

## SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-92207; File Nos. SR-BX-2021-018; SR-C2-2021-008; SR-CBOE-2021-030; SR-CboeBYX-2021-011; SR-CboeBZX-2021-034; SR-CboeEDGA-2021-010; SR-CboeEDGX-2021-024; SR-GEMX-2021-03; SR-ISE-2021-08; SR-MRX-2021-05; SR-NASDAQ-2021-029; SR-PHLX-2021-25)

June 17, 2021

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe Exchange, Inc.; NASDAQ BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; NASDAQ PHLX LLC and The NASDAQ Stock Market LLC; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes to Adopt a Fee Schedule to Establish Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

### I. Introduction

On April 21, 2021, Cboe BYX Exchange, Inc. (“CboeBYX”), Cboe BZX Exchange, Inc. (“CboeBZX”), Cboe C2 Exchange, Inc. (“C2”), Cboe EDGA Exchange, Inc. (“Cboe EDGA”), Cboe EDGX Exchange, Inc. (“Cboe EDGX”), Cboe Exchange, Inc. (“Cboe”), NASDAQ BX, Inc. (“BX”), Nasdaq GEMX, LLC (“GEMX”), Nasdaq ISE, LLC (“ISE”), Nasdaq MRX, LLC (“MRX”), NASDAQ PHLX LLC (“Phlx”), The NASDAQ Stock Market LLC (“Nasdaq”) (collectively, the “Nasdaq and Cboe Participants”) filed with the Securities and Exchange Commission (“Commission”), 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> proposed rule changes<sup>3</sup> to adopt a fee schedule to

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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> See Securities Exchange Act Release Nos. 91750 (May 4, 2021), 86 FR 25045 (May 10, 2021) (SR-BX-2021-018) (“Notice”); 91751 (May 4, 2021), 86 FR 24941 (May 10, 2021) (SR-PHLX-2021-25); 91752 (May 4, 2021), 86 FR 24921 (May 10, 2021) (SR-NASDAQ-2021-029); 91753 (May 4, 2021), 86 FR 24994 (May 10, 2021) (SR-MRX-2021-05); 91755 (May 4, 2021), 86 FR 25035 (May 10, 2021) (SR-ISE-2021-08); 91756 (May 4, 2021), 86 FR 24979 (May 10, 2021) (SR-GEMX-2021-03); 91757 (May 4, 2021), 86 FR 24911 (May 10, 2021) (SR-C2-2021-008); 91758 (May 4, 2021), 86 FR 25004 (May 10, 2021) (SR-CboeEDGX-2021-024); 91759 (May 4, 2021), 86 FR 24956

establish fees for Industry Members<sup>4</sup> related to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”).<sup>5</sup> The proposed rule changes were immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>6</sup> The proposed rule changes were published for comment in the Federal Register on May 10, 2021.<sup>7</sup> The Commission has received no comments on the proposed rule changes.

Pursuant to Section 19(b)(3)(C) of the Act, the Commission is hereby: (1) temporarily suspending the proposed rule changes; and (2) instituting proceedings to determine whether to approve or disapprove the proposals.

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(May 10, 2021) (SR-CboeEDGA-2021-010); 91760 (May 4, 2021), 86 FR 24966 (May 10, 2021) (SR-CBOE-2021-030); 91761 (May 4, 2021), 86 FR 25016 (May 10, 2021) (SR-CboeBYX-2021-011); and 91762 (May 4, 2021), 86 FR 24931 (May 10, 2021) (SR-CboeBZX-2021-034).

<sup>4</sup> The CAT NMS Plan defines “Industry Member” as “a member of a national securities exchange or a member of a national securities association.” See CAT NMS Plan, infra note 5, at Section 1.1.

<sup>5</sup> The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016). The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (“Company”). On August 29, 2019, the Participants replaced the CAT NMS Plan in its entirety with the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC, which became the Company. See Securities Exchange Act Release No. 87149 (September 27, 2019), 84 FR 52905 (October 3, 2019).

<sup>6</sup> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>7</sup> See supra note 3.

## II. Summary of the Proposed Rule Changes<sup>8</sup>

In July 2012, the Commission adopted Rule 613 of Regulation NMS, which required national securities exchanges and national securities associations (“Participants”)<sup>9</sup> to jointly develop and submit to the Commission a national market system plan (“NMS plan”) to create, implement, and maintain a consolidated audit trail (“CAT”)<sup>10</sup> that would capture customer and order event information for orders in NMS securities. On November 15, 2016, the Commission approved the CAT NMS Plan required by Rule 613.<sup>11</sup> Under the CAT NMS Plan, the Operating Committee of a newly formed company – CAT NMS, LLC, of which each Participant is a member – has the discretion (subject to the funding principles set forth in the CAT NMS Plan) to establish funding for the Company to operate the CAT, including establishing fees to be paid by the Participants and Industry Members.<sup>12</sup>

The Plan specified that, in establishing the funding of the Company, the Operating Committee shall establish “a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSS, are based upon the level of market share; (ii)

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<sup>8</sup> For a more detailed description of the proposed rule changes, see Notice, supra note 3.

