



September 28, 2021

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

Re: Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Amend the MIAX Pearl Options Fee Schedule to Remove Certain Credits and Increase Trading Permit Fees  
Release No. 34-92797; File No. SR-PEARL-2021-32

Dear Ms. Countryman:

Susquehanna International Group, LLP (“SIG”) appreciates the opportunity to comment on the above-noted proposal to increase Trading Permit fees by MIAX Pearl, LLC (“MIAX Pearl” or the “Exchange”). SIG asserts that the proposed fee increases should be disapproved, as the Exchange has not established that they represent the equitable allocation of reasonable, and not unfairly discriminatory, fees among MIAX Exchange members.

***Description of Trading Permit Fee Increases***

In its discussion of the proposal to increase its Trading Permit fees, the Exchange noted as follows:

The Exchange issues Trading Permits to Members who are either Electronic Exchange Members [footnote omitted] (“EEMs”) or Market Makers.[footnote omitted] The Exchange assesses Trading Permit fees based upon the monthly total volume executed by the Member and its Affiliates on the Exchange across all origin types, not including Excluded Contracts, as compared to the total TCV [total consolidated volume] in all MIAX Pearl-listed options. The Exchange adopted a tier-based fee structure based upon the volume-based tiers detailed in the definition of “Non-Transaction Fees Volume-Based Tiers” [footnote omitted] in the Definitions section of the Fee Schedule. The Exchange also assesses Trading Permit fees based upon the type of interface used by the Member to connect to the Exchange – the FIX Interface and/or the MEO Interface.

For Members who connect to the automated trading system used by the Exchange for the trading of securities (the "System") via the FIX Interface, the Exchange's legacy and proposed Trading Permit fees are as follows:

	<u>Legacy</u>	<u>Proposed</u>
Tier 1 <sup>1</sup>	\$250	\$500
Tier 2 <sup>2</sup>	\$350	\$1,000
Tier 3 <sup>3</sup>	\$450	\$1,500

For Members who connect to the System via the MEO Interface, the Exchange's legacy and proposed Trading Permit fees are as follows:

	<u>Legacy</u>	<u>Proposed</u>
Tier 1	\$300	\$2,500
Tier 2	\$400	\$4,000
Tier 3	\$500	\$6,000

As indicated above, the Exchange proposes to increase (i) FIX Interface rates by 2 times, 2.8 times, and 3.33 times legacy rates, respectively; and (ii) MEO Interface rates by 8.33 times, 10 times, and 12 times legacy rates, respectively.

***Fee increase proposals must satisfy the requirements of the Securities Exchange Act.***

As you are aware, Securities Exchange Act of 1934, as amended (the "Act") section 6(b)(4) mandates that the rules of an exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities."<sup>4</sup> Section 6(b)(5) of the Act requires that the rules of an exchange be designed to, *inter alia*, "remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest"<sup>5</sup> Section 6(b)(5) also requires that exchange rules not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers".<sup>6</sup>

Rule 700(b)(3) of the SEC Rules of Practice states that the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder ... is on the self-regulatory organization that proposed the rule change" and that a "mere assertion that the proposed rule change is consistent with those requirements ... is not sufficient."<sup>7</sup> It also states that "the description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an

<sup>1</sup> Volume up to 0.30% of TCv.

<sup>2</sup> Volume above 0.30% up to 0.60% of TCv.

<sup>3</sup> Volume above 0.60% of TCv.

<sup>4</sup> 15 U.S.C. 78f(b)(4)

<sup>5</sup> 15 U.S.C. 78(b)(5).

<sup>6</sup> *Id.*

<sup>7</sup> 17 CFR 201.700(b)(3).

affirmative Commission finding.”<sup>8</sup> In its review of exchange rule filings, the Commission should critically evaluate the representations made and the conclusions drawn.<sup>9</sup>

SIG asserts that MIAX Pearl has failed to meet its burden. More specifically, the Exchange has not demonstrated that the subject fee increases (1) provide for the equitable allocation of reasonable dues, fees, and other charges; (2) remove impediments to and perfect the mechanism of a free and open market and a national market system; or (3) protect investors and the public interest. To the contrary, the proposed fee increases fail in these regards and permit unfair discrimination between broker-dealers. We discuss these failings below.

