

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-93023; File No. SR-EMERALD-2021-28)

September 16, 2021

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by to Amend Its Fee Schedule with Respect to Open-Close Report Data

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 September 2, 2021, MIAX Emerald, LLC (“MIAX Emerald” or “Exchange”), filed with the Securities and Exchange Commission (“Commission”) a proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is filing a proposal to amend the Exchange’s Fee Schedule (“Fee Schedule”) to provide historical Open-Close Report data for free by amending the fees for the Open-Close Report to: (i) respond to ad hoc requests for end-of-day data free of charge; and (ii) provide mid-month subscribers data for the entire month in which they subscribe.

The text of the proposed rule change is available on the Exchange’s website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX’s principal office, and at the Commission’s Public Reference Room.

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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 recently 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(b)(1). The Exchange now proposes to provide historical Open-Close Report data for free by amending the fees for the Open-Close Report to: (i) respond to ad hoc requests for end-of-day data free of charge; and (ii) provide mid-month subscribers data for the entire month in which they subscribe.

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<sup>3</sup> See Securities Exchange Act Release No. 91963 (May 21, 2021), 86 FR 28662 (May 27, 2021) (SR-EMERADL-2021-18 [sic]) (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 that is registered with the Exchange pursuant to Chapter II of these 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 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 the MIAX Pearl [sic] Options Fee Schedule To Adopt Fees for the Open-Close Report).

## General

By way of background, the Exchange offers two versions of the Open-Close Report, an end-of-day summary and intra-day report.<sup>6</sup> The end-of-day version is a volume summary of trading activity on the Exchange at the option level by origin (Priority Customer, Non-Priority Customer, Firm, Broker-Dealer, and Market Maker<sup>7</sup>), side of the market (buy or sell), contract volume, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100-199 contracts, greater than 199 contracts). The Open-Close 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.

Members and non-Members may purchase the Open-Close Report on a monthly basis. The Exchange currently assess a monthly fee of \$600 per month for subscribing to the end-of-day summary Open-Close Report and \$2,000 per month for subscribing to the intra-day Open-Close Report. For mid-month subscriptions, new subscribers are currently charged for the full calendar month for which they subscribe and will be provided Open-Close Report data for each trading day of the calendar month from the day on which they subscribed.

## End-of-Day Ad Hoc Request (Historical Data)

The Exchange now proposes to provide Members and Non-Members who request on an

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<sup>6</sup> The intraday Open-Close Report provides similar information to that of Open-Close Data but will be produced and updated every 10 minutes during the trading day. Data is captured in “snapshots” taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period.

<sup>7</sup> See Exchange Rule 100.

ad hoc basis historical end-of-day Open-Close Report data free of charge.<sup>8</sup> 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. For example, as of the date of this filing, a market participant may request end-of-day Open-Close Report data for the month of June 2021 or July 2021, or may request such data for both June and July 2021 and would not be charged a fee for such request(s). The Exchange notes that other exchanges that provide similar data products allow for ad hoc requests of their end-of-day data for a fee<sup>9</sup> and, like the Exchange proposes herein, allow for ad hoc requests back to a certain month.<sup>10</sup>

The Exchange also proposes to make the historical monthly data available fifteen (15) days after the end of the month for which it is requested. The Exchange proposes this delay

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<sup>8</sup> The Exchange does not propose to allow for ad hoc requests for intra-day Open-Close Report data.

<sup>9</sup> See Price List – U.S. Derivatives Data for Nasdaq PHLX, LLC (“PHLX”), The Nasdaq Stock Market, LLC (“Nasdaq”), Nasdaq ISE, LLC (“ISE”), and Nasdaq GEMX, LLC (“GEMX”), available at <http://www.nasdaqtrader.com/Trader.aspx?id=DPPriceListOptions#web>. Particularly, PHLX offers “Nasdaq PHLX Options Trade Outline (PHOTO)” and assesses \$400 for historical end-of-day data; Nasdaq offers the “Nasdaq Options Trade Outline (NOTO)” and assesses \$250 for historical end-of-day data; ISE offers the “Nasdaq ISE Open/Close Trade Profile” and assesses \$600 per month for historical end-of-day data and \$27,500 for complete history; and GEMX offers the “Nasdaq GEMX Open/Close Trade Profile” and assesses \$400 for historical end-of-day data.

Cboe EDGX Exchange, Inc. (“EDGX”) and Cboe BZX Exchange, Inc. (“BZX”) both assess \$400 for historical end-of-day data per request per month. See the EDGX fee schedule available at [http://markets.cboe.com/us/options/membership/fee\\_schedule/edgx/](http://markets.cboe.com/us/options/membership/fee_schedule/edgx/) and the BZX fee schedule available at [http://markets.cboe.com/us/options/membership/fee\\_schedule/bzx/](http://markets.cboe.com/us/options/membership/fee_schedule/bzx/). Both EDGX and BZX allow for ad-hoc requests to be for any number of months beginning with January 2018 for which the data is available.