<sup>9</sup> The Participants include BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors’ Exchange LLC, Long-Term Stock Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

<sup>10</sup> See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012).

<sup>11</sup> See supra note 5.

<sup>12</sup> See CAT NMS Plan, supra note 5, at Section 11.1(b).

Industry Members’ non-ATS activities are based upon message traffic; and (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members).”<sup>13</sup> Under the Plan, such fees are to be implemented in accordance with various funding principles, including an “allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations” and the “avoid[ance of] any disincentives such as placing an inappropriate burden on competition and reduction in market quality.”<sup>14</sup>

On May 15, 2020, the Commission adopted amendments to the CAT NMS Plan designed to increase the Participants’ financial accountability for the timely completion of the CAT (“Financial Accountability Amendments”).<sup>15</sup> The Financial Accountability Amendments added Section 11.6 to the CAT NMS Plan to govern the recovery from Industry Members of any fees, costs, and expenses (including legal and consulting fees, costs and expenses) incurred by or for the Company in connection with the development, implementation and operation of the CAT from June 22, 2020 until such time that the Participants have completed Full Implementation of CAT NMS Plan Requirements<sup>16</sup> (“Post-Amendment Expenses”). Section 11.6 establishes target

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<sup>13</sup> Id. at Section 11.2(c). See Article XI of the CAT NMS Plan for additional detail. Id. at Article XI.

<sup>14</sup> Id. at Section 11.2(b) and (e).

<sup>15</sup> See Securities Exchange Act Release No. 88890, 85 FR 31322 (May 22, 2020).

<sup>16</sup> See CAT NMS Plan, supra note 5, at Section 1.1.

deadlines for four critical implementation milestones (Periods 1, 2, 3 and 4)<sup>17</sup> and reduces the amount of fee recovery available to the Participants if these deadlines are missed.<sup>18</sup>

The Participants filed an amendment to the CAT NMS Plan on March 31, 2021 (“Proposed CAT Fee Plan Amendment”) to implement a revised funding model (“Proposed Funding Model”) and to establish the CAT fees to be charged to themselves.<sup>19</sup> On April 21, 2021, the Proposed CAT Fee Plan Amendment was published for comment in the Federal Register.<sup>20</sup> The Commission has not acted on the Proposed CAT Fee Plan Amendment. In the meantime, the Nasdaq and Cboe Participants submitted the proposed rule changes that are the subject of this Order<sup>21</sup> to adopt a fee schedule to establish CAT fees applicable to their Industry Members in accordance with the Proposed CAT Fee Plan Amendment.<sup>22</sup> In their filings, the Nasdaq and Cboe Participants stated that the fee schedule provisions will become operative upon the Commission’s approval of the Proposed CAT Fee Plan Amendment.<sup>23</sup>

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<sup>17</sup> Id. at Section 11.6(a)(i).

<sup>18</sup> Id. at Section 11.6(a)(ii) and (iii).

<sup>19</sup> See Securities Exchange Act Release No. 91555 (April 14, 2021), 86 FR 21050 (April 21, 2021).

<sup>20</sup> Id.

<sup>21</sup> Section 11.1(b) of the CAT NMS Plan requires the Participants to file with the Commission under Section 19(b) of the Act any CAT fees applicable to Industry Members that the Operating Committee approves. See CAT NMS Plan, supra note 5, at Section 11.1(b).

<sup>22</sup> For additional details regarding these fees, see, e.g., Notice, supra note 3.

<sup>23</sup> Id. at 25045.

### A. Allocation of Total CAT Costs

Under the Proposed Funding Model, “Total CAT Costs” would include costs associated with developing, implementing and operating the CAT for the relevant period.<sup>24</sup> The Nasdaq and Cboe Participants propose to recover 75% of the Total CAT Costs from Industry Members (“Industry Member Allocation”).<sup>25</sup> As detailed below, the proposed rule changes would recover the Total CAT Costs from Industry Members on a quarterly basis through four categories of CAT fees: a Historical CAT Assessment,<sup>26</sup> a Period 3 CAT Fee,<sup>27</sup> a Period 4 CAT Fee<sup>28</sup> and a Quarterly CAT Fee.<sup>29</sup> The Historical CAT Assessment would be designed to recover certain CAT costs incurred prior to January 1, 2021 (“Historical CAT Assessment Costs”).<sup>30</sup> Excluding certain costs,<sup>31</sup> the Total CAT Costs for this period are \$193,273,342.<sup>32</sup> Under the proposed rule changes, the Historical CAT Assessment would recover 75% of these costs from Industry Members (\$144,955,006).<sup>33</sup> As proposed, the Period 3 CAT Fee would recover from Industry Members 75% of the Total CAT Costs incurred from January 1, 2021 through December 31, 2021.<sup>34</sup> The Period 4 CAT Fee would recover 75% of Total CAT Costs incurred from January 1,

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<sup>24</sup> Id. at 25045–6.

<sup>25</sup> Id. at 25046.

<sup>26</sup> See infra Section II.D.a.

<sup>27</sup> See infra Section II.D.b.

<sup>28</sup> See infra Section II.D.c.

<sup>29</sup> See infra Section II.D.d.

