

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98761; File No. SR-CboeBZX-2023-081)

October 16, 2023

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 4, 2023, 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”) proposes 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/options/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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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.³

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 17 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 19% of the market share and currently the Exchange represents only approximately 4% of the market share.⁴ 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.

³ The Exchange initially filed the proposed fee changes on September 29, 2023 (SR-CBOE-2023-076) [sic]. On October 4, 2023, the Exchange withdrew that filing and submitted this proposal.

⁴ See Cboe Global Markets U.S. Options Market Monthly Volume Summary (September 25, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

The Exchange's Fee Schedule sets forth standard rebates and rates applied per contract. For example, the Exchange assesses a standard transaction fee of \$0.48 per contract for Customer orders in Penny Securities, excluding SPY and IWM, that remove liquidity, yielding fee code "PC". The Exchange assesses a standard transaction fee of \$0.45 per contract for Customer SPY and IWM orders that remove liquidity, yielding fee code "PR". The Fee Codes and Associated Fees section of the Fees Schedule also provides for certain fee codes associated with certain order types and market participants that provide for various other fees or rebates. In response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with 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.

The Exchange proposes to amend the standard transaction fee applicable to fee code PC from \$0.48 per contract to \$0.45 per contract (same as current fee code PR), and to amend the definition of fee code PC so that such fee code (and corresponding transaction fee) applies to all Customer orders in Penny Securities that remove liquidity (including SPY and IWM). The Exchange also proposes to eliminate fee code "PR". Additionally, the Exchange proposes to delete the Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers, set forth in Footnote 14 of the Fee Schedule and applicable to orders yielding fee code PD.⁵

⁵ Orders yielding fee code PD are Firm, Broker Dealer and Joint Back Office orders that remove liquidity in Penny Program Securities and are charged a standard transaction fee of \$0.48. The Exchange proposes to make corresponding changes to the Standard Rates table included in the Exchange's Fee Schedule.

Currently, the Exchange provides a rebate of \$0.85 per contract for Customer orders in Non-Penny Securities that add liquidity, yielding fee code “NY”. The Exchange now proposes to increase the rebate provided for Customer orders in Non-Penny Securities that add liquidity and yield fee code NY, to \$1.05. The Exchange also proposes to delete the Customer Non-Penny Add Volume Tiers, set forth in Footnote 12 to the Fee Schedule and applicable to orders yielding fee code NY, since under the proposed rule change the Exchange is now providing a rebate for orders yielding fee code NY equal to the highest tier of the program.⁶

The Exchange currently assesses a standard transaction fee of \$1.10 for Non-Customer orders in Non-Penny Securities that remove liquidity, yielding fee code “NP”. The Exchange proposes to increase the standard transaction fee for Non-Customer orders in Non-Penny Securities that remove liquidity and yield fee code NP, to \$1.15. The Exchange also proposes to eliminate the Non-Customer Non-Penny Take Volume Tiers program set forth in Footnote 13 to the Fee Schedule, applicable to orders yielding fee code NP.⁷

Finally, the Exchange currently offers five Market Maker Penny Add Volume Tiers under Footnote 6 of the Fee Schedule, including on Market Maker Cross-Asset Add Tier, which provide additional rebates between \$0.31 and \$0.43 per contract for qualifying Market Maker orders (i.e., that yield fee code PM)⁸ where a Member meets

⁶ The Exchange proposes to make corresponding changes to the Standard Rates table included in the Exchange’s Fee Schedule.

⁷ The Exchange proposes to make corresponding changes to the Standard Rates table included in the Exchange’s Fee Schedule.

⁸ Orders yielding fee code PM are Market Maker orders that add liquidity in Penny Program Securities and are offered a rebate of \$0.29.

certain liquidity thresholds. For example, current Tier 2 offers an enhanced rebate of \$0.38 per contract for qualifying orders where a Member has an ADAV⁹ in Market Maker orders greater than or equal to 0.25% of average OCV¹⁰; Tier 3 offers an enhanced rebate of \$0.39 per contract for qualifying orders where a Member has an ADAV in Market Maker orders greater than or equal to 0.40% of average OCV; and Tier 4 offers an enhanced rebate of \$0.43 per contract for qualifying orders where a Member has an ADAV in Market Maker orders greater than or equal to 0.60% of average OCV. The Exchange now proposes to amend the Market Maker Penny Add Volume Tiers by updating the criteria for Tiers 2, 3, and 4.

Specifically, the proposed rule change amends the criteria in Tier 2 so that a Member must have an ADAV in Market Maker orders greater than or equal to 0.35% of average OCV; amends the criteria in Tier 3 so that a Member must have an ADAV in Market Maker orders greater than or equal to 0.35% of average OCV; and amends the criteria in Tier 4 so that a Member must have an ADAV in Market Maker orders greater than or equal to 0.65% of average OCV. The proposed rule change does not alter the enhanced rebates offered under each tier.

