyx/2021/34-92984.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 11.22 to Introduce a Product to be known as “Cboe Premium Exchange Tools” and to Amend its Fee Schedule to Establish a Fee for a User Login that Elects to Subscribe to the Cboe Premium Exchange Tools*, SEC, Exch. Act Rel. No. 92970, Sept. 14, 2021, available at <https://www.sec.gov/rules/sro/cboebzx/2021/34-92970.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 13.8 to Introduce a Product to be known as “Cboe Premium Exchange Tools” and to Amend its Fee Schedule to Establish a Fee for a User Login that Elects to Subscribe to the Cboe Premium Exchange Tools*, SEC, Exch. Act Rel. No. 92963, Sept. 13, 2021, available at <https://www.sec.gov/rules/sro/cboeedgx/2021/34-92963.pdf> (collectively, all four filings are the “Cboe Fee Filings”).

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Fee Schedule to Adopt a Tiered-Pricing Structure for Certain Connectivity Fees*, SEC, Exch. Act Rel. No. 93165, Sept. 28, 2021, available at <https://www.sec.gov/rules/sro/miix/2021/34-93165.pdf> (“MIAX Connectivity Filing”); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Options Fee Schedule to Adopt a Tiered-Pricing Structure for Certain Connectivity Fees*, SEC, Exch. Act Rel. No. 93162, Sept. 28, 2021, available at <https://www.sec.gov/rules/sro/pearl/2021/34-93162.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Emerald Fee Schedule to Adopt a Tiered-Pricing Structure for Certain Connectivity Fees*, SEC, Exch. Act Rel. No. 93166, Sept. 28, 2021, available at <https://www.sec.gov/rules/sro/emerald/2021/34-93166.pdf> (collectively, the three are “MIAX Fee Filings”).

³ To learn about HMA or our members, please see our website at <http://healthymarkets.org>.



The Commission's process for reviewing and approving many SRO filings, and fee filings in particular, is fundamentally flawed.⁴

While Congress created a "streamlined" process for review and consideration of SRO fee filings as part of the Dodd-Frank Act,⁵ it did not relieve the Commission of its obligation to review and ensure that SRO fee filings meet the requirements of the Exchange Act and Commission Rules.⁶ The Commission is still obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,⁷ including, inter alia, that an exchange's rules:

- are an equitable allocation of reasonable dues, fees, and other charges;⁸
- are "not ... designed to permit unfair discrimination between customers, issuers, brokers, or dealers";⁹ and
- do "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act.¹⁰

The Commission's Rules of Practice clearly place the "burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder" on the exchange proposing a rule change.¹¹ And, as the Commission staff has explained:

[t]he description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency

⁴ This conclusion is based upon HMA's review and assessment of each of the thousands of SRO filings since our launch in 2015.

⁵ *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub. L. 111-203, § 916, 124 Stat. 1376, 1833 (2010); see also, 17 C.F.R. § 240.19b-4.

⁶ See, *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> ("SRO Fee Filing Guidance").

⁷ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017); but see, Letter from Amir C. Tayrani, Gibson Dunn, to Brent J. Fields, SEC, at 2, Dec. 10, 2018, available at <https://www.sec.gov/rules/sro/box/2018/box201824-supplemental-letter-121018.pdf> (asserting that "although [] independent review is mandated when an exchange submits a rule change to the Commission for approval under Section 19(b)(2) of the Act, see 15 U.S.C. § 78s(b)(2), no such searching examination is required when an exchange submits an immediately effective rule change "establishing or changing a due, fee, or other charge" under Section 19(b)(3)(A) of the Act, see id. § 78s(b)(3)(A). Instead, when a rule is submitted under Section 19(b)(3)(A), the Commission "summarily may temporarily suspend the change in the rules ... if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes" of the Act. Id. § 78s(b)(3)(C) (emphasis added). The Act does not prescribe any affirmative findings that the Commission must make before deciding to leave an immediately effective rule change in effect.").

⁸ 15 U.S.C. § 78f(b)(4).

⁹ 15 U.S.C. § 78f(b)(5).

¹⁰ 15 U.S.C. § 78f(b)(8).

¹¹ Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).

with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.¹²

Despite these requirements, since the start of 2020, there have been approximately 550 fee-related filings and another approximately 250 market data-related filings (many of which are related to fees). Many of these SRO fee filings do not provide sufficient information for the Commission to determine who is impacted by the changes or how. To the extent that the impacts may be readily ascertained, many of the SRO fee filings appear to implement rules that facially discriminate against some market participants, unduly burden competition between market participants (e.g., brokers of different sizes), impose unreasonable or inequitably allocated fees, or otherwise violate the requirements of the Exchange Act.

Most SRO fee filings appear to have received only cursory Commission or staff review, as there is no record of any meaningful Commission or staff consideration or determinations with respect to the vast majority of them. While the Commission took some actions with respect to market data-related filings (mostly in 2018 and early 2019), those efforts have been stalled and some instances reversed.¹³

SRO filings have dramatically shaped, and are continuing to shape, the market structure landscape. As a result of the Commission's failure to meaningfully review and analyze SRO fee filings against the requirements of the Exchange Act and its own rules, we have seen large numbers of extremely complex filings, increased costs on investors and market participants, and increasing concentration of brokers and proprietary trading firms.