<sup>10</sup> Both EDGX and BZX allow for ad-hoc requests to be for any number of months beginning with January 2018 for which the data is available. See the EDGX fee schedule available at [http://markets.cboe.com/us/options/membership/fee\\_schedule/edgx/](http://markets.cboe.com/us/options/membership/fee_schedule/edgx/) and the BZX fee schedule available at [http://markets.cboe.com/us/options/membership/fee\\_schedule/bzx/](http://markets.cboe.com/us/options/membership/fee_schedule/bzx/).

because it is making historical end-of-day Open-Close Report data free of charge and seeks to not encourage subscribers to request historical end-of-day Open-Close Report data over a paid subscription.

### Mid-Month Subscriptions

The Exchange also proposes to amend the data range of Open-Close Report data it provides to mid-month subscribers. As noted above, the Exchange currently charges new mid-month subscribers for the full calendar month for which they subscribe, but only provides Open-Close Report data for each trading day of the calendar month from the day on which they subscribed. The Exchange now proposes to provide new mid-month subscribers data for each trading day of the calendar month prior to the day on which they subscribe. In other words, those that subscribe mid-month will be provided Open-Close Data retroactively for each trading day of the month in which they subscribed and prospectively for each trading day for the remainder of that calendar month pursuant to either the end-of-day or intra-day subscription they chose. This is identical to how the Exchange provides data to mid-month subscribers of the Exchange's Liquidity Taker Event report.<sup>11</sup>

### Implementation Date

The Exchange intends to provide historical Open-Close Report data for free pursuant this proposal immediately.

## 2. Statutory Basis

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<sup>11</sup> See the Exchange's fee schedule available at [https://www.miaxoptions.com/sites/default/files/fee\\_schedule-files/MIAX\\_Pearl\\_Options\\_Fee\\_Schedule\\_08122021.pdf](https://www.miaxoptions.com/sites/default/files/fee_schedule-files/MIAX_Pearl_Options_Fee_Schedule_08122021.pdf) [sic] (providing that “[n]ew subscribers will be charged for the full calendar month for which they subscribe and will be provided Liquidity Taker Event Report data for each trading day of the calendar month prior to the day on which they subscribed.”).

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>12</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>13</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and to protect investors and the public interest, and that it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange also believes that its proposed changes to its Fee Schedule concerning fees for the Open-Close Report is consistent with Section 6(b) of the Act<sup>14</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act<sup>15</sup> in particular, in that it is an equitable allocation of dues, fees and other charges among its members and other recipients of Exchange 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. Particularly, the Open-Close Report further broadens the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. The data product also promotes increased transparency through the dissemination of the Open-Close Report. Particularly, information regarding opening and closing activity across different option series during the trading day may indicate investor sentiment, which may allow market participants to make better informed trading decisions throughout the day. Subscribers to the data may also be able to

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

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

<sup>14</sup> 15 U.S.C. 78f(b).

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

enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes the Open-Close Report provides a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading. Moreover, other exchanges offer a similar data product.<sup>16</sup> This proposal simply and solely seeks to provide historical Open-Close Report data to market participants for free by amending the fees for the Open-Close Report to: (i) respond to ad hoc requests for end-of-day data free of charge; and (ii) provide mid-month subscribers data for the entire month in which they subscribe.

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. Based on publicly available information, no single options exchange has more than 15% of the market share and currently the Exchange represents only approximately 5.54% of the market share.<sup>17</sup> The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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>18</sup> Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supra-

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<sup>16</sup> See supra notes 9 and 10.

<sup>17</sup> See the Exchange’s “The market at a glance”, available at <https://www.miaxoptions.com/> (last visited September 1, 2021).

<sup>18</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

competitive fees. In the event that a market participant views one exchange's data product as more or less attractive than the competition they can and do switch between similar products. The proposed fees are a result of the competitive environment, as the Exchange seeks to adopt fees to attract purchasers of the recently introduced Open-Close Data product.

The Exchange believes its proposal to provide Open-Close data in response to ad hoc request for end-of-day data free of charge is reasonable as the proposed rate is lower than the fees assessed by other exchanges that provide data in response to ad hoc request for their similar data products.<sup>19</sup> In fact, the Exchange understands that no other exchange provides such data free of charge.<sup>20</sup> Indeed, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. Like the Exchange's Open-Close Report, other exchanges offer similar data products that each provide insight into trading on those markets and may likewise aid in assessing investor sentiment. Although each of these similar Open-Close data products provide only proprietary trade data and not trade data from other 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>21</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 relating to trading activity on one or more of the other markets that provide similar data products. As such, if a market participant views another exchange's Open-Close data as more attractive than its proposed Open-Close Report, then such

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<sup>19</sup> See supra notes 9 and 10.

