

A proposed rule change filed under Rule 19b-4(f)(6)<sup>42</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),<sup>43</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange has indicated that there is a continued need to extend the temporary relief because the Exchange agrees with FINRA that the COVID-19 related health concerns necessitating this relief will continue beyond October 31, 2022.<sup>44</sup> The Exchange also states that extending the temporary relief provided in SR-NYSE-2020-76 immediately upon filing and without a 30-day operative delay will allow the Exchange to continue critical adjudicatory and review processes so that the Exchange may continue to operate effectively and meet its critical investor protection goals, while also protecting the health and safety of hearing participants.<sup>45</sup> The Commission also notes that this proposal extends without change the temporary relief previously provided by SR-NYSE-2020-76.<sup>46</sup> As proposed, the temporary changes would be in place through January 31, 2023 and the amended rules will revert back to their original state at the conclusion of the temporary relief period and, if applicable, any extension thereof.<sup>47</sup> For these reasons, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>48</sup>

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B)<sup>49</sup> of the Act to determine whether the proposed rule change 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2022-50 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-NYSE-2022-50. 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 (<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-NYSE-2022-50 and should be submitted on or before December 6, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>50</sup>

**J. Matthew DeLesDernier,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96264; File No. SR-MRX-2022-24]

### Self-Regulatory Organizations; Nasdaq MRX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Options 7, Section 5

November 8, 2022.

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 November 1, 2022, Nasdaq MRX, LLC ("MRX" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend MRX's Pricing Schedule at Options 7, Section 5 related to Membership Fees.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/mrx/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed

<sup>42</sup> 17 CFR 240.19b-4(f)(6).

<sup>43</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>44</sup> See *supra* Item II; see also SR-FINRA-2022-029, 87 FR 64526, at 64527.

<sup>45</sup> See 87 FR 64526, at 64528-29 (noting the same in granting FINRA's request to waive the 30-day operative delay so that SR-FINRA-2022-029 would become operative immediately upon filing).

<sup>46</sup> See *supra* note 4.

<sup>47</sup> See *supra* note 5. As noted above, the Exchange states that if it requires temporary relief from the rule requirements identified in this proposal beyond January 31, 2023, it may submit a separate rule filing to extend the effectiveness of the temporary relief under these rules.

<sup>48</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>49</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>50</sup> 17 CFR 200.30-3(a)(12).

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

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

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

MRX proposes to amend its Pricing Schedule at Options 7, Section 5, Other Options Fees and Rebates, to assess membership fees, which were not assessed until this year. Prior to this year, MRX did not assess its Members any membership fees. MRX launched its options market in 2016 and Members did not pay any membership fees until 2022.<sup>3</sup>

The proposed changes are designed to update fees for MRX's services to reflect their current value—rather than their value when it was a new exchange six years ago—based on MRX's ability to deliver value to its customers through technology, liquidity and functionality. Newly-opened exchanges often charge no fees for certain services such as membership, in order to attract order flow to an exchange, and later amend their fees to reflect the true value of those services.<sup>4</sup> Allowing newly-opened exchanges time to build and sustain market share before charging non-transactional fees encourages market entry and promotes competition. The proposed changes to membership fees within Options 7, Section 5; Other Options Fees and Rebates, are described below.

This proposal reflects MRX's assessment that it has gained sufficient market share to compete effectively against the other 15 options exchanges without waiving fees for membership. These types of fees are assessed by options exchanges that compete with MRX in the sale of exchange services—

indeed, as of the date of the initial filing of these membership fees, MRX was the only options exchange (out of the 16 current options exchanges) not assessing membership fees today. New exchanges commonly waive membership fees to attract market participants, facilitating their entry into the market and, once there is sufficient depth and breadth of liquidity, “graduate” to compete against established exchanges and charge fees that reflect the value of their services.<sup>5</sup> If MRX is incorrect in this assessment, that error will be reflected in MRX's ability to compete with other options exchanges.<sup>6</sup>

Access Fees

As noted above, MRX Members were not assessed fees for membership until this year. Under the proposed fee change, MRX Members will pay a monthly Access Fee, which entitles MRX Members to trade on the Exchange based on their membership type. Specifically, MRX proposes to assess Electronic Access Members<sup>7</sup> and Market Makers,<sup>8</sup> which could be either a Primary Market Maker (“PMM”) or a Competitive Market Maker (“CMM”), an Access Fee of \$200 per month. A Member would pay each applicable fee (an Electronic Access Fee or a Market Maker Access Fee). For example, an Electronic Access Member who desires to submit orders and also act as a

Market Maker and submit quotes would pay the Electronic Access Member Access Fee and Market Maker Access Fee. The proposed Access Fee for submitting orders and quotes is the same fee of \$200 per month.

CMM Trading Rights Fee

In order to receive market making appointments to quote in any options class, CMMs will also be assessed a CMM Trading Right Fee identical to GEMX.<sup>9</sup> CMM trading rights entitle a CMM to enter quotes in options symbols that comprise a certain percentage of industry volume. On a quarterly basis, the Exchange assigns points to each options class equal to its percentage of overall industry volume (not including exclusively traded index options), rounded down to the nearest one hundredth of a percentage with a maximum of 15 points (“CMM Trading Right”). A new listing is assigned a point value of zero for the remainder of the quarter in which it was listed. CMMs may seek appointments to options classes that total 20 points for the first CMM Trading Right it holds, and 10 points for the second and each subsequent CMM Trading Right it holds.<sup>10</sup> In order to encourage CMMs to quote on the Exchange, MRX launched CMM Trading Rights without any fees, allowing CMMs to freely quote in all options classes.