We urge the Commission to revise several elements of its SRO fee filing process so as to better ensure that SRO fee filings comply with the Exchange Act and Commission rules, and better protect investors and other market participants.

In the pages that follow, we:

¹² *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, available at <https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf>.

¹³ See, e.g., *NASDAQ Stock Mkt., LLC v. SEC*, 961 F.3d 421, 424 (D.C. Cir. 2020) (vacating and remanding the Commission's 2018 decision to remand approximately 400 SRO filings).

- review how the Commission's inaction regarding transaction fee filings raises concerns regarding the Commission's fulfillment of its obligation to ensure that SRO fee filings comply with the Exchange Act;
- review how the Commission's general inaction on market data and connectivity-related filings raise concerns regarding the Commission's fulfillment of its obligation to ensure that SRO fee filings comply with the Exchange Act;
- examine some recent examples of Cboe fee filings and other exchange filings; and
- offer detailed recommendations on how the Commission may improve the SRO fee filing process to better protect investors and other market participants.

In particular, we recommend the Commission require exchanges to:

- provide at least two weeks advance public notice of fee filing changes to market participants, so that participants may adequately prepare for changes;¹⁴
- disclose the details of all oral and written communications with any market participants regarding any fee filings;
- publish fee structures in a machine-readable format, including the date on which the fee structure takes effect, and all changes;
- ensure that any fees or rebates are known at the time of trade, and are provided to the executing parties at the time of trade confirmation; and
- provide enhanced disclosures of transaction pricing tiers, so as to improve market participants' and regulators' understanding of who receives them, how they work, and what the impacts the pricing tiers are having on market participant behavior, execution quality, competition between market participants, and the markets overall.

Lastly, we urge the Commission to consider the elimination of various transaction pricing tiers, and particularly those that advantage larger volume traders (and discriminate against smaller traders). At a minimum, the fees and rebates for orders or market data

¹⁴ Notably, this could be accomplished by Revising Rule 19b-4(l) to change the notice to members from two days after filing with the Commission to one month before filing. This advance notice, if applied equally, would allow market participants with sufficient time to adjust their systems and trading strategies. See, Letter from Jaffray Woodruff and Michael Ledwith, Quantitative Investment Management, to Brent J. Fields, SEC, Dec. 21, 2018, available at <https://www.sec.gov/comments/sr-cboeedga-2018-017/srcboeedga2018017-4827803-177046.pdf> ("QIM Letter").



costs should not vary based on who is sending the order or buying the data (or that party's other activities in the markets).

Lastly, the Commission's level of review and analysis of SRO fee filings should not be dependent upon whether objections are lodged by market participants, as currently appears to be the practice in most instances. With hundreds of SRO filings each year, market participants are all-too-often simply overwhelmed, and cannot be expected to dedicate the significant resources necessary to remind the agency to do its statutorily-mandated job.

Transaction Pricing Filings

One of the principal ways exchanges attract orders to their venues is through offering pricing incentives for brokers and market makers.¹⁵

We begin by noting that these financial incentives are rarely passed on to the underlying customers. As a result, these incentives create the same principal-agent conflicts of interest as is often discussed in the retail trading context: are brokers routing to venues that pay them the most (or cost them the least), or are they routing to the venues that offer the best prices for their customers? And while we've written to the Commission extensively on these conflicts of interest and costs to investors,¹⁶ We wish to focus now on how variable transaction pricing creates significant economic distortions, discriminates against firms, establishes burdens on competition, and creates unnecessary firm and systemic risks.

Varied transaction pricing not only impacts the competition between venues for execution, but also the competition between brokers and other market participants. The ability of large brokers and high volume market makers to negotiate more favorable pricing with an exchange or set of exchanges has become a point of competition between brokers and market makers.¹⁷ *In fact, a smaller firm's trading costs for any*

¹⁵ See, e.g., Chester S. Spatt, *Is Equity Market Structure Anti-Competitive?*, May 24, 2018 (revised Dec. 28, 2020), available at <https://www.cmu.edu/tepper/faculty-and-research/assets/docs/anti-competitive-rebates.pdf>; Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, May 24, 2018, at 19-23, available at <https://healthymarkets.wpengine.com/wp-content/uploads/2018/06/05-24-18-HM-letter-Transaction-Fee-Pilot.pdf>; see also, Recommendation of the Market Structure Subcommittee of the SEC Investor Advisory Committee Re: Exchange Rebate Tier Disclosure, Inv. Advisory Cmte, SEC, Jan. 15, 2020, available at <https://www.sec.gov/spotlight/investor-advisory-committee-2012/iac-recommendation-rebate-tier-disclosure.pdf>.

