

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-99147; File No. SR-CboeBZX-2023-099)

December 12, 2023

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule Applicable to Members and Non-Members of the Exchange Pursuant to BZX Rules 15.1(a) and (c) in Order to Adopt a New Tier Under Footnote 13 (Tape B Volume and Quoting) Specific to Single-Stock Exchange Traded Funds (“Single-Stock ETFs”)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 1, 2023, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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 (“Commission” or “SEC”) a proposed rule change to amend the Fee Schedule applicable to Members and non-members of the Exchange pursuant to BZX Rules 15.1(a) and (c) in order to adopt a new Tier under footnote 13 (Tape B Volume and Quoting)

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

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

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

specific to Single-Stock Exchange Traded Funds (“Single-Stock ETFs”). 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 applicable to its equities trading platform (“BZX Equities”) to adopt a new Tier under footnote 13 (Tape B Volume and Quoting) specific to Single-Stock ETFs.<sup>5</sup> The Exchange proposes to implement these amendments to its fee schedule December 1, 2023.

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 registered equities exchanges, as well as a number of alternative trading

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<sup>5</sup> Single-Stock ETFs are investment products that pay positive or negative multiples of the market performance of the single underlying security.

systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Exchange Act, to which market participants may direct their order flow. Based on publicly available information,<sup>6</sup> no single registered equities exchange has more than 17% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a “Maker-Taker” model whereby it pays credits to Members that add liquidity and assesses fees to those that remove liquidity. The Exchange’s fee schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. Currently, for orders in securities priced at or above \$1.00, the Exchange provides a standard rebate of \$0.00160 per share for orders that add liquidity and assesses a fee of \$0.0030 per share for orders that remove liquidity.<sup>7</sup> For orders in securities priced below \$1.00, the Exchange does not provide a rebate or assess a fee for orders that add liquidity and assesses a fee of 0.30% of total dollar value for orders that remove liquidity.<sup>8</sup> 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.

Now, the Exchange proposes to adopt a new pricing Tier under footnote 13 of the Fee Schedule. Specifically, for orders yielding fee code B,<sup>9</sup> the Exchange proposes to adopt LEP Tier

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<sup>6</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (July 31, 2023), available at [https://www.cboe.com/us/equities/market\\_statistics/](https://www.cboe.com/us/equities/market_statistics/).

<sup>7</sup> See BZX Equities Fee Schedule, Standard Rates.

<sup>8</sup> Id.

<sup>9</sup> Fee code B is appended to displayed orders that add liquidity to BZX in Tape B securities.

1 under footnote 13 of the Fee Schedule.<sup>10</sup> The Exchange is proposing that a Member<sup>11</sup> will qualify for the LEP Tier 1 where the Member is enrolled in a minimum of five LEP Securities<sup>12</sup> for which it meets certain required criteria (the “Required Criteria”). A Member must be enrolled in at least the minimum number of LEP Securities for which it meets the Required Criteria every day in a trading month in order to be eligible for the proposed rebate. As proposed, the Exchange would count an LEP Security toward the minimum number of LEP Securities requirement where the Member meets the Required Criteria for at least 75% of the trading days in a particular month. As noted above, these proposed requirements are very similar to the existing LMP Tiers under footnote 13.

To qualify for proposed LEP Tier 1 a Member must be enrolled in at least five BZX-listed LEP Securities and meet the following Required Criteria,:

- (1) The Member has an NBBO Time<sup>13</sup> of equal or greater than 20%;
- (2) Member has bids and offers with a “Notional Depth”<sup>14</sup> of \$75,000 on each side for at least 90% of the trading day; and
- (3) The difference in the NBBO spread of each LEP Security is less than 0.50% for at least 95% of the trading day.

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<sup>10</sup> The existing tiers under footnote 13 were added in a fee filing adopting a similar structure related to LMP securities on the Exchange. See Securities Exchange Act No. 78338 (July 15, 2016) 81 FR 47458 (July 21, 2016) (SR-BatsBZX-2016-041) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of Bats BZX Exchange, Inc.).

<sup>11</sup> See Exchange Rule 1.5(n).