The Exchange is now proposing to adopt a monthly CMM Trading Right Fee. Under the proposed fee structure, CMMs will be assessed a CMM Trading Right Fee of \$850 per month for the first trading right, which will entitle the CMM to quote in 20 percent of industry volume. Each additional CMM Trading Right will cost \$500 per month, and will entitle the CMM to quote an additional 10 percent of volume. Similar to GEMX's trading rights fee,<sup>11</sup> a new CMM would pay \$850 for the first CMM Trading Right and all CMMs would thereafter pay \$500 for each additional CMM Trading Right. For example, if a CMM desired to quote in all options series listed on MRX, the CMM would need to obtain 9 CMM Trading Rights at a cost of \$4,850. The Exchange is proposing this pricing model to encourage CMMs to obtain a greater number of CMM Trading Rights in order that they may add more liquidity on MRX. With this model, each subsequent

<sup>3</sup> For example, MIAX Emerald commenced operations as a national securities exchange registered on March 1, 2019. See Securities Exchange Act Release No. 84891 (December 20, 2018), 83 FR 67421 (December 28, 2018) (File No. 10-233) (order approving application of MIAX Emerald, LLC for registration as a national securities exchange). MIAX Emerald filed to adopt its transaction fees and certain of its non-transaction fees in its filing SR-EMERALD-2019-15. 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). MIAX Emerald waived its one-time application fee and monthly Trading Permit Fees assessable to EEMs and Market Makers among other fees within SR-EMERALD-2019-15.

<sup>6</sup> Nasdaq announced that, beginning in 2022, it plans to migrate its North American markets to Amazon Web Services in a phased approach, starting with MRX. The MRX migration will take place in November 2022. The proposed fee changes are entirely unrelated to this effort.

<sup>7</sup> The term “Electronic Access Member” or “EAM” means a Member that is approved to exercise trading privileges associated with EAM Rights. See General 1, Section 1(a)(6).

<sup>8</sup> The term “Market Makers” refers to “Competitive Market Makers” and “Primary Market Makers” collectively. See Options 1, Section 1(a)(21). The term “Competitive Market Maker” means a Member that is approved to exercise trading privileges associated with CMM Rights. See Options 1, Section 1(a)(12). The term “Primary Market Maker” means a Member that is approved to exercise trading privileges associated with PMM Rights. See Options 1, Section 1(a)(35).

<sup>9</sup> See GEMX Options 7, Section 6.B. (CMM Trading Rights Fees).

<sup>10</sup> A CMM may request changes to its appointments at any time upon advance notification to the Exchange in a form and manner prescribed by the Exchange. See MRX Options 2, Section 3(c)(3).

<sup>11</sup> See GEMX Options 7, Section 6.B.

<sup>3</sup> The Exchange initially filed proposed pricing changes on May 2, 2022 (SR-MRX-2022-04) instituting fees for membership, ports and market data. On June 29, 2022, the Exchange withdrew that filing, and submitted separate filings for membership, ports and market data. SR-MRX-2022-07 replaced the membership fees set forth in SR-MRX-2022-04. Thereafter, SR-MRX-2022-13 replaced the membership fees set forth in SR-MRX-2022-07. On October 5, 2022, SR-MRX-2022-13 which withdrawn and replaced with SR-MRX-2022-19. The instant filing replaces SR-MRX-2022-19, which was withdrawn on November 1, 2022.

<sup>4</sup> See also Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR-MEMX-2021-19) (introduction of membership fees by MEMX).

CMM Trading Right of \$500 per month costs less than the initial CMM Trading Right of \$850 per month. As noted, the maximum expense would be \$4,850 for a CMM to obtain the ability to quote in all option series listed on MRX. All CMMs have the opportunity to purchase additional CMM Trading Rights beyond the initial CMM Trading Right in order to quote in some or all options series on MRX.

With this proposal, PMMs would not be assessed a Trading Rights Fee. PMMs have additional obligations on MRX as compared to CMMs. PMMs are required to open options series in which they are assigned each day on MRX. Specifically, PMMs must submit a Valid Width Quote each day to open their assigned options series.<sup>12</sup> PMMs are integral to providing liquidity during MRX's Opening Process.<sup>13</sup> Intra-day, PMMs must provide two-sided quotations in a certain percentage of their assigned options series.<sup>14</sup> In contrast, a CMM is not required to enter quotations in the options classes to which it is appointed; however, if a CMM initiates quoting in an options class, the CMM is required to provide two-sided quotations in a certain of their assigned options class, which percentage is less than that required of PMMs (60% for CMMs compared to 90% for PMMs).<sup>15</sup> While there can be multiple CMMs in an options series, there is only one PMM assigned per options series. The Exchange desires to encourage Market Makers to compete for appointments as PMMs in an options series. The Exchange believes that PMMs serve an important role on MRX in opening an

option series and ensuring liquidity in that option series throughout the trading day. This liquidity benefits the market through, for example, more robust quoting. Additionally, all market participants may interact with the liquidity.

Finally, the Exchange is proposing only to charge the \$200 Access Fee to Electronic Access Members, and no trading rights fee, as the technical, regulatory, and administrative services associated with an Electronic Access Member's use of the Exchange are not as comprehensive as those associated with Market Makers' use.<sup>16</sup> As noted above, a Member would pay each applicable fee (an Electronic Access Fee or a Market Maker Access Fee). A Competitive Market Maker or Primary Market Maker who does not enter orders would only pay \$200 per month Access Fee.

MRX believes that its membership fees, which have been in effect since May 2, 2022, are in line with or less than those of other options exchanges. The Exchange believes it is notable that during this time, there have been no comment letters submitted to the Commission arguing that the Exchange's new fees are unreasonable. The membership fees are constrained by competition. For example, since the inception of the membership fees on May 2, 2022, one firm cancelled nine CMM trading rights as well as their membership on MRX.<sup>17</sup> Also, another firm decreased their CMM trading rights from nine to four CMM trading rights.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>18</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>19</sup> in particular, in that it provides for the equitable allocation of reasonable dues, fees, and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The proposed changes to the Pricing Schedule are reasonable in several respects. As a threshold matter, the Exchange is subject to significant

competitive forces in the market for order flow, which constrains its pricing determinations. The fact that the market for order flow is competitive has 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 order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ . . . .”<sup>20</sup>

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention to determine prices, products, and services in the securities markets. In Regulation NMS, while adopting a series of steps to improve the current market model, the Commission highlighted the importance of market forces in determining prices and SRO revenues, and also recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>21</sup>

Congress directed the Commission to “rely on ‘competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.’”<sup>22</sup> As a result, the Commission has historically relied on competitive forces to determine whether a fee proposal is equitable, fair, reasonable, and not unreasonably or unfairly discriminatory. “If competitive forces are operative, the self-interest of the exchanges themselves will work powerfully to constrain unreasonable or unfair behavior.”<sup>23</sup> Accordingly, “the existence of significant competition provides a substantial basis for finding that the

<sup>20</sup> See *NetCoalition*, 615 F.3d at 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782–83 (December 9, 2008) (SR–NYSEArca–2006–21)).

