



Invested in America

March 21, 2017

Via Electronic Mail (rule-coments@sec.gov)

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: MIAX PEARL LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the MIAX Pearl Fee Schedule to Establish an Options Regulatory Fee (File No. SR-PEARL-2017-09)

Dear Mr. Fields:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the above-referenced filing (the “Filing” or the “PEARL Filing”) made by MIAX PEARL, Inc. (“PEARL”) with the Securities and Exchange Commission (“Commission”). In the Filing, PEARL applies to amend the fee schedule by establishing an Options Regulatory Fee (“ORF”) of \$0.0010 per contract, and states that the ORF would be assessed “for all options transactions executed, cleared, or ultimately cleared by the Member which are cleared by OCC in the “customer” range, regardless of the exchange on which the transaction occurs. The ORF would be collected indirectly from Members through their clearing firms by OCC on behalf of MIAX PEARL.”² For the reasons outlined below, SIFMA recommends the SEC disapprove the PEARL Filing.

Currently, all listed-options exchanges which assess ORF³ (the Options Exchanges), including PEARL’s sister Exchange, MIAX, specify in their rules that ORF is assessed on all options transactions that are executed or cleared by the Exchange Member in the Customer Range. However, in its rule Filing, PEARL seeks permission to “collect the ORF from such non-member involved in that transaction,⁴” which is outside the scope of the language of approved rules governing ORF on those Exchanges which assess it.

¹ SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over \$2.5 trillion for businesses and municipalities in the U.S., serving clients with over \$20 trillion in assets and managing more than \$67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See Securities Exchange Act Release No. 34-80035 (February 14, 2017), 82 FR 11272 ((February 21, 2017).

³ Bats BZX Exchange, Bats EDGX Exchange, BOX Options Exchange LLC, C2 Options Exchange, Chicago Board Options Exchange, International Securities Exchange, ISE Gemini, Miami International Securities Exchange, NASDAQ BX, NASDAQ PHLX, Nasdaq Stock Market, NYSE MKT and NYSE Arca.

⁴ See 82 FR at 11272.

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In the Filing, PEARL includes language to support the operational processes (“give-ups” or CMTAs) which result in the collection of ORF from a non-Exchange member’s OCC account. “The Exchange notes that, in the limited circumstance in which a Member executes or clears a transaction and then “gives-up” or “CMTAs” the trade to a non-member of MIAX PEARL (which non-member comes the ultimate clearing firm for the transaction), MIAX Pearl will collect the ORF from such non-member involving that transaction.⁵” It is worth noting that the use of the phrase “limited circumstance” is misleading as SIFMA retail firms are generally not members of the Exchanges.

In 2016, Bats BZX Exchange filed to assess ORF on all options transactions OCC clears in the “customer” range on all options exchanges⁶. Given the broad authority sought by BATS and the precedent that no other options-exchange had previously sought authority to apply any transaction-based fee to a non-member, SIFMA submitted a comment letter to the SEC on October 14, 2016⁷ recommending that the Commission disapprove the Bats filing. While PEARL’s Filing is narrower in scope, since it only seeks approval to collect ORF from non-Exchange members on executions that occur on PEARL, both the Bats filing, and the PEARL Filing seek approval to codify the collection of ORF from non-Exchange members.

SIFMA does agree that it is appropriate for PEARL to codify the collection of ORF from non-Exchange members for those trades that take place on the Exchange. SIFMA concedes that today, the self-regulatory model in the securities markets is premised on being supported by broker-dealer funding, and SIFMA supports the need for broker-dealers to contribute to the funding of regulation of listed options trading. However, the Exchanges, including PEARL, are for-profit entities and do not have unlimited authority to charge broker-dealers, or, their retail customers. ORF was designed as a pass-through fee to customers, and many broker-dealers pass through a blended rate on all customer trades to individual investors.

Interestingly, while ORF was designed to be a pass-through fee similar too Section 31 fees, not all broker-dealers pass through this fee (or tax) to their retail customer. This is due to the rate uncertainty and operational complexities associated with ORF. This contrasts with Section 31 fees, which are easily managed by firms because the fee is determinative and transparent. To pass-through ORF, firms typically use a blended rate since the method to calculate the fee varies by Exchange. To further complicate matters, if a trade is executed on two different exchanges, each portion of the trade can have a different ORF, depending on the methodology used to determine the fee (which is why some firms elect to establish a blended rate for ORF). (See SIFMA Whitepaper: *Options Regulatory Fee – A Guide to Exchange Collection Scenarios and Rates*: <http://www.sifma.org/issues/capital-markets/listed-options/resources/>.) Accordingly, given the disparate models, it is impossible to predict at the time the order is routed to the market, what the actual fee will be. No other Exchange transaction has a variable rate not clearly denoted in the fee schedule at the time the order is routed.

While PEARL rightly seeks to codify the ability to collect from non-members for trades on their Exchange, the Filing does not seek permission to codify said collection of ORF on non-member

⁵ *Id.*

⁶ See Release No. 34-78453; File No. SR-BatsBZX-2016-42.

⁷ Link to sifma comment letter on Release No. 34-78849; File No. SR-BATS-2016-42: <https://www.sec.gov/comments/sr-batsbzx-2016-42/batsbzx201642.shtml>.

OCC customer range trades which occur on away Exchanges. SIFMA continues to object to the current practice, which is not codified in any Exchange rule sets, whereby an exchange levies regulatory fees on non-members for executions that do not occur on said Exchange⁸. If the intent of Pearl is to collect ORF (from non-Exchange members) on transactions that do not occur on PEARL, SIFMA recommends that PEARL refile and seek explicit Commission approval to do so.

