

January 26, 2022

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

Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

RE: Exchange Act Rel. Nos. 34-93557 and 34-93883, File No. SR-IEX-2021-14;¹
Exchange Act Rel. No. 34-93937, File No. SR-MEMX-2021-22;² and Exchange Act Rel.
No. 34-93887, File No. SR-C2-2021-019³

Dear Secretary:

The Healthy Markets Association⁴ writes to comment on the above-referenced filings.⁵

HMA has raised concerns regarding exchanges' failures to meet their burdens under the Exchange Act and Commission Rules for years, and we welcome efforts by the Commission and staff to better scrutinize exchanges' filings. However, as we described in our October letter to Chair Gensler⁶ and as we describe below, we are concerned with the consistency and equitability of that scrutiny.

Below, we highlight three recent exchange filings; one each from IEX, MEMX, and Cboe C2.

¹ Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fee Schedule for Market Data Fees, SEC, Exch. Act Rel. No. 34-93557, Nov. 10, 2021, available at <https://www.sec.gov/rules/sro/iex/2021/34-93557.pdf> ("IEX Filing"); *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend its Fee Schedule for Market Data Fees*, SEC, Exch. Act Rel. No. 34-93883, Dec. 30, 2021, available at <https://www.sec.gov/rules/sro/iex/2021/34-93883.pdf> ("Suspension Order").

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Fee Schedule to Adopt Connectivity Fees*, SEC, Exch. Act Rel. No. 34-93937, Jan. 10, 2022, available at <https://www.sec.gov/rules/sro/memx/2022/34-93937.pdf> ("MEMX Filing").

³ *Notice of Filing and Order Granting Accelerated Approval of a Proposed Rule Change Relating to Certain Fine Amounts in Rule 13.15, which Governs the Exchange's Minor Rule Violation Plan, and Non-substantive Clarifying Changes*, SEC, Exch. Act Rel. No. 34-93887, Dec. 30, 2021, available at <https://www.sec.gov/rules/sro/c2/2021/34-93887.pdf> ("Cboe C2 Filing").

⁴ To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

⁵ Notably, the SRO section of the Commission's website lists the due date for comments to the IEX Filing as January 19th, when the comments were not due until today, January 26th. Frankly, these types of small errors may materially impact market participants' ability to effectively offer informed comments, and are likely indicative of an overworked staff.

⁶ See Letter from Tyler Gellasch, HMA, to Hon. Gary Gensler, SEC, Oct 29, 2021, available at <https://www.sec.gov/comments/sr-cboeedga-2021-017/srcboeedga2021017-9360012-261666.pdf>.



First, in November, IEX filed to begin charging in January for its proprietary market data streams.⁷ In particular, the exchange would begin charging “\$500 per month for real-time access to the TOPS feed; \$2,500 per month for real-time access to the DEEP feed; and \$500 per month to redistribute either the TOPS or DEEP feed (or both TOPS and DEEP) in real time.”⁸ Subscribers could continue to get delayed data for free. While IEX would generally charge for redistributions, it would not charge for redistributions that are: (1) internal to firms and their affiliated parties; or (2) delayed by at least fifteen milliseconds.⁹

Unlike filings from the dominant exchange families for similar products that have been permitted to go into effect, the IEX Filing attempted to (1) explain how it arrived at the fees using a “cost plus” methodology (and in so doing, disclosed its costs of production for the feeds), and (2) assess the impact on data subscribers, “both generally and in relation to other Data Subscribers, i.e., to assure the fee will not create an undue financial burden on any participant and will not have an undue impact in particular on smaller Data Subscribers and competition among Data Subscribers in general.”¹⁰ Additionally, the fees to be charged by IEX would be significantly lower than those of its competitor exchanges.

Nevertheless, just days before the fees were to kick in, the Commission staff issued the Suspension Order. Of course, the IEX Filing should be scrutinized for compliance with both the Exchange Act and Commission Rules. And we do not pass judgment on whether the IEX Filing meets that burden. That said, given that other exchanges’ filings have been permitted to take effect with far less information and evidentiary support, we continue to question the consistency of the scrutiny being applied.

Second, on the same day as the Suspension Order on the IEX Filing, MEMX was making a data-related filing of its own.¹¹ The MEMX Filing would charge significant, new connectivity fees. Again, we take no position on whether the MEMX Filing meets its burden under the Exchange Act and Commission Rules. And, again, we note that the exchange provided significantly greater information than past filings of its competitors for similar services.

However, the MEMX Filing does not appear to materially address one key issue: the exchange’s ownership structure. As currently organized, when the exchange lifts fees broadly, some of those fees may be imposed upon its owners. However, the owners

⁷ IEX Filing, at 1.

⁸ IEX Filing, at 6.

⁹ IEX Filing, at 6. Notably, delayed data may be extremely valuable to firms seeking to engage in transaction cost analysis, but is of limited utility for time-sensitive traders.

¹⁰ IEX Filing, at 3, 6-7.

¹¹ MEMX Filing.



may nevertheless recoup those higher costs – plus the additional revenues collected from non-owners. This is clearly a disparate impact on different market participants.

Will this filing be suspended? On what grounds? Unlike the IEX Filing, the MEMX Filing appears to be already in effect, meaning that the higher fees are already being assessed. Why the difference in treatment?

Third, also on December 30th, Cboe C2 filed to lower fines imposed on a subset of its most significant customers (*i.e.*, market makers) for violations of its rules.¹²

Again, we take no position on whether the filing meets its obligations under the Exchange Act or Commission Rules. However, we note that the Cboe C2 Filing offered essentially no data to support the action, including how lowering fines for minor trading violations could reasonably lead to improved quoting behavior on the exchange. Nor did it offer a detailed analysis of its potential impact on other market participants. Nevertheless, the Commission staff granted *accelerated approval* of the filing. Why was it necessary and appropriate to grant approval before the filing was even released for public comment?

Ultimately, the Commission is obligated to review exchange filings and determine whether those filings comply with the law and Commission rules. Despite the reality that there are hundreds of filings per year related to exchange fees, the SEC appears to be ignoring the law and its own guidance, instead applying ad hoc, inconsistent standards to each exchange filing as it comes. Worse, as we explained in our October 2021 letter to Chair Gensler, whatever standards being applied appear to consistently favor some, while disfavoring smaller exchange families.

In our view, the handling of these filings demonstrates the immediate need for the Commission to improve its staff review process for exchange filings. While new rules may be appropriate, significant improvements could be made by simply subjecting different exchanges to the same level of scrutiny for compliance with the Exchange Act and Commission rules, and following the SRO Fee Filing Guidance.¹³

Further, failure to act will not only continue inconsistent protections for investors and other market participants, but also open the Commission up to unnecessary litigation risks and perpetuate market uncertainty.

¹² *Cboe C2 Filing*.

¹³ *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>.



Conclusion

Thank you for your consideration. We again urge the Commission and staff to implement and enforce a consistent standard for exchange fee filings. Guidance and enforcement are both essential.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Tyler Gellasch', written in a cursive style.

Tyler Gellasch
Executive Director

Cc: Haoxiang Zhu, Director, Division of Trading and Markets