<sup>21</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>22</sup> See *NetCoalition*, 615 F.3d at 534–35; see also H.R. Rep. No. 94–229 at 92 (1975) (“[I]t is the intent of the conferees that the national market system evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed.”).

<sup>23</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770 (December 9, 2008) (SR–NYSEArca–2006–21).

<sup>12</sup> See Options 3, Section 8(c)(1) and 8(c)(3).

<sup>13</sup> The Exchange notes that most options markets do not require their primary or lead market maker to open their assigned options series.

<sup>14</sup> See Options 2, Section 5(e)(2) which states, “Primary Market Makers, associated with the same Member, are collectively required to provide two-sided quotations in 90% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading. Primary Market Makers shall be required to make two-sided markets pursuant to this Rule in any Quarterly Options Series, any Adjusted Options Series, and any option series with an expiration of nine months or greater for options on equities and ETFs or with an expiration of twelve months or greater for index options.”

<sup>15</sup> See Options 2, Section 5(e)(1) which states, that “On any given day, a Competitive Market Maker is not required to enter quotations in the options classes to which it is appointed. A Competitive Market Maker may initiate quoting in options classes to which it is appointed intra-day. If a Competitive Market Maker initiates quoting in an options class, the Competitive Market Maker, associated with the same Member, is collectively required to provide two-sided quotations in 60% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading . . . .”

<sup>16</sup> The Exchange notes that all MRX Members may submit orders; however, only Market Makers may submit quotes. The Exchange surveils Market Maker quoting to ensure these participants have met their obligations. The regulatory oversight for Market Makers is in addition to the regulatory oversight which is administered for all Electronic Access Members.

<sup>17</sup> The Exchange notes that this Member was not active on MRX prior to the cancellation.

<sup>18</sup> See 15 U.S.C. 78f(b).

<sup>19</sup> See 15 U.S.C. 78f(b)(4) and (5).

terms of an exchange's fee proposal are equitable, fair, reasonable, and not unreasonably or unfairly discriminatory."<sup>24</sup> In its 2019 guidance on fee proposals, Commission staff indicated that they would look at factors beyond the competitive environment, such as cost, only if a "proposal lacks persuasive evidence that the proposed fee is constrained by significant competitive forces."<sup>25</sup>

#### History of MRX Operations

Over the years, MRX has amended its transactional pricing to remain competitive and attract order flow to the Exchange.<sup>26</sup>

In June 2019, MRX commenced offering complex orders.<sup>27</sup> With the addition of complex order functionality, MRX offered Members certain order types, an opening process, auction capabilities, and other trading functionality that was nearly identical to functionality available on ISE.<sup>28</sup> By way of comparison, ISE, unlike MRX, assessed membership fees in 2019<sup>29</sup> while offering the same suite of functionality as MRX, with a limited exception.<sup>30</sup>

#### Membership is Subject to Significant Substitution-Based Competitive Forces.

An exchange can show that a product is "subject to significant substitution-based competitive forces" by introducing evidence that customers can substitute the product for products offered by other exchanges.

Chart 1 below shows the January 2022 market share for multiply-listed options by exchange. Of the 16 operating options exchanges, none currently has more than a 13.1% market share, and MRX has the smallest market share at 1.8%. Customers widely distribute their transactions across exchanges according to their business needs and the ability of each exchange to meet those needs

through technology, liquidity and functionality. Average market share for the 16 options exchanges is 6.26 percent, with the median at 5.8, and a range between 1.8 and 13.1 percent.

<sup>26</sup> See e.g. Securities Exchange Act Release Nos. 77292 (March 4, 2016), 81 FR 12770 (March 10, 2016) (SR-ISEMercury-2016-02) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Establish the Schedule of Fees); 77409 (March 21, 2016), 81 FR 16240 (March 25, 2016) (SR-ISEMercury-2016-05) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 81 FR 16238 (March 21, 2016), 81 FR 16238 (March 25, 2016) (SR-ISEMercury-2016-06) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 77841 (May 16, 2016), 81 FR 31986 (SR-ISEMercury-2016-11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees); 82537 (January 19, 2018), 83 FR 3784 (January 26, 2018) (SR-MRX-2018-01) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Schedule of Fees To Introduce a New Pricing Model); 82990 (April 4, 2018), 83 FR 15434 (April 10, 2018) (SR-MRX-2018-10) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Chapter IV of the Exchange's Schedule of Fees); 28677 (June 14, 2018), 83 FR 28677 (June 20, 2018) (SR-MRX-2018-19) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Increase Certain Route-Out Fees Set Forth in Section II.A of the Schedule of Fees); 84113 (September 13, 2018), 83 FR 47386 (September 19, 2018) (SR-MRX-2018-27) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Relocate the Exchange's Schedule of Fees); 85143 (February 14, 2019), 84 FR 5508 (February 21, 2019) (SR-MRX-2019-02) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Pricing Schedule at Options 7, Section 3); 85313 (March 14, 2019), 84 FR 10357 (March 20, 2019) (SR-MRX-2019-05) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to PIM Fees and Rebates); 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR-MRX-2019-14) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt Complex Order Pricing); 88022 (January 23, 2020), 85 FR 5263 (January 29, 2020) (SR-MRX-2020-02) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend MRX Pricing Schedule); 89046 (June 11, 2020), 85 FR 36633 (June 17, 2020) (SR-MRX-2020-11) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7); 89320 (July 15, 2020), 85 FR 44135 (July 21, 2020) (SR-MRX-2020-14) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7, Section 5, Other Options Fees and Rebates, in Connection With the Pricing for Orders Entered Into the Exchanges Price

#### Chart 1: Market Share by Exchange for January 2022

Improvement Mechanism); 90503 (November 24, 2020), 85 FR 77317 (December 1, 2020) (SR-MRX-2020-18) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Its Pricing Schedule at Options 7 for Orders Entered Into the Exchange's Price Improvement Mechanism); 90434 (November 16, 2020), 85 FR 74473 (November 20, 2020) (SR-MRX-2020-19) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To the Exchange's Pricing Schedule at Options 7 To Amend Taker Fees for Regular Orders); 90455 (November 18, 2020), 85 FR 75064 (November 24, 2020) (SR-MRX-2020-21) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Pricing Schedule); and 91687 (April 27, 2021), 86 FR 23478 (May 3, 2021) (SR-MRX-2021-04) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Exchange's Pricing Schedule at Options 7). Note that ISE Mercury is an earlier name for MRX.

