October 29, 2021

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

Re: File Nos. SR-BOX-2021-22; SR-CBOE-2021-044; SR-C2-2021-012; SR-NASDAQ-2021-057; SR-ISE-2021-16; SR-Phlx-2021-39; SR-MIAX-2021-48; SR-EMERALD-2021-33; SR-PEARL-2021-48

Dear Ms. Countryman:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the above-referenced proposed rule changes filed by the BOX Options Exchange, Inc ("BOX"), Cboe Exchange, Inc. ("CBOE Options"), Cboe C2 Exchange, Inc. ("C2"), Nasdaq Options Market LLC ("NOM"), Nasdaq ISE, LLC ("ISE"), Nasdaq PHLX LLC ("PHLX"), MIAX LLC ("MIAX"), MIAX Emerald, LLC ("MIAX Emerald"), and MIAX PEARL, LLC ("MIAX Pearl") (collectively, the "Exchanges") with the Securities and Exchange Commission ("Commission") under Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act").[2] Due to continued extremely high options trading volumes this year, Cboe

[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). For more information, visit http://www.sifma.org.

[2] See Release No. 34-93045 (September 17, 2021), 86 FR 52937 (September 23, 2021) (SR-BOX-2021-22); Release No. 34-92597 (August 6, 2021), 86 FR 44451 (August 12, 2021) (SR-CBOE-2021-044); Release No. 34-92596 (August 6, 2021), 86 FR 44461 (August 12, 2021) (SR-C2-2021-012); Release No. 34-92600 (August 6, 2021), 86 FR 44455 (August 12, 2021) (SR-NASDAQ-2021-057); Release No. 34-92577 (August 5, 2021), 86 FR 44092 (August 11, 2021) (SR-ISE-2021-16); Release No. 34-92585 (August 5, 2021), 86 FR 44096 (August 11, 2021) (SR-Phlx-2021-39); Release No. 34-93368 (October 15, 2021), 86 FR 58356 (October 21, 2021) (SR-MIAX-2021-48); Release No. 34-93367 (October 15, 2021), 86 FR 58315 (October 21, 2021) (SR-EMERALD-2021-33); Release No. 34-93369 (October 15, 2021), 86 FR 58360 (October 21, 2021) (SR-PEARL-2021-48). SR-MIAX-2021-48 replaces SR-MIAX-2021-38, which was filed on August 12, 2021 and withdrawn on October 7, 2021. See Release No. 34-92725 (August 23, 2021), 86 FR 48260 (August 27, 2021) (Notice of Filing); Release No. 34-93304 (October 13, 2021), 85 FR 57866 (October 19, 2021) (Notice of Withdrawal). SR-EMERALD-2021-33 replaces SR-EMERALD-2021-27, which was filed on August 12, 2021 and withdrawn on October 7, 2021. See Release No. 34-92726 (August 23, 2021), 86 FR 48268 (August 27, 2021) (Notice of Filing); Release No. 34-93303 (October 13, 2021), 85 FR 57882 (October 19, 2021) (Notice of Withdrawal). SR-PEARL-2021-48 replaces SR-PEARL-2021-

Options, C2, MIAX, MIAX Pea1rl, and BOX in their filings all propose to decrease their Options Regulatory Fee ("ORF") rates ("Reducing Exchanges"). Similarly, ISE, NOM and PHLX in their filings all propose to suspend their ORF charges from October 1, 2021 to January 31, 2022, and then recommence the ORF on February 1, 2022 subject to an assessment of whether their current ORF rates are set at the right level at that time ("Suspending Exchanges"). Unlike the other exchanges, however, MIAX Emerald proposes in its filing to increase its ORF rate ("Increasing Exchange").

As discussed below, SIFMA supports the filings by the exchanges to reduce their ORF rates and suspend their ORF charges as mechanisms to align the exchanges' revenue with their regulatory expenses in light of the significant options trading volume increase that has occurred since the beginning of the COVID-19 pandemic. Given these filings and the current options trading volumes, it is inconceivable that MIAX Emerald would seek to increase its ORF rate. Accordingly, SIFMA recommends that the Commission suspend the MIAX Emerald filing for the reasons set forth below.

I. The Proposed Rule Changes

As the Exchanges all note in their filings, ORF revenue, when combined with all of an exchange's other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the exchange for the supervision and regulation of members' customer options businesses. This includes performing routine surveillance, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities by the Exchanges.