***MIAX Pearl provided no justification for the proposed increases.***

Although MIAX Pearl makes various assertions attempting to support its claims that the proposed Trading Permit fees are consistent with Section 6(b) of the Act, it provides no affirmative justifiable reason to increase its fees whatsoever, and cites to no reason that its legacy fee rates are no longer sufficient. In fact, the sole claim the Exchange makes in this regard is that it proposes to increase its monthly fees “since it has not done so since the fees were first adopted in 2018.”<sup>10</sup> Clearly, the mere lapse of time is not a justifiable basis for a fee increase.

Options exchange fee increases impact investors and the public interest because they add to the cost of providing market maker liquidity, which accounts for over 90% of displayed options liquidity. Given that fee increases tend to widen bid-ask quotation spreads, the cost is effectively passed on to investors. Accordingly, unjustified fee increases harm, rather than protect, investors and the public interest.

Finally, MIAX Pearl has made no case at all that its legacy Trading Permit fees are in any way insufficient. The lack of any affirmative reason to increase the Trading Permit fees is all the more egregious in view of the extraordinary extent of said increases, ranging from 100% to 1100%.

***The proposed fee increases exacerbate an already discriminatory fee structure.***

As noted, MIAX Pearl charges higher Trading Permit fees for Members who connect through the MEO Interface than for Members who connect through the FIX Interface. The Exchange explains that this difference exists because the MEO Interface utilizes greater capacity and resources of the Exchange than the FIX Interface.<sup>11</sup>

The Exchange, however, offers no details to support its conclusory assertion. It provides no description of the “capacity and resources” being utilized, and no information on the nature or extent of the disparity in such utilization between the two Interface types. There is no basis provided, then, to justify the particular disparity levels in the fees charged for the two Interface types. While this is the case for the legacy fee levels, this omission is even more egregious for the proposed fee increases given their exaggerated disparities between the FIX and MEO Interfaces at the various tier levels. As noted above, the proposed Tier 1 increase is double for FIX, but 8.33 times for MEO; the proposed Tier 2 increase is

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<sup>8</sup> *Id.*

<sup>9</sup> See, *Susquehanna International Group v. SEC*, 866 F. 3d 442 (D.C. Cir. 2017), at 447.

<sup>10</sup> Rel. No. 34-92366, p. 8.

<sup>11</sup> *Id.*, p. 7.

2.8 times for FIX, but 10 times for MEO; and the proposed Tier 3 increase is 3.33 times for FIX, but 12 times for MEO.

MIAX Pearl states that its Trading Permit fees are designed to recover a portion of the costs associated with directly accessing the Exchange.<sup>12</sup> However, the Exchange provides no basis whatsoever to establish (i) that the costs of providing such access have grown so dramatically over the past three years, (ii) that the costs of providing access via the MEO Interface have grown so disproportionately to the costs of providing access via the FIX Interface so as to justify the extreme fee disparities between the two, or (iii) that the costs, or any of them, to provide access by way of each Interface type increase as the member's volume levels increase (at all, let alone to the extent commensurate with the respective rates of fee increases).

As such, the result of these fee increases will be unfair discrimination between Exchange Members in violation of Section 6(b)(5) of the Act; and an inequitable allocation of unreasonable fees in violation of Section 6(b)(4) of the Act.

