

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95885; File No. SR-EMERALD-2022-29)

September 22, 2022

Self-Regulatory Organizations: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX Emerald, LLC to Amend Its Fee Schedule

Pursuant to the provisions of 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 September 13, 2022, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”), filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III 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 is filing a proposal to amend the MIAX Emerald Fee Schedule (the “Fee Schedule”).

The text of the proposed rule change is available on the Exchange’s website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX’s principal office, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Section 1)a)i) of the Fee Schedule to amend the rebates provided for Market Maker Origins for Simple³ Maker (defined below) volume in Penny Classes (defined below) that trade contra to Priority Customers⁴ Origins by \$0.02 in each Tier (defined below). The Exchange initially filed this proposal on September 1, 2022 (SR-EMERALD-2022-26). On September 13, 2022, the Exchange withdrew SR-EMERALD-2022-26 and resubmitted this proposal (SR-EMERALD-2022-29).

Background

The Exchange currently assesses transaction rebates and fees to all market participants, which are based upon a threshold tier structure (“Tier”). Tiers are determined on a monthly basis and are based on three alternative calculation methods, as defined in Section 1)a)ii) of the Fee Schedule. The calculation method that results in the highest Tier achieved by the Member⁵ shall apply to all Origin types by the Member, except the Priority Customer Origin type. For the

³ The Simple Order Book is the Exchange’s regular electronic book of orders and quotes. See Exchange Rule 518(a)(15).

⁴ “Priority Customer” means a person or entity that (i) is not a broker or dealer in securities, and (ii) does not place more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). See Exchange Rule 100, including Interpretation and Policy .01.

⁵ “Member” means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed “members” under the Exchange Act. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

Priority Customer Origin calculation, the Tier applied for a Member and its Affiliates⁶ is solely determined by calculation Method 3, as defined in Section 1)a)ii) of the Fee Schedule, titled “Total Priority Customer, Maker sides volume, based on % of CTCV (‘Method 3’).” The monthly volume thresholds for each of the methods, associated with each Tier, are calculated as the total monthly volume executed by the Member in all options classes on MIAX Emerald in the relevant Origins and/or applicable liquidity, not including Excluded Contracts⁷, (as the numerator) expressed as a percentage of (divided by) Customer Total Consolidated Volume (“CTCV”) (as the denominator). CTCV is calculated as the total national volume cleared at The Options Clearing Corporation (“OCC”) in the Customer range in those classes listed on MIAX

⁶ “Affiliate” means (i) an affiliate of a Member of at least 75% common ownership between the firms as reflected on each firm’s Form BD, Schedule A, or (ii) the Appointed Market Maker of an Appointed EEM (or, conversely, the Appointed EEM of an Appointed Market Maker). An “Appointed Market Maker” is a MIAX Emerald Market Maker (who does not otherwise have a corporate affiliation based upon common ownership with an EEM) that has been appointed by an EEM and an “Appointed EEM” is an EEM (who does not otherwise have a corporate affiliation based upon common ownership with a MIAX Emerald Market Maker) that has been appointed by a MIAX Emerald Market Maker, pursuant to the following process. A MIAX Emerald Market Maker appoints an EEM and an EEM appoints a MIAX Emerald Market Maker, for the purposes of the Fee Schedule, by each completing and sending an executed Volume Aggregation Request Form by email to membership@miaxoptions.com no later than 2 business days prior to the first business day of the month in which the designation is to become effective. Transmittal of a validly completed and executed form to the Exchange along with the Exchange’s acknowledgement of the effective designation to each of the Market Maker and EEM will be viewed as acceptance of the appointment. The Exchange will only recognize one designation per Member. A Member may make a designation not more than once every 12 months (from the date of its most recent designation), which designation shall remain in effect unless or until the Exchange receives written notice submitted 2 business days prior to the first business day of the month from either Member indicating that the appointment has been terminated. Designations will become operative on the first business day of the effective month and may not be terminated prior to the end of the month. Execution data and reports will be provided to both parties. See the Definitions Section of the Fee Schedule.

⁷ The term “Excluded Contracts” means any contracts routed to an away market for execution. See the Definitions Section of the Fee Schedule.

Emerald for the month for which fees apply, excluding volume cleared at the OCC in the Customer range executed during the period of time in which the Exchange experiences an “Exchange System Disruption”⁸ (solely in the option classes of the affected Matching Engine)⁹. In addition, the per contract transaction rebates and fees shall be applied retroactively to all eligible volume once the Tier has been reached by the Member. Members that place resting liquidity, i.e., orders on the MIAX Emerald System, will be assessed the specified “maker” rebate or fee (each a “Maker”) and Members that execute against resting liquidity will be assessed the specified “taker” fee or rebate (each a “Taker”).¹⁰ Members are also assessed lower transaction fees and smaller rebates for order executions in standard option classes in the Penny Interval Program¹¹ (“Penny Classes”) than for order executions in standard option classes which are not in the Penny Program (“non-Penny Classes”), for which Members will be assessed a higher transaction fees and larger rebates.

