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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97769; File No. SR-PEARL-2023-26]

### **Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Remove Additional Separate Maker Rebates in Non-Penny Classes from the MIAX Pearl Options Fee Schedule**

June 20, 2023

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 9, 2023, MIAX PEARL, LLC (“MIAX Pearl” 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 Pearl Options 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/pearl> at MIAX Pearl’s principal office, and at the Commission’s Public Reference Room.

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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 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 remove the additional separate rebates from Section 1)a) of the Fee Schedule denoted by footnotes “■” and “□.” The Exchange originally filed this proposal on May 31, 2023, (SR-PEARL-2023-24). On June 9, 2023, the Exchange withdrew SR-PEARL-2023-24 and resubmitted this proposal.

Background

The Exchange currently assesses transaction rebates and fees to all market participants which are based upon the total monthly volume executed by the Member<sup>3</sup> on MIAX Pearl in the relevant, respective origin type (not including Excluded Contracts)<sup>4</sup> (as the numerator) expressed as a percentage of (divided by) TCV<sup>5</sup> (as the denominator).

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<sup>3</sup> “Member” means an individual or organization that is registered with the Exchange pursuant to Chapter II of Exchange Rules for purposes of trading on the Exchange as an “Electronic Exchange Member” or “Market Maker.” Members are deemed “members” under the Exchange Act. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

<sup>4</sup> “Excluded Contracts” means any contracts routed to an away market for execution. See the Definitions Section of the Fee Schedule.

<sup>5</sup> “TCV” means total consolidated volume calculated as the total national volume in those classes listed on MIAX PEARL for the month for which the fees apply,

In addition, the per contract transaction rebates and fees are applied retroactively to all eligible volume for that origin type once the respective threshold tier (“Tier”) has been reached by the Member. The Exchange aggregates the volume of Members and their Affiliates.<sup>6</sup> Members that place resting liquidity, i.e., orders resting on the book of the

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excluding consolidated volume executed during the period time in which the Exchange experiences an “Exchange System Disruption” (solely in the option classes of the affected Matching Engine (as defined below)). The term Exchange System Disruption, which is defined in the Definitions section of the Fee Schedule, means an outage of a Matching Engine or collective Matching Engines for a period of two consecutive hours or more, during trading hours. The term Matching Engine, which is also defined in the Definitions section of the Fee Schedule, is a part of the MIAX PEARL 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. The Exchange believes that it is reasonable and appropriate to select two consecutive hours as the amount of time necessary to constitute an Exchange System Disruption, as two hours equates to approximately 1.4% of available trading time per month. The Exchange notes that the term “Exchange System Disruption” and its meaning have no applicability outside of the Fee Schedule, as it is used solely for purposes of calculating volume for the threshold tiers in the Fee Schedule. See the Definitions Section of the Fee Schedule.

<sup>6</sup> “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 PEARL 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 PEARL Market Maker) that has been appointed by a MIAX PEARL Market Maker, pursuant to the following process. A MIAX PEARL Market Maker appoints an EEM and an EEM appoints a MIAX PEARL 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](mailto: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

MIAX Pearl System,<sup>7</sup> are paid the specified “maker” rebate (each a “Maker”), and Members that execute against resting liquidity are assessed the specified “taker” fee (each a “Taker”). For opening transactions and ABBO<sup>8</sup> uncrossing transactions, per contract transaction rebates and fees are waived for all market participants. Finally, Members are assessed lower transaction fees and receive lower rebates for order executions in standard option classes in the Penny Interval Program<sup>9</sup> (“Penny Classes”) than for order executions in standard option classes which are not in the Penny Interval Program (“Non-Penny Classes”), where Members are assessed higher transaction fees and receive higher rebates.

#### Proposal

Currently, the Exchange provides a per contract Maker rebate in Non-Penny classes for MIAX Pearl Market Maker origins in Tier 1 and Tier 2 of (\$0.30); (\$0.60) in Tier 3; (\$0.65) in Tier 4; (\$0.70) in Tier 5; and (\$0.85) in Tier 6 as shown in the Fee

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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.