¹⁶ See, e.g., Letter from Tyler Gellasch, Healthy Markets Association, to Hon. Gary Gensler, SEC, May 4, 2021, available at <https://healthymarkets.org/wp-content/uploads/2021/05/Gary-Gensler-Welcome-5-4-21-1.pdf>.

¹⁷ Remarks of Joe Wald, Clearpool Group, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 198, available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>; accord, Remarks of Tyler Gellasch, Healthy Markets Association, before the SEC



given trade on an exchange may be 30% or more of the costs of a larger competitor -- for the exact same trade.¹⁸ How is varying the cost of trading so significantly not an undue burden on competition and not discriminatory?

At times, some larger brokers have even advertised their favorable, negotiated pricing arrangements with exchanges to their smaller competitors, and offered to consolidate the order flow and split the “savings” with them. **Figure 1**, below, is one such pricing advertisement, which was sent by email from a large bank executive to an individual at a smaller competitor.

FIGURE 1: Broker A Exchange Pricing

	Tape A (NYSE)		Tape B (AMEX & Other)		Tape C (NASDAQ)	
	Taking	Providing	Taking	Providing	Taking	Providing
ARCA	0.00300	(0.00300)	0.00280	(0.00230)	0.00300	(0.00300)
BATS	0.00300	(0.00310)	0.00300	(0.00310)	0.00300	(0.00310)
NYSE	0.00250	(0.00180)	0.00250	(0.00180)	0.00250	(0.00180)
NASDAQ	0.00300	(0.00295)	0.00300	(0.00295)	0.00300	(0.00295)

Further, while the filings do not generally disclose precisely for which firm or firms the pricing tiers have been created, a cursory review suggests that many of the fee and rebate filings are essentially the results of bespoke negotiations between very sophisticated counterparties. For example, in late 2018, NYSE submitted a filing to make the following modification to its price list:

The Exchange currently provides an equity per share credit of \$0.0018 per transaction for all orders, other than MPL and Non-Display Reserve orders, for transactions in stocks with a share price of \$1.00 or more when adding liquidity to the Exchange if the member organization (1) has an average daily trading volume (“ADV”) that adds liquidity to the Exchange during the billing month (“Adding ADV”) that is at least 0.40% of NYSE consolidated average daily volume (“CADV”), and (2) executes MOC and LOC orders of at least 0.05% of NYSE CADV. The Exchange proposes to provide an alternate way for member organizations to qualify for the Tier 3

Roundtable and Market Access and Market Data, Oct. 26, 2018, Transcript at 280-281, available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf>.

¹⁸ The only practical constraint on these negotiations are the 30 cents per 100 shares “take” fee cap imposed by Rule 610. 17 CFR 242.610(c)(1). According to the Commission, at the time it proposed the take fee cap, the cap “largely codified the prevailing fee level set through competition among the various trading centers.” *Transaction Fee Pilot for NMS Stocks*, SEC, 83 Fed. Reg. 13008 (Mar. 26, 2018), available at <https://www.gpo.gov/fdsys/pkg/FR-2018-03-26/pdf/2018-05545.pdf>. However, in recent years, we have even seen the proliferation of rebates that exceed the “take” fee, meaning that the exchange would be subsidizing that trading -- likely with fees assessed on other market participants for trading and market data revenues.



Adding Credit. As proposed, the Exchange would provide an equity per share credit of \$0.0018 per transaction for all orders, other than MPL and Non-display Reserve orders, for transactions in stocks with a share price of \$1.00 or more when adding liquidity to the Exchange if the member organization (1) has an Adding ADV that is at least 0.35% of NYSE CADV, (2) executes MOC and LOC orders of at least 0.05% of NYSE CADV, and (3) has an Adding ADV in MPL orders of at least 400,000 shares.¹⁹

These conditions appear to be customized to meet the trading parameters of a very narrow set of market participants, if not just one. However, despite the fact that the Commission's SRO filing form requires an exchange to disclose whether it had written communications with market participants about the filing, no communications were identified. More broadly, despite the apparently customized nature of nearly all transaction pricing changes, exchanges do not generally disclose any communications with customers in their filings.

To better assist the Commission and staff in reviewing the exchanges' compliance with the Exchange Act and Commission Rules, exchanges should be required to disclose the number of market participants who qualify for a particular pricing tier on a monthly basis, but also disclose all communications (not just written) with any market participants about their SRO fee filings both before the filings are made and thereafter.

As we have previously articulated to the Commission, brokers and other market participants' profitability may depend upon their abilities to negotiate discounts -- notwithstanding the fact that the exchanges providing these volume discounts are ostensibly prohibited by the Exchange Act from having fees that are inequitable, discriminatory, or burdensome on competition.²⁰ Each firm is subject to whatever rate it can convince an exchange to grant, whether it be based on competitive pressures and their own trading volumes -- or even their executives' personal relationships. This is an insiders' game.

But who are the insiders who benefit from this system? Both the total number of pricing tiers is generally unknown, as are details about who (or what types of firms) qualifies for them. That said, somewhat refreshingly, one exchange executive stood on the SEC's stage in late 2018 and declared that

five out of the top 10 get a check from [Cboe] after the costs of their connectivity and market data. So we [Cboe] are cutting them a check

¹⁹ *New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the NYSE Price List*, SEC, Oct. 17, 2018, available at <https://www.sec.gov/rules/sro/nyse/2018/34-84444.pdf>.

