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June 13, 2023

Submitted electronically

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-1090

Re: Securities Exchange Act Release No. 34-97406 (SR-CboeEDGX-2023-016), and Release No. 34-97437 (SR-CboeBZX-2023-020).

Dear Ms. Countryman:

Cboe EDGX Exchange, Inc. ("EDGX") and Cboe BZX Exchange, Inc. ("BZX") (collectively, "Cboe" or the "Exchange") appreciate the opportunity to provide comments to the U.S. Securities and Exchange Commission (the "SEC" "Commission") regarding the above-referenced suspension orders. On March 1, 2023, and March 6, 2023, EDGX and BZX, respectively, filed with the Commission, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")[1], and Rule 19b-4 thereunder[2], proposed rule changes to amend their equities fee schedules effective March 1, 2023[3]. The EDGX and BZX fee filings were immediately effective upon filing with the Commission and were published in the Federal Register for comment. At that time, the SEC did not raise any concerns regarding these filings, and no comments were received. Nevertheless, on the 60th day the Commission suspended the EDGX and BZX fee filings ("Suspended Filings")[4] and instituted proceedings to determine whether to approve or disapprove the proposed fees.

As an initial matter, the Exchange notes that certain tiers at issue in the Suspended Filings have been removed from its fee schedules, and the Exchange has implemented new tiers to replace the tiers suspended by the SEC. Nevertheless, the Exchange is submitting this comment letter to write in support of the Suspended Filings. For the reasons discussed in more detail, below, as well as in the BZX and EDGX fee filings, the Exchange believes that the Suspended Filings meet all of the statutory requirements of the Act.

<u>The Proposed Step-up and Growth Tiers Met the Requirements Under the Act</u>

At issue are certain of the Exchange's step-up and growth tiers that have, as one of several criteria, baseline volume months from May 2021, October 2021, August 2022, October 2022, January 2022, and January 2023 (collectively, the "Suspended Tiers")[5]. Step-up and growth tiers are long-standing incentives commonly used by securities exchanges to encourage market participants to provide liquidity to an exchange by offering market participants an opportunity to receive an enhanced rebate by increasing their volume relative to a baseline month.

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1 15 U.S.C. 78s(b)(1)
2 17 CFR 240.19b-4
3 <u>See</u> Securities Exchange Act Release No. 97042 (March 3, 2023), 88 FR 14657 (March 9, 2023) (SR-CboeEDGX-2023-016); <u>see also</u> Securities Exchange Act Release No. 97108 (March 10, 2023), 88 FR 16285 (March 16, 2023) (SR-CboeBZX-2023-020). Note that the Exchange initially filed the proposed BZX fee changes on March 1, 2023 (SR-CboeBZX-2023-017), but withdrew that filing on March 6, 2023, and submitted SR-CboeBZX-2023-20.
4 <u>See</u> Securities Exchange Act Release No. 97406 (April 28, 2023), 88 FR 28641 (May 4, 2023) (SR-CboeEDGX-2023-016); <u>see also</u> Securities Exchange Act Release No. 97437 (May 4, 2023), 88 FR 30181 (May 10, 2023) (SR-CboeBZX-2023-020).
5 <u>Supra</u> note 3 (Describing EDGX Growth Tier 1, EDGX Growth Tier 2, EDGX Non-Displayed Step-Up Volume Tier 1, and EDGX Retail Growth Tier 3, and BZX Tier 1, BZX Tier 3, and BZX Non-Displayed Step-Up Tier).

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The SEC has raised concerns that the Suspended Tiers may not be accomplishing their purpose of incentivizing liquidity, "[because they] remain the same and may continue indefinitely." More specifically, the SEC is considering whether the Suspended Tiers are consistent with Section 6(b)(4)[6], 6(b)(5)[7], and 6(b)(8)[8], of the Act, which require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities; (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Importantly, Cboe believes that the Suspended Tiers satisfy each of these requirements under the Act.

The Suspended Tiers are based on the Exchange's analysis and understanding of historical market volumes dating from 2021 to April 2023, year-to-date ("YTD"), and are reasonably designed to incentivize additional liquidity in the manner intended by step-up and growth tiers. The underlying purpose of step-up and growth tiers is to incentivize the provision of *additional* liquidity, month-to-month, relative to an Exchange Member's trading volume from a prior baseline month. There are various reasons the Exchange may choose a certain baseline month versus another. For instance, perhaps the baseline month for a chosen tier has set the volume threshold at level where no Members have satisfied the criteria for that step-up or growth tier. In this case, the Exchange might choose to amend that tier to choose a baseline month that represents a lower level of volume but increases participation by Members. Alternatively, the Exchange could also elect to remove such tiers, and redirect future resources and funding into other programs and tiers intended to incentivize increased order flow. Conversely, perhaps various Members have achieved the established volume thresholds consistently, month-over-month, and to incentivize additional liquidity from such Members, the Exchange could elect to use a baseline month with a higher level of volume to incentivize Members to strive for even higher volumes. The underlying rationale aside, the critical point to note is that there are multiple bases that appropriately justify a chosen baseline month.