<sup>27</sup> See Securities Exchange Act Release No. 86326 (July 8, 2019), 84 FR 33300 (July 12, 2019) (SR-MRX-2019-14) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt Complex Order Pricing).

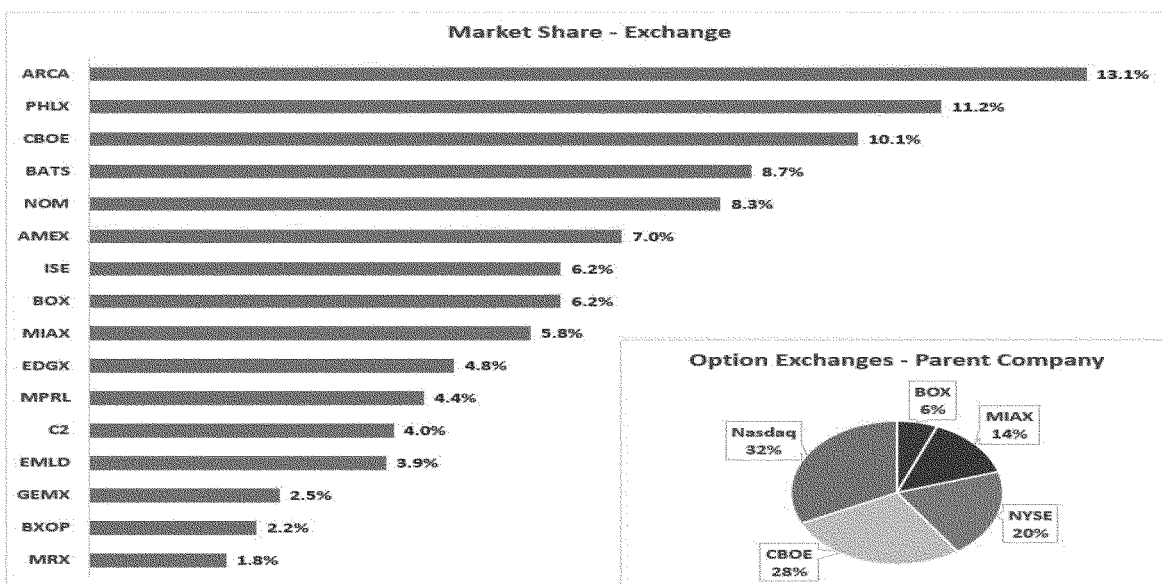
<sup>28</sup> One distinction is that ISE offered its Members access to Nasdaq Precise in 2019 and since that time. MRX has never offered Precise. "Nasdaq Precise" or "Precise" is a front-end interface that allows Electronic Access Members and their Sponsored Customers to send orders to the Exchange and perform other related functions. Features include the following: (1) order and execution management: enter, modify, and cancel orders on the Exchange, and manage executions (e.g., parent/child orders, inactive orders, and post-trade allocations); (2) market data: access to real-time market data (e.g., NBBO and Exchange BBO); (3) risk management: set customizable risk parameters (e.g., kill switch); and (4) book keeping and reporting: comprehensive audit trail of orders and trades (e.g., order history and done away trade reports). See ISE Supplementary Material .03(d) of Options 3, Section 7. Precise is also available on GEMX.

<sup>29</sup> In 2019, ISE assessed the following Access Fees: \$500 per month, per membership to an Electronic Access Member, \$5,000 per month, per membership to a Primary Market Maker and \$2,500 per month, per membership to a Competitive Market Maker. ISE does not assess Trading Rights Fees to Competitive Market Makers. See Securities Exchange Act Release No. 82446 (January 5, 2018), 83 FR 1446 (January 11, 2018) (SR-ISE-2017-112) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Certain Non-Transaction Fees in the Exchange's Schedule of Fees). Of note, ISE assessed Access Fees prior to 2019 as well.

<sup>30</sup> Unlike ISE, MRX does not offer Precise. See note 30, *supra*.

<sup>24</sup> *Id.*

<sup>25</sup> See U.S. Securities and Exchange Commission, "Staff Guidance on SRO Rule Filings Relating to Fees" (May 21, 2019), available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.



Market share is the percentage of volume on a particular exchange relative to the total volume across all exchanges, and indicates the amount of order flow directed to that exchange. High levels of market share enhance the value of trading and membership. MRX has the smallest number of Members relative to its GEMX, ISE, NOM and Phlx affiliates, with approximately 40 members. This demonstrates that customers can and will choose where to become members, need not become members of all exchanges, and do not need to become Members of MRX and instead may utilize a third party.<sup>31</sup>

The Exchange established these lower (when compared to other options exchanges in the industry) membership fees in order to encourage market participants to become MRX Members and register as MRX Market Makers. As noted above, MRX has grown its market share since inception and seeks to continue to grow its membership base. The Exchange believes that there are many factors that may cause a market participant to decide to become a member of a particular exchange in addition to its pricing.

As noted herein, MRX filed its membership fees on May 2, 2022 and has not received a comment with respect to the proposed membership fee changes. MRX Members may elect to cancel their membership on MRX. Since the inception of the membership fees on May 2, 2022, one firm cancelled nine

<sup>31</sup> Of course, that third party must itself become a Member of MRX, so at least some market participants must become Members of MRX for any trading to take place at all. Nevertheless, because some firms would be able to exercise the option of not becoming Members, excessive membership fees would cause the Exchange to lose members.

CMM trading rights as well as their membership on MRX. Also, another firm decreased their CMM trading rights from nine to four CMM trading rights. Also, no MRX Member is required by rule, regulation, or competitive forces to be a Member on the Exchange.

#### Fees for Membership

The proposed membership fees described below are in line with or less than those of other markets. Setting a fee above competitors is likely to drive away customers, so the most efficient price-setting strategy is to set prices at the same level as other firms.