²⁰ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, at 22, May 24, 2018, available at <https://www.sec.gov/comments/s7-05-18/s70518-3704495-162465.pdf> ("HMA Initial Fee Pilot Letter").



monthly after their costs...[and the] top 10 firms on our exchange eat up 50 percent of the capacity on our exchanges.²¹

Assuming the exchanges are rational actors seeking to remain financially solvent, then those payments must be made using revenues derived elsewhere: most often, fees on other market participants and market data. Further, to the extent that those rebates are paid to one set of firms, and paid for by revenues collected from a different set of market participants, transaction pricing and market data fees act as a net wealth transfer to not only the exchanges, but to certain “favored” market participants.

On the other hand, the outsiders are severely disadvantaged. As one broker explained to the Commission

there is a disproportionate impact of the current market data and market access regime on smaller broker-dealers and does this act as a barrier of entry to innovation? From what we have experienced, through the high costs for market data and the complex and opaque tiering structure established by the exchanges for transactional fees, smaller broker-dealers end up subsidizing many of the costs for larger firms.

This is the opposite of an equitable allocation of reasonable dues, fees, and charges. This is facially discriminatory, and it is facially a burden on competition. Yet, the Commission has now -- for years -- let this broken system continue to grow.

Neither the Commission nor its staff have ever offered a detailed explanation of how a filing that implements a customized, volume-based, more favorable price that applies to a single firm -- to the detriment of smaller market participants -- complies with the Exchange Act.

In addition to discrimination and competitive concerns, the current SRO fee filing process can create significant risks to market participants who may have to update or revise their systems to reflect the changes. Essentially, securities exchanges are able to compel hundreds of market participants to review filings, determine whether those filings may impact their trading, and then design and implement adjustments -- potentially overnight. While the exchanges themselves are subject to Regulation

²¹ Remarks of Chris Concannon, Cboe Global Markets, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 74-75, *available at* <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf> (openly admitting that of the top 10 firms across Cboe’s four exchanges by market share “there are four investment banks and six HFTs” and of these, “five out of the top 10 get a check from [Cboe] after the costs of their connectivity and market data. So we [Cboe] are cutting them a check monthly after their costs...[At the same time, the] top 10 firms on our exchange eat up 50 percent of the capacity on our exchanges).



Systems Compliance and Integrity,²² market participants are being denied the opportunity to consider, design, test, and implement changes in a thoughtful, controlled environment.

This has led to investor losses.²³ Further, implementation of routing logic changes may require significant planning and testing to avoid disasters.²⁴ For example, when the NYSE Retail Liquidity Pilot was being unveiled in 2012, a coding error in routing logic by one market participant led to a market-wide disruption and catastrophic collapse of the market participant.²⁵ The fact that this system has not already led to greater losses and more system-wide problems appears to reaffirm the assumption above that many of the transaction pricing changes are designed to benefit a single firm or a very small subset of firms, who are likely made aware of the changes in advance of the implementation. The Commission should not continue to ignore the risks to firms or the markets overall.

It's unclear whether and to what extent the Commission or its staff ever meaningfully review the vast majority of transaction fee filings -- despite occasional objection from HMA²⁶ and investors.²⁷ This is a failure of process. That process should change.

Market Data and Connectivity-Related Filings

In a world where trading decisions are often made in nanoseconds, the timely and cost-effective availability of essential market data, including not just top-of-book data, but also odd-lots, auction information and depth-of-book information, is essential for many market participants. Information necessary to evaluate order routing decisions and trade execution quality is also extremely important to many market participants.

As a result of this demand for data, exchanges have become increasingly dependent upon market data revenues. Collectively, the exchanges' market data and connectivity products comprise the majority of the revenues for the dominant three exchanges families.²⁸

Exchanges have continued to innovate by offering new products and services. Connections get faster. Datasets become more complete. Analytical tools become

²² *Regulation Systems Compliance and Integrity*, SEC, 79 Fed. Reg. 72252 (2014), available at <https://www.govinfo.gov/content/pkg/FR-2014-12-05/pdf/2014-27767.pdf>.

²³ See, e.g., QIM Letter.

²⁴ See, e.g., Press Release, *SEC Charges Knight Capital With Violations of Market Access Rule*, SEC, Oct. 16, 2013, available at <https://www.sec.gov/news/press-release/2013-222> (regarding coding errors related to the implementation of the NYSE Retail Liquidity Pilot, which led to a catastrophic trading error for one firm and a market-wide disruption).

²⁵ *Id.*

²⁶ See, e.g., Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Nov. 13, 2018, available at <https://www.sec.gov/comments/sr-nyse-2018-49/srnyse201849-4640899-176435.pdf>.

²⁷ See, e.g., QIM Letter.

