

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98259; File No. SR-EMERALD-2023-21)

August 31, 2023

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Exchange's Options Fee Schedule to Extend the Date for Which Ad Hoc Requests for Historical Intra-Day Open-Close Report Data May Be Requested

Pursuant to the provisions of 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 August 18, 2023, MIAX Emerald, LLC ("MIAX Emerald" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I and II 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 the Exchange's Options Fee Schedule ("Fee Schedule") to extend the date for which ad hoc requests for historical intra-day Open-Close Report data may be requested.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-options/emerald-options/rule-filings>, at MIAX Emerald's principal office, and at the Commission's Public Reference Room.

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

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

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

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

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 adopted a new data product for options known as the Open-Close Report,<sup>3</sup> which the Exchange made available for purchase to Exchange Members<sup>4</sup> and non-Members on June 1, 2021.<sup>5</sup> The Open-Close Report is described under Exchange Rule 531(d)(1).

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report, both of which can be requested on an ad-hoc basis. The Open-Close Report data is proprietary Exchange trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The Exchange notes that Open-Close Report data is not necessary for trading and subscribing to the Open-Close Report is completely optional.

The Exchange charges Members and Non-Members who request on an ad hoc basis historical intra-day Open-Close Report data \$1,000 per request per month. The Fee Schedule currently specifies that an ad hoc request may be for any number of months beginning with June 2021, the month in which the Exchange first made the Open-Close Report available. The

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<sup>3</sup> See Securities Exchange Act Release No. 91963 (May 21, 2021), 86 FR 28662 (May 27, 2021) (SR-EMERALD-2021-18) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Adopt a New Historical Market Data Product To Be Known as the Open-Close Report).

<sup>4</sup> The term “Member” means an individual or organization approved to exercise the trading rights associated with a Trading Permit. Members are deemed “members” under the Exchange Act. See Exchange Rule 100.

<sup>5</sup> See Securities Exchange Act Release No. 92138 (June 9, 2021), 86 FR 31769 (June 15, 2021) (SR-EMERALD-2021-20) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule To Adopt Fees for the Open-Close Report).

Exchange recently completed an initiative to now make available historical intra-day Open-Close Report data beginning with March 2019, the first full month in which the Exchange began operations.<sup>6</sup>

The Exchange now proposes to amend the Fee Schedule to reflect that ad hoc requests for historical intra-day Open-Close Report data may be made for data dating back to March 2019. The Exchange does not propose to amend the fee for ad hoc request for historical intra-day Open-Close Report data.

#### Implementation Date

The Exchange intends to implement the proposed changes immediately.

#### 2. Statutory Basis

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2019 and to correspondingly amend its Fee Schedule is consistent with Section 6(b) of the Act<sup>7</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>8</sup> in particular, in that it is an equitable allocation of reasonable fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2019 and to correspondingly amend its Fee Schedule is consistent with Section 6(b)(5) of the Act<sup>9</sup> in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect

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<sup>6</sup> See the Exchange's press release "MIAX Emerald Successfully Launches Trading Operations" available at <https://www.prnewswire.com/news-releases/miax-emerald-successfully-launches-trading-operations-300805959.html>.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(4).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers.

The Exchange believes its proposal is reasonable and not unfairly discriminatory because the Exchange now has over four years of historical intra-day Open-Close Report data to provide to market participants who request ad-hoc historical intra-day Open-Close Report data since the Exchange's first full month of operations in March 2019. The Exchange notes that competing exchanges offer similar historical data products,<sup>10</sup> which provide insight into trading on those markets. The Exchange believes that its proposal to expand this particular range of available historical data will allow the Exchange to compete better with the other exchanges that offer similar historical intra-day reports. Although each of these similar Open-Close Report data products provide only proprietary trade data and not trade data from competing exchanges, it is possible investors are still able to gauge overall investor sentiment across different option series based on open and closing interest on any one exchange.<sup>11</sup> Similarly, market participants may be able to analyze option trade and volume data, and create and test trading models and analytical strategies using only Open-Close data, including historical intra-day data, relating to trading activity on one or more of the competing markets that provide similar data products. As such, if a market participant views another exchange's historical intra-day Open-Close data as more