The Exchange's proposal to adopt membership fees is reasonable, equitable and not unfairly discriminatory. As a self-regulatory organization, MRX's membership department reviews applicants to ensure that each application complies with the rules specified within MRX General 3<sup>32</sup> as well as other requirements for membership.<sup>33</sup> Applicants must meet the Exchange's qualification criteria prior to approval. The membership review includes, but is not limited to, the registration and qualification of associated persons, financial health, the validity of the required clearing relationship, and the history of disciplinary matters. Approved Members would be required to comply with MRX's By-Laws and Rules and would be subject to regulation by MRX. The proposed membership fees are in

<sup>32</sup> MRX General 3, Membership and Access, incorporates by reference Nasdaq General 3.

<sup>33</sup> The Exchange's Membership Department must ensure, among other things, that an applicant is not statutorily disqualified.

line with or lower than similar fees assessed on other options markets.<sup>34</sup>

#### Access Fees

MRX's flat rate Access Fee to Electronic Access Members and Market Makers of \$200 per month is reasonable. The Exchange would assess the same fee to Electronic Access Members who submit orders and Market Makers who submit quotes.<sup>35</sup> The Exchange believes that it is reasonable to assess an Access Fee because there are technical, regulatory, and administrative services associated with being an Electronic Access Member or a Market Maker.

Any Electronic Access Member entering orders or Market Maker entering quotes on MRX would pay the same \$200 per month Access Fee. MRX's flat rate Access Fee to Electronic Access Members and Market Makers of \$200 per month is equitable and not unfairly discriminatory as all Members would be subject to this same fee.

Additionally, the Exchange believes that the proposed change will better align MRX's membership fees with rates charged by competing options exchanges.<sup>36</sup> Further, the Exchange believes that the proposal is reasonably designed to continue to compete with

<sup>34</sup> See Cboe's Fees Schedule. Cboe assesses permit fees as follows: Market-Maker Electronic Access Permit of \$5,000 per month; Electronic Access Permits of \$3,000 per month; and Clearing TPH Permit of \$2,000 per month. See also Miami International Securities Exchange, LLC's ("MIAX") Fee Schedule. MIAX assesses an Electronic Exchange Member Fee of \$1,500 per month.

<sup>35</sup> All MRX Members may submit orders; however, only Market Makers may submit quotes.

<sup>36</sup> See GEMX Options 7, Section 7. GEMX's Access Fees are within the range of fees proposed by MRX. Additionally, MRX assesses a Trading Rights Fees to CMMs and not PMMs.

other options exchanges by incentivizing market participants to register as both Electronic Access Members and Market Makers on MRX in a manner than enables MRX to improve its overall competitiveness and strengthen market quality for all market participants.

#### CMM Trading Right Fee

The Exchange believes that it is reasonable to assess CMMs a CMM Trading Right Fee because these Market Makers are not required to enter quotations in the options classes to which it is appointed unless the CMM initiates quoting in an options class.<sup>37</sup> With respect to the CMM Trading Rights Fee, the proposed fees compare favorably with those of other options exchanges. For example, a market maker on MIAX is assessed a \$3,000 one-time fee and then a tiered monthly fee from \$7,000 for up to 10 classes to \$22,000 for over 100 classes.<sup>38</sup> By comparison, under the proposed fee structure, a CMM can be granted access on the Exchange for as little as \$950 per month (*i.e.*, a \$100 access fee and an \$850 trading right), and could quote in all options classes on the Exchange by paying the access fee and obtaining nine CMM trading rights for a total of \$4,950 per month. The Exchange notes that its tiered model for CMM trading rights is consistent with the pricing practices of other exchanges, such as NYSE Arca, which charges \$6,000 per month for the first market maker trading permit, down to \$1,000 per month for the fifth and additional trading permits, with various tiers in-between. Like other options exchanges, the Exchange is proposing a tiered pricing model because it may encourage CMM firms to purchase additional trading rights and quote more options series because subsequent CMM Trading Rights are priced lower than the initial CMM Trading Right.

The Exchange believes that it is equitable and not unfairly discriminatory to assess only CMMs a CMM Trading Right Fee. While there can be multiple CMMs in an options series, there is only one PMM assigned per options series. Unlike PMMs who must open each option series to which they are assigned,<sup>39</sup> CMMs have no opening obligations. Intra-day, unlike PMMs, a CMM is not required to enter quotations in the options classes to which it is appointed; however, if a

CMM initiates quoting in an options class, the CMM is required to provide two-sided quotations in a certain of their assigned options class, which percentage is less than that required of PMMs (60% for CMMs as compared to 90% for PMMs).<sup>40</sup> Because PMMs have an obligation to open an options series and higher quoting obligations, and also because there can be only one PMM whereas there are multiple CMMs, the Exchange believes that it is equitable and not unfairly discriminatory to incentivize Market Makers to act as PMMs by assessing no Trading Right Fees to PMMs and only assessing CMMs such fees.

Similar to a recent proposal by BOX Exchange LLC (“BOX”)<sup>41</sup> and Cboe Exchange, Inc. (“Cboe”),<sup>42</sup> the Exchange notes that there is no regulatory requirement that market makers connect and access any one options exchange or that any market participant connect to any one options exchange. Moreover, a Market Maker membership is not a requirement to participate on the Exchange and participation on an exchange is completely voluntary.

Additionally, Cboe noted that several broker-dealers are members of only a single exchange that lists options for trading and it identified numerous broker-dealers that are members of other options exchanges, but not the Exchange.<sup>43</sup> BOX noted in its rule

<sup>40</sup> See Options 2, Section 5(e)(1) which states, that “On any given day, a Competitive Market Maker is not required to enter quotations in the options classes to which it is appointed. A Competitive Market Maker may initiate quoting in options classes to which it is appointed intra-day. If a Competitive Market Maker initiates quoting in an options class, the Competitive Market Maker, associated with the same Member, is collectively required to provide two-sided quotations in 60% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member’s assigned options class is open for trading. . . .”

<sup>41</sup> See Securities and Exchange Release No. 94894 (May 11, 2022), 87 FR 29987 (May 17, 2022) (SR-BOX-2022-17) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule on the BOX Options Market LLC Facility To Adopt Electronic Market Maker Trading Permit Fees). BOX amended its fees on January 3, 2022 to adopt an electronic market maker trading permit fee.

<sup>42</sup> See Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR-CBOE-2020-105) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule in Connection With Migration).