²⁸ Email from Larry Tabb, TABB Group, to Tyler Gellasch, Oct. 19, 2018.



more useful. This evolution and potential improvement for investors and other market participants is generally unbounded.

These new products and services nearly always feed into a captive market demand. Ultimately, given that an exchange is often the sole source for essential data -- for which there may be no reasonable substitute -- exchanges often enjoy essentially monopoly pricing power, and extremely limited elasticity of demand. Competitors often simply cannot afford to not have the fastest connections or best available market data. They often simply cannot afford to not receive odd-lot, or other key information. To the extent that demand may be diminished as prices and complexity rise, that is often the result of market participants accepting less competitive capabilities, or even leaving the marketplace.

Unfortunately, as with the transaction pricing fees, the Commission and staff appear to have let the vast majority of market data offerings -- and associated fees -- go into effect unabated. Again, while the Commission and staff have taken some limited actions (particularly with regards to connectivity-related filings by smaller exchange families such as BOX and MIAX), there is little evidence that the Commission and staff have materially reviewed or analyzed the vast majority of these filings for compliance with the Exchange Act and Commission Rules.

Again, to assess the filings related to market data and connectivity filings, the Commission and staff would ostensibly need to know who is using the product or service, the costs to them, and how the product or service impacts not just those firms, but those firms in relation to those that do not purchase it. It would need to have sufficient information to determine if the costs for the products or services are "reasonable" and "equitably allocated." It would need to determine if the products or services (or costs associated with them) are discriminatory or impose undue burdens on competition.

For example, a market maker could not readily compete in today's marketplace without access to the fastest connections or depth-of-book information. So while an exchange may charge for those products, the Commission should consider the competitive advantages those products convey. It hasn't. And yet, the products likely create a classic cost-based barrier to entry for not only smaller market participants but also the formation of new investment strategies that could diversify price and liquidity competition making the markets more fair, orderly, and efficient.

Further, market data and connectivity-related revenues may be used to subsidize other programs of the exchanges, including paying rebates to some traders that may even exceed transaction fees collected for those trades. As we discussed above, of course, those rebates themselves tend to be greatest for the largest and most connected firms. Unfortunately, the Commission and staff have also not explored these connections when evaluating market data or connectivity-related SRO fee filings.

Lastly, market data and connectivity fees create perverse incentives that may negatively impact market participants and market structure broadly. These fees are essentially monopolistic for registered exchanges, and have incentivized firms to create and operate multiple exchanges within the same family, performing essentially the same functions and using essentially the same technologies and business models. These numerous exchanges create further unnecessary market fragmentation, greater complexity, and greater costs for market participants. Nevertheless, the Commission and staff appear to simply let over a hundred of market data filings each year go into effect without any evidence of thorough review or analysis.

Recent Cboe Fee Filings Example

On August 31st, 2021, the Cboe Fee Filings were submitted to the Commission. Those filings impose new fees for an “internet-based tool that allows users access to certain execution information for their firm through a single interface.”²⁹ The SEC published the 15-page, cursory filings for public comment, no comments were received, and the filings remain effective today.

The Cboe Fee Filings impose fees on users who subscribe to an internet-based tool that creates: (i) trade data reports, (ii) latency statistics reports, and (iii) volume history reports.³⁰ The tool largely existed prior to the filings, and was provided to users free of charge,³¹ although some features have been tweaked over time.

Cboe claims that the reports provide users with valuable information in a “convenient, user-friendly format.” For instance, the tool provides users with trade data with microsecond timestamps, which can be extremely valuable to firms seeking to conduct order routing reviews and transaction cost analysis.³² The Cboe family of exchanges determined that it is a valuable tool, and so it filed to begin charging a fee of \$40 per user login³³ that is applied monthly.

Cboe notes that the tool is a “completely voluntary product, in that the Exchange is not required by any rule or regulation to make the reports or services available and that potential subscribers may purchase it only if they voluntarily choose to do so.”³⁴ Further, the exchange notes that other exchanges charge for offering similar products, such as Nasdaq’s “TradeInfo Fees” (which is a fee of “\$95 per user per month.”)³⁵

Importantly, the “value-added service” of some of the reports is not so much that the data wouldn’t generally be available without the service, but rather that the data would

²⁹ Cboe Fee Filings, at 2-3.

³⁰ Cboe Fee Filings, at 3.

³¹ Cboe Fee Filings, at 2.

³² Cboe Fee Filings, at 5.

³³ Cboe Fee Filings, at 5.

³⁴ Cboe Fee Filings, at 6.

³⁵ Cboe Fee Filings, at 6 n.16.



be provided “in a user-friendly format” that is “substantially similar to data offered in the Nasdaq TradeInfo tool.”³⁶ Other data (particularly latency data) is generally not otherwise available from the exchanges, but the Cboe Fee Filings assert that much of it could be ascertained through other mechanisms.³⁷

Analysis

Cboe asserts that “Premium Exchange Tools provides users with an easily accessible tool that allows them to access certain execution and latency information from a single interface and provides such information in a convenient, user-friendly format.”³⁸

We do not question the value of the tool. Having accurate, time-stamped trade and latency data in a useful format is valuable for investors and other market participants, and may be essential to their assessments of routing and exchange performance, as well as overall execution quality.

