

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89320; File No. SR-MRX-2020-14)

July 15, 2020

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Its Pricing Schedule at Options 7, Section 5, Other Options Fees and Rebates, in Connection With the Pricing for Orders Entered Into the Exchanges Price Improvement Mechanism

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 1, 2020, Nasdaq MRX, LLC (“MRX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend its Pricing Schedule at Options 7, Section 5, Other Options Fees and Rebates, in connection with the pricing for orders entered into the Exchange’s Price Improvement Mechanism (“PIM”).³ The Exchange also proposes an amendment to Options 7, Section 1, General Provisions.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ PIM is a process by which an Electronic Access Member (“EAM”) can provide price improvement opportunities for a transaction wherein the EAM seeks to facilitate an order it represents as agent, and/or a transaction wherein the EAM solicited interest to execute against an order it represents as agent. See Options 3, Section 13.

The text of the proposed rule change is available on the Exchange's Website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Pricing Schedule at Options 7, Section 5, Other Options Fees and Rebates. Specifically, the Exchange proposes to amend Options 7, Section 5E, PIM Pricing for Regular and Complex Orders, to lower the Fees for PIM Contra-Side Orders, in both Penny Symbols and Non-Penny Symbols, for all market participants. The Exchange also proposes to eliminate note 1 within Options 7, Section 5E. Finally, the Exchange proposes to amend Options 7, Section 1, General Provisions. These changes will be described in greater detail below.

Options 7, Section 5E

For regular and complex PIM orders, the Exchange currently charges a PIM originating

fee in Penny and Non-Penny Symbols of \$0.20 per contract for Non-Priority Customers⁴ and \$0.00 per contract for Priority Customers.⁵ The Exchange also charges all market participants a PIM contra-side fee in Penny and Non-Penny Symbols of \$0.05 per contract. Members that execute an average daily volume (“ADV”) of 10,000 PIM originating contracts or greater within a month are eligible for a reduced PIM contra-side fee of \$0.02 per contract (in lieu of \$0.05 per contract). In addition, the Exchange presently charges PIM response fees of \$0.50 per contract in Penny Symbols and \$1.10 per contract in Non-Penny Symbols.

The Exchange proposes to lower the current regular and complex Fees for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols, from \$0.05 per contract to \$0.02 per contract, for all market participants.⁶ In connection with lowering this fee, the Exchange proposes to eliminate note 1 within Options 7, Section 5E, which today provides, “Members that execute an ADV of 10,000 PIM originating contracts or greater within a month will be assessed a fee of \$0.02 per contract on the contra-side of a PIM auction (in lieu of \$0.05 per contract).” This incentive is no longer necessary as all market participants would be entitled to receive the lower regular and complex Fee for PIM Contra-Side Orders of \$0.02 per contract for both Penny

⁴ Non-Priority Customers consist of Market Makers (including Market Maker orders sent to the Exchange by EAMs), Non-Nasdaq MRX Market Makers (FarMM), Firm Proprietary / Broker-Dealers, and Professional Customers.

⁵ A “Priority Customer” is a person or entity that is not a broker/dealer in securities, and does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s), as defined in Nasdaq MRX Options 1, Section 1(a)(36).

⁶ Today, Market Makers, Non-Nasdaq MRX Market Makers (FarMM), Firm Proprietary/Broker Dealers, Professional Customers and Priority Customers are assessed the same regular and complex Fee for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols of \$0.05 per contract. These market participants have the opportunity to lower that fee to \$0.02 per contract, pursuant to note 1 of Options 7, Section 5E, provided they execute the requisite volume.

Symbols and Non-Penny Symbols.

Options 7, Section 1

The Exchange proposes an amendment to Options 7, Section 1, General Provisions. The Exchange proposes to replace the term “Penny Pilot Program” with “Penny Interval Program.” On April 1, 2020 the Commission approved the amendment to the OLPP to make permanent the Pilot Program (the “OLPP Program”).⁷ The Exchange recently filed a proposal to amend MRX Options 3, Section 3 to conform the rule to Section 3.1 of the Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options (the “OLPP”).⁸ The Exchange’s proposal amended MRX Options 3, Section 3 to refer to a Penny Interval Program instead of a Penny Pilot Program. This proposed change to Options 7, Section 1 conforms the name of the program.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange’s proposed changes to its Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the

⁷ See Securities Exchange Act Release No. 88532 (April 1, 2020), 85 FR 19545 (April 7, 2020) (File No. 4-443) (“Approval Order”).