<sup>20</sup> See supra note 9.

<sup>21</sup> The exchange notes that its Open-Close Report data product does not include data on any exclusive, singly-listed option series.



market participant can merely choose not to subscribe to the Exchange's Open-Close Report and instead purchase another exchange's Open-Close data product, which offer similar data points, albeit based on that other market's trading activity.

The Exchange also believes its proposal to amend the fees for the Open-Close Report to: (i) provide historical end-of-day data free of charge and (ii) provide mid-month subscribers data for the entire month in which they subscribe, is reasonable as it would further support its recent introduction of the Open-Close Report, which is designed to aid investors by providing insight into trading on the Exchange. Providing market data, such as the Open-Close Report, is also a means by which exchanges compete to attract business. Subscribers that receive end-of-day Open-Close data for free in response to an ad hoc request may use such data to evaluate the usefulness of the Exchange's Open-Close Report and decide, based on that data, whether to subscribe to the Open-Close Report on a monthly basis. In addition, providing new mid-month subscribers data for the entire calendar month would further enhance the value of the Open-Close Report and encourage mid-month subscriptions market participants that seek to subscribe to the Open-Close Report not having to wait to the first of the next month to subscribe and receive a full month of Open-Close Report Data for the current monthly fee. To the extent that the Exchange is successful in attracting subscribers for the Open-Close Report through this proposal, it may earn trading revenues and further enhance the value of its data products. The Exchange also believes its proposal to make historical end-of-day Open-Close Report data on a delayed basis is a reasonable means to not encourage subscribers to request historical end-of-day Open-Close Report data over a paid subscription. If the market deems the proposal to be unfair or inequitable, firms can diminish or discontinue their use of the data and/or avail themselves of

similar products offered by other exchanges.<sup>22</sup> The Exchange therefore believes that its proposal reflects the competitive environment and would be properly assessed on Member or non-Member users. The Exchange also believes the proposal is equitable and not unfairly discriminatory as it would apply equally to all users who choose to purchase or receive such data.

As noted above, a wide variety of market participants to subscribe to the Open-Close Report, including but not limited to individual customers, buy-side investors and investment banks. The Exchange reiterates that the decision as to whether or not to subscribe to the Open-Close Report is entirely optional for all potential subscribers. Indeed, no market participant is required to subscribe to the Open-Close Report, and the Exchange is not required to make the Open-Close Report available to all investors. Rather, the Exchange is voluntarily making additional Open-Close Report data available via ad hoc requests for end-of-day data and to mid-month subscribers under this proposal at the request of customers, and market participants may choose to receive this data based on their own business needs. Potential subscribers may choose to subscribe to or request the data at any time if they believe it to be valuable or may decline to subscribe to such data.

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 enhance the value of a data product that is similar to those offered by other competitor options exchanges.<sup>23</sup> The Exchange made Open-Close Data available in order to

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<sup>22</sup> See supra notes 9 and 10.

<sup>23</sup> See supra note 9.

keep pace with changes in the industry and evolving customer needs, and believes the data product will continue to contribute to robust competition among national securities exchanges. At least eight other U.S. options exchanges offer a market data product that is substantially similar to the Open-Close Report. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Furthermore, the Exchange operates in a highly competitive environment, and its ability to price the Open-Close Report is constrained by competition among exchanges that offer similar data products to their customers. As discussed, there are currently a number of similar products available to market participants and investors. At least eight other U.S. options exchanges offer a market data product that is substantially similar to the Open-Close Report, which the Exchange must consider in its pricing discipline in order to compete for the market data.<sup>24</sup> For example, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as discussed, market participants are under no obligation to utilize. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

The Exchange also does not believe the proposal would cause any unnecessary or in appropriate burden on intermarket competition as other exchanges are free to introduce their own comparable data product and lower their prices to better compete with the Exchange's offering. The Exchange does not believe the proposed rule change would cause any unnecessary or

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<sup>24</sup> See, e.g., Cboe Options Fees Schedule, Livevol Fees, Open-Close Data. See also Nasdaq ISE Options 7 Pricing Schedule, Section 10.A and Nasdaq PHLX Options 7 Pricing Schedule, Section 10, PHLX Options Trade Outline ("PHOTO").

inappropriate burden on intramarket competition. Particularly, the proposal would apply uniformly to any market participant, in that it does not differentiate between subscribers to the Open-Close Report. The proposal is modest and would allow any interested Member or non-Member to subscribe to or request such data based on their business needs.

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

Written comments were neither solicited nor received.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act,<sup>25</sup> and Rule 19b-4(f)(2)<sup>26</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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-EMERALD-

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<sup>25</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>26</sup> 17 CFR 240.19b-4(f)(2).

2021-28 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-EMERALD-2021-28. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions.

You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-EMERALD-2021-28 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>27</sup> 17 CFR 200.30-3(a)(12).