

be submitted on or before April 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

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Assistant Secretary.

[FR Doc. 2020-05843 Filed 3-19-20; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88392; File No. SR-CboeBZX-2020-023]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating To Amend Its Fee Schedule

March 16, 2020.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 10, 2020, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “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

Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to amend its Fee Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

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

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

proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

##### 1. Purpose

The Exchange proposes to amend its fee schedule for its equity options platform (“BZX Options”), effective March 2, 2020.<sup>3</sup>

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 17% of the market share and currently the Exchange represents only 9% of the market share.<sup>4</sup> Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange’s transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. The Exchange’s fee schedule sets forth standard rebates and rates applied per contract. For example, the Exchange assesses a standard rebate of \$0.29 per contract for Market Maker orders that add liquidity in Penny Pilot Securities and a standard rebate of \$0.40 per contract in Non-Penny Pilot Securities. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for

higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

For example, the Exchange currently offers two Market Maker Non-Penny Pilot Add Volume Tiers under footnote 7 of the fee schedule which provides enhanced rebates between \$0.45 and \$0.54 per contract for qualifying Market Maker orders which meet certain add liquidity thresholds and yield fee code NM.<sup>5</sup> Under the current Market Maker Non-Penny Pilot Add Volume Tiers, a Member receives an enhanced rebate between \$0.45 and \$0.54 per contract where the Member has an ADAV<sup>6</sup> in Market Maker orders greater or equal to a specified percentage of OCV<sup>7</sup> (Tiers 1–2). The Exchange now proposes to adopt a new Market Maker Non-Penny Pilot Add Volume Tier, “Tier 3”.

The Exchange believes the proposed Market Maker Non-Penny Pilot Add Volume Tier will provide Members an additional opportunity to receive an enhanced rebate for meeting the corresponding proposed criteria. The Exchange believes the proposed tier, along with the existing tiers, also provide an incremental incentive for Members to strive for the highest tier levels, which provide increasingly higher rebates for such transactions. Particularly, the Exchange proposes to add new Market Maker Non-Penny Pilot Add Volume Tier 3, which would provide an enhanced rebate of \$0.86 per contract where a Member (i) has an ADAV in Market Maker orders greater than or equal to 1.00% of the average OCV; and (ii) has an ADAV in Market Maker Non-Penny Pilot orders of greater than or equal to 0.20% of the average OCV. As such, under the proposed Tier, the Exchange is adopting an additional threshold that Members must meet in addition to the standard ADAV in Market Maker orders threshold.

<sup>5</sup> Orders yielding fee code NM are Market Maker orders that add liquidity in Non-Penny Pilot securities.

<sup>6</sup> “ADAV” means average daily added volume calculated as the number of contracts added, “ADRV” means average daily removed volume calculated as the number of contracts removed, and “ADV” means average daily volume calculated as the number of contracts added or removed, combined, per day.

<sup>7</sup> “OCC Customer Volume” or “OCV” means the total equity and ETF options volume that clears in the Customer range at the Options Clearing Corporation (“OCC”) for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close.

<sup>3</sup> The Exchange initially filed the proposed fee changes on March 2, 2020 (SR-CboeBZX-2020-019). On March 10, 2020, the Exchange withdrew that filing and submitted this filing.

<sup>4</sup> See Cboe Global Markets U.S. Options Market Volume Summary (February 24, 2020), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

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

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

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

Particularly, Members must not only satisfy a higher ADAV threshold in Market Maker orders, but must also satisfy an ADAV threshold in Market Maker Non-Penny orders in order to receive the proposed enhanced rebate. The proposed tier is designed to encourage a Market Maker's liquidity adding volume in Non-Penny orders, and moreover to encourage Members to increase their order flow, thereby contributing to a deeper and more liquid market, which benefits all market participants and provides greater execution opportunities on the Exchange.<sup>8</sup>

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>9</sup> in general, and furthers the requirements of Section 6(b)(4),<sup>10</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members.

In particular, the Exchange believes the proposed tier is reasonable because it provides an additional opportunity for Members to receive a higher rebate by providing additional criteria they can reach for. The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges,<sup>11</sup> including the Exchange,<sup>12</sup> and are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the

value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon Members achieving certain volume and/or growth thresholds. These competing pricing schedules, moreover, are presently comparable to those that the Exchange provides, including pricing incentives tied to comparable tiers.<sup>13</sup>

Moreover, the Exchange believes the proposed Market Maker Non-Penny Pilot Add Volume Tier 3 is a reasonable means to encourage Members to increase their liquidity on the Exchange. The Exchange believes that adopting a tier with additional criteria to the existing Market Maker Non-Penny Pilot Add Volume Tiers will encourage Members to increase their order flow in Non-Penny securities on the Exchange. Increased liquidity benefits all investors by deepening the Exchange's liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange also believes that proposed enhanced rebate is reasonable based on the difficulty of satisfying the tier's criteria and ensures the proposed rebate and threshold appropriately reflects the incremental difficulty to achieve the existing Market Maker Non-Penny Pilot Add Volume Tiers.

