SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99207; File No. SR-CboeBZX-2023-106)

December 19, 2023

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fee Schedule by Modifying Certain Tiers and Discontinuing the NBBO Setter Program

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 December 12, 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, 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/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

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

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") by 1) modifying certain Add/Remove Volume Tiers; 2) modifying the Lead Market Maker ("LMM") Pricing Tiers; and 3) discontinuing the NBBO Setter Program. The Exchange proposes to implement these changes effective December 1, 2023.[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 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the "Act"), to which market participants may direct their order flow. Based on publicly available information,[4] no single registered equities exchange has more than 14% 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 rebates 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

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3 The Exchange initially filed the proposed fee change on December 1, 2023 (SR-CboeBZX-2023-098). On December 12, 2023, the Exchange withdrew that filing and submitted this proposal.

4 See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (November 27, 2023), available at https://www.cboe.com/us/equities/market_statistics/.

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.[5] For orders in securities priced below $1.00, the Exchange provides a standard rebate of $0.00009 per share for orders that add liquidity and assesses a fee of 0.30% of the total dollar value for orders that remove liquidity.[6] 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.

Add/Remove Volume Tiers

Under footnote 1 of the Fee Schedule, the Exchange currently offers various Add/Remove Volume Tiers that provide enhanced rebates for orders yielding fee codes B,[7] V[8] and Y[9] where a Member reaches certain add volume-based criteria. The Exchange also offers various Add/Remove Volume Tiers that provide enhanced rebates for orders yielding fee codes HB,[10] HV[11] or HY[12] where a Member reaches certain non-displayed add volume-based criteria. The Exchange first proposes to modify the enhanced rebate associated with Non-Displayed Add

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5 See BZX Equities Fee Schedule, Standard Rates.

6 Id.

7 Fee code B is appended to orders that add liquidity to BZX in Tape B securities.

8 Fee code V is appended to orders that add liquidity to BZX in Tape A securities.

9 Fee code Y is appended to orders that add liquidity to BZX in Tape C securities.

10 Fee code HB is appended to orders that add non-displayed liquidity to BZX in Tape B securities.

11 Fee code HV is appended to orders that add non-displayed liquidity to BZX in Tape A securities.

12 Fee code HY is appended to orders that add non-displayed liquidity to BZX in Tape C securities.

Volume Tier 4. Currently, Members who satisfy the criteria of Non-Displayed Add Volume Tier 4 receive an enhanced rebate of $0.00275 per share for securities priced at or above $1.00. As proposed, Members who satisfy the criteria of Non-Displayed Add Volume Tier 4 will receive an enhanced rebate of $0.0027 per share for securities priced at or above $1.00. The purpose of reducing the enhanced rebate associated with Non-Displayed Add Volume Tier 4 is for business and competitive reasons, as the Exchange believes that reducing such rebate as proposed would decrease the Exchange's expenditures with respect to transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that despite the modest decrease in the enhanced rebate associated with Non-Displayed Add Volume Tier 4, the enhanced rebate remains competitive and continues to be in-line with the enhanced rebates provided under Non-Displayed Add Volume Tiers 1 – 3.[13]

Next, the Exchange proposes to discontinue Non-Displayed Add Volume Tier 5, as no Members have satisfied the criteria within the past six months and the Exchange no longer wishes to, nor is required to, maintain such tier. More specifically, the proposed change removes this tier as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow.

Lead Market Maker Pricing Tiers

Under footnote 14 of the Fee Schedule, the Exchange offers a comprehensive liquidity provision program to incentivize Lead Market Makers ("LMMs") to provide enhanced market quality across all BZX-listed securities. Under the Exchange's LMM Program,[14] the Exchange

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[13] The Exchange notes that Non-Displayed Add Volume Tier 1 pays an enhanced rebate of $0.0018 per share for securities priced at or above $1.00, Non-Displayed Add Volume Tier 2 pays an enhanced rebate of $0.0020 per share for securities priced at or above $1.00, and Non-Displayed Add Volume Tier 3 pays an enhanced rebate of $0.0025 for securities priced at or above $1.00. See BZX Equities Fee Schedule, Footnote 1.

