

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93549; File No. SR-EMERALD-2021-39)

November 10, 2021

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Section 1)a)ii) of the Fee Schedule to Revise the Application of the Tier Calculation

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 October 29, 2021, 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)ii) of the Fee Schedule to revise the application of the Tier calculation (defined below).

Background

The Exchange currently assesses transaction rebates and fees to all market participants which are based upon a threshold tier structure (“Tier”) that is applicable to transaction fees. 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 first calculation (“Method 1”) is total Member sides, based on % of Customer Total Consolidated Volume (“CTCV”);³ the second calculation (“Method 2”) is total Emerald Market Maker sides volume, based on % of CTCV;

³ “CTCV” means Customer Total Consolidated Volume calculated as the total national volume cleared at The Options Clearing Corporation in the Customer range in those classes listed on MIAX Emerald for the month for which fees apply, excluding volume cleared at the Options Clearing Corporation in the Customer range executed during the period of time in which the Exchange experiences an Exchange System Disruption (solely in the option classes of the affected Matching Engine). See the Definitions Section of the MIAX Emerald Fee Schedule. 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 id. A “Matching Engine” is a part of the MIAX Emerald electronic system that processes options orders and trades on a symbol-by-symbol basis. Some Matching Engines will process option classes with multiple root symbols, and other Matching Engines may be dedicated to one single option root symbol (for example, options on SPY may be processed by one single Matching Engine that is dedicated only to SPY). A particular root symbol may only be assigned to a single designated Matching Engine. A particular root symbol may not be assigned to multiple Matching Engines. Id.

and the third calculation (“Method 3”) is total Priority Customer,⁴ Maker (defined below) sides volume, based on % of CTCV. The calculation method that results in the highest Tier achieved by the Member⁵ shall apply to all Origin types by the Member. The monthly volume thresholds for each method, 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,⁶ (as the numerator) expressed as a percentage of (divided by) CTCV (as the denominator). 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”).⁷ Members are also assessed lower transaction fees and smaller rebates for order executions in standard option classes in the Penny Interval Program⁸ (“Penny classes”) than for order

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.

⁶ “Excluded Contracts” means any contracts routed to an away market for execution. See the Definitions Section of the Fee Schedule.

⁷ 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.

⁸ 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

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.

Proposal

The Exchange proposes to amend the application of the calculation methodology used to determine the applicable Tier for Origin types by Member as follows. The Tier applied for a Member and its Affiliates’⁹ Priority Customer Origin will solely be determined by Method 3, Total Priority Customer, Maker sides volume, based on % of CTCV. The Tier applied for a Member and its Affiliates’ Market Maker and other professional Origins will be the highest Tier achieved among the three alternative calculation methods.

Purpose of Developing and Implementing Procedures Designed To Facilitate the Listing and Trading of Standardized Options) (the “Penny Program”).

⁹ “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 MIAX Emerald Fee Schedule.

The Exchange proposes to amend the current text in Section 1)a)ii), Tiers and their Application, to read, “Tiers are determined on a monthly basis. Tiers are determined based on three (3) alternative calculation methods. The Tier applied for a Member and its Affiliates’ Priority Customer Origin will solely be determined by Method 3 below. The Tier applied for a Member and its Affiliates’ Market Maker and other professional Origins will be the highest Tier achieved among the three alternative calculation methods. Following are the three (3) alternative calculation methods:”

For example, under this proposal, if Member A reaches Tier 2 via Total Volume (Method 1); Tier 2 via Market Maker Volume (Method 2); and Tier 4 via Priority Customer Maker (Method 3); the effective Tier for Member A would be Tier 4 across all Origins. If Member B reaches Tier 3 via Total Volume (Method 1); Tier 4 via Market Maker Volume (Method 2); and Tier 2 via Priority Customer Maker (Method 3); their effective Tier will be Tier 4 for Market Maker and other professional Origins, and Priority Customer Origin will remain Tier 2.

The purpose of adjusting the application of the calculation methodology used to determine the applicable Tier for Origin types by Member is for business and competitive reasons. The Exchange designed the current calculation methodology to encourage Market Maker and Priority Customer order flow to the Exchange from its inception. The Exchange believes that this proposal continues to incentive all types of volume to the Exchange including Market Maker, professional, and Priority Customer.

Implementation

The proposed changes will become effective on November 1, 2021.