<sup>30</sup> See, e.g., Notice, supra note 3, at 25049.

<sup>31</sup> Proposed CAT Fee Plan Amendment, supra note 19, at 21064.

<sup>32</sup> See, e.g., Notice, supra note 3, at 25049.

<sup>33</sup> Id.

<sup>34</sup> Id. at 25050.

2022 through December 30, 2022.<sup>35</sup> Beginning in the second quarter of 2023, Industry Members would be assessed a Quarterly CAT Fee on an ongoing basis of 75% of the budgeted Total CAT Costs for the relevant year.<sup>36</sup> The proposed rule changes state that the budgeted Total CAT Costs would be set forth in the annual operating budget approved by the Operating Committee for the relevant year pursuant to Section 11.1(a) of the CAT NMS Plan.<sup>37</sup> The Total CAT Costs applicable to the Period 3 and 4 CAT Fees would be set forth in the year-end financial statements of the Company for 2021 and 2022, respectively.<sup>38</sup>

#### B. Message Traffic

Under the proposed rule changes, each Industry Member would pay a CAT fee calculated by multiplying its message traffic percentage of total Industry Member message traffic per quarter<sup>39</sup> by the Industry Member Allocation, subject to market maker discounts for message traffic, as applicable, as well as a minimum fee and a maximum fee.<sup>40</sup> Under the proposed rule changes, when calculating the message traffic of an Industry Member that is an Options Market

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<sup>35</sup> Id. at 25051.

<sup>36</sup> Id. at 25052.

<sup>37</sup> The proposed rule changes state that the budgeted Total CAT Costs may be adjusted on a quarterly basis, and if the Operating Committee adjusts such costs within a year, the adjusted costs would be used in calculating the remaining CAT fees for that year. Id. at 25052.

<sup>38</sup> See, e.g., Notice, supra note 3, at 25050, 25051.

<sup>39</sup> The proposed rule changes state that message traffic would be calculated based on Industry Members' Reportable Events reported to the CAT, as defined in the CAT Reporting Technical Specifications for Industry Members. Reportable Events that would be counted as message traffic would include the New Order Event, the Order Route Event and the Trade Event. Message traffic would not include reporting activity related to Customer information as set forth in the CAT Reporting Customer and Account Technical Specifications for Industry Members. Id. at 25047.

<sup>40</sup> See infra Section II.C.

Maker,<sup>41</sup> its market making message traffic would be discounted by multiplying its Listed Options<sup>42</sup> market making message traffic by the Listed Options trade-to-quote ratio.<sup>43</sup> The trade-to-quote ratio would be calculated each quarter based on the prior quarter's SIP Data<sup>44</sup> that is included in CAT Data.<sup>45</sup> The proposed discount would be calculated by dividing the adjusted trade count<sup>46</sup> by the total number of quotes received by the SIPs.<sup>47</sup>

Under the proposed rule changes, when calculating the message traffic of an Industry Member that is an equity market maker in NMS Stocks ("Equity Market Maker"), its market making message traffic would be discounted by multiplying its market making message traffic in NMS Stocks by the NMS Stock trade-to-quote ratio.<sup>48</sup> The trade-to-quote ratio would be

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<sup>41</sup> The CAT NMS Plan defines "Options Market Maker" as "a broker-dealer registered with an exchange for the purpose of making markets in options contracts traded on the exchange." See CAT NMS Plan, *supra* note 5, at Section 1.1.

<sup>42</sup> The CAT NMS Plan states that "Listed Option" has the meaning set forth in Regulation NMS. *Id.* Rule 600(b)(43) of Regulation NMS defines "Listed Option" as "any option traded on a registered national securities exchange or automated facility of a national securities association." See 17 CFR 242.600(b)(43).

<sup>43</sup> See, e.g., BX Proposed Rule General 7A(g)(1).

<sup>44</sup> See, e.g., Notice, *supra* note 3, at 25047. See also CAT NMS Plan, *supra* note 5, at Section 1.1., Section 6.5(a)(ii).

<sup>45</sup> See, e.g., Notice, *supra* note 3, at 25047. See also CAT NMS Plan, *supra* note 5, at Section 1.1.

<sup>46</sup> The proposed rule changes describe the adjusted trade count as "the total number of trades for the quarter minus the total number of trade busts." See, e.g., Notice, *supra* note 3, at 25047.

<sup>47</sup> For each Options Market Maker, the discount would apply to "(1) all message traffic reported to the CAT by the Options Market Maker related to an order originated by a market maker in its market making account for a security in which it is registered... and (2) all message traffic for which a 'quote sent time' is reported by an Options Exchange on behalf of the given Options Market Maker." *Id.*

<sup>48</sup> See, e.g., BX Proposed Rule General 7A(g)(2).

calculated each quarter based on the prior quarter's SIP Data that is included in CAT Data.<sup>49</sup> The proposed discount would be calculated by dividing the adjusted trade count by the total number of quotes received by the SIPs.<sup>50</sup> The discounted message traffic of Options Market Makers and Equity Market Makers would be counted as part of total Industry Member message traffic.<sup>51</sup>