[14] See Securities Exchange Act Release No. 72020 (April 25, 2014), 79 FR 24807 (May 1, 2014), SR-BATS-

offers daily incentives for LMMs in securities listed on the Exchange for which the LMM meets certain Minimum Performance Standards.[15] Such daily incentives are determined based on the number of Cboe-listed securities for which the LMM meets the Minimum Performance Standards and the average auction volume across such securities. Generally, the more LMM Securities[16] for which the LMM meets the Minimum Performance Standards and the higher the auction volume across those securities, the greater the total daily payment to the LMM. Currently, pursuant to paragraph (D) of footnote 14 the Exchange offers LMM Add Volume Tiers, which provide an enhanced rebate to LMMs who reach certain add-volume based criteria. Now, the Exchange proposes to update the applicable fee codes for LMM Add Volume Tiers 2, 3, and 4 to remove fee codes ZV,[17] ZB,[18] and ZY.[19] Specifically, the Exchange proposes to: i) amend LMM Add Volume Tier 2 to apply to orders yielding fee codes V and HV (removing fee code ZV); ii) amend LMM Add Volume Tier 3 to apply to orders yielding fee codes B and HB (removing fee code ZB); and iii) amend LMM Add Volume Tier 4 to apply to orders yielding fee codes Y and HY (removing fee code ZY). The purpose of eliminating certain fee codes from LMM Add Volume Tiers 2 – 4 is for business and competitive reasons, as the Exchange believes that eliminating such fee codes as proposed would decrease the Exchange's expenditures with

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2014-015 ("Original LMM Filing").

15 As defined in Rule 11.8(e)(1)(E), the term "Minimum Performance Standards" means a set of standards applicable to an LMM that may be determined from time to time by the Exchange. Such standards will vary between LMM Securities depending on the price, liquidity, and volatility of the LMM Security in which the LMM is registered. The performance measurements will include (A) Percent of time at the NBBO; (B) percent of executions better than the NBBO; (C) average displayed size; and (D) average quoted spread. For additional detail, see Original LMM Filing.

16 See Rule 11.8(e)(1)(D). The term "LMM Security" means a Listed Security that has an LMM. See also Rule 11.8(e)(1)(B). The term "Listed Security" means any ETP or any Primary Equity Security or Closed-End Fund listed on the Exchange pursuant to Rule 14.8 or 14.9.

17 Fee code ZV is appended to Retail Orders that add liquidity to BZX in Tape A securities.

18 Fee code ZB is appended to Retail Orders that add liquidity to BZX in Tape B securities.

19 Fee code ZY is appended to Retail Orders that add liquidity to BZX in Tape C securities.

respect to transaction pricing in a manner that is still consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange notes that despite eliminating fee codes associated with retail orders from LMM Add Volume Tiers 2 – 4, LMM Add Volume Tiers 2 – 4 will continue to provide enhanced rebates for liquidity-adding orders in displayed and non-displayed orders, which does not represent a significant departure from the enhanced rebate offered under LMM Add Volume Tier 1.

NBBO Setter Program

Under footnote 20 of the Fee Schedule the Exchange offers its NBBO Setter Program, which offers an enhanced rebate to Members which reach certain add volume criteria in NBBO Setter Securities.[20] The Exchange now proposes to discontinue the NBBO Setter Program as the Exchange no longer wishes to, nor is required to, maintain such tier. More specifically, the proposed change removes this tier as the Exchange would rather redirect future resources and funding into other programs and tiers intended to incentivize increased order flow. In addition, the Exchange proposes to eliminate the terms Setter NBBO,[21] NBBO Setter Securities, Baseline Setter ADAV,[22] and Current Setter ADAV[23] from the Definitions section of the Fee Schedule as these terms apply only to the NBBO Setter Program.

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[20] NBBO Setter Securities means a list of securities included in the NBBO Setter Program, the universe of which will be determined by the Exchange and published in a Notice distributed to Members and on the Exchange's website.

[21] Setter NBBO means a quotation of at least 100 shares that is better than the NBBO or a quotation of a notional size of at least $10,000.00 that is better than the NBBO.

[22] Baseline Setter ADAV means ADAV calculated as the number of displayed shares added per day that establish a new NBBO in NBBO Setter Securities. ADAV means average daily added volume calculated as the number of shares added per day, calculated on a monthly basis.

[23] Current Setter ADAV means ADAV calculated as the number of displayed shares added per day that establish a new Setter NBBO in NBBO Setter Securities.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[24] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[25] 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)[26] 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)[27] 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.

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 Exchange believes that its proposal to lower the enhanced rebate paid to Members that satisfy the criteria of Non-Displayed Add Volume Tier 4 is reasonable, equitable, and consistent with the Act because such change is

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24 15 U.S.C. 78f(b).