<sup>7</sup> The term “System” means the automated trading system used by the Exchange for the trading of securities. See Exchange Rule 100.

<sup>8</sup> “ABBO” means the best bid(s) or offer(s) disseminated by other Eligible Exchanges (defined in Exchange Rule 1400(g)) and calculated by the Exchange based on market information received by the Exchange from OPRA. See the Definitions Section of the Fee Schedule and Exchange Rule 100.

<sup>9</sup> See Securities Exchange Act Release No. 88992 (June 2, 2020), 85 FR 35142 (June 8, 2020) (SR-PEARL-2020-06).

Schedule section for the origin type, “All MIAX Pearl Market Makers.” Under footnote “■” of section 1)a) of the Fee schedule Market Makers may qualify for additional separate rebates for transactions in Non-Penny classes in Tiers 1 through 4 if the Market Maker increases their Non-Penny Class Maker TCV by 100% or more as compared to that Market Maker’s TCV for the month of July 2022, which is the Market Maker’s baseline Non-Penny Class Maker TCV. Market Makers that qualify will receive the following additional rebates (in addition to the relevant rebates described in the Fee Schedule): (\$0.40) in Tier 1; (\$0.40) in Tier 2; (\$0.10) in Tier 3; and (\$0.05) in Tier 4. Market Makers with no volume in the Non-Penny Class Maker segment for the month of July 2022 will have any new volume considered as added volume.

Additionally, the Exchange provides a per contract Maker rebate in Non-Penny classes for Non-Priority Customer, Firm, BD, and Non-MIAX Pearl Market Maker origins in Tier 1 and Tier 2 of (\$0.30); (\$0.60) in Tier 3; (\$0.65) in Tier 4; (\$0.70) in Tier 5; (\$0.85) in Tier 6 as shown in the Fee Schedule for the following origin types, “Non-Priority Customer, Firm, BD, and Non-MIAX Pearl Market Makers.” Under footnote “□” of section 1)a) of the Fee schedule EEMs may qualify for additional separate rebates for transactions in Non-Penny classes in Tiers 1 through 4 if the EEM Professional Origins, which include Non-Priority Customer, Firm, BD, and Non-MIAX Pearl Market Makers collectively, increases their Non-Penny Class Maker TCV by 100% or more as compared to that EEM’s TCV for the month of July 2022, which is the EEM’s Professional Origins baseline Non-Penny Class Maker TCV. EEMs Professional Origins who qualify will receive the following additional rebates (in addition to the relevant rebates described in the Fee Schedule): (\$0.40) in Tier 1; (\$0.40) in Tier 2; (\$0.10) in

Tier 3; and (\$0.05) in Tier 4. EEMs with no Professional Origins volume in the Non-Penny Class Maker segment for the month of July 2022 will have any new volume considered as added volume. These rebates were adopted to attract additional Non-Penny Class volume to the Exchange.<sup>10</sup>

The Exchange has observed that the incremental credit has not had the intended result in the last six months. Since the incremental credit has not incentivized MIAX Pearl Market Makers and EEM Professional origins to significantly increase their Non-Penny Class volume on the Exchange, the Exchange has determined to eliminate the incremental credit and remove it from the Exchange's Fee Schedule.

The Exchange now proposes to remove these additional separate rebates from the Exchange's Fee Schedule denoted by the "■" and "□" footnotes. Accordingly, the Exchange proposes to remove the footnotes from the table in Section 1)a) and also the explanatory note below the table for each footnote.

### 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 Act<sup>11</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>12</sup> 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)

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<sup>10</sup> See Securities Exchange Act Release No. 95886 (September 22, 2022), 87 FR 58843 (September 28, 2022) (SR-PEARL-2022-40).

<sup>11</sup> 15 U.S.C. 78f(b).