Today, the seven Options Exchanges (MIAX Options Exchange, MIAX PEARL Options Exchange, Chicago Board Options Exchange, Inc., C2 Options Exchange, Inc., International Securities Exchange, LLC, ISE Gemini, LLC, and BOX Options Exchange LLC) assess an ORF on all contracts that are cleared in the customer range at OCC for all transactions that were either executed or cleared by a member firm or trading permit holder, regardless of the exchange used for execution. SIFMA re-affirms our view that this is an overly broad application of the ORF, and we urge the Commission to reconsider the ability of any options exchange to charge an ORF on transactions executed on other exchanges.

What is more, SIFMA members have indicated that they are currently being assessed the ORF by those seven Options Exchanges, even by those of which they are not a member. This practice simply should not be allowed to continue given that the fees are not supported by relevant exchange rules or the Exchange Act itself. SIFMA continues to stress the importance for the Commission to review these practices to verify that the current practice and assessment of fees is consistent with the existing authority in exchange rules and the Exchange Act. The Commission should review these practices both in terms of charging the ORF to non-members and to charging the ORF to members for their transactions on other exchanges. SIFMA recommends that in addition to reviewing current practices, the Commission should require the Options Exchanges to maintain standardized files that would enhance transparency and ensure the ORF is charged uniformly.

As part of its broad review of ORF, the Commission should direct the exchanges to provide full public disclosure of the categories of regulatory activity covered by the fees and the specific total costs of those activities, along with the total amount revenue they receive from the ORF.⁹ Currently, the Options Exchanges make no such disclosure to the public or to member firms. As the PEARL proposal demonstrates, transparency is necessary to evaluate whether the fees are reasonable and appropriately related to the exchange's stated purpose in imposing them.

While the PEARL Filing does not on its face seek to collect ORF from non-members for trades on away exchanges, the ORF is in fact assessed in practice. SIFMA reiterates the comments made in its comment letter on the BZX ORF SEC filing¹⁰ that to charge a transaction fee to a broker-dealer that is not a member of the exchange is inconsistent with the Exchange Act. Section

⁸ SIFMA members report their February OCC invoices include a debit from PEARL for *all* executions in the customer range during February, as opposed to executions PEARL. This practice is inconsistent with the filing.

⁹ SIFMA recently made a similar request in connection with funding the Consolidated Audit Trail. Letter from Theodore R. Lazo, Managing Dir. & Assoc. Gen. Counsel, Sec. Indus. & Fin. Mkts. Ass'n, and Ellen Greene, Managing Dir., Sec. Indus. & Fin. Mkts. Ass'n, to Brent J. Fields, Sec'y, U.S. Sec. & Exchange Comm'n (July 18, 2016). SIFMA asked the Commission to require self-regulatory organizations ("SROs") "to engage an independent third-party to conduct an audit and review of the SROs' current regulatory revenues and how that money is allocated, and the [Commission] should publish the results of that audit." *Id.* at 14.

¹⁰ See SIFMA Comment Letter - <https://www.sec.gov/comments/sr-batsbzx-2016-42/batsbzx201642.shtml>.

6(b)(4) of the Exchange Act expressly states that an exchange's rules must provide for the "equitable allocation of reasonable...fees, and other charges *among its members*...and other persons *using its facilities*."¹¹

SIFMA reiterates that as a part of its review, the Commission should examine the method each exchange uses to calculate the ORF. Several exchanges have identical or parallel rules instituting an ORF and describing how the ORF is charged. In practice, however, the exchanges do not interpret or apply the ORF rules consistently. As previously stated, SIFMA has identified three methodologies used to assess ORF, as further outlined in its publicly available white paper, *Options Regulatory Fee – A Guide to Exchange Collection Scenarios and Rates*¹². It is SIFMA's belief that only one of the three methods utilized by the Exchanges is accurate, but questions whether it is currently allowed by the Exchange's rule set. While the PEARL Filing would codify this method, in practice, it should also prevent the collection of ORF on those exchanges that did execute any portion of the order.

SIFMA urges the Commission to require PEARL and each of the Options Exchanges to disclose fully and publicly how ORF revenue is allocated and to detail the percentage of regulatory costs covered by the ORF. Each exchange should provide a breakdown of the types of costs associated with its regulation and supervision of members' customer options business. SIFMA remains concerned that exchanges could use ORF revenue to offset costs that go beyond appropriate regulatory expenses, and could in fact, be used to subsidize startup costs for a new options exchange.

For the reasons set forth above, SIFMA recommends the SEC disapprove the PEARL Filing. While SIFMA agrees with the intent of the Filing to codify the practice of the collection of ORF from non-members for executions on the MIAX PEARL Exchange, the Filing does not address the practice of collecting ORF on all transactions in the customer range, regardless of where the transaction occurred. SIFMA re-affirms our view that this is an overly broad application of the ORF, and we urge the Commission to reconsider the ability of any options exchange to charge an ORF on transactions executed on other exchanges.

* * *

SIFMA greatly appreciates the Commission's consideration of our comments on File No. SR-PEARL-2017-009. We would be pleased to discuss these comments in greater detail with the staff of the Commission. If you have any questions, please contact Ellen Greene at (212) 313-1287 or egreene@sifma.org.

Sincerely,



Ellen Greene
Managing Director

cc: The Honorable Michael S. Piwowar, Acting-Chair, SEC
The Honorable Kara M. Stein, Commissioner, SEC

¹¹ 15 U.S.C.A. § 78f(b)(4) (2016) (emphasis added).

¹² http://www.sifma.org/uploadedfiles/issues/capital_markets/listed_options/sifmalotcorf.pdf?n=73317.

Brent J. Fields
March 21, 2017
Page 5

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