<sup>43</sup> *Id.* Cboe notes it has identified approximately 25 broker-dealers that are members of ISE, but not Cboe, both options only exchanges. Similarly, Cboe identified at least 4 broker-dealers that trade options and are members of one or more of the Exchange’s affiliated options exchanges, but not Cboe. Cboe mentioned that the number of members at each exchange that trades options varies greatly. Particularly, the number of members of exchanges that trade options vary between approximately 9

change that it reviewed membership details at three options exchanges and found that there are 62 market making firms across these three exchanges.<sup>44</sup> Further, BOX found that 42 of the 62 market making firms access only one of the three exchanges.<sup>45</sup> Additionally, BOX identified numerous market makers that are members of other options exchanges, but not BOX.<sup>46</sup>

Not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no “de facto” or practical requirement as well, as further evidenced by the Cboe membership analysis and market maker membership analysis by BOX of three options exchanges discussed above. Indeed, Electronic Access Members and Market Makers choose if and how to access a particular exchange and because it is a choice, MRX must set reasonable pricing, otherwise prospective members and market makers would not connect and existing Electronic Access Members and Market Makers would disconnect from the Exchange.

As noted above, one MRX Member cancelled their membership on MRX as well as nine CMM Trading Rights.<sup>47</sup> Also, another MRX Member decreased their CMM Trading Rights from nine to four CMM Trading Rights. The Exchange believes the Commission has a sufficient basis to determine that MRX was subject to significant competitive forces in setting the terms of its proposed fees. Moreover, the Commission has found that, if an exchange meets the burden of demonstrating it was subject to significant competitive forces in setting its fees, the Commission “will find that its fee rule is consistent with the Act unless ‘there is a substantial countervailing basis to find that the terms’ of the rule violate the Act or the rules thereunder.”<sup>48</sup> The Exchange is not aware of, nor has the Commission articulated, a substantial countervailing

and 171 broker-dealers. Even the number of members between the Exchange and its 3 other options exchange affiliates vary. Particularly, while the Exchange currently has 92 members, Cboe C2 has 54 members, Cboe EDGX has 52 members that trade options and Cboe BZX has 66 members that trade options.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* For example, BOX identified 47 market makers that are members of Cboe (an exchange that only lists options), but not the Exchange (which also lists only options).

<sup>47</sup> The Exchange notes that this Member was not active on MRX prior to the cancellation.

<sup>48</sup> See Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (“2008 ArcaBook Approval Order”) (approving proposed rule change to establish fees for a depth-of-book market data product).

<sup>37</sup> See Options 2, Section 5(e)(2).

<sup>38</sup> See Miami International Securities Exchange, LLC Fee Schedule at 20 and 21: [https://www.miaxoptions.com/sites/default/files/fee\\_schedule-files/MIAX\\_Options\\_Fee\\_Schedule\\_03012022.pdf](https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Options_Fee_Schedule_03012022.pdf).

<sup>39</sup> See Options 3, Section 8(c)(1) and 8(c)(3).

basis for finding the proposal violates the Act or the rules thereunder.

Membership fees were charged by all options exchanges except MRX until May 2, 2022. In 2022, similar to MRX, MEMX LLC (“MEMX”) commenced assessing a monthly membership fee.<sup>49</sup> MEMX reasoned in that rule change that there is value in becoming a member of the exchange.<sup>50</sup> MEMX stated that it believed that its proposed membership fee “is not unfairly discriminatory because no broker-dealer is required to become a member of the Exchange.”<sup>51</sup> Moreover, “neither the trade-through requirements under Regulation NMS nor broker-dealers’ best execution obligations require a broker-dealer to become a member of every exchange.”<sup>52</sup> In this respect, MEMX is correct; a monthly membership fee is reasonable, equitably allocated and not unfairly discriminatory. Market participants may choose to become a member of one or more options exchanges based on the market participant’s business model. A very small number of market participants choose to become a member of all sixteen options exchanges. It is not a requirement for market participants to become members of all options exchanges, in fact, certain market participants conduct an options business as a member of only one options market.

MRX makes the same arguments herein as were proposed by MEMX in similarly adopting membership fees. The Exchange notes that MRX’s ability to assess membership fees similar to MEMX and all other options markets permits it to compete with other options markets on an equal playing field. MRX was the only options market prior to May 2, 2022 that did not assess membership fees. Most firms that actively trade on options markets are not currently Members of MRX. Using options markets that Nasdaq operates as points of comparison, less than a third of the firms that are members of at least one of the options markets that Nasdaq operates are also Members of MRX (approximately 29%). The Exchange notes that no firm is a Member of MRX only. Few, if any, firms have become Members at MRX, notwithstanding the fact that MRX membership is currently free, because MRX currently has less liquidity than other options markets. As explained above, MRX has the smallest

market share of the 16 options exchanges, representing only approximately 1.8% of the market, and, for certain market participants, the current levels of liquidity may be insufficient to justify the costs associated with becoming a Member and connecting to the Exchange, notwithstanding the fact that membership is free.

The decision to become a member of an exchange, particularly for registered market makers, is complex, and not solely based on the non-transactional costs assessed by an exchange. Becoming a member of an exchange does not “lock” a potential member into a market or diminish the overall competition for exchange services. The decision to become a member of an exchange is made at the beginning of the relationship, and is no less subject to competition than trading fees.

In lieu of becoming a member at each options exchange, a market participant may join one exchange and elect to have their orders routed in the event that a better price is available on an away market. Nothing in the Order Protection Rule requires a firm to become a Member at MRX.<sup>53</sup> If MRX is not at the NBBO, MRX will route an order to any away market that is at the NBBO to prevent a trade-through and also ensure that the order was executed at a superior price.<sup>54</sup>

In lieu of joining an exchange, a third-party may be utilized to execute an order on an exchange. For example, a third-party broker-dealer Member of MRX may be utilized by a retail investor to submit orders into an Exchange. An institutional investor may utilize a broker-dealer, a service bureau,<sup>55</sup> or request sponsored access<sup>56</sup> through a member of an exchange in order to submit a trade directly to an options

exchange.<sup>57</sup> A market participant may either pay the costs associated with becoming a member of an exchange or, in the alternative, a market participant may elect to pay commissions to a broker-dealer, pay fees to a service bureau to submit trades, or pay a member to sponsor the market participant in order to submit trades directly to an exchange. Market participants may elect any of the above models and weigh the varying costs when determining how to submit trades to an exchange. Depending on the number of orders to be submitted, technology, ability to control submission of orders, and projected revenues, a market participant may determine one model is more cost efficient as compared to the alternatives.