***MIAX Pearl's assertion that its proposed fee increases are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other options exchanges is without merit.***

MIAX Pearl asserts that its proposed Trading Permit fees "are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other options exchanges."<sup>13</sup> In support of this assertion, the Exchange seeks to demonstrate this point in footnote 18 of its rule filing, set out as follows:

See e.g., NYSE Arca Options Fees and Charges, p. 1 (assessing market makers \$6,000 for up to 175 option issues, an additional \$5,000 for up to 350 option issues, an additional \$4,000 for up to 1,000 option issues, an additional \$3,000 for all option issues on the exchange, and an additional \$1,000 for the fifth trading permit and for each trading permit thereafter); NYSE American Options Fee Schedule, p. 23 (assessing market maker \$8,000 for up to 60 plus the bottom 45% of option issues, an additional \$6,000 for up to 150 plus the bottom 45% of option issues, an additional \$5,000 for up to 500 plus the bottom 45% of option issues, an additional \$4,000 for up to 1,100 plus the bottom 45% of option issues, an additional \$3,000 for all issues traded on the exchange, and an additional \$2,000 for 6<sup>th</sup> to 9<sup>th</sup> ATPs; plus an addition fee for premium products). See also CBOE BZX Options Exchange ("BZX Options") assesses the Participant Fee, which is a membership fee, according to a member's ADV. See Cboe BZX Options Exchange Fee Schedule under "Membership Fees". The Participant Fee is \$500 if the member ADV is less than 5000 contracts and \$1,000 if the member is equal to or greater than 5000 contracts. Id.

As noted above, the MIAX Pearl Trading Permit fees are based on trade volume. By contrast, the aforementioned NYSE Arca and NYSE American fees are based on the number of option issues traded by a member. These wholly separate and distinct fee bases make for an "apples-to-oranges" comparison that undercuts the Exchange's "in-line" assertion from the outset.

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<sup>12</sup> *Id.*, P. 8.

<sup>13</sup> *Id.*

The only exchange that MIAX Pearl cites for comparison that, like MIAX Pearl, has a volume-based fee is BZX. Despite having greater market share than MIAX Pearl, and therefore greater trade volume, BZX's fees are lower than MIAX Pearl's proposed fees, particularly the Exchange's proposed fees associated with the MEO Interface. What is more, unlike MIAX Pearl, BZX has only one Tier structure regardless of Interface type; and does not charge more for non-FIX connectivity regardless of the amount of capacity and resource utilization.<sup>14</sup> Accordingly, MIAX Pearl is simply wrong to claim that its proposed Trading Permit fees are in line with, or cheaper than, those of the BZX, which is the only exchange cited by MIAX Pearl for a credible comparison.

Even if MIAX Pearl's proposed Trading Permit fees were in line with, or cheaper than, those of other exchanges, this alone is not a basis to approve the proposed MIAX fees. MIAX offers no information about the capacity and resource 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. It has not established that the other exchange fees are reasonable, nor that this would mean that the MIAX Pearl fees are reasonable as well.<sup>15</sup> In fact, each exchange to which MIAX Pearl compares its access fees have greater market share than MIAX Pearl, which may well be considered to enhance the value of access to those exchanges over that of MIAX Pearl.

The Exchange claimed that its proposed fees are reasonable because they are in line with, or cheaper than, the trading permit fees or similar membership fees charged by other option exchanges.<sup>16</sup> For the reasons noted above, this claim is without merit.

***The Exchange's claim that its proposal is consistent with Section 6(b)(4) of the Act because the proposed fees will not result in excessive pricing or supra-competitive profit, is without merit.***

The Exchange asserts that "its proposal is consistent with Section 6(b)(4) of the Act because the Proposed Access Fees will not result in excessive pricing or supra-competitive profit."<sup>17</sup> In support of this assertion, the Exchange discusses (i) its allocation of various costs associated with providing Exchange access and (ii) projected revenue associated with the proposed Trading Permit fees. Based on these assessments, the Exchange projects that its annualized revenue from the proposed Trading Permit fees would be approximately \$1,170,000, and that its associated annualized expenses would be approximately \$844,741, for a 28% profit margin of \$325,259.<sup>18</sup>

In support of the Exchange's claim that the proposed changes do not result in a "supra-competitive profit", the Exchange notes that this term, under SEC Staff guidance, refers to profits that exceed the profits that can be obtained in a competitive market.<sup>19</sup> It then compares its projected 28% profit margin on the proposed Trading Permit fees to the 2019 operating profit margins of Nasdaq ISE, LLC (83%) and Nasdaq PHLX LLC (67%).