The proposed changes to the criteria in Tiers 2, 3, and 4 are designed to continue to provide an incremental incentive for Members to strive for the highest tier levels, which provide increasingly higher rebates for such transactions.

2. Statutory Basis

⁹ “ADAV” means average daily added volume calculated as the number of contracts added, per day.

¹⁰ “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.

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹¹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹² 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. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹³ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁴ which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

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

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

¹³ Id.

¹⁴ 15 U.S.C. 78f(b)(4).

market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. Additionally, competing exchanges offer similar tiered pricing structures, including schedules of rebates and fees that apply based upon similarly situated members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.

In particular, the Exchange believes that proposed changes to fee code PC to reduce the standard transaction fee and make the fee code applicable to all customer orders in Penny Securities that remove liquidity (including SPY and IWM), is reasonable, equitable and not unfairly discriminatory. The current fee code PC already applies to customer orders in Penny Securities that remove liquidity, except for SPY and IWM (which yield fee code PR), and will apply in the same manner to liquidity removing IWM and SPY Customer orders. As amended, fee code PC assesses the same rate, \$0.45, as fee code PR, which is eliminated under the proposed rule change. Thus, the Exchange believes the proposed change is reasonable as Members will continue to pay the same fee for liquidity removing IWM and SPY Customer orders. Further, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory as fee code PC applies automatically and uniformly to all Customer orders in Penny Securities that remove liquidity.

The Exchange also believes that it is equitable and not unfairly discriminatory to assess a lower fee for Customer orders in Penny Securities that add liquidity, as compared to other market participants, because customer order flow enhances liquidity on the Exchange for the benefit of all market participants. Specifically, customer liquidity

benefits all market participants by providing more trading opportunities, which attracts Market-Makers. An increase in the activity of these market participants in turn facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Moreover, the options industry has a long history of providing preferential pricing to customers, and the Exchange's current Fee Schedule currently does so in many places, as do the fees structures of multiple other exchanges.¹⁵

The Exchange believes the proposed rule change to increase the rebate provided for Customer orders that add liquidity in Non-Penny Securities is reasonably designed to further incentivize Members to submit Customer orders that add liquidity in Non-Penny Securities, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants. Further, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory as all Members that submit Customer orders that add liquidity in Non-Penny Securities and yield fee code NY will receive the rebate.

The Exchange believes eliminating the Customer Non-Penny Add Volume Tiers under Footnote 12 is reasonable because the Exchange is not required to maintain this program. While the Exchange is not required to provide Members an opportunity to receive reduced fees or enhanced rebates, Members may still have other opportunities to obtain enhanced rebates for orders in Non-Penny Securities, such as via the Non-Penny Add Volume Tiers (via Footnotes 7, 8, and 11 of the Fee Schedule). Further, the Exchange believes the Customer Non-Penny Add Volume Tiers may no longer

¹⁵ See BZX Options Fee Schedule, Fee Codes and Associated Fees. See also Cboe C2 Options Exchange Fees Schedule, Transaction Fees.

incentivize Members, as the rebate offered under amended fee code NY is equal to the highest rebate available under the Customer Non-Penny Add Volume Tiers. The Exchange believes that eliminating the Customer Non-Penny Add Volume Tiers is equitable and not unfairly discriminatory because it applies uniformly to all Members. Further, the Exchange notes that the proposed changes will not adversely impact any Member's ability to otherwise qualify for reduced fees or enhanced rebates offered under other programs in the Fee Schedule.

The Exchange believes the proposed rule change to increase the standard fee for Non-Customer orders that remove liquidity in Non-Penny Securities is reasonable because it is a modest increase in this transaction rate for these orders. Additionally, the increased fee is in line with fees assessed for similar transactions at other exchanges.¹⁶ The Exchange believes the proposed change is equitable and not unfairly discriminatory because it applies uniformly to all Members.

The Exchange believes eliminating the Non-Customer Non-Penny Take Volume Tiers under Footnote 13 and Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers under Footnote 14 is reasonable because the Exchange is not required to maintain these programs or provide Members an opportunity to receive reduced fees or enhanced rebates. The Exchange believes that eliminating the Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers and Non-Customer Non-Penny Take Volume Tiers is equitable and not unfairly discriminatory because it applies

¹⁶ See, e.g., NYSE Arca Fee Schedule, Transaction Fee for Electronic Executions – Per Contract, which provides that Firms and Broker Dealers that remove liquidity are assessed \$1.10 per contract in Non-Penny Issues. See also MIAX Pearl Options Exchange Fee Schedule, which provides Non-Priority Customer, Firm, BD, and Non-MIAX Pearl Market Makers that remove liquidity are assessed between \$1.09 and \$1.10 per contract for Non-Penny classes, depending on volume.

uniformly to all Members, in that, such programs will not be available for any Member. Further, the Exchange notes that the proposed changes will not adversely impact any Member's ability to otherwise qualify for reduced fees or enhanced rebates offered under other programs in the Fee Schedule.