After 6 years, MRX proposes to commence assessing membership fees, just as all other options exchanges.<sup>58</sup> The introduction of these fees will not impede a Member’s access to MRX, but rather will allow MRX to continue to compete and grow its marketplace so that it may continue to offer a robust trading architecture, a quality opening process, an array of simple and complex order types and auctions, and competitive transaction pricing. If MRX is incorrect in its assessment of the value of its services, that assessment will be reflected in MRX’s ability to compete with other options exchanges.

Similar to Cboe,<sup>59</sup> MRX believes that the proposed changes are consistent with the Act because they are reasonable, equitably allocated, not unfairly discriminatory, and not an undue burden on competition, as they are supported by evidence (including data and analysis) and are constrained by significant competitive forces. The Exchange also believes the proposed fees are reasonable as they are in line with the amounts assessed by other exchanges for membership.

Accordingly, the Exchange believes that the Commission should find that the Proposed Fee Increases are consistent with the Act.

#### *B. Self-Regulatory Organization’s Statement on Burden on Competition*

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

<sup>57</sup> This may include utilizing a Floor Broker and submitting the trade to one of the five options trading floors.

<sup>58</sup> Today, MRX is the only options exchange that does not assess membership fees.

<sup>59</sup> See Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR-CBOE-2020-105).

<sup>49</sup> See Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR-MEMX-2021-19). The Monthly Membership Fee is assessed to each active Member at the close of business on the first day of each month.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Options Order Protection and Locked/Crossed Market Plan (August 14, 2009), available at [https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options\\_order\\_protection\\_plan.pdf](https://www.theocc.com/getmedia/7fc629d9-4e54-4b99-9f11-c0e4db1a2266/options_order_protection_plan.pdf).

<sup>54</sup> MRX Members may elect to not route their orders by marking an order as “do-not-route.” In this case, the order would not be routed. See Options 3, Section 7(m).

<sup>55</sup> Service bureaus provide access to market participants to submit and execute orders on an exchange. On MRX, a Service Bureau may be a Member. Some MRX Members utilize a Service Bureau for connectivity and that Service Bureau may not be a Member. Some market participants utilize a Service Bureau who is a Member to submit orders. As noted herein only MRX Members may submit orders or quotes through ports.

<sup>56</sup> Sponsored Access is an arrangement whereby a member permits its customers to enter orders into an exchange’s system that bypass the member’s trading system and are routed directly to the Exchange, including routing through a service bureau or other third-party technology provider.



The Exchange believes its proposal remains competitive with other options markets, and will offer market participants with another choice of venue to transact options. The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive, or rebate opportunities available at other venues to be more favorable. Because competitors are free to modify their own fees in response, and because market participants may readily adjust their order routing practices, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited.

The Exchange notes that other options markets have adopted membership fees. MEMX recently reasoned that it should be permitted to adopt membership fees because MEMX's proposed membership fees would be lower than the cost of membership on other exchanges, and therefore,

. . . may stimulate intramarket competition by attracting additional firms to become Members on the Exchange or at least should not deter interested participants from joining the Exchange. In addition, membership fees are subject to competition from other exchanges. Accordingly, if the changes proposed herein are unattractive to market participants, it is likely the Exchange will see a decline in membership as a result. The proposed fee change will not impact intermarket competition because it will apply to all Members equally. The Exchange operates in a highly competitive market in which market participants can determine whether or not to join the Exchange based on the value received compared to the cost of joining and maintaining membership on the Exchange."<sup>60</sup>

The Exchange also notes that Cboe amended access fees<sup>61</sup> in a fee change that was filed subsequent to the D.C. Circuit decision in *Susquehanna Int'l Grp., LLC v. SEC*, 866 F.3d 442 (D.C. Cir. 2017), meaning that such fee filings were subject to the same (and current) standard for SEC review and approval as the instant filing. The Commission permitted Cboe to amend their trading permit fees<sup>62</sup> based on competitive

arguments. Cboe stated in its proposal that,

The rule structure for options exchanges are also fundamentally different from those of equities exchanges. In particular, options market participants are not forced to connect to (and purchase market data from) all options exchanges. For example, there are many order types that are available in the equities markets that are not utilized in the options markets, which relate to mid-point pricing and pegged pricing which require connection to the SIPs and each of the equities exchanges in order to properly execute those orders in compliance with best execution obligations. Additionally, in the options markets, the linkage routing and trade through protection are handled by the exchanges, not by the individual members. Thus not connecting to an options exchange or disconnecting from an options exchange does not potentially subject a broker-dealer to violate order protection requirements. Gone are the days when the retail brokerage firms (such as Fidelity, Schwab, and eTrade) were members of the options exchanges—they are not members of the Exchange or its affiliates, they do not purchase connectivity to the Exchange, and they do not purchase market data from the Exchange. Accordingly, not only is there not an actual regulatory requirement to connect to every options exchange, the Exchange believes there is also no “de facto” or practical requirement as well, as further evidenced by the recent significant reduction in the number of broker-dealers that are members of all options exchanges.<sup>63</sup>

The Cboe proposal also referenced the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”),<sup>64</sup> wherein the Commission discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models. In that filing, the Commission acknowledged that, even if an exchange were to exit the marketplace due to its proposed fee-related change, it would not significantly impact competition in the market for exchange trading services because these markets are served by

assessed a monthly fee of \$1,600 per permit. The Exchange also offered separate Market-Maker and Electronic Access Permits for the Global Trading Hours (“GTH”) session, which were assessed a monthly fee of \$1,000 per permit and \$500 per permit respectively. In connection with the migration, the Exchange adopted separate on-floor and off-floor Trading Permits for Market-Makers and Floor Brokers, adopted a new Clearing TPH Permit, and proposes to modify the corresponding fees and discounts. Among other fees, Cboe amended its Electronic Access Permit to a monthly fee of \$3,000, and amended its Clearing TPH Permit, for TPHs acting solely as a Clearing TPH, to a monthly fee of \$2,000. Also, Cboe adopted progressive monthly fees for MM Appointment Units.