The Reducing Exchanges note that as a result of their reviews of the amount of ORF revenue to be collected versus regulatory expenses, they determined to reduce the ORF rate charged on customer transactions. The Reducing Exchanges believe that the revenue from decreased ORF rates, when combined with all of the Exchanges' other regulatory fees and fines, would allow the Exchanges to continue covering a material portion of their regulatory costs, while lessening the potential for generating excess revenue that may otherwise occur using the current rate given the record-high volume levels in the options market.

Similarly, the Suspending Exchanges note that record-high options trading volumes and volatility in 2021, coupled with lower regulatory costs, led them to waive their ORF. The Suspending Exchanges note that they continuously monitor revenue from the ORF and find it difficult to determine when the volumes will return to more normal levels. These exchanges noted that they determined to suspend their ORF so that they can avoid future rule changes to

38, which was filed on August 12, 2021 and withdrawn on October 7, 2021. See Release No. 34-92728 (August 23, 2021), 86 FR 48253 (August 27, 2021) (Notice of Filing); Release No. 34-93301 (October 13, 2021), 86 FR 57879 (October 19, 2021) (Notice of Withdrawal).

adjust their ORF rate and allow for more time for options trading volume and volatility to normalize. They believe that such a normalization will allow them to more accurately assess the ORF rate that needs to be charged in the future to ensure that the ORF revenue collected does not exceed their total regulatory costs. The Suspending Exchanges further note that on February 1, 2022, when their ORFs recommence, they anticipate reinstituting the ORF at their current rate or filing proposed rule changes to bring their ORFs in line with their regulatory costs.

MIAX Emerald, the one Increasing Exchange, has filed to increase its ORF rate by approximately 266% more than its current rate. MIAX Emerald asserts that this change will balance its regulatory revenue against anticipated regulatory costs. In support, the exchange notes that its ORF rate has remained unchanged since the fee was first adopted in 2019 and that its regulatory cost structure has significantly increased since that time. The exchange states that this will bring its ORF rate in line with other "more mature, established exchanges."

II. Prior SIFMA Positions on the ORF

SIFMA and its member firms have long been concerned about the ORF fee collection practices of all of the options exchanges since the fee was first implemented by Cboe Options in 2009 and subsequently adopted by the other options exchanges over the years.[3] These concerns have generally focused on the confusion faced by firms and investors related to the ORF charges as well as the lack of transparency related to the determination of the level of ORF rates and the use of the ORF revenue by exchanges.

On the confusion front, SIFMA notes there are currently three different models for assessing the ORF on customer transactions among the exchange groups. SIFMA has previously discussed and commented on these models in prior letters to the Commission.[4] In addition to the complexity of having to grapple with three different models for assessing the ORF charges, both customers and firms must deal with different ORF rates among the individual exchanges. For instance, after the submission of the filings noted above, Cboe Options' new ORF rate is $.0017 per contract, whereas the BOX Options' new ORF rate is $.00295 per contract and MIAX's new ORF rate is $.0019 per contract. Coupled with the three different ORF assessment methodologies, these different ORF rates among the individual exchanges makes it very difficult

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[3] See, e.g., Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated August 27, 2019 (https://www.sec.gov/comments/sr-nyseamer-2019-27/srnyseamer201927-6032478-191228.pdf); Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated April 10, 2019 (https://www.sec.gov/comments/sr-emerald-2019-01/sremerald201901-5343269-184039.pdf); and Letter from Ellen Greene, Managing Director, SIFMA, to Brent Fields, dated September 13, 2017 (https://www.sec.gov/comments/sr-phlx-2017-54/phlx201754-2442743-161060.pdf).

[4] See, e.g., Letter from Ellen Greene, Managing Director, SIFMA, to Vanessa Countryman, dated August 31, 2020 (https://www.sec.gov/comments/sr-cboe-2020-069/srcboe2020069-7715510-222948.pdf).

for customers and firms to predict how much in ORF charges a particular option transaction will have.