Here, the Exchange selected the baseline months at issue because they represented high-water marks of trading volume. Because of declining trading volumes dating from April 2021 to April 2023 YTD, the Exchange determined that choosing baseline months with higher levels of trading volume would best help the Exchange attract greater levels of liquidity. In fact, our data shows that volumes in 2021 and 2022 were higher than volumes seen from January 2023 through April 2023, year-to-date, with total market average daily volume down 4.9% (YTD 2023 vs. FY 2022) and down 11.5% (YTD 2023 vs. YTD 2022). In fact, when analyzing total market average daily volume ("ADV"), volumes have been trending downwards since January 2022, with a few macroeconomic events resulting in high volatility months – e.g., March 2022 (Russia/Ukraine conflict) and March 2023 (bank failures). More critically, the number of shares traded on-exchange over the same time period have been in noticeable decline, with 4.6 billion shares trading off-exchange and TRF market share comprising 45% of overall market volume as of April 2023[9].

Accordingly, the Exchange believes the use of historical baseline volume months that represented higher-water marks of trading was critical in order for the Exchange to address the overall decline in trading volumes and significant increase in off-exchange trading, and to incentivize additional *on-exchange* liquidity. By utilizing a baseline month containing higher volume, the Exchange is establishing a higher threshold of growth that Members are required to maintain in lower volume months in order to be eligible to receive an enhanced rebate. Both market volumes and exchange trading volumes are subject to unpredictable macroeconomic events that may make any month – including months more current than the existing baseline months – the new high-water mark of trading. But the fact that a more current month may set a new high-water mark of trading volume should not discredit the fact that a historical baseline month can in fact represent a meaningful guidepost versus which Members may be incentivized to increase their on-Exchange liquidity provision.

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6 15 U.S.C. § 78f(b)(4)

7 15 U.S.C. § 78f(b)(5)

8 15 U.S.C. § 78f(b)(8)

9 See "Off-Exchange Trends: Beyond Sub-dollar Trading", May 17, 2023, available at: https://www.cboe.com/insights/posts/off-exchange-trends-beyond-sub-dollar-trading/.

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The Suspended Filings also demonstrate that the step-up and growth tiers at issue provide for the equitable allocation of reasonable fees among Members. Both the March 2023 BZX and March 2023 EDGX filing make clear that rebates offered by the Exchange are available to "all Members". The Suspended Filings also indicate where certain rebates apply only to Members engaging in certain trading activity such as, liquidity provision. While all Members are eligible to try and earn enhanced rebates offered by step-up and growth tiers, Members are also *not required* to try and achieve such incentives. Fee schedules must be looked at holistically and tiers must be reviewed in the context of the fee schedule as a whole. If the rebates offered by a step-up or growth tier are not achievable for a Member then a Member is free to try and earn rebates from other tiers offered by the Exchange.

It should also be kept in mind that Members have differing business models (e.g., agency broker-dealers versus market-makers/liquidity providers), manage and handle different types of order flow, and have different investment benchmarks, which may make certain tiers appealing or unappealing, thus dictating whether they choose to try and satisfy certain step-up or growth tiers. There are also a host of other factors that influence trading decisions that the Exchange can neither control nor predict when establishing baseline months. For instance, Members may choose (or not choose) to route their order flow to the Exchange due to changes in their underlying routing strategy, better priced liquidity, or better fill rates in away venues, or due to an overall depression in trading volumes due macroeconomic events that drive trading. As such, whether a Member adds the requisite volume required by a step-up or growth tier is dependent on many factors outside of the ADAV or TCV requirements implemented by the Exchange.

The Exchange notes further that the Suspended Tiers do not permit unfair discrimination between Members. Indeed, the term "*unfair* discrimination" strongly suggests that the Congress itself did not intend for the Act to prohibit differentiation amongst Members where such distinctions are intended for Members that logically trade in the manner necessary to achieve a volume-based incentive – i.e., liquidity providers that typically trade in large volumes. Furthermore, it stands to reason that differentiating between Members in this manner is *not* "unfair discrimination" given the many benefits that additional liquidity provides to investors, and the overall market, such as enhanced price transparency and price discovery.