<sup>12</sup> As discussed further below, the Exchange proposes to adopt the term “LEP Securities”, which means a list of Single-Stock ETFs, including options-based ETFs in a single underlying equity security, for which the Exchange wants to incentivize Members to provide enhanced market quality. The Exchange will not remove a security from the list of LEP Securities without 30 days prior notice.

<sup>13</sup> “NBBO Time” means the average of the percentage of time during regular trading hours during which the Member maintains at least 100 shares at each of the NBB and NBO.

<sup>14</sup> As discussed further below, the Exchange proposes to adopt a new definition for “Notional Depth” which means the notional value of bids of at least 100 shares that are within \$0.05 of the BZX NBB and offers of at least 100 shares that are within \$0.05 of the BZX NBO.

The Required Criteria for each LEP Security will each be evaluated separately, and the Member does not need to meet the Required Criteria for all applicable LEP Securities on the same 75% of trading days. For example, in a month with 22 trading days, a Member would be eligible for Tier 1 where the Member met the Required Criteria in five LEP Securities in the first 11 trading days of the month and met the Required Criteria for a different set of five LEP Securities in the second 11 trading days of the month.

Members that meet proposed LEP Tier 1 would receive a rebate of \$0.0025 per share. In the event that a Member would receive a higher rebate under a different Tier set forth in the Fee Schedule, the Member would be entitled to the higher of the two rebates. As noted above, the Exchange also proposes to adopt two new definitions to the Fee Schedule. First, the Exchange proposes to adopt the term Notional Depth which will mean the notional value of bids of at least 100 shares that are within \$0.05 of the NBB or offers of at least 100 shares that are within \$0.05 of the NBO. Second, the Exchange proposes to adopt the term “LEP Securities” which will a list of Single-Stock ETFs, including options-based ETFs in a single underlying equity security, for which the Exchange wants to incentivize Members to provide enhanced market quality.

All Members will be eligible to enroll in LEP Securities, there will be no limit to the number of LEP Securities in which a Member may enroll, and there will be no limit to the number of Members that can enroll in each LEP Security.<sup>15</sup> All Members enrolled in LMP Securities will be eligible for the rebate where the Member meets the Tape B Quoting LMP Tier 1 requirements. Such LEP Securities will include all Cboe-listed Single-Stock ETFs for which

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<sup>15</sup> The Exchange anticipates that the initial list of LMP Securities will include at least nine ETPs. A current list of LEP Securities will be available on [www.cboe.com](http://www.cboe.com), which will be updated as new securities are added to the list of LEP Securities. All Cboe-listed LEP Securities will be enrolled in the program immediately upon listing on the Exchange.

the Exchange wants to incentivize Members to provide enhanced market quality. The Exchange will not remove a security from the list of LEP Securities without 30 days prior notice.

The Exchange also proposes to make a conforming change to the existing Tiers under footnote 13 of the Fee Schedule. Specifically, the Exchange proposes to rename existing Tiers 1 and 2 under footnote 13 “LMP Tier 1” and “LMP Tier 2”, respectively.

## 2. Statutory Basis

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.<sup>16</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>17</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. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>18</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers as well as Section 6(b)(4)<sup>19</sup> as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

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<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

<sup>18</sup> Id.

<sup>19</sup> 15 U.S.C. 78f(b)(4).

The proposed rule reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange and enhance market quality in LEP Securities and Tape B securities. The Exchange 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. The Exchange believes that the proposed LEP Tier represents an equitable allocation of rebates and are not unfairly discriminatory because all Members are eligible for such LEP Tier and would have the opportunity to meet the LEP Tier's criteria and would receive the proposed rebate if such criteria is met. Further, the proposed rebates are commensurate with the proposed criteria. That is, the rebates reasonably reflect the difficulty in achieving the applicable criteria as proposed. 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 LEP Tier. While the Exchange has no way of predicting with certainty how the proposed LEP Tier will impact Member activity, the Exchange reasonably expects four Members to compete for and reach the proposed LEP Tier. The Exchange also notes that proposed Tier/rebate will not adversely impact any Member's ability to qualify for other reduced fee or enhanced rebate Tiers. Should a Member not meet the proposed criteria under the proposed LEP Tier, the Member will merely not receive that corresponding rebate.

