

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-89525; File No. SR-CboeBZX-2020-065)

August 11, 2020

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amend its Fees Schedule

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 August 4, 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

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

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

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”).<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 approximately 8% 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

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<sup>3</sup> The Exchange initially filed the proposed fee changes on July 31, 2020 (SR-CboeBZX-2020-062). On August 4, 2020, the Exchange withdrew that filing and submitted this filing.

<sup>4</sup> See Cboe Global Markets U.S. Options Market Month-to-Date Volume Summary (July 27, 2020), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

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, which varies depending on the Member's Capacity (Customer, Firm, Market Maker, etc.), whether the order adds or removes liquidity, and whether the order is in Penny or 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 five NBBO Setter Tiers under footnote 7 of the Fee Schedule which provide additional rebates between \$0.01 and \$0.05 per contract for qualifying orders which establish a new NBBO and yield fee code PM or PN,<sup>5</sup> where a Member meets certain liquidity thresholds. Under the current NBBO Setter Tiers, a Member may receive an additional rebate where the Member has an ADAV<sup>6</sup> in Non-Customer orders, or Firm/Market Maker/Away MM orders greater or equal to a specified percentage of OCV<sup>7</sup>. The Exchange now proposes to amend the criteria in NBBO Setter Tiers 2 through 5 by increasing, in each, a percentage of ADV into average OCV within existing criteria and also adding to Tier 5 a new,

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<sup>5</sup> Orders yielding fee code PM are Market Maker orders that add liquidity in Penny Pilot Securities and are offered a rebate of \$0.29, and orders yielding fee code PN are Away Market Maker orders that add liquidity in Penny Pilot Securities and are offered a rebate of \$0.26.

<sup>6</sup> "ADAV" means average daily added volume calculated as the number of contracts added, 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.

additional criteria that that a Member must meet to receive the existing additional rebate. The Exchange notes that the proposed changes do not alter the current rebates provided under NBBO Setter Tiers 2 through 5.

Specifically, Tier 2 currently provides an additional rebate of \$0.02 for a Member's qualifying orders (i.e., that yield fee code PM or PN and establish a new NBBO) for Members that have 1) an ADAV in Non-Customer orders greater than or equal to 0.40% of average OCV, and 2) an ADAV in Firm/Market Maker/Away Market Maker (MM) orders that establish a new NBBO greater than or equal to 0.05% of average OCV. Tier 3 currently provides an additional rebate of \$0.03 for qualifying orders for Members that have 1) an ADAV in Non-Customer orders greater than or equal to 0.75% of average OCV, and 2) an ADAV in Firm/Market Maker/Away MM orders that establish a new NBBO greater than or equal to 0.05% of average OCV. Tier 4 currently provides an additional rebate of \$0.04 for qualifying orders for Members that have 1) an ADAV in Non-Customer orders greater than or equal to 1.80% of average OCV, 2) an ADAV in Non-Customer Non-Penny orders greater than or equal to 0.20% of average OCV, and 3) an ADAV in Firm/Market Maker/Away MM orders that establish a new NBBO greater than or equal to 0.05% of average OCV. Tier 5 currently provides an additional rebate of \$0.05 for qualifying orders for Member that have 1) an ADAV in Non-Customer orders greater than or equal to 3.00% of average OCV, and 2) Member has an ADAV in Firm/Market Maker/Away MM orders that establish a new NBBO greater than or equal to 0.05% of average OCV. The Exchange notes that prong 2 of Tiers 2, 3, and 5 and prong 3 of Tier 4 (as well as prong 2 of Tier 1 which is not being amended) provide the same criteria. The proposed change updates these criteria in each tier to instead become incrementally more difficult. The proposed criteria in Tier 2 requires that a Member have an has an ADAV in Firm/Market Maker/Away