<sup>63</sup> *Id.* at 71677.

<sup>64</sup> See Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7-13-19).

multiple competitors.<sup>65</sup> Further, the Commission explicitly stated that “[c]onsequently, demand for these services in the event of the exit of a competitor is likely to be swiftly met by existing competitors.”<sup>66</sup> Finally, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.<sup>67</sup>

Cboe concluded in its fee filing that the Exchange is subject to significant substitution-based competitive forces in pricing its connectivity and access fees.<sup>68</sup> Cboe stressed that the proof of competitive constraints does not depend on showing that members walked away, or threatened to walk away, from a product due to a pricing change. Rather, the very absence of such negative feedback (in and of itself, and particularly when coupled with positive feedback) is indicative that the proposed fees are, in fact, reasonable and consistent with the Exchange being subject to competitive forces in setting fees.<sup>69</sup>

MRX requests the Commission apply the same standard of review to its proposed fee change that was applied to the Cboe fee filing which permitted Cboe to amend its membership fees. If the Commission were to apply a different standard of review to MRX's membership fee filing than it applied to other exchange fee filings it would create a burden on competition such that it would impair MRX's ability to compete among other options markets. MRX's ability to assess membership fees, similar to MEMX, Cboe and all other options markets, would permit it to compete with other options markets on an equal playing field. As noted herein, MRX is the only options market that did not have membership fees until May 2, 2022.

The Exchange does not believe that the proposed rule change will impose any intramarket burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Any Electronic Access Member entering orders or Market Maker submitting quotes on MRX would pay the same \$200 per month Access Fee. MRX's flat

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> See Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 at 71669 (November 10, 2020) (SR-CBOE-2020-105).

<sup>69</sup> *Id.* at 71680.

<sup>60</sup> See Securities Exchange Act Release No. 93927 (January 7, 2022), 87 FR 2191 (January 13, 2022) (SR-MEMX-2021-19).

<sup>61</sup> See Securities Exchange Act Release No. 90333 (November 4, 2020), 85 FR 71666 (November 10, 2020) (SR-CBOE-2020-105).

<sup>62</sup> Pre-migration, the Exchange issued the following three types of Trading Permits: (1) Market-Maker Trading Permits, which were assessed a monthly fee of \$5,000 per permit; (2) Floor Broker Trading Permits, which were assessed a monthly fee of \$9,000 per permit; and (3) Electronic Access Permits (“EAPs”), which were



rate Access Fee to Electronic Access Members and Market Makers of \$200 per month does not impose an undue burden on competition as all Members would be subject to the same fee.

With respect to the CMM Trading Rights Fee, the proposed fees compare favorably with those of other options exchanges.<sup>70</sup> Like other options exchanges, the Exchange is proposing a tiered pricing model because it may encourage CMM firms to purchase additional Trading Rights and quote more issues because subsequent trading rights are priced lower than the initial Trading Right. The Exchange notes that it is not proposing Trading Right Fees for PMMs. As compared to CMMs, PMMs have additional obligations on MRX. PMMs are required to open options series in which they are assigned each day on MRX. Specifically, PMMs must submit a Valid Width Quote each day to open their assigned options series.<sup>71</sup> PMMs are integral to providing liquidity during MRX's Opening Process.<sup>72</sup> Intra-day, PMMs must provide two-sided quotations in a certain percentage of their assigned options series.<sup>73</sup> In contrast, a CMM is not required to enter quotations in the options classes to which it is appointed; however, if a CMM initiates quoting in an options class, the CMM is required to provide two-sided quotations in a certain of their assigned options class, which percentage is less than that required of PMMs (60% for CMMs as compared to 90% for PMMs).<sup>74</sup> While

<sup>70</sup> See NYSE Arca Fees and Charges, General Options and Trading Permit (OTP) Fees (comparing CMM Trading Rights Fees to the Arca Market Maker fees).

<sup>71</sup> See Options 3, Section 8(c)(1) and 8(c)(3).

<sup>72</sup> The Exchange notes that most options markets do not require their primary or lead market maker to open their assigned options series.

<sup>73</sup> See Options 2, Section 5(e)(2) which states, "Primary Market Makers, associated with the same Member, are collectively required to provide two-sided quotations in 90% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading. Primary Market Makers shall be required to make two-sided markets pursuant to this Rule in any Quarterly Options Series, any Adjusted Options Series, and any option series with an expiration of nine months or greater for options on equities and ETFs or with an expiration of twelve months or greater for index options."

<sup>74</sup> See Options 2, Section 5(e)(1) which states, that "On any given day, a Competitive Market Maker is not required to enter quotations in the options classes to which it is appointed. A Competitive Market Maker may initiate quoting in options classes to which it is appointed intra-day. If a Competitive Market Maker initiates quoting in an options class, the Competitive Market Maker, associated with the same Member, is collectively required to provide two-sided quotations in 60% of the cumulative number of seconds, or such higher percentage as the Exchange may announce in advance, for which that Member's assigned options class is open for trading . . . ."

there can be multiple CMMs in an options series, there is only one PMM assigned per options series. The Exchange desires to encourage Members to compete for appointments as PMMs in an options series. The Exchange believes that PMMs serve an important role on MRX in opening an option series and ensuring liquidity in that option series throughout the trading day. This liquidity benefits the market through, for example, more robust quoting.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.<sup>75</sup> At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is: (i) necessary or appropriate in the public interest; (ii) for the protection of investors; or (iii) otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### Electronic Comments

- Use the Commission's internet comment form (<http://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-MRX-2022-24 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-MRX-2022-24. This file number should be included on the subject line if email is used. To help the Commission process and review your

<sup>75</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MRX-2022-24 and should be submitted on or before December 6, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>76</sup>

J. Matthew DeLesDernier,  
Assistant Secretary.

[FR Doc. 2022-24765 Filed 11-14-22; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96263; File No. SR-NYSE-2022-11]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Withdrawal of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend the NYSE Listed Company Manual To Provide a Limited Exemption From the Shareholder Approval Requirements for Closed-End Management Investment Companies With Equity Securities Listed Under Section 102.04 of the Listed Company Manual

November 8, 2022.

On February 23, 2022, the New York Stock Exchange LLC ("Exchange" or

<sup>76</sup> 17 CFR 200.30-3(a)(12).