### C. Minimum and Maximum Industry Member CAT Fee

Under the proposed rule changes, each Industry Member would be subject to a minimum Industry Member CAT fee of \$125 per quarter ("Minimum Industry Member CAT Fee").<sup>52</sup> If an Industry Member's CAT fee would be less than \$125 per quarter, it would pay the Minimum Industry Member CAT Fee, even if it has not yet begun to report to the CAT.<sup>53</sup> If any Industry Member is required to pay the Minimum Industry Member CAT Fee, the total additional amount paid by all such Industry Members over the amount they otherwise would have paid as a result of their message traffic calculation would be discounted from all Industry Members other than those that were subject to a Minimum Industry Member CAT Fee in accordance with their message traffic percentage ("Minimum Industry Member CAT Fee Re-Allocation").<sup>54</sup>

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<sup>49</sup> See, e.g., Notice, supra note 3, at 25048.

<sup>50</sup> Id. See also supra note 46.

<sup>51</sup> See, e.g., Notice, supra note 3, at 25047.

<sup>52</sup> Id. at 25048; see, e.g., BX Proposed Rule General 7A(h)(1).

<sup>53</sup> See, e.g., Notice, supra note 3, at 25048.

<sup>54</sup> See, e.g., BX Proposed Rule General 7A(h)(2). Options Market Makers and Equity Market Makers would be required to pay the Minimum Industry Member CAT Fee if their quarterly CAT fee calculated with the market maker discounts is less than \$125 per quarter. See, e.g., Notice, supra note 3, at 25048, n.32.

Under the proposed rule changes, each Industry Member’s CAT fee would also be subject to a maximum Industry Member CAT fee, which would be the fee calculated based on 8% of the total Industry Member message traffic for the relevant quarter (“Maximum Industry Member CAT Fee”).<sup>55</sup> If any Industry Member’s fee is subject to the Maximum Industry Member CAT Fee, any excess amount which the Industry Member would have paid as a fee above such Maximum Industry Member CAT Fee will be re-allocated among all Industry Members (including any Industry Members subject to the Maximum Industry Member CAT Fee and any Industry Members subject to the Minimum Industry Member CAT Fee) in accordance with their percentage of total message traffic (“Maximum Industry Member CAT Fee Re-Allocation”).<sup>56</sup>

#### D. Amount and Timing of Proposed CAT Fees

As discussed above, the proposed rule changes would recover the Total CAT Costs from Industry Members through the assessment of four categories of CAT fees on a quarterly basis: a Historical CAT Assessment, a Period 3 CAT Fee, a Period 4 CAT Fee and a Quarterly CAT Fee.

##### a. Historical CAT Assessment

The proposed rule changes state that, for four calendar quarters commencing “in the first quarter after SEC approval of the Historical CAT Assessment, based on CAT Data from the quarter in which the SEC approved the CAT fees,”<sup>57</sup> each Industry Member would pay a Historical CAT Assessment which would be the greater of: (1) the Minimum Industry Member

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<sup>55</sup> Id. at 25048. The Commission notes that the proposed rule text states “[t]he Maximum Industry Member CAT Fee for each quarter is 8% of the total CAT costs for the relevant quarter” (emphasis added). See, e.g., BX Proposed Rule General 7A(f)(1).

<sup>56</sup> See, e.g., BX Proposed Rule General 7A(f)(2).

<sup>57</sup> See, e.g., Notice, supra note 3, at 25049.

CAT Fee (plus any applicable Maximum Industry Member CAT Fee Re-Allocation); or (2) the amount calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic based on the prior quarter's message traffic by \$36,238,752<sup>58</sup> (subject to the proposed market maker discounts for message traffic, as applicable, as well as the Maximum Industry Member CAT Fee, Maximum Industry Member CAT Fee Re-Allocation and Minimum Industry Member CAT Fee Re-Allocation).<sup>59</sup>

As discussed above, the proposed Historical CAT Assessment is intended to recover the Historical CAT Assessment Costs, which comprise certain CAT costs incurred prior to January 1, 2021.<sup>60</sup> These costs would include costs incurred through June 22, 2020, the effective date of Section 11.6 of the CAT NMS Plan, and costs related to Post-Amendment Expenses incurred during Period 1 (June 22, 2020 through July 31, 2020, the date of Initial Industry Member Core Equity and Options Reporting<sup>61</sup>) and during Period 2 (August 1, 2020 through December 31, 2020, the date of the Full Implementation of Core Equity Reporting<sup>62</sup>).<sup>63</sup> The Historical CAT Assessment Costs would include fees, costs and expenses incurred by or for the Company in connection with the development, implementation and operation of the CAT during Periods 1 and 2.<sup>64</sup>

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<sup>58</sup> The Commission notes that \$36,238,752 is one-quarter of the \$144,955,006 Historical CAT Assessment Costs. See supra Section II.A.

<sup>59</sup> See, e.g., BX Proposed Rule General 7A(b).

<sup>60</sup> See supra Section II.A.

<sup>61</sup> See CAT NMS Plan, supra note 5, at Section 1.1.

<sup>62</sup> Id.

<sup>63</sup> See, e.g., Notice, supra note 3, at 25049, 25050.