Cboe’s arguments in support of the new fee seem to boil down to four key points:

- 1) the product is voluntary, as firms are not regulatorily compelled to buy it;
- 2) the fee is “reasonable because the amount assessed is less than the analogous fees charged by Nasdaq, Nasdaq BX, and PHLX”³⁹;
- 3) the fee is “equitable and not unfairly discriminatory because it will apply to all Members and non-Members that choose to subscribe”⁴⁰; and
- 4) The fee is not an undue burden on competition because the tool “will be available equally to all Members and non-Members that choose to subscribe to such tools.”⁴¹

That’s insufficient to support a finding by the Commission that the fees satisfy the Exchange Act or Commission rules.

As the Commission staff explained in the SRO Fee Filing Guidance, the Commission needs to know who’s being targeted by fees and the potential impacts of the fees on them might be. For example, the Commission should know:

1. whether the relevant product or service, including the corresponding proposed fee or fee change, is targeted at – or expected to be limited

³⁶ Cboe Fee Filings, at 7.

³⁷ Cboe Fee Filings, at 8.

³⁸ Cboe Fee Filings, at 9.

³⁹ Cboe Fee Filings, at 10.

⁴⁰ Cboe Fee Filings, at 10.

⁴¹ Cboe Fee Filings, at 11.

- in its applicability to – a specific segment(s) of market participants (and if so, the related details);
2. the projected number of purchasers (including members, as well as non-members) of any new or modified product or service and the expected number of purchasers likely to be subject to a new fee; ... and
 3. how the fee may apply differently (e.g., additional cost vs. additional discount) to different *types* of market participants (e.g., market makers, institutional brokers, retail brokers, vendors, etc.) and different *sizes* of market participants.⁴²

In fact, the SRO Fee Filing Guidance provides a detailed outline of the information that is necessary for the Commission to make informed decisions about whether a fee filing complies with the Exchange Act and Commission rules. Unfortunately, the Cboe Fee Filings offer essentially none of these details. The Cboe Fee Filings appear to essentially disregard the SRO Fee Filing Guidance, and make no effort to provide the details necessary to assess, for example, whether the fees impose undue burdens on competition.

Lastly, we recognize that trade and latency data provided by the tool is very likely to be useful for many market participants. But why is providing data to market participants *about their own trading and latency data* in a manner that they may actually be able to use an “extra” cost? Doesn’t this encourage the exchanges to provide the data in un-helpful ways, and then increasingly offer “new” ways to “improve” the provision of the data for greater fees?

The Cboe Fee Filings assert that market participants may have access to most of the information they need already, but if they want it in a format they can actually use, that will be extra. Well, you can buy an unassembled bookcase online and try to assemble it without instructions. You may have all the parts you need, and you could figure it out on your own, but the information being presented to you in a way that is useful will certainly save you time and energy.

You don’t see retailers charging customers separate fees for instructions, but that’s essentially what the exchanges are now doing for its customers. We wonder why financially struggling retailers aren’t engaged in this potential “new” source of revenues, while Cboe is looking to build a business around it.

Cboe Bigger Picture

⁴² See SRO Fee Filing Guidance.



We weren't surprised that the Commission permitted the Cboe Fee Filings to proceed unchallenged. HMA has repeatedly commented on filings related to the Cboe family of exchanges, only to watch as the Commission repeatedly declines to take action.

In June 2018, for example, the Cboe imposed significant new connectivity fee hikes on its Cboe BYX, Cboe BZX, Cboe EDGA, Cboe EDGX, C2 and CBOE exchanges. Those filings raised connectivity fees for 1 gigabit connections from \$2000 to \$2500 per month, and for 10 gigabit connections from \$7000 to \$7500 per month. We objected to those filings, which we argued were inconsistent with the Exchange Act.⁴³ Despite our objections, the Commission did not suspend or disapprove the filings. The impact of the fee hikes on individual customers of some of the exchanges have been enormous.

As then-Commissioner Robert J. Jackson, Jr. explained in 2018, one of the Cboe's exchanges (now Cboe EDGX) "has raised the price on its standard 10GB connection five times since 2010—in total, leaving the price of the connection seven times higher."⁴⁴

Similarly, two years ago, on October 7, 2019, the Cboe Exchange completed migrating its trading platform to the same system used by its other affiliated exchanges. According to the Exchange,

As a result of this migration, the Exchange's pre-migration connectivity architecture was rendered obsolete, and as such, the Exchange now offers new functionality, including new logical connectivity, and therefore proposes to adopt corresponding fees.⁴⁵

Beginning on October 2, 2019, Cboe began a series of filings to impose new fees and fee structures.

*Cboe not only increased its fees, but also linked market data-related costs to firms with their trading volumes--something which the Commission has previously explicitly rejected as inconsistent with the Exchange Act.*⁴⁶

⁴³ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Commission, July 26, 2018, available at <https://www.sec.gov/comments/sr-cboebyx-2018-006/cboebyx2018006-4127982-171758.pdf>.