As with the Exchange's fee rate comparisons noted above, its profit margin comparison for its Trading Permit fee revenue to the *overall* operating profit margins of competing exchanges is an unavailing

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<sup>14</sup> This calls into question all the more the disparities between the FIX and MEO Interface fee structures.

<sup>15</sup> The fact that other exchange fees are in effect does not mean that they have been determined to be reasonable.

<sup>16</sup> Rel, No. 34-92366, 15.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, p. 25.

<sup>19</sup> *Id.*, p. 27.



“apples to oranges” comparison. As is widely known, 2019 was a record-setting year for order and trade volume in the securities markets that, together with the full panoply of other exchange revenue sources, resulted in extraordinarily high profit margins. To compare these overall profit margins, with a litany of various unidentified components, to the profit margin of MIAX Pearl’s Trading Permit fee revenue is incredulous. The fortuitously high overall profits of options exchanges in 2019 does not mean that such margins are reasonable expected investment returns.<sup>20</sup> The 28% profit margin projected by MIAX is excessive, and the Exchange provides no credible support to the contrary.

In assessing its costs associated with the provision of Exchange access for purposes of supporting its proposed Trading Permit fees, the Exchange identified multiple third party and internal expense sources. For each expense source, the Exchange asserts that it allocated only that portion which it identified as being specifically mapped to providing the access services associated with the proposed fees.<sup>21</sup> However, the Exchange does not explain how it determined what portion (or percentage) of each identified expense actually supports those access services, nor justify why such unidentified methodology(ies) was appropriate and properly applied. Nor has the SEC been supplied with the base data to which any such methodology(ies) was applied, and so has not been equipped to determine the reliability of the Exchange’s representations.

The same holds true for the Exchange’s revenue projection. The Exchange says that it “projects that its annualized revenue for providing the access services associated with the Proposed Access Fees would be approximately \$1,170,000 per annum, based on a recent billing cycle.” It does not provide or otherwise identify the billing data, nor the methodology(ies) for the annualized projection based upon such data. For both the Exchange’s cost allocation and revenue projections, the SEC has been left to simply “trust the process”.

***The Exchange’s claim that its proposed fees are reasonable, equitably allocated and not unfairly discriminatory because the Exchange, and its affiliates, are still recouping their initial expenditures, is without merit.***

The Exchange stated that it “further believes 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.”<sup>22</sup> The Exchange, however, draws no link between the recoupment of capital outlays with the reasonability, equitable allocation, and lack of unfair discriminatory nature of the proposed fees. It provides no support for this whatsoever.

Moreover, this basis, if accepted, would justify any outrageous fee so long as the Exchange was recouping an investment. This would be an absurd result.

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<sup>20</sup> Notably, MIAX Pearl does not compare its own overall operating profit margin to those of the named competing exchanges; nor does it divulge what its profit margin for Trading Permit fees have been to date.

<sup>21</sup> See, Rel. No. 34-92366, pp. 18 – 25.

<sup>22</sup> *Id.*, p. 28. MIAX Pearl also asserts that “If the Exchange were to attempt to establish unreasonable pricing, then no market participant would join or connect, and existing market participants would disconnect.” *Id.*, p. 13. This point is made in conjunction with the Exchange’s argument that it does not have anti-competitive pricing power. Clearly, however, this prospect would not mean that a given proposed fee is reasonable, and cannot be a test for the same. It is *ex post facto*, and, if accepted, would absurdly qualify any fee no matter how outrageous it may be.

As with the Exchange's other conclusory representations, there is no information offered in support of this allegation. The Exchange provides no details on the noted expenditures, the extent of any such recoupment to date, the reasonability of the rate of recoupment or a justifiable need to accelerate the same. It likewise makes no argument for how the prospect that other exchanges may have recouped their initial expenditures has any bearing on the validity of the instant proposed fees.

***Conclusion***

For the reasons noted above, SIG submits that the Commission does not have a basis for finding that the proposed fee changes are consistent with the Act, particularly with sections 6(b)(4) and (5) thereof. Accordingly, SIG requests that the Commission disapprove the subject proposal.

Respectfully,



Richard J. McDonald