

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97387; File No. SR-EMERALD-2023-11)

April 26, 2023

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

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 April 13, 2023, 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 footnote “*” to adopt new fees for Priority Customer³ Complex Orders that remove liquidity that leg into the Simple book.⁴ The Exchange originally filed this proposal on March 31, 2023 (SR-EMERALD-2023-08). On April 13, 2023, the Exchange withdrew SR-EMERALD-2023-08 and resubmitted this proposal.

Background

The Exchange 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 Priority Customer Origin calculation, the Tier applied for a Member and its Affiliates⁶ is solely

³ The term “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.

⁴ The Simple Order Book or Simple book is the Exchange’s regular electronic book of orders and quotes. See Exchange Rule 518(a)(15).

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.

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

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 Contracts,⁷ (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

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.

“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 higher transaction fees and larger rebates.

Currently, footnote “*” provides that Priority Customer Complex Orders contra to Priority Customer Complex Orders are neither charged nor rebated. Footnote “*” further provides that, Priority Customer Complex Orders that leg into the Simple book are neither charged nor rebated.

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 the Strategy Book for 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”).

Proposal

The Exchange now proposes to amend footnote “*” to adopt fees for Priority Customer Complex Orders that leg into the Simple Order Book. Specifically, the Exchange proposes to amend footnote “*” to provide that Priority Customer Complex Orders that remove liquidity that leg into the Simple book will be charged a per contract fee of \$0.20 in Penny classes and \$0.40 in Non-Penny classes. Additionally, the Exchange proposes to amend the second sentence of footnote “*” for clarity to provide that Priority Customer Complex Orders that add liquidity that leg into the Simple book are neither charged nor rebated.

As amended footnote “*” will provide that, “Priority Customer Complex Orders contra to Priority Customer Complex Orders are neither charged nor rebated. Priority Customer Complex Orders that add liquidity that leg into the Simple book are neither charged nor rebated. Priority Customer Complex Orders that remove liquidity that leg into the Simple book will be charged a per contract fee of \$0.20 in Penny classes and \$0.40 in Non-Penny classes.” Complex Orders for Origins other than Priority Customer that remove liquidity that leg into the Simple book are charged a per contract “Taker” fee of \$0.50 in Penny Classes and \$0.88 in Non-Penny Classes. These fees are not changing under this proposal.

The purpose of adopting these new fees is for business and competitive reasons. In order to attract order flow, the Exchange initially set its rebates and 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 adjust its fees to be

¹² See Securities Exchange Act Release No. 85393 (March 21, 2019), 84 FR 11599 (March 27, 2019) (SR-EMERALD-2019-15) Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the MIAX Emerald Fee Schedule.

competitive with other Exchanges that offer similar functionality and have similar fee structures.¹³

Implementation

The proposed changes are immediately effective.

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.

¹³ The Nasdaq ISE Pricing Schedule provides that a \$0.25 per contract fee applies instead of the applicable fee or rebate when trading against Priority Customer Complex Orders that leg into the regular order book. See ISE Options 7 Pricing Schedule, Section 3. Regular Order Fees and Rebates, footnote 11; Nasdaq Phlx Pricing Schedule provides that Customers will be assessed a \$0.15 per contract surcharge to the extent that they execute the individual components of their Complex Orders in SPY against Market Maker or Lead Market Maker quotes that are resting on the Simple Order Book. See also Nasdaq Phlx Options 7, Pricing Schedule, Section 3. Rebates and Fees for Adding Liquidity in SPY.

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).

The Exchange believes its proposal provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. 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 12-13% of the equity options market.¹⁷ Therefore, no exchange possesses significant pricing power. More specifically, as of March 24, 2023, the Exchange had a market share of approximately 3.28% of executed volume of multiply-listed equity options for the month of March 2023.¹⁸

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).¹⁹ MIAX Pearl experienced a decrease in total market share for the

¹⁷ See "The market at a glance, MTD AVERAGE," available at <https://www.miaxoptions.com/> (Data as of March 1, 2023 to March 23, 2023).

¹⁸ See id.

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

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.

Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to the competitive environment, the Exchange offers specific rates and credits in its fees schedule, like those of other options exchanges' fees schedules.

The Exchange believes that its proposal to implement a new fee for Priority Customer Complex Orders that remove liquidity that leg into the Simple book is consistent with Section 6(b)(4) of the Act²⁰ in that the proposal is reasonable, equitable and not unfairly discriminatory as it applies equally to all similarly situated market participants. The Exchange believes that the application of this fee will continue to encourage Priority Customer order flow to the Exchange and may improve liquidity on the Exchange's Strategy Book. Priority Customer order flow benefits all market participants because it attracts liquidity to the Exchange by providing more trading opportunities. This attracts Market Makers and other liquidity providers, thus, facilitating increased order flow and trading opportunities to the benefit of all market participants.

²⁰ 15 U.S.C. 78f(b)(4).