On the transparency front, SIFMA notes that exchanges historically have provided very little public details regarding how they determine the level of their ORF rates. For example, the current rule filings do not provide a dollar breakdown of the Exchanges' regulatory costs or how the planned ORF rates will cover those costs.[5] Similarly, the Exchanges have not publicly provided, other than at a high-level, details on the actual regulatory functions that the Exchanges use the ORF revenue to fund, and no exchange has publicly provided the costs of those functions. SIFMA believes that greater transparency is especially important now as the Exchanges have moved to for-profit models and many of the options exchanges are part of larger holding company structures in which the parent holding company is listed and publicly traded.

SIFMA has noted, for instance, that the way the ORF is implemented at certain exchange families appears to allow such an exchange family to launch a new options exchange without having any out-of-pocket costs for the regulatory expenses of the new exchange once it launches in production. In other words, a newly formed exchange at such an exchange family can start collecting ORF revenue on customer options transactions without having executed a single trade. These newly formed exchanges often have very little market share but can charge an ORF similar to that of an exchange with substantial market share. It is also possible that an exchange may be able to launch other commercial endeavors if they can somehow point to some of the costs associated with those endeavors as being regulatory in nature. The current lack of public transparency regarding the Exchanges' determination of the level of ORF rates and Exchanges' use of the ORF revenue causes these types of questions to be raised by member firms.

III. Discussion

A. Reducing and Suspending ORF Charges

SIFMA supports the decisions of the Reducing and Suspending Exchanges in their filings to effectively reduce their ORF charges. As the Reducing and Suspending Exchanges note in their filings, options exchange volumes have significantly increased since the COVID-19 pandemic started affecting the markets in March 2020. OCC's recent September 2, 2021 press release notes that August 2021 options volume was 30.8% higher than August 2020 volume, with August 2021 being the highest August monthly volume ever, and that year-to-date options

[5] See, e.g., Exchange Act Release No. 34-93045 (September 17, 2021), 86 FR 52937 (September 23, 2021) (File No. SR-BOX-2021-22).

volume is 36.4% higher than the same period in 2020.[6] Similarly, March 2021 volume was the highest options volume month in the history of the U.S. options markets and the June 2021 volume was a close second.[7] This volume increase has resulted in a significant increase in the amount of ORF revenue collected by the options exchanges, leading to scenarios in which ORF revenue coupled with an exchange's other regulatory fees could exceed 100% of the exchange's projected regulatory costs.

Given the record options volumes and the resulting increases in the amount of ORF revenue collected by the Reducing and Suspending Exchanges, SIFMA believes that it is appropriate for the exchanges to reduce or suspend their ORF rates. In making these comments, SIFMA is not taking a position on whether the Exchanges' filings comply with the Exchange Act requirements for fee filings and the Commission staff's May 2019 guidance regarding those requirements.[8] The Commission as the regulator of national securities exchanges is the one that ultimately makes this determination. Nonetheless, SIFMA member firms support the ORF decreases and suspensions.

With regard to the ORF suspensions, SIFMA further recognizes the Suspending Exchanges' arguments that the suspensions will allow them to avoid over collecting on ORF revenue while also allowing them time to determine what the ORF rate should be once options trading volume stabilizes. Once the ORF is reinstated by the Suspending Exchanges in February 2022, we fully expect that the Suspending Exchanges will reduce their ORF rates if options trading volume does not decrease.

B. Increasing ORF Charges

As the fee filings that are the subject of this comment letter indicate, ORF revenue is at an all-time high for the Exchanges due to the recent record options trading volumes. This increased ORF revenue leads SIFMA to question why the increased ORF rate by the Increasing Exchange, MIAX Emerald, is supportable under the Exchange Act standards for fee filings, which require exchange fees to be (i) reasonable, (ii) equitably allocated, (iii) not unfairly discriminatory, and (iv) not an undue burden on competition.[9]. MIAX Emerald states in its filing that the increase will bring them in line with more mature exchanges. However, MIAX Emerald currently has 3.8% of the options market share based on 2021 year-to-date volume. This puts

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[6] See (https://www.theocc.com/Newsroom/Press-Releases/2021/09-02-OCC-August-2021-Total-Volume-Up-30-9-Percent).

[7] See, e.g., Exchange Act Release No. 34-92597; File No. SR-CBOE-2021-044 at 4.

[8] See (https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees).

[9] See, e.g., Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Exchange Act.

them near the bottom of listed options exchange market share, with only two exchanges having a smaller share.[10] Even if MIAX Emerald did have higher market share, that would not demonstrate the fee change is consistent with the Exchange Act fee filing standards.