The Exchange believes that the proposed new LEP Tier is reasonable in that they will enhance market quality on the Exchange in two ways: (i) by incentivizing Members to meet certain quoting standards in LEP Securities designed to narrow spreads, increase size at the inside, and increase liquidity depth; and (ii) providing a rebate for all of a qualifying Member's orders that add liquidity in LEP Securities will incentivize Members to increase their

participation on the Exchange in LEP Securities. Furthermore, the Exchange believes it is appropriate to incentivize Members to meet the Required Criteria in LEP Securities as such securities poses an enhanced risk to Members providing liquidity in those securities. Therefore, the proposal offers an incentive to Members providing liquidity in LEP Securities.

The Exchange believes that such incentives will promote price discovery and market quality in such securities and, further, that the tightened spreads and increased liquidity from the proposal will benefit 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, enhancing quoting competition across exchanges, promoting market transparency, and improving investor protection. Accordingly, the Exchange believes that the proposal is reasonable, equitably allocated, and non-discriminatory because it would apply uniformly to all Members and is consistent with the overall goals of enhancing market quality.

The Exchange notes that the proposed pricing structure is not dissimilar from volume-based rebates and fees ("Volume Tiers") that have been widely adopted by exchanges, including the Exchange, and are equitable and not unfairly discriminatory because they are open to all Members on an equal basis and provide higher rebates and lower fees that are reasonably related to the value to an exchange's market quality. Much like Volume Tiers are generally designed to incentivize higher levels of liquidity provision and/or growth patterns on the Exchange, the proposal is designed to incentivize enhanced market quality on the Exchange through tighter spreads, greater size at the inside, and greater quoting depth in LEP Securities by offering a rebate in LEP Securities. Such rebates will simultaneously incentivize higher levels of liquidity provision in all LEP Securities. Accordingly, the Exchange believes that the proposal will act to enhance liquidity and competition across exchanges in LEP Securities on the Exchange by

providing a rebate reasonably related to such enhanced market quality to the benefit of all investors, thereby promoting the principles discussed in Section 6(b)(5) of the Act.<sup>20</sup>

The Exchange also believes that the proposed definitions and name changes to existing Tiers under footnote 13 are reasonable, fair and equitable and non-discriminatory because it is designed to make sure that the fee schedule is as clear and easily understandable as possible.

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. Particularly, the proposed LEP Tier is available to all Members equally in that all Members are eligible for the proposed LEP Tier, have a reasonable opportunity to meet the LEP Tier's criteria and will receive the corresponding rebate if such criteria is met. Additionally, the proposed LEP Tier is designed to attract additional order flow to the Exchange. The Exchange believes that the proposed LEP Tier criteria would incentivize market participants to direct liquidity adding displayed order flow to the Exchange, bringing with it additional execution opportunities for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefits all market participants on the Exchange by enhancing market quality and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem.

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,

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<sup>20</sup> 15 U.S.C. 78f(b)(5).

including 15 other equities exchanges and off exchange venues and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 17%<sup>21</sup> 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 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>22</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>23</sup> Accordingly, the Exchange does not believe

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<sup>21</sup> Supra note 6.

<sup>22</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>23</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)).

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>24</sup> and Rule 19b-4(f)(6)<sup>25</sup> thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>26</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>27</sup> the Commission may designate a shorter time if such action is consistent with the protection of investor and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that waiving the operative delay would allow market participants to realize the benefits of the proposal immediately and that such waiver is consistent with the protection of investors and the public interest because it would promote enhanced market quality and serve as an additional safeguard against extreme price dislocation. Based on the foregoing, the Commission believes that waiving the 30-day operative delay is consistent with the protection of

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<sup>24</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>25</sup> 17 CFR 240.19b-4(f)(6).

<sup>26</sup> 17 CFR 240.19b-4(f)(6).

<sup>27</sup> 17 CFR 240.19b-4(f)(6)(iii).

investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.<sup>28</sup>

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](mailto:rule-comments@sec.gov). Please include file number SR-CboeBZX-2023-099 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.

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<sup>28</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

All submissions should refer to file number SR-CboeBZX-2023-099. 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-2023-099 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.<sup>29</sup>

**Christina Z. Milnor,**

*Assistant Secretary.*

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<sup>29</sup> 17 CFR 200.30-3(a)(12), (59).