

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88487; File No. SR-CboeBZX-2020-027)

March 26, 2020

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amend the Fee Schedule to Institute a Fee Code Applicable to the Cboe Market Close

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 19, 2020, Cboe BZX Exchange, Inc. (“BZX” or “Exchange”) filed with the Securities and Exchange Commission (“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. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change to amend the fee schedule to institute a fee code applicable to the Cboe Market Close. 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/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 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 proposes to amend the fee schedule applicable to its equities trading platform (“BZX Equities”) to introduce a fee code for orders that participate in the Cboe Market Close.³ As proposed, orders executed in the Cboe Market Close would yield fee code “MC.” There would be no transaction fees associated with such orders.

The Exchange plans to implement the Cboe Market Close on March 6, 2020 as part of its ongoing efforts to improve market structure for the benefit of investors.⁴ The Cboe Market Close is an innovative closing match process for non-BZX Listed Securities that is designed to match buy and sell Market-On-Close (“MOC”) orders at the official closing price for such security published by the primary listing market. The Exchange is introducing the Cboe Market Close in response to requests from market participants, particularly buy-side firms, for an alternative to

³ The Exchange initially filed the proposed fee changes on March 5, 2020 (SR-CboeBZX-2020-022). On March 13, 2020, the Exchange withdrew that filing and re-filed (SR-CboeBZX-2020-024). On March 19, 2020, the Exchange withdrew that filing and submitted this filing.

⁴ The Commission approved the Cboe Market Close on January 21, 2020. See Securities Exchange Act Release No. 88008 (January 21, 2020) 85 FR 4726 (January 27, 2020) (the “Approval Order”) (SR-BatsBZX-2017-34).

the primary listing exchanges' closing auctions that still provides an execution at a security's official closing price. Cboe Market Close is designed in response to industry persistence and interest in an alternative to the listing market's closing auction.

As noted in the Approval Order, BZX stated that the fees for Cboe Market Close would be set and maintained over time at a rate less than the fee charged by the applicable listing exchange for its own respective closing mechanism. Accordingly, in conjunction with the upcoming implementation of the Cboe Market Close, the Exchange proposes to introduce a new fee code for orders that are executed in the Cboe Market Close, which would yield fee code "MC." As proposed, there would be no fee to participate in the Cboe Market Close, thereby providing cost effective executions at the official closing price on a public exchange, and facilitating the execution of those orders at a lower rate than such orders would be charged in a primary listing markets' closing auction.⁵

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,⁶ in general, and furthers the objectives of Section 6(b)(4),⁷ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also notes

⁵ For example, Nasdaq offers tiered fees for both MOC and Limit-on-Close ("LOC") order executions in its closing auction process ranging from \$0.0008 to \$0.0016 per executed share. See Nasdaq Crossing Network, Execution Fees for the Nasdaq Closing Cross, Tiers A through G of the Nasdaq Price List. NYSE offers tiered fees for MOC order executions in its closing auction process ranging from \$0.0004 to \$0.0010. See Executions at the Close Equity Per Share Charge – per transaction (both sides) – of the NYSE Price List.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4).

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. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their MOC orders to the Cboe Market Close, which the Exchange believes would facilitate the execution of those orders at the official closing price.

In particular, the Exchange believes the proposal is reasonable because it provides Members a free alternative for executing MOC orders at the official closing price. Currently, market participants may execute MOC orders on public exchanges at the official closing price only by participating in the primary listing market's closing auction. As noted in the Approval Order, BZX stated that the fees for Cboe Market Close would be set and maintained over time at a rate less than the fee charged by the applicable listing exchange for its own respective closing mechanism. Accordingly, the proposal would allow all Members to participate in the Cboe Market Close without charge, and therefore at a price that is less than the applicable closing auction fees that would be incurred on the primary listing exchanges.⁸ The Exchange also believes the proposal is reasonable because fostering price competition for the execution of MOC orders may facilitate the ability for smaller and mid-size brokers to better compete for investors' MOC order flow. In turn, greater choice among, and participation by, broker-dealers in handling MOC orders should inure to the benefit of end investors. Further, the Exchange believes the proposal may increase execution quality competition for MOC orders by

⁸ For example, Nasdaq offers tiered fees for executions in its closing auction process ranging from \$0.0008 to \$0.0016 per executed share. See Tiers A through G of the Nasdaq fee schedule <http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2>.

incentivizing other venues, including the primary listing exchanges, to continue to innovate and compete to attract MOC orders to their venues.

Additionally, the Exchange believes the proposal is equitable and not unfairly discriminatory because it would apply equally to all Members who choose to participate in the Cboe Market Close. The proposed fee change is designed to allow broad participation in the Cboe Market Close, and there would be no differentiation in fees charged to Members. Rather, the Exchange's proposal would allow all Members to participate in the Cboe Market Close without charge. In turn, this would allow any interested Member to participate in the Cboe Market Close on an equal and non-discriminatory basis.

Lastly, while the Exchange's proposal offers participation in the Cboe Market Close at no cost to Members, the Exchange will continue to surveil for potentially manipulative activities and will enhance its surveillance procedures and work with other SROs to detect and prevent manipulative activity through the use of Cboe Market Close.

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 MOC orders to a public exchange for execution at the official closing price.

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change allows all Members to participate in the Cboe Market Close without charge. The proposal is designed to encourage Members to participate in the Cboe Market Close, which the Exchange believes will benefit all Members by fostering price

competition for the execution of MOC orders at the official closing price, and may facilitate the ability for smaller and mid-size brokers to better compete for investors' MOC order flow. In turn, greater choice among, and participation by, broker-dealers in handling MOC orders should inure to the benefit of end investors.

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. The purpose of Cboe Market Close is to increase competition for the execution of MOC orders. Specifically, the Exchange believes the proposal may increase competition for MOC orders by incentivizing other venues, including the primary listing exchanges, to continue to innovate and compete to attract MOC orders to their venues.⁹ Further, as previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their MOC order flow, including primary listing markets and off-exchange venues and alternative trading systems.¹⁰

Lastly, the proposal is offered in conjunction with the launch of the Cboe Market Close which is designed to enhance competition for the execution of MOC orders at the official closing price. Market participants may only execute at the official closing price on a public exchange is through the primary listing market auction. Generally, more than 70% of execution volume at the official closing price occurs on the primary listing exchange. Therefore, the proposal is designed to enhance competition among exchanges by offering market participants an alternative option to execute MOC orders at the official closing price. Furthermore, market participants can readily choose to send their MOC orders to primary listing markets and off-exchange venues if they

⁹ Supra note 3.

¹⁰ Id.

deem fee levels at those other venues to be more favorable. For example, recent studies have shown that Trade Reporting Facility (“TRF”) volumes using the primary closing auction price have reached as high as 30% on some occasions.¹¹

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.”¹² The fact that this market is competitive has also long been recognized by the courts. 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’ ...”.¹³ Accordingly, the Exchange does not believe the proposal imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

¹¹ See BZX Statement in Support of the Division’s Order Approving a Rule to Introduce Cboe Market Close, at 16 (April 12, 2018).

¹² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹³ *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)).

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 Act¹⁴ and paragraph (f) of Rule 19b-4¹⁵ 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 e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2020-027 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.

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f).

All submissions should refer to File Number SR-CboeBZX-2020-027. 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-CboeBZX-2020-027, 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.¹⁶

J. Matthew DeLesDernier
Assistant Secretary

¹⁶ 17 CFR 200.30-3(a)(12).