2. Statutory Basis

The Exchange believes that its proposal to amend its Fee Schedule is consistent with Section 6(b) of the Act¹⁰ in general, and furthers the objectives of Section 6(b)(4) of the Act,¹¹ 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,¹² in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that 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 highly competitive market. 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.”¹³ There are currently 16 registered options exchanges competing for order flow. Based on

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78f(b)(1) and (b)(5).

¹³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

publicly-available information, and excluding index-based options, no single exchange has more than approximately 13% of the market share of executed volume of multiply-listed equity and exchange-traded fund (“ETF”) options trades as of October 26, 2021, for the month of October 2021.¹⁴ Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, as of October 26, 2021, the Exchange had an approximately 4.66% market share of executed volume of multiply-listed equity and ETF options for the month of October 2021.¹⁵ The Exchange cannot predict with certainty how the proposed change regarding the application of the Tier calculation will affect market participants as Members may continually shift among the different Tiers from month to month.

The Exchange believes that the ever-shifting market shares among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue or reduce use of certain categories of products, in response to transaction and/or non-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).¹⁶ MIAX Pearl experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange

¹⁴ See MIAX’s “The Market at a Glance”, available at <https://www.miaxoptions.com/> (last visited October 26, 2021).

¹⁵ See *id.*

¹⁶ See Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR-PEARL-2019-07).

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 revise the application of the Tier calculation to determine the Origin type Tier provides for the equitable allocation of reasonable dues and fees and is not unfairly discriminatory for the following reasons. The Exchange is only changing the application of the Tier calculation for the Tier for Members and its Affiliates' Priority Customer Origin, which will solely be determined by Priority Customer, Maker sides volume, based on % of CTCV (Method 3). The Exchange believes that it is equitable and not unfairly discriminatory to calculate the Priority Customer Tier independently and to only use the Priority Customer Tier for all Origin types when it is the highest of all the Tier calculations as this may incentivize Members to increase their Priority Customer volume on the Exchange. An increase in Priority Customer order flow to the Exchange would create additional liquidity which would benefit all market participants who trade on the Exchange.

The Exchange believes its proposal is consistent with Section 6(b)(4) of the Act¹⁷ because it applies equally to all Members of the Exchange and similarly situated participants are subject to the same Tier calculations and access to the Exchange is offered on terms that are not unfairly discriminatory. The Exchange believes its proposal may result in increased Priority Customer order flow which liquidity benefits all Exchange participants by providing more trading opportunities and tighter spreads.

¹⁷ 15 U.S.C. 78f(b)(4).

In addition, The Exchange believes that its proposal is consistent with Section 6(b) (5) of the Act¹⁸ 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 and tighter spreads.

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. The Exchange believes that the proposed changes in the application of the Tier calculation should continue to encourage 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.

Intra-Market Competition

The Exchange does not believe that other market participants at the Exchange would be placed at a relative disadvantage by the proposed change to amend the application of the calculation methodology used to determine the applicable Tier for Origin types by Member. The proposed change is designed to attract additional Priority Customer order flow to the Exchange. Accordingly, the Exchange believes that the proposal will not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because it will continue to encourage Priority Customer order flow to the Exchange and an increase in Priority Customer order flow will bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads.

¹⁸ 15 U.S.C. 78f(b)(4).

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 exceeded approximately 13% of the market share of executed volume of multiply-listed equity and ETF options trades as of October 26, 2021, for the month of October 2021.¹⁹ Therefore, no exchange possesses significant pricing power in the execution of multiply-listed equity and ETF options order flow. More specifically, as of October 26, 2021, the Exchange had a market share of approximately 4.66% of executed volume of multiply-listed equity and ETF options for the month of October 2021.²⁰ 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 changes reflect this competitive environment because they modify the Exchange's fees in a manner that encourages market participants to provide Priority Customer liquidity and to send order flow to the Exchange. To the extent this is achieved, all the Exchange's market participants should benefit from the improved market quality.

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.

¹⁹ Supra note 14.

²⁰ See id.

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,²¹ and Rule 19b-4(f)(2)²² 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-2021-39 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-EMERALD-2021-39. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

²¹ 15 U.S.C. 78s(b)(3)(A)(ii).

²² 17 CFR 240.19b-4(f)(2).

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-2021-39 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.²³

J. Matthew DeLesDernier
Assistant Secretary

²³ 17 CFR 200.30-3(a)(12).