<sup>64</sup> Id.

b. Period 3 CAT Fee

Under the proposed rule changes, for four quarters commencing in the second quarter of 2022, each Industry Member would pay a Period 3 CAT Fee which would be the greater of: (1) the Minimum Industry Member CAT Fee (plus any applicable Maximum Industry Member CAT Fee Re-Allocation); or (2) the amount calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic based on the prior quarter's message traffic by 1/4<sup>th</sup> of 75% of the Period 3 Total CAT Costs<sup>65</sup> (subject to the proposed market maker message traffic discounts, as applicable, as well as the Maximum Industry Member CAT Fee, Maximum Industry Member CAT Fee Re-Allocation and Minimum Industry Member CAT Fee Re-Allocation).<sup>66</sup>

According to the Nasdaq and Cboe Participants, the proposed Period 3 CAT Fee is intended to recover a percentage of the Total CAT Costs incurred from January 1, 2021 through December 31, 2021.<sup>67</sup> The Period 3 CAT Costs would be related to Post-Amendment Expenses<sup>68</sup> and would include fees, costs and expenses incurred by or for the Company in connection with the development, implementation and operation of the CAT during Period 3.<sup>69</sup> The Period 3 CAT Costs would be calculated at the end of 2021 and would be set forth in the

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<sup>65</sup> The Period 3 CAT Costs would be the Total CAT Costs incurred from January 1, 2021 through December 31, 2021. Id. at 25050.

<sup>66</sup> See, e.g., BX Proposed Rule General 7A(c).

<sup>67</sup> See, e.g., Notice, supra note 3, at 25050.

<sup>68</sup> Id. at 25051.

<sup>69</sup> Id.

2021 financial statements for the Company.<sup>70</sup> Through a CAT alert after the end of 2021, the Operating Committee would announce the Total CAT Costs for 2021 to be used to calculate the Period 3 CAT Fees.<sup>71</sup> Industry Members would be required to commence paying the Period 3 CAT Fee in the second quarter of 2022, based on CAT Data from the first quarter of 2022.<sup>72</sup>

The proposed rule changes state that collection of the full amount of the Period 3 CAT Fee will depend upon achievement of Full Availability and Regulatory Utilization of Transaction Database Functionality<sup>73</sup> by December 31, 2021.<sup>74</sup> If such achievement is not met, the amount of the Period 3 CAT Fee that may be recovered from Industry Members will depend upon the fee limitations in Section 11.6(a)(ii) of the CAT NMS Plan, as established by the Financial Accountability Amendments.<sup>75</sup>

c. Period 4 CAT Fee

Under the proposed rule changes, for four quarters commencing in the second quarter of 2023, each Industry Member shall pay a Period 4 CAT Fee which shall be the greater of: (1) the Minimum Industry Member CAT Fee (plus any applicable Maximum Industry Member CAT Fee Re-Allocation); or (2) the amount calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic based on the prior

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<sup>70</sup> Id. at 25050. The proposed rule changes state that the Period 3 CAT Costs will be the total actual CAT costs incurred for the CAT for 2021 as set forth in the year-end financial statements of the Company for 2021. Id.

<sup>71</sup> Id.

<sup>72</sup> See, e.g., Notice, supra note 3, at 25050.

<sup>73</sup> See CAT NMS Plan, supra note 5, at Section 1.1.

<sup>74</sup> See, e.g., Notice, supra note 3, at 25051.

<sup>75</sup> Id. See also supra note 15.

quarter's message traffic by 1/4<sup>th</sup> of 75% of the Period 4 Total CAT Costs<sup>76</sup> (subject to the proposed market maker message traffic discounts, as applicable, as well as the Maximum Industry Member CAT Fee, Maximum Industry Member CAT Fee Re-Allocation and Minimum Industry Member CAT Fee Re-Allocation).<sup>77</sup>

According to the Nasdaq and Cboe Participants, the proposed Period 4 CAT Fee is intended to recover a percentage of the Total CAT Costs incurred from January 1, 2022 through December 30, 2022 (the date of Full Implementation of CAT NMS Plan Requirements).<sup>78</sup> The Period 4 CAT Costs would recover costs related to Post-Amendment Expenses<sup>79</sup> and would include fees, costs and expenses incurred by or for the Company in connection with the development, implementation and operation of the CAT during Period 4.<sup>80</sup> The Period 4 CAT Costs would be calculated at the end of 2022 and will be set forth in the 2022 financial statements for the Company.<sup>81</sup> Through a CAT alert after the end of 2022, the Operating Committee would announce the Total CAT Costs for 2022 to be used to calculate the Period 4 CAT Fees.<sup>82</sup>

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<sup>76</sup> The Period 4 CAT Costs would be the Total CAT Costs incurred from January 1, 2022 through December 30, 2022. See, e.g., Notice, supra note 3, at 25050.

<sup>77</sup> See, e.g., BX Proposed Rule General 7A(d).

<sup>78</sup> See, e.g., Notice, supra note 3, at 25051.

<sup>79</sup> Id.

<sup>80</sup> Id. at 25051–2.

<sup>81</sup> Id. at 25051. The proposed rule changes state that the Period 4 CAT Costs will be the total actual CAT costs incurred for the CAT in 2022 as set forth in the year-end financial statements of the Company for 2022. Id.

