

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94406; File No. SR-EMERALD-2022-10)

March 14, 2022

Self-Regulatory Organizations; MIAX EMERALD, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change 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 February 28, 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 Simple Maker (defined below) rebates in Tier 4 for options transactions in Penny Classes and non-Penny Classes (defined below) for executed Priority Customer³ orders when the contra is an Affiliated⁴

³ “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.

⁴ “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.

Market Maker.⁵

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 Member⁶ shall apply to all Origin types by the Member, except the Priority Customer Origin type. For the Priority Customer Origin calculation, the Tier applied for a Member and its Affiliates’ 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 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

⁵ “Market Maker” refers to “Lead Market Maker” (“LMM”), “Primary Lead Market Maker” (“PLMM”) and “Registered Market Maker” (“RMM”), collectively. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

⁶ “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.

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

“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

The Exchange proposes to amend Section 1)a)i) of the Fee Schedule to amend the Simple Maker rebates in Tier 4 for options transactions in Penny Classes and non-Penny Classes for executed Priority Customer orders when the contra is an Affiliated Market Maker. Currently, the

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”).

Exchange provides Simple Maker rebates of (\$0.53) and (\$1.05) for executed Priority Customer orders in Tier 4 in options in Penny Classes and non-Penny Classes, respectively, if the contra is not an Affiliated Market Maker. If the contra is an Affiliated Market Maker, the Exchange provides lower Simple Maker rebates of (\$0.49) and (\$0.95) for executed Priority Customer orders in Tier 4 in options in Penny Classes and non-Penny Classes, respectively.¹² The lower Simple Maker rebate for an Affiliated Market Maker transaction for executed Priority Customer orders in Tier 4 in options in Penny Classes is denoted by the symbol “■” following the table of fees and rebates in Section 1)a)i) of the Fee Schedule. The lower Simple Maker rebate for an Affiliated Market Maker transaction for executed Priority Customer orders in Tier 4 in options in non-Penny Classes is denoted by the symbol “■” following the table of fees and rebates in Section 1)a)i) of the Fee Schedule.¹³

The Exchange now proposes to lower the Simple Maker rebates in Tier 4 for options transactions in Penny Classes and non-Penny Classes for executed Priority Customer orders when the contra is an Affiliated Market Maker. Specifically, the Exchange proposes to lower the Simple Maker rebate for executed Priority Customer orders in options in Penny Classes in Tier 4 from (\$0.49) to (\$0.43) when the contra is an Affiliated Market Maker. The Exchange also proposes to lower the Simple Maker rebate for executed Priority Customer orders in options in non-Penny Classes in Tier 4 from (\$0.95) to (\$0.85) when the contra is an Affiliated Market Maker. The proposed changes would be reflected in current footnotes “■” and “■” for Penny and non-Penny Classes, respectively. Accordingly, the Exchange proposes to update footnote

¹² See Fee Schedule, Section 1)a)i), notes “■” and “■”. See also Securities Exchange Act Release No. 89927 (September 21, 2020), 85 FR 60498 (September 25, 2020) (SR-EMERALD-2020-07) (establishing lower Priority Customer Tier 4 Simple Maker rebates in Penny and non-Penny Classes when the contra is an Affiliated Market Maker).

¹³ See *id.*

“■” to now read: “This Maker rebate is for executed Priority Customer Simple Orders when the contra is not an Affiliated Market Maker. When the contra is an Affiliated Market Maker, this Maker rebate for executed Priority Customer Simple Orders will be (\$0.43).” The Exchange also proposes to update footnote “■” to now read: “This Maker rebate is for executed Priority Customer Simple Orders when the contra is not an Affiliated Market Maker. When the contra is an Affiliated Market Maker, this Maker rebate for executed Priority Customer Simple Orders will be (\$0.85).”