Finally, the Exchange believes updating the criteria for Tiers 2, 3, and 4 of the Market Maker Penny Add Volume Tiers is reasonable as it is designed to encourage Market Makers to increase their order flow to the Exchange to achieve each tiers' criteria, as amended. More specifically, the Exchange believes that updating the criteria for Tiers 2, 3, and 4 may encourage Members to increase their ADAV in Market Makers orders, over a modestly higher percentage of average OCV, and encourage Members to strive to achieve higher tiers (and corresponding higher rebates) by submitting the requisite add volume order flow. An increase in Market Maker add volume, particularly, facilitates tighter spreads and an increase in overall liquidity provider activity, both of which signal additional corresponding increase in order flow from other market participants, contributing towards a robust, well-balanced market ecosystem. Indeed, increased overall order flow benefits investors by continuing to deepen the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, 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 the proposed criteria in Tiers 2, 3, and 4 continues to reasonably reflect the incremental difficulty in achieving the Market Maker Penny Add Volume Tiers.

The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to all Members, who will have the opportunity to meet the tiers' new criteria and receive the corresponding rebate for the tier if such criteria is 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 definitively result in any changes to particular Market Makers qualifying for the proposed tiers, the Exchange believes that that at least two Market Makers will reasonably be able to achieve the proposed criteria in Tier 2, one Market Maker may be able to achieve the proposed criteria in Tier 3, and one Market Maker may be able to achieve the proposed criteria in Tier 4; however, the proposed tiers are open to any Market-Maker that satisfies the tier's criteria. Additionally, all Members are able to increase their Market Maker order flow to attempt to achieve the new tiers' criteria. Should a Member not meet the proposed new criteria, the Member will merely not receive that corresponding enhanced rebate.

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 competition that is not necessary or appropriate in furtherance of the purposes of the Act. 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.

The Exchange believes the proposed change to apply fee code PC to all Customer orders that remove liquidity in all Penny Securities, including IWM and SPY, will not impose any burden on intramarket competition because it will apply uniformly to all

Members. Further, the Exchange believes the proposal to reduce the standard fee for Customer orders that remove liquidity in Penny Securities will not impose any burden on intramarket competition because it will apply uniformly to all Members, in that all Members that submit orders yielding fee codes PC will pay the same transaction fee. As discussed above, the Exchange believes the proposed change to reduce the transaction fee would attract additional Customer orders that remove liquidity, 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 Securities and Exchange Commission's (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."

Additionally, the Exchange believes the proposal to increase the rebate offered for Customer orders in Non-Penny Securities that add liquidity and to increase the standard transaction fee for Non-Customer orders in Non-Penny Securities that remove liquidity will not impose any burden on intramarket competition, as the changes will apply uniformly to all Members. Further, the Exchange believes the proposal to eliminate the Customer, Firm, Broker Dealer and Joint Back Office Penny Take Volume Tiers, Non-Customer Non-Penny Take Volume Tiers, and Customer Non-Penny Add Volume Tiers will not impose any burden on intramarket competition because they will no longer be available to any Members.

The Exchange believes the proposals to amend the criteria for Tiers 2, 3, and 4 of the Market Maker Penny Add Volume Tiers will also not impose any burden on intramarket competition, as they will also apply to all Members. All Members will

continue to have an opportunity to receive rebates under various tiers. Market Maker Volume Add Tiers are generally designed to increase the competitiveness of BZX and incentivize participants to increase their order flow on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. An overall increase in add activity may provide for deeper, more liquid markets and execution opportunities at improved prices.

The Exchange does not believe that the proposed changes represent a significant departure from pricing currently offered by the Exchange or pricing offered by other options exchanges. Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value. Accordingly, the Exchange does not believe that the proposed changes will impair the ability of Members or competing venues to maintain their competitive standing in the financial markets.

The Exchange also 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 they may participate on and direct their order flow, including 17 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 19% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges 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.” 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’”. 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 Act¹⁷ and paragraph (f) of Rule 19b-4¹⁸ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-081 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.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

All submissions should refer to file number SR-CboeBZX-2023-081. 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-081 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Sherry R. Haywood,
Assistant Secretary.

¹⁹ 17 CFR 200.30-3(a)(12).