⁴⁴ Remarks of Hon. Robert J. Jackson, Jr. before the Healthy Markets Association and George Mason University, Sept. 19, 2018, n.32, available at <https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets>.

⁴⁵ See Sixth Filing, at 2-3.

⁴⁶ See, e.g., *Order Disapproving a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 65362; Sep 21, 2011, available at <https://www.sec.gov/rules/sro/nasdaq/2011/34-65362.pdf>.



In total, Cboe ended up making more than a half dozen filings imposing new connectivity-related fees.⁴⁷ Each time, Cboe continued to make filings, withdraw them, and then refile them. HMA repeatedly objected.⁴⁸ According to Cboe, despite the repeated withdrawals, as of September 2020, “the proposed fees have been effective, and thus have been paid by Trading Permit Holders, for approximately eleven months.”⁴⁹ By engaging in this pattern of filing, withdrawing, and refiling, the Cboe was able to continue to collect revenues for fees.

Of course, the Commission could have suspended the filings if it had concerns, but that never happened. Instead, the day after submitting its Seventh Filing, two Cboe

⁴⁷ See *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-87304, File No. SR-CBOE-2019-082, Oct. 15, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87304.pdf> (“Initial Filing”, filed on October 2, 2019 and withdrawn November 29, 2019); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-87727; File No. SR-CBOE-2019-111, Dec. 12, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87727.pdf> (filed on November 29, 2020 and withdrawn on Jan. 28, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88164; File No. SR-CBOE-2020-005, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88164.pdf> (filed on January 28th and withdrawn on March 27, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88586, File No. SR-CBOE-2020-028, Apr. 8, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88586.pdf> (filed March 27, 2020 and withdrawn on May 21, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88984; File No. SR-CBOE-2020-048, June 1, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88984.pdf> (filed May 21, 2020, refiled “to correct an error on May 22, 2020, and withdrawn on July 2, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-89239; File No. SR-CBOE-2020-064, July 7, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-89239.pdf> (filed July 2, 2020 and withdrawn September 2, 2020); and *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-89826; File No. SR-CBOE-2020-086, Sept. 10, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-89826.pdf> (“Seventh Filing,” filed September 2, 2020).

⁴⁸ Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Nov. 18, 2019, available at <https://www.sec.gov/comments/sr-cboe-2019-082/srcboe2019082-6437608-198687.pdf> (“First Objection”) and Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, May 5, 2020, available at <https://www.sec.gov/comments/sr-cboe-2020-028/srcboe2020028-7152089-216415.pdf> (“Second Objection”); and Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Sept. 30, 2020, available at <https://www.sec.gov/comments/sr-cboe-2020-086/srcboe2019082-7864216-224008.pdf> (“Third Objection”).

⁴⁹ Seventh Filing, at 7.



executives met with two senior staffers for then-Chairman Clayton.⁵⁰ Thereafter, the Seventh Filing was not withdrawn, suspended, or disapproved.

Obviously, the Commission should take action to stop all SROs from abusing the process of review for rules changes that are “effective upon filing”.⁵¹ That also hasn’t happened despite our bringing this matter to the attention of the Commission on several occasions.

More recently, the Cboe revised its fee to address a years-long billing error and its dispute resolution policies across its several exchanges.⁵² In particular, as HMA explained in our objection, the changes seek to

limit its exchanges’ customers’ rights to recourse for past and future billing errors, as well as effectively cut off responsibility for several years of recently discovered billing errors. We sincerely appreciate Cboe’s attempt to mitigate some of the potential negative impacts on some customers from its recent years-long billing errors. However, the filings are not limited to just waiving fees and expenses that might otherwise be due from customers for its recently discovered billing error, but would also purportedly abrogate rights of customers who may have claims against Cboe arising from these and future errors.⁵³

The filings did not detail the impacts on different customers or the dollars involved. But also, it didn’t explain how some of the most sophisticated market participants did not detect or attempt to correct the years-long billing error. This is likely because -- as we discussed above -- pricing tiers are often extremely complex, customized, and applied on a retroactive basis. This alone suggests that the bespoke, complex, transaction pricing system is not likely compliant with the Exchange Act’s requirements.

⁵⁰ Memorandum Regarding Telephonic Conference with Cboe Exchange Inc., Kay Smith, SEC, Sept. 24, 2020, available at <https://www.sec.gov/comments/sr-cboe-2020-086/srcboe2020086-7825727-223743.pdf> (reflecting a call on September 11, 2020).

⁵¹ See Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Mar. 19, 2019, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-5151485-183409.pdf>; see also Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm’n, Jan. 2, 2019, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4842084-177140.pdf>.