<sup>82</sup> Id.

The proposed rule changes state that collection of the full amount of the Period 4 CAT Fee will depend upon achievement of Full Implementation of CAT NMS Plan Requirements by December 30, 2022.<sup>83</sup> If such achievement is not met, the amount of the Period 4 CAT Fee that may be recovered from Industry Members will depend upon the fee limitations in Section 11.6(a)(ii) of the CAT NMS Plan, as established by the Financial Accountability Amendments.<sup>84</sup>

d. Quarterly CAT Fee

Under the proposed rule changes, on an ongoing basis commencing in the second quarter of 2023, each Industry Member would pay a Quarterly CAT Fee which would be the greater of: (1) the Minimum Industry Member CAT Fee (plus any applicable Maximum Industry Member CAT Fee Re-Allocation); or (2) the amount calculated by multiplying the percentage of the Industry Member's message traffic of the total Industry Member message traffic based on the prior quarter's message traffic by 1/4<sup>th</sup> of 75% of the budgeted Total CAT Costs<sup>85</sup> (subject to the proposed market maker message traffic discounts, as applicable, as well as the Maximum Industry Member CAT Fee, Maximum Industry Member CAT Fee Re-Allocation and Minimum Industry Member CAT Fee Re-Allocation).<sup>86</sup>

According to the Nasdaq and Cboe Participants, the proposed Quarterly CAT Fee is intended to recover estimated Total CAT Costs budgeted for an upcoming year.<sup>87</sup> The budgeted

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<sup>83</sup> See, e.g., Notice, supra note 3, at 25052.

<sup>84</sup> Id. at 25051. See also supra note 15.

<sup>85</sup> The proposed rule changes state that the budgeted Total CAT Costs for the relevant year would be the total CAT costs set forth in the annual operating budget approved by the Operating Committee pursuant to Section 11.1(a) of the CAT NMS Plan for the relevant year. See, e.g., Notice, supra note 3, at 25052.

<sup>86</sup> See, e.g., BX Proposed Rule General 7A(a).

<sup>87</sup> See, e.g., Notice, supra note 3, at 25052.

Total CAT Costs would include Plan Processor costs, insurance costs, third-party support costs and an operational reserve.<sup>88</sup> The Operating Committee may adjust the budgeted Total CAT Costs on a quarterly basis for the prudent operation of the Company, in which case, the adjusted budgeted costs for the CAT would be used to calculate the remaining CAT fees for that year.<sup>89</sup> Through a CAT alert at the beginning of the relevant year, the Operating Committee would announce the budgeted Total CAT Costs to be used to calculate the Quarterly CAT Fee for the year.<sup>90</sup>

e. Multiple Payments

According to the proposed rule changes, to the extent that any two or more of the four categories of Industry Member CAT fees are due during the same quarter, any Industry Member that is obligated to pay one or more categories of fees would be required to pay each category of fee for that quarter.<sup>91</sup> The proposed rule changes explain, “[f]or example, if an Industry Member would be subject to the Minimum Industry Member CAT Fee for the Period 4 CAT Fee and the Minimum Industry Member CAT Fee for the Quarterly CAT Fee during the same quarter, the Industry Member would be required to pay two minimum \$125 fees that quarter for a total of \$250. As another example, suppose that an Industry Member owed a CAT fee (other than the minimum fee of \$125) for both the Historical CAT Assessment and the Period 3 CAT Fee, the Industry Member would be required to pay both fees that quarter.”<sup>92</sup>

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88 Id.

89 Id.

90 Id.

91 Id. at n.44.

92 Id.

f. Timing and Manner of Payment

Under the proposed rule changes, the Company would provide one invoice to each Industry Member per payment period for the Historical CAT Assessment, Period 3 CAT Fee, Period 4 CAT Fee and Quarterly CAT Fee.<sup>93</sup> An Industry Member that is a member of multiple self-regulatory organizations would only receive one invoice from the Company per payment period.<sup>94</sup>

Industry Members would pay their CAT fees to the Company through a centralized system.<sup>95</sup> Payment of CAT fees would be due within 30 days after receipt of an invoice, unless a longer period is indicated.<sup>96</sup> If an Industry Member's payment is late, the Industry Member would pay interest on the outstanding balance from the due date until such fee is paid at a per annum rate equal to the lesser of (i) the Prime Rate plus 300 basis points, or (ii) the maximum rate permitted by applicable law.<sup>97</sup>

III. Suspension of the Proposed Rule Changes

Pursuant to Section 19(b)(3)(C) of the Act,<sup>98</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change in accordance with Section 19(b)(1) of the Act,<sup>99</sup> the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization ("SRO") made thereby if it appears to the Commission that such action is

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<sup>93</sup> See, e.g., Notice, supra note 3, at 25053.

<sup>94</sup> Id.

<sup>95</sup> Id.

<sup>96</sup> Id.

<sup>97</sup> Id.

<sup>98</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>99</sup> 15 U.S.C. 78s(b)(1).

necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The Commission believes a temporary suspension of the proposed rule changes is warranted here.