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<sup>10</sup> BOX Options Market LLC ("BOX") offers a market data report for Intraday Ad-hoc Requests (historical data) beginning with January 2018. BOX charges \$1,000 per request per month. See the BOX fee schedule, available at <https://boxexchange.com/assets/BOX-Fee-Schedule-as-of-July-3-2023.pdf>. Nasdaq ISE, LLC ("ISE") offers the market data report for Nasdaq ISE Intraday Ad-hoc Requests (historical data) beginning with May 2005. See <https://www.nasdaq.com/solutions/nasdaq-open-close-trade-profiles%3A-ise-and-gemx>. ISE charges \$1,000 per request per month. See ISE fee schedule, available at <https://listingcenter.nasdaq.com/rulebook/ise/rules/ise-options-7>. Nasdaq PHLX LLC ("PHLX") offers historical data for its intra-day report starting in January 2009 for purchase on an ad-hoc basis. See <https://www.nasdaqtrader.com/micro.aspx?id=photo>. PHLX charges \$1,000 per month or \$12,000 for the most recent 36 months to firms currently subscribed to the on-going subscription. See PHLX fee schedule, available at <https://listingcenter.nasdaq.com/rulebook/phlx/rules/Phlx%20Options%207>.

<sup>11</sup> The Exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.

attractive than the Exchange's historical intra-day Open-Close Report data, then such market participant can choose not to request such data from the Exchange and instead purchase another exchange's historical intra-day Open-Close data, which offers similar data points, albeit based on that other market's trading activity.

The Exchange also believes its proposal is reasonable as it would further enhance the usefulness of its Open-Close Report data, which is designed to aid investors by providing insight into trading on the Exchange. Providing market data, such as the historical intra-day Open-Close Report, is also a means by which exchanges compete to attract business. Purchasers that receive the expanded historical intra-day Open-Close Report data as a result of this proposal, may use such data to evaluate the usefulness of the Exchange's Open-Close Report and decide, based on that data, whether to purchase the Open-Close Report. To the extent that the Exchange is successful in selling the ad-hoc historical intra-day Open-Close Report, it may earn trading revenues and further enhance the value of its data products.

The Exchange currently charges \$1,000 per request per month for ad hoc requests for its historical intra-day Open-Close Report data, which is in line with, or lower than, the per request amounts charged by competing exchanges for their similar historical data products.<sup>12</sup> The Exchange does not propose to amend the amount of the fee for ad hoc requests for historical intra-day Open-Close Report data.

In adopting Regulation NMS, the Commission granted self-regulatory organizations ("SROs") and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

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<sup>12</sup> See supra note 10.

Particularly, the expanded historical intra-day Open-Close Report data further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS.

The Exchange believes that its proposal to permit ad-hoc requests for historical intra-day Open-Close Report data to be made for data going back to March 2019 is consistent with Section 6(b)(5) of the Act<sup>13</sup> in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. In particular, the proposed extended historical data range would remove impediments to and perfect the mechanism of a free and open market and benefit Members and market participants by providing access to an expanded range of historical intra-day Open-Close Report data, which as noted above, may aid investors by providing insight into trading on the Exchange, as well as research and studies of the options industry as a whole.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Exchange believes that the proposal will promote competition by permitting the Exchange to sell, for months not previously available, a historic data product similar to those offered by other competitor options exchanges.<sup>14</sup> The Exchange made the expanded historical intra-day Open-Close Report data available in order to keep pace with changes in the industry and evolving customer needs, and believes that providing such data to market participants that

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

<sup>14</sup> See supra note 10.

make requests for it will continue to contribute to robust competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges are free to expand their own comparable data product and compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or inappropriate burden on intramarket competition because the expanded date range will be available to both Members and non-Members equally.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and Rule 19b-4(f)(6) thereunder.<sup>16</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>17</sup> normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)<sup>18</sup> permits

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

<sup>16</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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

<sup>18</sup> 17 CFR 240.19b-4(f)(6)(iii).

the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has requested that the Commission to waive the 30-day operative delay so that the proposal may become operative immediately upon filing. The Exchange states that the proposal expands the data available under an existing product, the intra-day Open-Close Report, and that this product is designed to compete with products that other exchanges offer.<sup>19</sup> The Exchange further states that it does not propose to amend the fee for ad hoc requests for historical intra-day Open-Close Report data. For these reasons, and because the proposal raises no novel legal or regulatory issues, the Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.<sup>20</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 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 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:

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<sup>19</sup> See supra note 10.

<sup>20</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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-EMERALD-2023-21 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-EMERALD-2023-21. 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-EMERALD-2023-21 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>21</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>21</sup> 17 CFR 200.30-3(a)(12), (59).