⁵² See, e.g., Notice of Filing and Immediate Effectiveness of a Proposal to Permit the Exchange to Look Back Only to July 2020 to Correct Certain Billing Errors which were Discovered in October 2020, SEC, Exch. Act Rel. No. 34-91239, (Mar. 2, 2021), available at <https://www.sec.gov/rules/sro/cboebzx/2021/34-91239.pdf> (regarding Cboe BZX); Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Options and Equities Fees Schedules to Adopt a Provision Relating to Billing Errors and Fee Disputes, SEC, Exch. Act Rel. No. 34-90897, (Jan. 11, 2021), available at <https://www.sec.gov/rules/sro/cboebzx/2021/34-90897.pdf>.

⁵³ Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Mar. 26, 2021, available at <https://www.sec.gov/comments/sr-cboebzx-2021-017/srcboebzx2021017-8547761-230719.pdf>.



While the Cboe family of exchanges has seemingly enjoyed changing its rules to collect fees despite nearly entirely disregarding the strictures of the Exchange Act, Commission Rules, and the Commission staff's SRO Fee Filing Guidance, other exchanges have not been so lucky.

For example, just a few months after Cboe overcame HMA's objections to hike its connectivity fees, filings by BOX and MIAX to similarly raise their connectivity fees (albeit, to lower levels than Cboe) were suspended.⁵⁴ More recently, MIAX has repeatedly filed to change its connectivity fees in a way that will materially lower costs for many users, while increasing the costs for some of its heaviest of users. These filings have been withdrawn and repeatedly refiled. Each time, however, the filings contain significantly greater information about who is impacted and how than other filings that have been permitted to take effect without suspension.

For example, MIAX detailed the associated projected revenues generated from the connectivity fees by user class, again in a clear attempt to comply with the SRO Fee Filing Guidance. Further, in its most recent recent filing, MIAX explained that "After the effective date of the First Proposed Rule Change on August 1, 2021, approximately 80% of the firms that purchased at least one 10Gb ULL connection experienced a decrease in their monthly connectivity fees while only approximately 20% of firms experienced an increase in their monthly connectivity fees as a result of the proposed tiered-pricing structure when compared to the flat monthly fee structure."⁵⁵ By contrast, none of the Cboe Fee Filings (or any other filings we have reviewed from the Cboe family of exchanges) has provided near the level of detail to what MIAX has provided.

Put simply, in addition to failing to ensure that all exchange filings comply with the Exchange Act and Commission Rules, we also worry that the Commission's process for reviewing and evaluating exchange filings may be inconsistently applied.

While we wished we had the time to remind the Commission to fulfill its responsibilities and comment on every fee filing, we don't. Neither do other market participants. There are simply too many filings. The absence of public comment should not be interpreted as a lack of public interest, but rather evidence of an overwhelmed public having difficulty keeping up with the sheer number of filings. The Commission and its staff must

⁵⁴ *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, SEC, Exch. Act Rel. No. 84168, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-84168.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, SEC, Exch. Act Rel. No. 84175, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf>.

⁵⁵ MIAX Connectivity Filing, at 6.



fulfill their responsibilities to review and assess all SRO filings, not just those that elicit a comment.

Recommendations for Fee Filings

We urge the Commission to revise its fee filing review process for all SRO Fee Filings to ensure that the staff review and subject fee filings are reviewed for consistency across exchanges with the Exchange Act and Commission rules, and following the guidance provided by the SRO Fee Filing Guidance.

In particular, we recommend the Commission revise the SRO Fee Filing process to:

- Require exchanges to provide at least two weeks advance public notice of fee filing changes to market participants, so that participants may adequately prepare for changes;⁵⁶
- Require exchanges to disclose the details of all oral and written communications with any market participants regarding any fee filings;
- Require exchanges to publish fee structures in a machine-readable format, including the date on which the fee structure takes effect, and all changes;
- Require exchanges to ensure that any fees or rebates are known at the time of trade, and are provided to the executing parties at the time of trade confirmation; and
- Strengthen disclosure of pricing tiers, so as to improve market participants' and regulators' understanding of how they work, and what the impacts of pricing tiers have on market participant behavior and execution quality.

Lastly, the Commission should consider the elimination of various transaction pricing tiers, and particularly those which advantage larger volume traders (and discriminate against smaller traders). At a minimum, pricing shouldn't be based on *who* sends an order or is buying data, but rather the characteristics of the order itself and what data is being bought.

⁵⁶ Notably, this could be accomplished by Revising Rule 19b-4(l) to change the notice to members from two days after filing with the Commission to one month before filing. This advance notice, if applied equally, would allow market participants with sufficient time to adjust their systems and trading strategies. See, QIM Letter.



Conclusion

The Commission is obligated to ensure that SRO fee filings comply with the Exchange Act and its own rules. Unfortunately, it is clear that the Commission and staff's current process for fulfilling this important task is failing.

We urge you to implement the above modest tweaks to better protect investors and market participants, as well as the markets overall. Thank you for your consideration.

Should you have any questions or would like to discuss these matters further, please contact Chris Nagy at (402) 312-7918 or me at (202) 909-6138.

Sincerely,

Tyler Gellasch
Executive Director

Cc: Hon. Hester M. Peirce
Hon. Elad L. Roisman
Hon. Allison Herren Lee
Hon. Caroline A. Crenshaw