As Participants of the CAT NMS Plan, the Nasdaq and Cboe Participants are subject to Rule 608 of Regulation NMS under the Act,<sup>100</sup> which governs the filing and amendment of NMS plans. Rule 608(c) of Regulation NMS<sup>101</sup> requires each SRO that is a sponsor or participant of an effective NMS plan to comply with the terms of the plan. In temporarily suspending the proposed rule changes, the Commission intends to consider whether, among other things, the following aspects of the proposed rule changes are consistent with the CAT NMS Plan, and, consequently, Rule 608(c) of Regulation NMS:

Alternative Trading Systems: The proposed rule changes include all alternative trading system (“ATS”) message traffic in calculating Industry Member CAT fees. The Commission is considering whether the proposed rule changes are consistent with Section 11.3(b) of the Plan, which requires the Operating Committee to establish fixed fees to be payable by Industry Members, that include message traffic generated by: (i) an ATS that does not execute orders that is sponsored by an Industry Member; and (ii) routing orders to and from any ATS sponsored by an Industry Member.<sup>102</sup> In addition, the Commission is considering whether the proposed rule changes are consistent with Section 11.2(c) of the CAT NMS Plan, which requires the Operating Committee to establish a tiered fee structure whereby Industry Members are charged fees based on message traffic for non-ATS activities.<sup>103</sup>

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<sup>100</sup> 17 CFR 242.608.

<sup>101</sup> 17 CFR 242.608(c).

<sup>102</sup> See CAT NMS Plan, supra note 5, at Section 11.3(b).

<sup>103</sup> Id. at Section 11.2(c).

Tiered Fixed Fees: Under the proposed rule changes, Industry Member CAT fees would be calculated based on an Industry Member’s percentage of total Industry Member message traffic without any tiering (subject to the proposed market maker message traffic discounts, as applicable, as well as the Maximum Industry Member CAT Fee, the Maximum Industry Member CAT Fee Re-Allocation and the Minimum Industry Member CAT Fee Re-Allocation). The Commission is considering whether the proposed rule changes are consistent with Section 11.3(b) of the CAT NMS Plan, which requires the Operating Committee to establish at least five, but no more than nine, tiers of fixed fees to be payable by Industry Members,<sup>104</sup> and Section 11.1(d) of the Plan, which requires the Operating Committee to adopt policies, procedures, and practices regarding the assignment of tiers.<sup>105</sup>

Comparability: The proposed rule changes do not require that CAT fees for Industry Members and Participants with the most CAT-related activity be generally comparable. The Commission is considering whether the proposed rule changes are consistent with Section 11.2(c) of the CAT NMS Plan, which requires the tiered fee structure to charge fees whereby “CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members).”<sup>106</sup>

Minimum and Maximum Industry Member CAT Fees and Market Maker Discounts: In calculating an Industry Member’s CAT fee, the proposed rule changes would require the

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<sup>104</sup> Id. at Section 11.3(b).

<sup>105</sup> Id. at Section 11.1(d).

<sup>106</sup> Id. at Section 11.2(c).

application of the Minimum Industry Member CAT Fee, Minimum Industry Member CAT Fee Allocation, Maximum Industry Member CAT Fee, Maximum Industry Member CAT Fee Allocation, and, as applicable, discounts on the message traffic of Options Market Makers and Equity Market Makers. The Commission is considering whether the proposed rule changes are consistent with Section 11.3(b) of the CAT NMS Plan, which requires the Operating Committee to establish fixed fees to be payable by Industry Members, based on the message traffic generated by such Industry Member, subject to tiering.<sup>107</sup>

Financial Accountability Milestones: In describing the costs to be recovered by the Historical CAT Assessment, the proposed rule changes refer to “certain costs from Period 1 of the Financial Accountability Milestones (which covered the period from June 22, 2020 – July 31, 2020 and certain costs from Period 2 of the Financial Accountability Milestones (which covered the period from August 1, 2020 – December 31, 2020).”<sup>108</sup> For the Period 3 CAT Fee, the proposed rule changes refer to “Total CAT Costs incurred from January 1, 2021 through December 31, 2021.”<sup>109</sup> For the Period 4 CAT Fee, the proposed rule changes refer to “Total CAT Costs incurred from January 1, 2022 through December 30, 2022.”<sup>110</sup>

Section 11.6 of the CAT NMS Plan provides that the Participants may recover from Industry Members Post-Amendment Expenses<sup>111</sup> over four Periods: Period 1, Period 2, Period 3 and Period 4. Section 11.6(a) sets target deadlines for each Period and establishes a fee

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<sup>107</sup> Id. at Section 11.3(b).

<sup>108</sup> See, e.g., Notice, supra note 3, at 25049.

<sup>109</sup> Id. at 25050.

<sup>110</sup> Id. at 25051.