Proposal

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- ⁸ The term “Exchange System Disruption” means an outage of a Matching Engine or collective Matching Engines for a period of two consecutive hour or more, during trading hours. See the Definitions Section of the Fee Schedule.
- ⁹ A “Matching Engine” is a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. See the Definitions Section of the Fee Schedule.
- ¹⁰ For a Priority Customer complex order taking liquidity in both a Penny Class and non-Penny Class against Origins other than Priority Customer, the Priority Customer order will receive a rebate based on the Tier achieved.
- ¹¹ See Securities Exchange Act Release No. 88993 (June 2, 2020), 85 FR 35145 (June 8, 2020) (SR-EMERALD-2020-05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Exchange Rule 510, Minimum Price Variations and Minimum Trading Increments, 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 “Penny Program”).

The Exchange proposes to adopt note “!” to Market Maker in the Origin column to provide that, the rebate for Market Maker Origins for Simple Maker volume in Penny Classes will be reduced by \$0.02 for each Tier when trading contra to a Priority Customer Origins. Currently, the Exchange provides a Simple Maker rebate for Market Maker Origins, for any contra Origin, in Tier 1 of \$0.30; Tier 2 of \$0.33; Tier 3 of \$0.35; and Tier 4 of \$0.45. Under the Exchange’s proposal when a Market Maker Origin is contra to a Priority Customer in a Penny Class the Exchange will reduce the rebate for each Tier by \$0.02. Therefore, the effective rebate for Market Maker Origins in Simple Maker volume when trading contra to a Priority Customer Origin in Tier 1 would be \$0.28; Tier 2 would be \$0.31; Tier 3 would be \$0.33; and Tier 4 would be \$0.43.

The purpose of adjusting the specified Simple Maker rebate is for business and competitive reasons. In order to attract order flow, the Exchange initially set its Maker rebates and Taker fees so that they were meaningfully higher/lower than other options exchanges that operate comparable maker/taker pricing models.¹² The Exchange now believes that it is appropriate to further adjust the specified Maker rebates based upon contra party Origin. The Exchange notes that at least one other options exchange offers a similar pricing structure for rebates/fees that is dependent upon the contra party Origin type.¹³

Implementation

The proposed changes are immediately effective.

¹² See Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR-EMERALD-2019-15).

¹³ See BOX Options Exchange Fee Schedule, Section IV, A, Non-Auction Transactions, which provides a table where the exchange assesses a per contract fee (or credit) based upon three factors: (i) the account type of the Participant submitting the order; (ii) whether the Participant is a liquidity provider or liquidity taker; and (iii) the account type of the contra party, on its public website (available at <https://boxoptions.com/fee-schedule/>).

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹⁴ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹⁵ in particular, in that it is an equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5) of the Act¹⁶ that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, and to promote just and equitable principles of trade, foster cooperation and coordination with persons engaged in facilitating transactions in securities, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, protect investors and the public interest, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange operates in a competitive marketplace in which market participants can readily direct their order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has a market share of more than approximately 11-12% of the equity options market.¹⁷ Therefore, no exchange possesses significant pricing power. More specifically,

¹⁴ 15 U.S.C. 78f(b).

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(1) and (b)(5).

¹⁷ See “The market at a glance, MTD AVERAGE” (last visited August 29, 2022), available at <https://www.miaxoptions.com/> (Data as of August 1, 2022 to August 26, 2022).

as of August 29, 2022, the Exchange had a market share of approximately 3.06% of executed volume of multiply-listed equity options for the month of August 2022.¹⁸

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, 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.”¹⁹

The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can discontinue or reduce use of certain categories of products and services, terminate an existing membership or determine to not become a new member, and/or shift order flow, in response to transaction fee changes. For example, on February 28, 2019, the Exchange’s affiliate, MIAX PEARL, LLC (“MIAX Pearl”), filed with the Commission a proposal to increase Taker fees in certain Tiers for options transactions in certain Penny classes for Priority Customers and decrease Maker rebates in certain Tiers for options transactions in Penny classes for Priority Customers (which fee was to be effective March 1, 2019).²⁰ MIAX Pearl experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that the MIAX Pearl March 1, 2019 fee change, to increase certain transaction fees and decrease certain transaction

¹⁸ See id.

¹⁹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37499 (June 29, 2005).

²⁰ See Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR-PEARL-2019-07).

rebates, may have contributed to the decrease in MIAX Pearl's market share and, as such, the Exchange believes competitive forces constrain the Exchange's, and other options exchanges, ability to set transaction fees and market participants can shift order flow based on fee changes instituted by the exchanges.

The Exchange believes its proposal to amend the rebate provided to Market Maker Origins for Simple Maker volume in Penny Classes when contra to Priority Customer Origins is reasonable, equitable and not unfairly discriminatory because all similarly situated participants in the same Origin type and Tier are subject to the same tiered Maker rebates and Taker fees. The Exchange believes it is equitable and not unfairly discriminatory to reduce the rebates provided for executions of Simple Maker volume where the contra party is a Priority Customer Origin in Penny Classes.