<sup>12</sup> 15 U.S.C. 78f(b)(4).

of the Act,<sup>13</sup> 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 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.”<sup>14</sup>

There are currently 16 registered options exchanges competing for order flow. Based on publicly-available information, and excluding index-based options, as of May 26, 2023, no single exchange had more than approximately 12-13% equity options market share for the month of May 2023.<sup>15</sup> Therefore, no exchange possesses significant pricing power. More specifically, as of May 26, 2023, the Exchange had a market share of approximately 6.87% of executed volume of multiply-listed equity options for the month of May 2023.<sup>16</sup>

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<sup>13</sup> 15 U.S.C. 78f(b)(1) and (b)(5).

<sup>14</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

<sup>15</sup> See MIAX’s “The market at a glance/MTD AVERAGE,” available at <https://www.miaxglobal.com/> (Data as of 5/1/2023 – 5/25/2023).

<sup>16</sup> See id.

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 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).<sup>17</sup> The Exchange experienced a decrease in total market share for the month of March 2019, after the proposal went into effect. Accordingly, the Exchange believes that its 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 eliminate additional separate Maker rebates for options transactions in Non-Penny Classes in Tiers 1 through 4 for MIAX Pearl Market Makers and EEM Professional origins is reasonable because the incentive that is the subject of this proposal did not have the intended results. The rebates were intended to attract additional Non-Penny Class volume to the Exchange.<sup>18</sup> The Exchange notes that the incremental credit has been underutilized in the last six months and has not

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<sup>17</sup> See Securities Exchange Act Release No. 85304 (March 13, 2019), 84 FR 10144 (March 19, 2019) (SR-PEARL-2019-07).

<sup>18</sup> See supra note 10.

incentivized Members to increase Non-Penny Class volume on the Exchange as anticipated. The Exchange also does not anticipate that any Member will qualify for the pricing incentive that is the subject of this proposal in the near future. The Exchange believes that it is reasonable to eliminate incentives when such incentives are underutilized. The Exchange believes that eliminating incentive programs from the Fee Schedule when such incentives become ineffective is equitable and not unfairly discriminatory because the incentive would be eliminated in its entirety and would no longer be available to any Member.

The Exchange notes that all Members would continue to be subject to the same fee structure, and access to the Exchange's market would continue to be offered on fair and non-discriminatory terms. The Exchange also believes that the proposed change would protect investors and the public interest because the removal of an underutilized pricing incentive would simplify the Fee Schedule and facilitate market participants' understanding of the fees charged and rebates offered by the Exchange.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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

The Exchange believes that the proposed change will not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intra-market Competition

The Exchange does not believe that the proposal will impose any burden on intra-market competition not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the elimination of the enhanced rebates will not impose any

burden on intra-market competition as the incentive has been underutilized in the last six months. The Exchange believes that it is reasonable to eliminate incentives when such incentives are underutilized. The Exchange believes that eliminating incentive programs from the Fee Schedule when such incentives become ineffective is equitable and not unfairly discriminatory because the incentive would be eliminated in its entirety and would no longer be available to any Member. Therefore 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.

#### Inter-market Competition

The Exchange operates in a highly competitive market in which market participants can readily choose to send their orders to other exchanges if they deem fee levels and incentives at those other exchanges to be more favorable. As noted above, the Exchange's market share is currently 6.87%.<sup>19</sup> In such an environment, the Exchange must continually adjust its fees and rebates to remain competitive with other exchanges. Because competitors are free to modify their own fees and credits in response, and because market participants may readily adjust their own order routing practices, the Exchange does not believe its proposed fee change can impose any burden on inter-market competition.

#### 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

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<sup>19</sup> See supra note 15.

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>20</sup> and Rule 19b-4(f)(2)<sup>21</sup> 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-PEARL-2023-26 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.

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<sup>20</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>21</sup> 17 CFR 240.19b-4(f)(2).

All submissions should refer to file number SR-PEARL-2023-26. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 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-PEARL-2023-26 and should be submitted on or before **[INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

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<sup>22</sup> 17 CFR 200.30-3(a)(12).

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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