MM orders that establish a new NBBO greater than or equal to 0.15% of average OCV, in Tier 3 requires a threshold greater than or equal to 0.30% of average OCV, in Tier 4 requires a threshold of greater than or equal to 0.50% of average OCV, and in Tier 5 requires a threshold of 0.80% of average OCV. In addition to this, the proposed change amends the criteria in prong 1 of Tier 5 to decrease the threshold of Non-Customer orders over average OCV from 3.00% to 2.55% and adopts an additional criteria in Tier 5, a new prong 2 (current prong 2 will become prong 3), which requires an ADAV in Non-Customer Non-Penny orders greater than or equal to 0.25% of average OCV. The proposed increases in Firm/Market Maker/Away MM order ADAV that establish a new NBBO as a percentage of average OCV in Tiers 2 through 5 are intended to incrementally increase the level of difficulty in achieving each of these tiers, thus, incentivizing Members to increase their overall order flow to the Exchange by encouraging those Members to strive for the different, incrementally more difficult tier criteria under the proposed tiers to receive the additional rebates. The proposed additional prong of criteria in Tier 5 is also designed to incrementally increase the level of difficulty in achieving Tier 5, while the proposed decrease in the threshold of ADAV over average OCV in prong 1 is designed to balance the entirety of Tier 5's difficulty in light of the proposed additional criteria, incentivizing Members to continue to submit Non-Customer orders to the Exchange's Order Book.

The Exchange believes that the proposed fee changes are overall designed to incentivize more Firm, Market Maker, and Away Market Maker add volume order flow to establish a new NBBO as well as overall Non-Customer add volume order flow to the Exchange. Increased add volume order flow, particularly by liquidity providers, contributes to a deeper, more liquid market, which, in turn, provides for increased execution opportunities and thus overall enhanced price discovery and price improvement opportunities on the Exchange. As such, this benefits all

Members by contributing towards a robust and well-balanced market ecosystem, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>8</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>9</sup> 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 believes that the proposed rule change is consistent with the objectives of Section 6(b)(5)<sup>10</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As described above, 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

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<sup>8</sup> 15 U.S.C. 78f.

<sup>9</sup> 15 U.S.C. 78f(b)(4).

<sup>10</sup> 15 U.S.C. 78f.(b)(5).

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 tiers are reasonable because they amend existing opportunities in a manner that incentivizes increased Non-Customer (which would include, where applicable, Firm, Market Maker, and Away MM specifically) order flow via incrementally more challenging criteria in order to receive the same additional rebates on a Member's qualifying orders. 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 a 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.

Moreover, the Exchange believes the amended NBBO Setter Tiers are a reasonable means to encourage Members to increase their liquidity on the Exchange, specifically their Non-Customer add volume order flow. The Exchange believes that modifying existing criteria in Tiers 2 through 5 to be incrementally more difficult to achieve, as opposed to the current fixed

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<sup>11</sup> See e.g., NYSE Arca Options Fee Schedule, Firm and Broker Dealer Penny Posting Credit Tiers, and Non-Customer Non-Penny Posting Credit Tiers.

<sup>12</sup> See e.g., The Exchange's Fee Schedule, Footnote 4, NBBO Setter Tiers.

criteria pursuant to the same prong in each tier, and adopting an additional prong of criteria in Tier 5 are reasonable modifications of existing criteria because they are designed to incrementally increase the difficulty in achieving these tiers, thereby incentivizing Members to increase their overall add volume order flow, and particularly, to strive to establish new NBBOs. This benefits all market participants by incentivizing continuous display of and opportunity to execute at the best prices, and by incentivizing overall additional liquidity, which signals other market participants to take the additional execution opportunities provided by such liquidity. This overall increase in activity deepens the Exchange's liquidity pool, offers additional cost savings, supports the quality of price discovery, promotes market transparency and improves market quality, for all investors. The Exchange also notes that it is reasonable to decrease the threshold of ADAV as a percentage average OCV in prong 1 of Tier 5 in order to balance the ultimate level of difficult in achieving the tier with the added proposed prong of criteria that a Member must meet to achieve the current rebate.