⁸ See Securities Exchange Act Release No. 89163 (June 26, 2020) (SR-MRX-2020-13).

⁹ 15 U.S.C. 78 f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

market for options securities transaction services that constrain its pricing determinations in that market. The fact that this market is competitive has long been recognized by the courts. In NetCoalition v. Securities and Exchange Commission, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹¹

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹²

Numerous indicia demonstrate the competitive nature of this market. For example, clear substitutes to the Exchange exist in the market for options security transaction services. The Exchange is only one of sixteen options exchanges to which market participants may direct their order flow. Within this environment, market participants can freely and often do shift their order

¹¹ NetCoalition v. SEC, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

¹² Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

flow among the Exchange and competing venues in response to changes in their respective pricing schedules. As such, the proposal represents a reasonable attempt by the Exchange to increase its liquidity and market share relative to its competitors.

Options 7, Section 5E

The Exchange's proposal to lower the current regular and complex Fees for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols, from \$0.05 per contract to \$0.02 per contract for all market participants, and eliminate note 1¹³ within Options 7, Section 5E is reasonable.¹⁴ Lowering the regular and complex Fees for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols, from \$0.05 to \$0.02 per contract, will incentivize Members to execute a greater number of PIM contracts on the Exchange. All market participants will benefit from a greater number of PIM contracts in that they will be able to interact with that order flow either by responding directly to a PIM or by submitting unrelated orders in the Order Book.

The Exchange's proposal to lower the current regular and complex Fees for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols, from \$0.05 per contract to \$0.02 per contract for all market participants, and eliminate note 1 within Options 7, Section 5E is equitable and not unfairly discriminatory. All market participants will be uniformly assessed a regular and complex Fee for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols, of \$0.02 per contract.

¹³ Options 7, Section 5E at note 1 provides, "Members that execute an ADV of 10,000 PIM originating contracts or greater within a month will be assessed a fee of \$0.02 per contract on the contra-side of a PIM auction (in lieu of \$0.05 per contract)."

¹⁴ Today, Market Makers, Non-Nasdaq MRX Market Makers (FarMM), Firm Proprietary/Broker Dealer, Professional Customer and Priority Customers are assessed the same regular and complex Fee for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols of \$0.05 per contract.

Options 7, Section 1

The Exchange's proposal to amend Options 7, Section 1 to replace the term "Penny Pilot Program" with "Penny Interval Program" is reasonable, equitable and not unfairly discriminatory. This amendment seeks to conform the name of the program which governs the listing of certain standardized options.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

In terms of inter-market competition, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. In such an environment, the Exchange must continually adjust its fees to remain competitive with other options exchanges. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

Moreover, as noted above, price competition between exchanges is fierce, with liquidity and market share moving freely between exchanges in reaction to fee and rebate changes. In sum, if the changes proposed herein are unattractive to market participants, it is likely that the Exchange will lose market share as a result. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing order execution venues to maintain their competitive standing in the financial markets.

Options 7, Section 5E

In terms of intra-market competition, the Exchange does not believe that its proposal will place any category of Exchange market participant at a competitive disadvantage. The proposed change is designed to incentivize market participants to direct PIM order flow to the Exchange. Specifically, the Exchange's proposal to lower the current regular and complex Fees for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols, from \$0.05 per contract to \$0.02 per contract for all market participants, and eliminate note 1 within Options 7, Section 5E does not impose an undue burden on competition. All market participants would be uniformly assessed a regular and complex Fee for PIM Contra-Side Orders, for both Penny Symbols and Non-Penny Symbols, of \$0.02 per contract.

Options 7, Section 1

The Exchange's proposal to amend Options 7, Section 1 to replace the term "Penny Pilot Program" with "Penny Interval Program" does not impose an undue burden on competition. This amendment seeks to conform the name of the program which governs the listing of certain standardized options.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁵ and Rule 19b-4(f)(2)¹⁶ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears

¹⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁶ 17 CFR 240.19b-4(f)(2).

to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-MRX-2020-14 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-MRX-2020-14. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F

Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MRX-2020-14 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

J. Matthew DeLesDernier
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).