MIAX Emerald also argues that it is increasing its ORF rate because its regulatory cost structure has significantly increased since it became an options exchange. Again, this assertion is not a basis to demonstrate that the fee increase is consistent with the Exchange Act. In fact, the actions by the Reducing and Suspending Exchanges suggest that MIAX Emerald cannot make such a showing. In this regard, even if regulatory fees for the exchange have substantially increased, ORF revenue also has substantially increased as a result of the record options volumes. As noted in the other filings, revenue from ORF has increased beyond what the Reducing and Suspending Exchanges projected, causing them to effectively reduce their ORF charges. In this current high-volume environment, any increase in regulatory fees should be more than offset by the ORF revenue received by the options exchanges. Based on the foregoing, we fail to understand how MIAX Emerald's ORF increase is consistent with the Exchange Act fee filing standards, and therefore recommend that the Commission suspend the MIAX Emerald filing.

Of course, we further note the commenting public has no way to test any of the assertions made by the Suspending and Reducing Exchanges and the Increasing Exchange in their filings because none of the options exchanges provide any real transparency into their actual regulatory costs and the numbers they use to determine their ORF rates.

C. The Need for ORF Rate Transparency

SIFMA believes that perhaps the biggest issue related to the ORF practices of the options exchanges is the lack of detail regarding how the exchanges determine their ORF rates as well as the regulatory functions and the costs of those functions they use the ORF revenue to cover. In the future, SIFMA believes that the Commission should consider in connection with ORF filings ways to enhance the information provided by the options exchanges with the ultimate goal of having the exchanges provide actual breakouts in dollar amounts of the ORF revenue collected as well as the regulatory functions and the costs of those functions the ORF revenue is used to cover. Such breakouts should be designed to provide enough detail to allow market participants to have a reasonable picture of the regulatory functions that the exchanges use ORF revenue to fund as well as the costs of those functions. The Commission could consider its 2004 proposed amendments to Form 1 as a reference point in connection with determining the level of detail

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[10] See Cboe Listed Options Exchanges Historical Market Share (September 30, 2021). By way of comparison to some longer-established options exchanges, Cboe Options has 15.1% market share, PHLX has 12.0% market share, Arca has 10.2% market share, Cboe BZX has 8.1% market share, and NASDAQ and NYSE American each have 7.8% market share.

that options exchanges provide regarding the amount of ORF revenue collected as well the regulatory functions and their associated costs that the ORF revenue is used to fund.[11]

SIFMA fails to understand why there would be objections to exchanges providing more public detail regarding their regulatory costs as such costs does not seem to be an area of competitive concern among the exchanges. Furthermore, this current lack of detail on such costs does not allow market participants and the public the ability to judge whether an exchange's regulatory costs are appropriate. In fact, this lack of transparency could be fostering a scenario in which there is no incentive among the options exchanges to control their regulatory costs. SIFMA understands that many of the regulatory functions of the options exchanges have been outsourced to FINRA.[12] It would seem that there should be certain efficiencies that could be gained from a regulatory cost perspective by having a single provider such as FINRA provide the same regulatory services to multiple exchanges. Without further transparency into these costs, market participants have no way of understanding whether exchanges' regulatory costs as well as the costs of FINRA's services are appropriate.

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SIFMA greatly 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,

Ellen Greene

Ellen Greene
Managing Director
Equities & Options Market Structure

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[11] See Exchange Act Release No. 50699 (November 18, 2004), 69 FR 71125 (December 8, 2004). In this release, the Commission proposed among other things amendments to Form 1 that would require exchanges to provide detailed disclosure regarding the portion of their overall revenues devoted to regulatory expenses as well as a break-down of those expenses.

[12] In September 2017, the CEO of FINRA noted in a speech that FINRA had entered into Regulatory Services Agreements with 19 exchanges that operate 26 stock and options markets at the time of his speech. FINRA's CEO further noted that through these agreements, and in coordination with the exchanges, FINRA's surveillance canvassed 99.5 percent of U.S. stock market trading volume and about 65 percent of U.S. options trading activity. See Speech by Robert Cook, President and CEO, FINRA titled "Equity Market Surveillance Today and the Path Ahead" dated September 20, 2017 (https://www.finra.org/media-center/speeches-testimony/equity-market-surveillance-today-and-path-ahead).