Further, the Exchange believes that the proposed rule changes are reasonable as they represent proportional increases in difficulty per adjacent tiers and the criteria thresholds appropriately reflect the incremental difficulty to achieve the existing rebates that increase with each ascending tier. For example, the Exchange proposes to simultaneously increase the ADAV thresholds of Firm/Market Maker/Away MM orders that establish a new NBBO in each of Tier 2, 3, 4, and 5 in a manner that poses a step up in difficulty per each ascending tier to achieve the current ascending rebates per each tier. The Exchange also believes that the proposed change to Tier 5 in adding another prong of criteria, as well as tempering the difficulty posed by the added prong by decreasing the threshold of ADAV over average OCV in an existing prong,

appropriately balances the step up in difficulty from Tier 4 to Tier 5. The Exchange again notes that the proposed rule changes do not alter the amount of any of the current rebates in place.

The Exchange believes that the proposal represents an equitable allocation of fees and is not unfairly discriminatory because all Members will be eligible for the proposed tier and the corresponding additional rebate will apply uniformly to all Members that reach the proposed tier criteria. That is, the proposed tiers are designed as an incentive to any and all Members interested in meeting the tier criteria to submit additional order flow to the Exchange and each will receive the proposed additional rebate if the tier criteria is met.

The Exchange believes that the proposal represents an equitable allocation of rebates and is not unfairly discriminatory because all Members will continue to be eligible for NBBO Setter Tiers 2 through 5, as amended. The proposed changes to the tiers' criteria are designed as an incentive to any and all Members interested in meeting the tier criteria to submit additional Non-Customer orders (with opportunities to achieve such tiers via criteria for Firm/Market Maker/Away MM orders) to the Exchange. Each will have the opportunity to submit the requisite order flow and will receive the applicable existing rebate if the tier criteria are met. Without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying for the proposed tiers. While the Exchange has no way of predicting with certainty how the proposed tiers will impact Member activity, the Exchange anticipates that approximately at least three Members will be able to compete for and achieve the amended criteria in each of Tier 2 and Tier 3, and at least one Member will be able to compete for and achieve the amended criteria in each of Tier 4 and Tier 5. The Exchange anticipates that the tiers will particularly include liquidity providers, such as traditional Market Makers, and wholesale or consolidator

firms that mainly make markets for retail orders, each providing distinct types of order flow to the Exchange to the benefit of all market participants. The Exchange also notes that the proposed tiers will not adversely impact any Member's pricing or their ability to qualify for other rebate tiers. Rather, should a Member not meet the proposed criteria for a tier, the Member will merely not receive the corresponding additional rebate. Furthermore, the existing rebate and fees will continue to uniformly apply to all Members that meet the required criteria, as amended, per each respective tier.

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 individual stocks for all types of orders, large and small."<sup>13</sup>

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 applies to all Members equally in that all Members are eligible to achieve the tiers' proposed criteria, have a reasonable opportunity to meet the tiers' proposed criteria and will all receive the existing rebates if such criteria is met. Overall, the

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<sup>13</sup> Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

proposed change is designed to attract additional Non-Customer (including, where applicable, specifically Firm/Market Maker/Away MM) order flow to the Exchange. The Exchange believes that the modified tier criteria would incentivize market participants to strive to increase such order flow to the Exchange to meet the proposed criteria and, as a result, provide for deeper levels of liquidity, increasing trading opportunities for other market participants, thus signaling further trading activity, ultimately incentivizing more overall order flow and improving price transparency on the Exchange. Greater overall order flow and pricing transparency benefits all market participants on the Exchange by generally providing continuous trading opportunities, enhancing market quality, and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem, which benefits all market participants.

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>14</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,

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<sup>14</sup> See supra note 3.

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>15</sup> 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’....”<sup>16</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.

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<sup>15</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>16</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)).

### 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>17</sup> and paragraph (f) of Rule 19b-4<sup>18</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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBZX-2020-065 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-2020-065. This file number should

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<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

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

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-2020-065 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>19</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).