In addition, the Exchange believes that its proposal is consistent with Section 6(b)(5) of the Act²¹ because it perfects the mechanisms of a free and open market and a national market system and protects investors and the public interest because an increase in Priority Customer order flow will bring greater volume and liquidity to the Exchange, which benefits all market participants by providing more trading opportunities. To the extent Priority Customer order flow is increased by this proposal, market participants will increasingly compete for the opportunity to trade on the Exchange by sending additional orders in an effort to trade with such Priority Customer order flow.

The Exchange believes that assessing a fee for Priority Customer Complex Orders that remove liquidity that leg into the Simple book is equitable and not unfairly discriminatory because the proposed fees will apply equally to all similarly situated participants. The Exchange believes that the application of the fee is equitable and not unfairly discriminatory because, as stated above, Priority Customer order flow enhances liquidity on the Exchange, which in turn provides more trading opportunities and attracts other market participants, thus, facilitating increased order flow and trading opportunities to the benefit of all market participants. Moreover, the options industry has a long history of providing preferential pricing to Priority Customer Orders, and the Exchange's current fees schedule currently does so in many places, as does the fee schedule of at least one other exchange.²²

As noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The Exchange believes that the proposed

²¹ 15 U.S.C. 78f(b)(5).

²² See supra note 13.

fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges offer similar fees for similar functionality.²³

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.”²⁴

The Exchange believes that its proposal represents an equitable allocation of fees and is not unfairly discriminatory as the fee will apply uniformly to all Priority Customer Complex Orders that remove liquidity that leg into the Simple Order Book. Additionally, the Exchange recently adopted a new optional complex order instruction, “Do Not Leg” or “DNL,”²⁵ that provides Members²⁶ the ability to direct their complex orders to the Strategy Book²⁷ exclusively for execution, or if the instruction is not used, allows their complex orders to leg into the Simple Order Book.²⁸

²³ Id.

²⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37499 (June 29, 2005).

²⁵ See Securities Exchange Act Release No. 96378 (November 22, 2022), 87 FR 73364 (November 29, 2022) (SR-EMERALD-2022-31).

²⁶ The term “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 Exchange Rule 100.

²⁷ The “Strategy Book” is the Exchange’s electronic book of complex orders and complex quotes. See Exchange Rule 518(b)(17).

²⁸ Do Not Leg or “DNL” is an optional order instruction that may be applied to any complex order (excluding Complex Customer Cross Orders, Complex Qualified

The Exchange is making this change for business and competitive reasons as the Exchange initially set its fees lower than other options exchanges that offer similar functionality and operate comparable pricing models.²⁹ The Exchange now believes that it is appropriate to implement this new fee and application so that it is more in line with other exchanges, but will remain highly competitive such that it should enable the Exchange to continue to attract order flow and maintain market share.

For the reasons discussed above, the Exchange submits that the proposal satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities and is not designed to unfairly discriminate between customers, issuers, brokers, or dealers. As described more fully above and below, in the Exchange's statement regarding the burden on competition, the Exchange believes that its transaction pricing is subject to significant competitive forces, and that the proposed fees described herein are appropriate to address such forces.

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

In accordance with Section 6(b)(8) of the Act,³⁰ the Exchange does not believe that the proposed rule change will impose any burden on intra-market or inter-market competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Contingent Cross Orders, and cPRIME Orders) to prevent the complex order from legging into the Simple Order Book. See Exchange Rule 518(b)(10).

²⁹ See supra note 13.

³⁰ 15 U.S.C. 78f(b)(8).

Intra-Market Competition

The Exchange does not believe that its proposal will impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes will apply uniformly to all similarly situated Priority Customer Complex Orders. The Exchange believes that the proposal will continue to encourage Members to submit Priority Customer Complex Orders to the Exchange, which will increase liquidity and benefit all market participants by providing more trading opportunities. The Exchange notes the fact that preferential pricing to Priority Customers is a long-standing options industry practice. The proposed fees may enhance Priority Customer liquidity on the Exchange's Strategy Book, which, as a result, facilitates increased liquidity and execution opportunities to the benefit of all market participants. Additionally, the Exchange provides an optional complex order DNL instruction that Members may use to prevent their complex orders from legging into the Simple Order Book, and thereby not be subject to the proposed fees.

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 12-13% of the equity options market.³¹ Therefore, no exchange possesses significant pricing power. More specifically, as of March 24, 2023, the Exchange had a market share of approximately 3.28% of executed volume of multiply-listed

³¹ See supra note 17.

equity options for the month of March 2023.³² Therefore, no exchange possesses significant pricing power in the 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 fees 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.”³³ 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’ . . .”³⁴

³² See *id.*

³³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

³⁴ *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)).

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.

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,³⁵ and Rule 19b-4(f)(2)³⁶ 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-2023-11 on the subject line.

³⁵ 15 U.S.C. 78s(b)(3)(A)(ii).

³⁶ 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-2023-11. 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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

subject to copyright protection. All submissions should refer to File Number SR-EMERALD-2023-11, 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.³⁷

Sherry R. Haywood,
Assistant Secretary

³⁷ 17 CFR 200.30-3(a)(12).