<sup>111</sup> See text accompanying notes 15–16.

reduction schedule if those target deadlines are missed.<sup>112</sup> The target dates for Period 1, Period 2, Period 3 and Period 4 are July 31, 2020, December 31, 2020, December 31, 2021 and December 30, 2022, respectively.<sup>113</sup> To enable the Commission to determine whether the fee reduction provisions should be applied to fees associated with a specific Period,<sup>114</sup> Section 11.6(b) further requires that filings submitted by the Participants to the Commission under Section 19(b) of the Act, to establish or implement fees to recover Post-Amendment Expenses, must clearly indicate whether such fees are related to Post-Amendment Expenses incurred during Period 1, Period 2, Period 3, or Period 4.<sup>115</sup> The Commission is considering whether the aspects of the proposed rule changes related to the Financial Accountability Milestones are consistent with Section 11.6 of the CAT NMS Plan.<sup>116</sup>

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<sup>112</sup> See CAT NMS Plan, supra note 5, at Section 11.6(a)

<sup>113</sup> Id.

<sup>114</sup> See Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458, 48472 (“Requiring the Participants to specify whether any proposed fees are related to Post-Amendment Expenses, and the Period to which they are related, will help the Commission to determine whether it must consider the provisions of proposed Section 11.6 in evaluating the proposed fees.”).

<sup>115</sup> See CAT NMS Plan, supra note 5, at Section 11.6(b).

<sup>116</sup> Id. at Section 11.6.

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Changes

The Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>117</sup> and 19(b)(2)(B) of the Act<sup>118</sup> to determine whether the proposed rule changes should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as stated below, the Commission seeks and encourages interested persons to provide comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>119</sup> the Commission is hereby providing notice of the grounds for disapproval under consideration. The Commission believes that instituting proceedings will allow for additional analysis of, and input from commenters with respect to, the proposed rule change's consistency with Section 11A of the Act<sup>120</sup> and Rule 608(c) of Regulation NMS thereunder.<sup>121</sup> Section 11A of the Act directs the Commission, with due regard for the public interest, the protection of investors, and the maintenance of fair and orderly markets, to use its authority to facilitate the establishment of a national market system for

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<sup>117</sup> 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

<sup>118</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>119</sup> 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchanges consent to the longer period. See id.

<sup>120</sup> 15 U.S.C. 78k-1.

<sup>121</sup> 17 CFR 242.608(c).

securities, including by authorizing or requiring SROs to act jointly to plan, develop, operate, or regulate an NMS plan. Rule 608(c) requires each SRO to comply with the terms of any effective NMS plan of which it is a sponsor or a participant. As discussed above, the Commission is considering whether the proposed rule changes are consistent with Section 11A of the Act<sup>122</sup> and the rules and regulations thereunder, including Rule 608(c).<sup>123</sup> The Commission also is considering whether the proposed rule changes are consistent with Sections 11.1(d), 11.2(c), 11.3(b) and 11.6 of the CAT NMS Plan.<sup>124</sup>

#### V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register]. The Commission asks that commenters address the sufficiency and merit of the Participants' statements in support of the proposal, which are set forth in the proposed rule changes,<sup>125</sup> in addition to any other comments they may wish to submit about the proposed rule changes.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule changes, including whether the proposed rule changes are 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

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<sup>122</sup> See supra note 120.

<sup>123</sup> See supra note 121.

<sup>124</sup> See CAT NMS Plan, supra note 5, at Sections 11.1(d), 11.2(c), 11.3(b) and 11.6.

<sup>125</sup> See, e.g., Notice, supra note 3.

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include any of: File Nos. SR-BX-2021-018; SR-C2-2021-008; SR-CBOE-2021-030; SR-CboeBYX-2021-011; SR-CboeBZX-2021-034; SR-CboeEDGA-2021-010; SR-CboeEDGX-2021-024; SR-GEMX-2021-03; SR-ISE-2021-08; SR-MRX-2021-05; SR-NASDAQ-2021-029; or SR-PHLX-2021-25 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 any of: File Nos. SR-BX-2021-018; SR-C2-2021-008; SR-CBOE-2021-030; SR-CboeBYX-2021-011; SR-CboeBZX-2021-034; SR-CboeEDGA-2021-010; SR-CboeEDGX-2021-024; SR-GEMX-2021-03; SR-ISE-2021-08; SR-MRX-2021-05; SR-NASDAQ-2021-029; or SR-PHLX-2021-25 on the subject line. The file numbers should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 such filing also will be available for inspection and copying at the principal office of the Participants. 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 any of: File Nos. SR-BX-2021-018; SR-C2-2021-008; SR-CBOE-2021-030; SR-CboeBYX-2021-011; SR-CboeBZX-2021-034; SR-CboeEDGA-2021-010; SR-CboeEDGX-2021-024; SR-GEMX-2021-03; SR-ISE-2021-08; SR-MRX-2021-05; SR-NASDAQ-2021-029; or SR-PHLX-2021-25 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

#### VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>126</sup> that File Nos. SR-BX-2021-018; SR-C2-2021-008; SR-CBOE-2021-030; SR-CboeBYX-2021-011; SR-CboeBZX-2021-034; SR-CboeEDGA-2021-010; SR-CboeEDGX-2021-024; SR-GEMX-2021-03; SR-ISE-2021-08; SR-MRX-2021-05; SR-NASDAQ-2021-029; and SR-PHLX-2021-25 be and hereby are, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule changes should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>127</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>126</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>127</sup> 17 CFR 200.30-3(a)(57) and (58).