The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because it applies uniformly to all Market Makers. Further, the Exchange offers similar tiered pricing to Firm, Broker Dealer, Joint-Back Office,<sup>14</sup> Away Market Maker,<sup>15</sup>

and Customer<sup>16</sup> orders for liquidity adding volume in Non-Penny Pilot securities. Additionally a number of Market Makers have a reasonable opportunity to satisfy the tier's criteria, which the Exchange believe is more stringent than other existing Market Maker Non-Penny Pilot Add Volume Tiers. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular Market Maker qualifying for the proposed tier, the Exchange anticipates at least one Market Maker meeting, or being reasonably able to meet, the proposed criteria; however, the proposed tier is open to any Market Maker that satisfies the tier's criteria. The Exchange believes the proposed tier could provide an incentive for other Members to submit additional liquidity on the Exchange to qualify for the proposed enhanced rebate.

The Exchange lastly notes that the proposal will not adversely impact any Member's pricing or their ability to qualify for other tiers. Rather, should a Member not meet the proposed criteria, the Member will merely not receive the proposed enhanced rebate. Furthermore, the proposed enhanced rebate would apply to all Members that meet the required criteria under proposed Market Maker Non-Penny Pilot Add Volume Tier 3.

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

The Exchange does not believe that the proposed rule change will impose any burden on intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of

less difficult than the proposed criteria for a Market Maker to satisfy Tier 3.

<sup>16</sup> See the Customer Non-Penny Pilot Add Volume Tiers in the Exchange's Fee Schedule. The applicable tiers offer rebates ranging from \$0.92 up to \$1.05 per contract.

<sup>8</sup> The Exchange notes that similar rebates are offered on the Nasdaq and MIAX exchanges.

<sup>9</sup> 15 U.S.C. 78f.

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> See e.g., Cboe EDGX U.S. Options Exchange Fee Schedule, Footnote 2, Market Maker Volume Tiers, which provide reduced fees between \$0.01 and \$0.17 per contract for Market Maker Penny and Non-Penny orders where Members meet certain volume thresholds.

<sup>12</sup> See e.g., Cboe BZX U.S. Options Exchange Fee Schedule, Footnotes 6 and 7, Market Maker Penny Pilot and Non-Penny Pilot Volume Tiers which provide enhanced rebates for Market Maker orders where Members meet certain volume thresholds.

<sup>13</sup> *Supra* note 9.

<sup>14</sup> See the Firm, Broker Dealer, and Joint Back Office Non-Penny Pilot Add Volume Tiers in the Exchange's Fee Schedule. Tier 4 offers a rebate of up to \$0.82 per contract to Members satisfying the tier.

<sup>15</sup> See the Away Market Maker Non-Penny Pilot Add Volume Tiers in the Exchange's Fee Schedule. Tier 2 offers a rebate of up to \$0.52 per contract to Members satisfying the tier. While the tier with the highest applicable rebate is significantly less than the proposed rebate, the required criteria for an Away Market Maker to satisfy Tier 2 is significantly

individual stocks for all types of orders, large and small.”<sup>17</sup>

The Exchange believes the proposed rule change does impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change applies uniformly to market participants. As discussed above, the Exchange believes that adopting a tier with additional criteria to the existing Market Maker Non-Penny Pilot Add Volume Tiers will encourage Members to increase their order flow in Non-Penny securities on the Exchange. Increased liquidity benefits all investors by deepening the Exchange’s liquidity pool, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 17% of the market share.<sup>18</sup> Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, 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>19</sup> The fact that this market is competitive has also long been recognized by the courts.

<sup>17</sup> Securities Exchange Act Release No. 51808, 70 FR 37495, 37498–99 (June 29, 2005) (S7–10–04) (Final Rule).

<sup>18</sup> *Supra* note 3.

<sup>19</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[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> Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange neither solicited nor received comments on the proposed rule change.

#### **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) of the Act<sup>21</sup> and paragraph (f) of Rule 19b–4<sup>22</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 will 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:

#### *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–CboeBZX–2020–023 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–CboeBZX–2020–023. 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–CboeBZX–2020–023 and should be submitted on or before April 10, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**J. Matthew DeLesDernier,**  
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[FR Doc. 2020–05842 Filed 3–19–20; 8:45 am]

**BILLING CODE 8011–01–P**

<sup>20</sup> *NetCoalition v. SEC*, 615 F.3d 525, 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> 15 U.S.C. 78s(b)(3)(A).

<sup>22</sup> 17 CFR 240.19b–4(f).

<sup>23</sup> 17 CFR 200.30–3(a)(12).