



April 10, 2019

Ms. Vanessa Countryman
Acting Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: SIFMA Comment Letter on the Options Regulatory Fee Filings by SR-EMERALD-2019-01.

Dear Ms. Countryman,

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the above-referenced filings submitted by MIAX Emerald, LLC (“MIAX Emerald”, and the “Exchange”)² to the Securities and Exchange Commission (“SEC” or “Commission”). In the filing, the exchange proposes to establish its Options Regulatory Fee (“ORF”).

While SIFMA supports certain aspects of the filing, we recommend the Commission suspend the referenced-filing to provide additional time for the Commission to establish a framework for determining whether the proposed ORFs are consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (“Exchange Act”).³ If the Commission determines the proposals are inconsistent with the Exchange Act, the Commission should institute proceedings to disapprove the filing. Due to the lack of uniform transparency on the amount of the collected ORFs, and the Exchanges’ use of this

¹ SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry’s nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

² Securities Exchange Act Release No. 85251; File No. SR-EMERALD-2019-01 (March 6, 2019).

³ 15 U.S.C. 78f(b).

money, SIFMA requests the Commission to suspend the filing to ensure the proposed ORFs provide for the equitable allocation of reasonable fees, as required by Section 6(b)(4) of the Exchange Act.⁴

SIFMA has submitted numerous comment letters to the Commission on ORF filings submitted by the options exchanges in recent years advocating for changes.⁵ To date, some of the options exchanges have amended their filings consistent with SIFMA's recommendations. For example, many exchanges have codified that ORF rates should be changed only two times per year, February and August, and that the exchange will provide members with 30 days notification. Additionally, SIFMA applauds Cboe Options and C2 on their filings, which provided additional transparency pertaining to ORF revenues and expenditures. However, adoption of SIFMA recommendations has not occurred on all the Exchanges.

Recently, each exchange was required to describe in a SEC filing the methodology used to assess and collect ORF for options trades that clear in the customer range at the Options Clearing Corp ("OCC"). While each exchange has refiled with the SEC, SIFMA continues to advocate for changes to the assessment of ORFs. SIFMA recommends that the SEC work with the Exchanges to amend the current rules to adopt a more transparent and harmonized rules for the assessment and collection of ORF.

1. Issues with the Current ORF Methodology

A. Uncertainty, Complexity in Exchange Options Regulatory Fee Calculation

Exchanges' ORF is intended to be a pass-through fee to customers', but ORFs differ across the exchanges and are difficult to predict and manage. Because of ORFs variability, broker-dealers cannot sufficiently compute the fee at the time of order entry. That is why some firms do not pass the fee through to their customers and other firms charge a blended rate which is derived from data from prior executions. SIFMA would prefer that ORF be structured similarly to the Commission's fees under Section 31 of the Exchange Act ("SEC Section 31 Fees").

The Exchanges use three different methodologies to impose ORFs, which vary by exchange group. The NYSE group "assesses ORFs to ATP Holders for all options transactions cleared (but not necessarily executed) by an ATP Holder through the OCC in the customer range regardless of the exchange that the transaction occurs on."⁶ Nasdaq collects ORFs from the broker-dealer that clears the trade, including non-member firms, for trades that occur on the exchange. For executed trades on away venues, ORF is

⁴ 15 U.S.C. 78f(b)(4).

⁵ See Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated Sept. 13, 2017, *available at [Link](#)* ; See Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated July 13, 2017, *available at [Link](#)* ; See Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated May 5, 2017, *available at [Link](#)* ; See Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated March 21, 2017 *available at [Link](#)* ; See Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated October 14, 2016 *available at [Link](#)* ; See Letter from Ellen Greene, Vice President, SIFMA, to Elizabeth Murphy, dated October 23, 2013 *available at [Link](#)*.

⁶ Securities Exchange Act Release No. 82992; File No. SR-NYSEAMER-2018-11 (April 10, 2018).

collected from exchange clearing firm members. The third method, utilized by Cboe, MIAX exchange groups and BOX, imposes the ORF on all customer-range transactions cleared by a member, even if the transactions do not take place on the Exchange. The ORF is collected by OCC on behalf of the Exchange from the Clearing Firm that ultimately clears the transaction, regardless if they are an exchange member.

The difficulty in determining the amount of ORFs to pass through to retail is compounded by the lack of transparency into how the Exchanges calculate the broker-dealers' bill. Unlike established vendor / customer relationships, neither exchange members nor non-member firms receive an invoice or transaction details supporting the ORFs collected by each exchange. Rather, the OCC provides each exchange with a report from which they derive the monthly billing for both member and non-member firms, and each exchange uses this to direct the OCC to debit the funds from the applicable clearing firms account on a monthly basis. As a result, firms have little to no opportunity to rectify any billing discrepancies. Additionally, this method of billing for ORFs prevents broker-dealers from ensuring that the exchanges fees are reasonable.

Further, while most of the options-exchanges agreed to comply with SIFMA's guidance to change rates two times a year, several exchanges failed to comply with this policy by recently changing their ORFs. SIFMA requested that the exchanges adopt this methodology to reduce the operational risk associated with system changes. Due to the complexity of ORFs, requiring firms to modify their systems only twice a year ensures that firms can prioritize upcoming ORF changes and customers are charged the appropriate blended rate.

B. Exchanges' ORF Assessment and Collection Policies Do Not Comply with the Exchange Act

The Exchanges have not met their burden of showing the ORFs are reasonable, as required by section 6(b)(4) of the Exchange Act⁷ nor shown that the fees are designed to perfect the mechanism of a free and open market and a national market system and not permit unfair discrimination between brokers or dealers, as required by Section 6(b)(5) of the Exchange Act.⁸ To show that the proposed ORFs are reasonable, the Exchanges must provide adequate information to show how the revenues from ORFs are related to the actual regulatory costs incurred from surveillances, investigations and examinations. Additionally, Exchanges must explain how charging ORFs for trades occurring on other exchanges' markets, and not contributing to its own regulatory costs, promote a free and open market and not discriminating against dealers.