25 15 U.S.C. 78f(b)(5).

26 Id.

27 15 U.S.C. 78f(b)(4)

designed to decrease the Exchange's expenditures with respect to transaction pricing in order to offset some of the costs associated with the Exchange's current pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The proposed lower enhanced rebate ($0.0027 per share) is reasonable and appropriate because it represents only a modest decrease from the current enhanced rebate ($0.00275 per share) and remains competitive with the enhanced rebates offered under Non-Displayed Add Volume Tiers 1 – 3. The Exchange further believes that the proposed decrease to the enhanced rebate associated with Non-Displayed Add Volume Tier 4 is not unfairly discriminatory because it applies to all Members equally, in that all Members will receive the reduced enhanced rebate upon satisfying the criteria of Non-Displayed Add Volume Tier 4.

Similarly, the Exchange believes that its proposal to eliminate fee codes ZV, ZB, and ZY from LMM Add Volume Tiers 2 – 4 is reasonable, equitable, and consistent with the Act because such change is designed to decrease the Exchange's expenditures with respect to transaction pricing in order to offset some of the costs associated with the Exchange's current pricing structure, which provides various rebates for liquidity-adding orders, and the Exchange's operations generally, in a manner that is consistent with the Exchange's overall pricing philosophy of encouraging added liquidity. The Exchange further believes that the proposal to eliminate fee codes ZV, ZB, and ZY from LMM Add Volume Tiers 2 – 4 is not unfairly discriminatory because it applies to all LMMs equally, in that no LMMs will be permitted to use fee codes ZV, ZB, or ZY to receive an enhanced rebate under LMM Add Volume Tiers 2 – 4 and all LMMs are still eligible to receive an enhanced rebate by satisfying the criteria of LMM Add Volume Tiers 2 – 4 pursuant to the remaining fee codes. The remaining fee codes applicable to

LMM Add Volume Tiers 2 – 4 do not represent a significant departure from LMM Add Volume Tier 1, which all LMMs continue to be eligible to receive an enhanced rebate from.

Finally, The Exchange believes that its proposal to eliminate Non-Displayed Add Volume Tier 5 and the NBBO Setter Tier is reasonable because the Exchange is not required to maintain these tiers or provide Members an opportunity to receive enhanced rebates. The Exchange believes its proposal to eliminate these tiers is also equitable and not unfairly discriminatory because it applies to all Members (i.e., the tiers will not be available for any Member). The Exchange also notes that the proposed rule change to remove these tiers merely results in Members not receiving an enhanced rebate, which, as noted above, the Exchange is not required to offer or maintain. Furthermore, the proposed rule change to eliminate Non-Displayed Add Volume Tier 5 and the NBBO Setter Tier enables the Exchange to redirect resources and funding into other programs and tiers intended to incentivize increased order flow.

B. <u>Self-Regulatory Organization's Statement on Burden on Competition</u>

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. Rather, as discussed above, the Exchange believes that the proposed changes would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes further 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."

The Exchange believes the proposed rule changes do not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the

Act. Particularly, the proposed changes to Non-Displayed Add Volume Tier 4 and LMM Add Volume Tiers 2 – 4 will apply to all Members and LMMs equally in that all Members and LMMs are eligible for the tiers, have a reasonable opportunity to meet the tiers' criteria and will receive the enhanced rebate on their qualifying orders if such criteria is met. The Exchange does not believe the proposed changes burden competition, but rather, enhances competition as it is intended to increase the competitiveness of BZX by adopting pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. The proposed change to eliminate Non-Displayed Add Volume Tier 5 and the NBBO Setter Program will not impose any burden on intramarket competition because the changes apply to all Members uniformly, as in, the tiers will no longer be available to any Member.

Next, the Exchange believes the proposed rule changes 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 other equities exchanges, 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 14% of the market share.[28] 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,

28 Supra note 4.

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."[29] 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'….".[30] 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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29 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

30 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[31] and paragraph (f) of Rule 19b-4[32] 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-2023-106 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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31 15 U.S.C. 78s(b)(3)(A).

32 17 CFR 240.19b-4(f).

All submissions should refer to file number SR-CboeBZX-2023-106. 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-2023-106 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.[33]

Sherry R. Haywood,

Assistant Secretary.

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33 17 CFR 200.30-3(a)(12).