Additionally, the Suspended Tiers do not permit unfair discrimination because they are available to all Members and all Members will have a reasonable opportunity to meet the Suspended Tiers' criteria and will receive the corresponding enhanced rebates if such criteria are met. Furthermore, other exchanges offer similar pricing structures to the Exchange, including offering step-up tiers with historical baseline months[10]. The Suspended Tiers are also not obligatory, and Members are free to adjust their routing strategies to trade on other exchanges or off-exchange venues they believe have more favorable pricing. Importantly, whether a Member is a new Exchange Member, or a Member who has traded prior to the subject baseline month, each Member is required to add the same number of incremental shares (i.e., a Member who did not trade on the Exchange prior to the baseline month simply starts with baseline volume of zero shares, whereas an existing Member must grow their volume at the incremental number of shares *in addition* to the shares they traded in the preceding month).

Moreover, share quantity is not the only threshold that a Member can choose to satisfy in order to receive an enhanced rebate. In fact, the Suspended Tiers each included a Total Consolidated Volume ("TCV")[11] component, which compared a Member's relevant activity in the baseline month as compared to the current month. If a current Member was not yet a Member as of the baseline date, its volume for the baseline month is simply zero, and the Member would simply be required to grow by the designated percentage of TCV in order to satisfy that particular prong of the Suspended Tiers.

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10 See generally, "Fees and Charges", available at: https://www.nyse.com/publicdocs/nyse/markets/nyse-arca/NYSE_Arca_Marketplace_Fees.pdf, which sets forth various fees, rebates, and tiers utilized by NYSE Arca; see also "Add/Remove Rates", available at: http://www.nasdaqtrader.com/Trader.aspx?id=PriceListTrading2, which sets forth various fees, rebates, and tiers utilized by Nasdaq Stock Market, LLC.

11 TCV means total consolidated volume calculated as the volume reported by all exchange and trade reporting facilities to a consolidated transaction reporting plan for the month in which the fees apply.

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Furthermore, the Suspended Tiers do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Rather, the Suspended Tiers are necessary to foster healthy competition amongst exchanges, as well as off-exchange venues that account for a large majority of traded volume. Indeed, other exchanges offer similar pricing structures to the Exchange, including offering step-up tiers with historical baseline months[12]. Additionally, because off-exchange venues are exempted from the 19b-4 rule filing process and can freely change their fee schedules without prior approval from the SEC, any burden on competition the Suspended Tiers may pose is at best, de minimis.

Finally, it should also be noted that today's marketplace is highly competitive and investors have access to a variety of trading venues, including not only other national securities exchanges, but also off-exchange trading venues such as electronic liquidity providers ("ELPs"), alternative trading systems ("ATSs"), central risk books ("CRBs"), single dealer platforms ("SDPs"), and wholesale broker-dealers, amongst others, which in aggregate, account for 45% of continuous trading volume as April 2023[13]. This growth in off-exchange volume makes the ability to offer tiered incentives to Members a particularly crucial tool for exchanges, as off-exchange venues are simply not subject to the same regulatory requirements as exchanges, providing them with a competitive advantage. Venues such as ELPs and ATSs, as well as wholesale broker-dealers, can commit capital to orders, provide targeted indications of interest, and offer order segmentation to increase fill rates and improve parent order level performance. Exchanges, however, are not able to offer such services, and are instead typically limited to competing with these venues through pricing incentives such as those at issue in the Suspended Filings.

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In conclusion, although the Exchange will withdraw the Suspended Filings, Cboe believes strongly that the Suspended Tiers are consistent with the Act and are well designed to achieve the purpose of incentivizing additional liquidity while affording all Members the ability to achieve enhanced rebates for achieving volume requirements. The Suspended Tiers are the product of thorough empirical analysis and our understanding of historical versus present-day volumes. The Exchange again notes that the ability to differentiate our offerings from our peer exchanges, as well as with off-exchange venues that have competitive advantages relative to regulated exchanges, is largely dependent on our ability to innovate and provide enhanced incentives to our Membership. Step-up and growth tiers are a critical tool in this regard, and it is imperative that the SEC seek to foster innovation and competition by allowing the Exchange to exercise its discretion when establishing these incentives.

Regards,

/s/ Vaishali Javeri

Vaishali Javeri
SVP, Chief Legal Officer, North American Securities

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12 Supra note 10.

13 Supra note 9.