

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96925; File No. SR-MRX-2023-03)

February 14, 2023

Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Pricing Schedule at Options 7, Section 4 (Complex Order Fees)

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 January 30, 2023, Nasdaq MRX, LLC (“MRX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the 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 proposes to a proposal to amend the Exchange’s Pricing Schedule at Options 7, Section 4 (Complex Order Fees).

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 purpose of the proposed rule change is to amend the Exchange’s Pricing Schedule at Options 7, Section 4 (Complex Order Fees).³

As set forth in Options 7, Section 4, the Exchange presently assesses all market participants except Priority Customers⁴ a uniform \$0.15 per contract fee for all complex order transactions in all symbols.⁵ Priority Customers are presently assessed no fees for complex order transactions. In addition, the Exchange currently reduces this \$0.15 per contract fee to \$0.00 for Market Makers⁶ when a Market Maker trades against Priority Customer orders that originate from an Affiliated Member⁷ or Affiliated Entity.⁸ This incentive is designed to encourage

³ The Exchange initially filed the proposed pricing changes on January 3, 2023 (SR-MRX-2023-01) to adopt a Market Maker growth incentive and to amend complex order fees. On January 17, 2023, the Exchange withdrew that filing and submitted SR-MRX-2023-02. On January 30, 2023, the Exchange withdrew that filing and submitted separate filings for the Market Maker growth incentive and complex order fees. This specific filing replaces the complex order fees set forth in SR-MRX-2023-02.

⁴ 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).

⁵ With the exception of complex PIM orders, which are subject to separate pricing in Options 7, Section 3.A.

⁶ The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21).

⁷ An “Affiliated Member” is a Member that shares at least 75% common ownership with a particular Member as reflected on the Member's Form BD, Schedule A.

⁸ An “Affiliated Entity” is a relationship between an Appointed Market Maker and an Appointed OFP for purposes of qualifying for certain pricing specified in the Pricing Schedule. Market Makers and OFPs are required to send an email to the Exchange to

Market Makers, Affiliated Members, and/or Affiliated Entities to direct additional Priority Customer order flow to the Exchange.

The Exchange now proposes to differentiate complex order pricing between Penny and Non-Penny Symbols as follows:

Capacity of Market Participant	Fee per contract – Penny Symbols	Fee per contract – Non-Penny Symbols
Market Maker	\$0.35	\$0.85
Non-Nasdaq MRX Market Maker (FarMM)	\$0.35	\$0.85
Firm Proprietary / Broker-Dealer	\$0.35	\$0.85
Professional Customer	\$0.35	\$0.85
Priority Customer	\$0.00	\$0.00

With the proposed changes, the complex order fee for all non-Priority Customers will increase from \$0.15 to \$0.35 per contract in Penny Symbols. In Non-Penny Symbols, this fee will increase from \$0.15 to \$0.85 per contract for all non-Priority Customers. Priority Customers will continue to receive free executions in all symbols under this proposal.

In addition, the Exchange will continue to provide Market Makers with the reduced fee described above for their complex orders in both Penny and Non-Penny Symbols when the Market Maker trades against Priority Customer orders that originate from an Affiliated Member

appoint their counterpart, at least 3 business days prior to the last day of the month to qualify for the next month. The Exchange will acknowledge receipt of the emails and specify the date the Affiliated Entity is eligible for applicable pricing, as specified in the Pricing Schedule. Each Affiliated Entity relationship will commence on the 1st of a month and may not be terminated prior to the end of any month. An Affiliated Entity relationship will automatically renew each month until or unless either party terminates earlier in writing by sending an email to the Exchange at least 3 business days prior to the last day of the month to terminate for the next month. Affiliated Members may not qualify as a counterpart comprising an Affiliated Entity. Each Member may qualify for only one (1) Affiliated Entity relationship at any given time.

or Affiliated Entity. Accordingly, the Exchange proposes to clarify note 2 in Options 7, Section 4 to reflect the proposed changes. In particular, note 2 will provide that a complex order Market Maker fee of \$0.00 per contract applies instead of the above-referenced complex order fee in Penny and Non-Penny Symbols, when the Market Maker trades against Priority Customer orders that originate from an Affiliated Member or an Affiliated Entity.

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 schedule of credits are reasonable in several respects. As a threshold matter, the Exchange is subject to significant competitive forces in the 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

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

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 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.

The Exchange believes that the proposed changes to its complex order fee schedule in Options 7, Section 4 are reasonable. As discussed above, the proposed complex order fee for all non-Priority Customers will increase from \$0.15 to \$0.35 per contract in Penny Symbols. In Non-Penny Symbols, this fee will increase from \$0.15 to \$0.85 per contract for all non-Priority

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”).

Customers. Priority Customers will continue to receive free executions in all symbols under this proposal. While the non-Priority Customer complex fees are increasing across the board for all symbols, the Exchange believes that the proposing pricing will remain competitive and in line with other options exchanges that charge complex order fees.¹³ When the Exchange first adopted complex functionality and related fees back in 2019, it initially set non-Priority Customer complex fees at \$0.15 per contract (i.e., the current rate).¹⁴ The Exchange adopted this initial pricing structure (which was lower than certain options exchanges that had comparable complex pricing) to enable it to effectively compete with other exchanges by attracting complex order flow to the Exchange, thereby helping the Exchange to gain market share for complex executions. After more than three years, the Exchange now believes that it is appropriate and reasonable to adjust these fees in order to bring them in line with complex fees charged at other options exchanges.

Furthermore, the Exchange believes that the proposed fee structure for non-Priority Customer complex orders is equitable and not unfairly discriminatory because it will apply uniformly to all similarly situated participants. The Exchange believes that it is equitable and not unfairly discriminatory to continue to offer Priority Customers free executions in complex orders in all symbols. Priority Customer liquidity benefits all market participants by providing more

¹³ For example, MIAX Emerald charges complex order fees in Penny Classes that range from \$0.10 to \$0.50 per contract for all origin types except Priority Customers, depending on whether the market participant is a maker or taker. In Non-Penny Classes, those fees range from \$0.20 to \$0.88 per contract for all origin types except Priority Customer, depending on whether the market participant is a maker or taker. See MIAX Emerald Fee Schedule, Section 1)a)i at https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_1_9_2023.pdf.

¹⁴ See Securities Exchange Act Release No. 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR-MRX-2019-14).

trading opportunities, which attracts Market Makers. 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.

Lastly, the Exchange believes that the proposed changes to note 2 in Options 7, Section 4 are reasonable, equitable, and not unfairly discriminatory because these are clarifying changes to reflect that the Exchange will continue to provide Market Makers with the reduced fee described above for their complex orders in all symbols when the Market Maker trades against Priority Customer orders that originate from an Affiliated Member or Affiliated Entity.

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 intra-market competition, the Exchange does not believe that its proposals will place any category of market participant at a competitive disadvantage. As noted above, the proposed changes will apply uniformly to all similarly situated market participants.

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. As discussed above for the proposed

non-Priority Customer complex fee structure, the Exchange notes that its proposal will bring this pricing in line with other options exchanges that offer similar complex functionality.¹⁵

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.

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 Act.¹⁶ 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: (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:

¹⁵ See supra note 13.

¹⁶ 15 U.S.C. 78s(b)(3)(A)(ii).

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-2023-03 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-2023-03. 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-2023-03 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

Sherry R. Haywood,
Assistant Secretary.

¹⁷ 17 CFR 200.30-3(a)(12).