The purpose of adjusting the specified Simple Maker rebates 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.¹⁴ The Exchange now believes that it is appropriate to further adjust these specified Maker rebates so that they are more in line with other exchanges, but will still remain highly competitive such that they should enable the Exchange to continue to attract order flow and maintain market share.¹⁵

Implementation

The proposed changes are effective beginning March 1, 2022.

¹⁴ See Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR-EMERALD-2019-15).

¹⁵ See Cboe BZX Options Exchange Fee Schedule, under “Transaction Fees” (providing Customer rebates for Penny Program Securities ranging from \$0.25 to \$0.53 and Non-Penny Program Securities ranging from \$0.90 to \$1.05); see also Nasdaq Stock Market, Options 7, Pricing Schedule, Section 2 Nasdaq Options Market – Fees and Rebates, note 2 (providing lower rates when the Participant is both the buyer and seller).

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹⁶ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹⁷ in that it is an equitable allocation of reasonable dues, fees and other charges among Exchange members and issuers and other persons using its facilities, and 6(b)(5) of the Act,¹⁸ in that it is designed to prevent fraudulent and manipulative acts and practices, 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.

The Commission has repeatedly expressed its 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

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 13-14% of the equity options market.²⁰ Therefore, no

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(4).

¹⁸ 15 U.S.C. 78f(b)(1) and (b)(5).

¹⁹ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

²⁰ See “The Market at a Glance,” (last visited February 25, 2022), available at <https://www.miaxoptions.com/>.

exchange possesses significant pricing power. More specifically, as of February 25, 2022, the Exchange had a market share of approximately 3.68% of executed volume of multiply-listed equity and exchange traded fund (“ETF”) options for the month of February 2022.²¹

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).²² 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 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 decrease the Simple Maker rebates in Tier 4 for options transactions in Penny and non-Penny Classes for Priority Customers is reasonable, equitable and not unfairly discriminatory because all similarly situated market participants in the

²¹ See id.

²² See Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR-PEARL-2019-07).

same Origin type are subject to the same tiered Maker rebates and Taker fees and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes it is equitable and not unfairly discriminatory to reduce the Simple Maker rebates to Priority Customer orders in Penny and non-Penny Classes for competitive and business reasons because the Exchange initially set its Simple Maker rebates for such orders higher than certain other options exchanges that operate comparable maker/taker pricing models.²³ The Exchange now believes that it is appropriate to further decrease the specified Simple Maker rebates so that they are more in line with other exchanges, and will still remain highly competitive such that they should enable the Exchange to continue to attract order flow and maintain market share.

Furthermore, the proposed decrease to the Simple Maker rebates for Priority Customers 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 Simple Maker rebates for such orders still remain highly competitive with certain other options exchanges offering comparable pricing models, and should enable the Exchange to continue to attract order flow and maintain market share.²⁴ The Exchange believes that the amount of such fees, as proposed to be decreased, will continue to encourage those market participants to send orders to the Exchange.

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

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

²³ See supra note 15.

²⁴ See id.

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 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 order flow with other exchanges. 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.

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 13-14% of the equity options market.²⁵ Therefore, no exchange possesses significant pricing power. More specifically, as of February 25, 2022, the Exchange had a market share of approximately 3.68% of executed volume of multiply-listed equity and ETF options for the month of February 2022.²⁶ Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF 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

²⁵ See supra note 20.

²⁶ See id.

the proposed rule changes reflect this competitive environment because it modifies the Exchange's rebates in a manner that will allow the Exchange to remain competitive.

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,²⁷ and Rule 19b-4(f)(2)²⁸ 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 Number SR-EMERALD-2022-10 on the subject line.

²⁷ 15 U.S.C. 78s(b)(3)(A)(ii).

²⁸ 17 CFR 240.19b-4(f)(2).

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-EMERALD-2022-10. 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-EMERALD-2022-10, 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.²⁹

J. Matthew DeLesDernier
Assistant Secretary

²⁹ 17 CFR 200.30-3(a)(12).