The Exchange is making this change for business and competitive reasons as the Exchange initially set its Simple Maker rebates for such orders higher than certain other options exchanges that operate comparable pricing models.²¹ The Exchange also believes it is equitable and not unfairly discriminatory to provide a different rebate to Market Makers Origins for Simple Maker volume in Penny Classes when contra to Priority Customer Origins, as at least one other competing exchange also provides differing rebates and fees dependent upon the origin and contra origin type.²² Additionally, the Exchange believes that the proposed change (a \$0.02 decrease from the current rebate provided in each Tier) is reasonable in that it represents a modest decrease from the current rebate in each Tier. The Exchange believes that the proposed

²¹ See supra note 13.

²² See id.

rebates will continue to provide an incentive for Market Makers to continue to trade with Priority Customer Origins on the Exchange.

The Exchange believes that it is equitable and not unfairly discriminatory that Priority Customer Origins be treated differently than other Origin types. The exchanges, in general, have historically aimed to improve markets for investors and develop various features within their market structure for customer benefit. Priority Customer liquidity benefits all market participants by providing more trading opportunities. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

Furthermore, the proposed amendment of Simple Maker rebates when the contra is a Priority Customer promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in facilitating transactions in securities, and protects investors and the public interest, because even with the decrease, the Exchange's proposed rebates should enable the Exchange to continue to attract order flow and maintain market share.²³

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.

Intra-Market Competition

The Exchange believes that the proposed changes to the specified Simple Maker rebates for the applicable market participants should continue to encourage the provision of liquidity that enhances the quality of the Exchange's market and increases the number of trading opportunities

²³ See supra note 17.

on the Exchange for all participants who will be able to compete for such opportunities. The proposed rule change should enable the Exchange to continue to attract and compete for Priority Customer order flow with other exchanges. The Exchange believes that even with the proposed changes, the rebates provided will continue to encourage Members to transact on the Exchange, which benefits all Exchange participants by providing more trading opportunities and tighter spreads. However, this competition does not create an undue burden on competition but rather offers all market participants the opportunity to receive the benefit of competitive pricing.

The Exchange believes that the pricing structure to provide different rebates to Market Maker Origins for Simple volume dependent upon whether the contra is a Priority Customer Origin will not impose any undue burden on intra-market competition because the applicable rebate applies equally to all similarly situated Market Makers on the Exchange.

The Exchange believes that it is equitable and not unfairly discriminatory that Priority Customer Origins be treated differently than other Origin types. The exchanges, in general, have historically aimed to improve markets for investors and develop various features within their market structure for customer benefit. Priority Customer liquidity benefits all market participants by providing more trading opportunities. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants.

The Exchange believes that it is equitable and not unfairly discriminatory to reduce the rebate provided to Market Maker Origins for Simple volume when the contra Origin is Priority Customer. A Priority Customer by definition is not a broker or 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).²⁴ This change does not apply to Market Makers that trade contra to other Origin types on the Exchange, such as non-MIAX Emerald Market Maker, Firm Proprietary/Broker Dealer, or Non-Priority Customers, who will generally submit a higher number of orders than Priority Customers. The Exchange believes that even with the proposed changes, the rebates provided to Market Maker Origins for Simple volume when the contra Origin is Priority Customer will continue to provide an incentive for Market Makers to participate on the Exchange, which benefits all Exchange participants by providing more trading opportunities.

The Exchange does not believe its proposal will have any effect on Priority Customer order flow to the Exchange as the proposal affects only Simple Maker volume in Penny Classes when contra to Priority Customer Origins.

Inter-Market Competition

The Exchange 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. There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, no single exchange has a market share of more than approximately 11-12% of the equity options market.²⁵ Therefore, no exchange possesses significant pricing power. More specifically, as of August 29, 2022, the Exchange had a market share of approximately 3.06% of executed volume of multiply-listed equity options for the month of August 2022.²⁶ Therefore, no exchange possesses significant pricing power in the

²⁴ See supra note 4.

²⁵ See supra note 17.

²⁶ See id.

execution of multiply-listed equity options order flow. In such an environment, the Exchange must continually adjust its transaction and non-transaction fees to remain competitive with other exchanges and to attract order flow. The Exchange believes that the proposed rule change reflects this competitive environment because it modifies the Exchange's rebates in a manner that will allow the Exchange to remain competitive.

Additionally, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, 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."²⁷ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. circuit stated: "[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 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 possess a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers' . . .".²⁸ Accordingly, the Exchange does not believe its proposed pricing changes impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

²⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²⁸ *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-NYSE-2006-21)).

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

Written comments were neither solicited nor 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 Act,²⁹ and Rule 19b-4(f)(2)³⁰ 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 to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or 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 SR-EMERALD-2022-29 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.

²⁹ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁰ 17 CFR 240.19b-4(f)(2).

All submissions should refer to File Number SR-EMERALD-2022-29. 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 such 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-EMERALD-2022-29 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.³¹

J. Matthew DeLesDernier,
Deputy Secretary.

³¹ 17 CFR 200.30-3(a)(12).