Prior to increasing ORF fees, the Exchanges must provide detailed accounting information on the appropriate level of ORFs based on past and anticipated ORF revenues compared to the past and

⁷ 15 U.S.C. 78f(b)(4)

⁸ 15 U.S.C. 78f(b)(5)

anticipated regulatory costs. While Cboe took the positive step of providing the types of costs included in its estimates, and the associated percentages of direct and indirect costs compared to anticipated ORF revenues,⁹ all the Exchanges must provide this information and more. In addition to the information provided by Cboe, to show the fees are reasonable, the Exchanges should provide detailed accounting information, including the actual numbers, on the anticipated ORF revenues compared to anticipated regulatory costs and a snapshot of its past reporting of ORF revenues compared to the incurred regulatory costs. Providing this additional information ensures the Commission, and market participants, can verify the Exchanges' claims that the ORFs are reasonable.

SIFMA continues to question the Exchanges practice of charging ORFs for trades executed on an away market, thereby effectively charging firms multiple times for the same execution. SIFMA disagrees that ORFs charged for trades executed on another market are reasonable because these ORF revenues do not cover a corresponding cost since there is no duty to surveil trades occurring on other exchanges. This practice allows new exchanges to impose ORFs once they become operational and thus permitting new exchanges to receive revenues solely because of their status as an exchange. There is no similar regulatory fee assessed by the U.S. Equities Exchanges, and SIFMA questions its appropriateness in Listed Options. Additionally, SIFMA sees little economies of scale as exchange families increase the number of Exchanges they own and ORFs they impose. For example, with the MRX filing, now each of Nasdaq's six listed-options exchanges has an ORF rate in their rule book with no description of how the regulatory costs are reduced through shared services. Conversely, venues with market share below 5% have ORF rates comparable to venues whose market share is substantially greater. Consequently, retail and institutional investors become responsible for funding an exchange's opaque regulatory expenses on terms that are unreasonable.

The Exchanges' practice of charging ORFs to non-member clearing firms unfairly discriminates against the OCC clearing members. Placing the burden on paying the ORF solely on the OCC clearing member, without consideration of its exchange membership status or where the trade occurs, unfairly discriminates against clearing firms. While ORF was intended to be a pass-through fee to retail, many firms do not collect the fee from their customers due to the complexity involved in determining the applicable rate. Those firms that do collect the fee from retail typically charge a blended rate which is lower than the actual fee since it is impossible to determine the fee at the time of order entry and firms do not want to overcharge ORF to their retail clients. Instead, exchanges should only be allowed to charge for transactions executed on their exchange and reasonably allocate that cost across the market participants that impact the exchanges' regulatory costs.

⁹ Cboe Options, C2, *supra*, at 2-3.

2. Recommendations for Options Regulatory Fee

A. Eliminate ORF Assessment on Away Exchanges

As discussed earlier in this letter, SIFMA does not support the practice whereby certain exchanges assess the options regulatory fee for all executions that occur in the customer range that were executed or cleared by an exchange member, regardless of where the trade occurred. Rather, SIFMA promotes a transparent model where an exchange assesses ORF only on trades (that clear in the customer range at OCC) that are executed on the exchange.

B. Requirement to Achieve Minimum Market Share Threshold to Assess ORF

SIFMA disagrees with the rationale that exchanges can assess and collect ORF upon their launch. SIFMA recommends that an exchange should achieve a minimum market share threshold prior to assessing an options regulatory fee. The options regulatory fee allows exchanges with diminutive market share to assess and collect ORF to support their regulatory operations. For example, according to OCC, on April 2, 2019, three listed options exchanges had market share less than 0.30%, yet each venue assess ORF which funds regulation. SIFMA remains steadfast in its belief that if ORF rules were altered and SIFMA's 'eat what you kill' approach was adopted, the simplicity and uniformity of the practice across all markets would enhance market structure.

C. Timing and Disclosure of Rate Changes

SIFMA recommends that the Commission develop a framework for the Exchanges to follow prior to adopting additional changes to the options regulatory fee. Each listed-options exchange should be required to publicly disclose how much ORF is collected and how it uses those revenues on regulatory expenses. Exchanges should also be required to provide both member and non-member firms with a detailed invoice for ORF. This would allow firms to reconcile their invoice on an execution by execution basis and would ensure that firms are not unfairly subsidizing U.S. Options Exchanges regulatory programs. Firms should have an opportunity to challenge billing discrepancies and be provided an opportunity to rectify errors. This practice would be consistent with exchange rules that provide exchange member with a process when billing issues arise. Regardless of exchange membership, firms do not receive an invoice or other exchange disclosure itemizing the ORF sum that is debited from their OCC account. This practice should cease since it inconsistent with other exchange rules and does not exist on the U.S. Equity Markets.

Lastly, the cadence and notification timelines for rate changes must be codified by all exchanges. SIFMA recommends that all exchanges should be required to provide 30 days-notice for ORF rate changes to *all* OCC Clearing Members (since ORF collection is not limited to exchange members). Rates should only be changed two times per year to reduce operational complexity and reduce risk.

* * *

SIFMA appreciates the Commission's consideration of the issues raised above and would be pleased to discuss these comments in greater detail. If you have any questions or need any additional information, please contact me (at 212-313-1287 or egreene@sifma.org).

Sincerely,

A handwritten signature in cursive script that reads "Ellen Greene".

Ellen Greene
Managing Director