

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79600; File No. SR-BatsBZX-2016-91)

December 19, 2016

Self-Regulatory Organizations; Bats BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Adopt a Participant Fee Applicable to Options Members of its Equity Options Platform

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 15, 2016, Bats BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. 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

The Exchange filed a proposal to amend the fee schedule applicable to Members⁵ and non-members of the Exchange pursuant to BZX Rules 15.1(a) and (c) to adopt a Participant Fee applicable to Options Members⁶ of its equity options platform (“BZX Options”).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

⁵ The term “Member” is defined as “any registered broker or dealer that has been admitted to membership in the Exchange.” See Exchange Rule 1.5(n).

⁶ The term “Options Member” is defined as “a firm, or organization that is registered with

The text of the proposed rule change is available at the Exchange's website at www.bats.com, at the principal office of the Exchange, 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 parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its fee schedule for BZX Options to adopt a Participant Fee applicable to Options Members. The Exchange believes the Participant Fee will help recoup costs related to the administration of Options Members. As proposed, Options Members would pay a Participant Fee of \$500 per month where they have an ADV⁷ of less than 5,000 contracts traded or \$1,000 per month where they have an ADV equal to or greater than 5,000 contract traded. New Options Members would not be charged a Participant Fee for their first three (3) month of membership on BZX Options. The Exchange proposes to implement the

the Exchange pursuant to Chapter XVII of these Rules for purposes of participating in options trading on BZX Options as an 'Options Order Entry Firm' or 'Options Market Maker.'" See Exchange Rule 16.1(a)(38).

⁷ As defined in the BZX Options fee schedule.

Participant Fee on January 3, 2017.⁸

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,⁹ in general, and furthers the objectives of Section 6(b)(4),¹⁰ in particular, 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 . The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all Members.

The Commission and the courts have repeatedly expressed their preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. In Regulation NMS, for example, the Commission indicated that market forces should generally determine the price of non-core market data because national market system regulation “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹¹ Likewise, in NetCoalition v. NYSE Arca, Inc.¹² (“NetCoalition”) the D.C. Circuit upheld the Commission’s use of a market-based approach in evaluating the fairness of market data fees against a challenge claiming that Congress mandated a cost-based approach.¹³ As the court emphasized, the Commission “intended in Regulation NMS that ‘market forces, rather than regulatory

⁸ The Exchange notes that the date of the fee schedule was amended to January 3, 2017 in SR-BatsBZX-2016-90 (December 14, 2016).

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(4).

¹¹ Securities Exchange Act Release No. 51808 at 37499 (June 9 [sic], 2005) (“Regulation NMS Adopting Release”).

¹² NetCoalition v. NYSE Arca, Inc., 615 F.3d 525 (D.C. Cir. 2010).

¹³ See NetCoalition, at 534.

requirements’ play a role in determining the market data . . . to be made available to investors and at what cost.”¹⁴

Further, “[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’....”¹⁵ Although the court and the SEC were discussing the cash equities markets, the Exchange believes that these views apply with equal force to the options markets.

The Exchange believes the adoption of a Participant Fee for Options Members is equitable and reasonable because the Exchange is seeking to recoup costs related to membership administration. Depending on the Options Member’s ADV, the proposed fee is either less than or equal to that charged by the Nasdaq Stock Market LLC (“Nasdaq”).¹⁶ The Exchange also believes it is equitable and not unfairly discriminatory to charge a lower Participant Fee to those Options Members with an ADV less than 5,000 contracts traded.¹⁷ The lower fee, coupled with

¹⁴ Id. at 537.

¹⁵ Id. at 539 (quoting ArcaBook Order, 73 FR at 74782-74783).

¹⁶ See Nasdaq Options Rules Chapter XV, Section 10, Participant Fee – Options (charging a Participant Fee of \$1,000 to all Nasdaq options participants, regardless of volume). See also Securities Exchange Act Release Nos. 68502 (December 20, 2012), 77 FR 76572 (December 28, 2012) (SR-Nasdaq-2012-139); and 76760 (December 23, 2015), 80 FR 81562 (December 30, 2015) (SR-Nasdaq-2015-154).

¹⁷ The fee is also less than similar fees charged by other exchanges, some of which also charged different rates based on the type of member or that member’s participation on that exchange. See e.g., The Chicago Board Options Exchange, Incorporated’s Fees Schedule (charging per month a Market Maker Trading Permit is \$5,500, an SPX Tier appointment is \$3,000, a VIX Tier Appointment is \$2,000, and an electronic Access

not charging new Options Members the Participant Fee during their first three (3) months of membership, is designed to encourage membership and to allow firms to grow their business on BZX Options. Therefore, the Exchange believes the proposed tiered Participant Fee is equitable, reasonable, and not unfairly discriminatory because it is designed to recoup costs related to membership administration while not serving as a deterrent to firms seeking to become new members of BZX Options.

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 not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes the proposed Participant Fee will not impose an undue burden on competition because the Exchange will uniformly assess the participant fee on all Member based on their ADV of contracts traded. The Exchange does not believe that the proposed changes represent a significant departure from pricing offered by the Exchange's competitors.¹⁸ Additionally, Members may opt to disfavor the Exchange's pricing if they believe that alternatives offer them better value or if they view the proposed fee as excessive. Further, excessive fees for participation would serve to impair an exchange's ability to compete for order flow and members rather than burdening competition.

Permit is \$1,600); the International Securities Exchange LLC's Schedule of Fees (charging per month an Electronic Access Member is assessed \$500.00 for membership and a market maker is assessed from \$2,000 to \$4,000 per membership depending on the type of market maker); C2 Options Exchange, Incorporated's Fees Schedule (charging per month, a market-maker is assessed a \$5,000 permit fee, an Electronic Access Permit is assessed a \$1,000 permit fee); and NYSE Arca, Inc.'s Fee Schedule (charging per month, a Clearing Firm is assessed a \$1,000 per month fee for the first Options Trading Permit ("OTP") and \$250 thereafter, and a market maker is assessed a permit based on the maximum number of OTPs held by an OTP Firm or OTP Holder during a calendar month ranging from \$1,000 to \$6,000 a month).

¹⁸

Id.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from Members or other interested parties.

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 Act¹⁹ and paragraph (f) of Rule 19b-4 thereunder.²⁰ 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.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-BatsBZX-2016-91 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f).

All submissions should refer to File Number SR-BatsBZX-2016-91. This file number 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 change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-BatsBZX-2016-91 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Eduardo A. Aleman
Assistant Secretary

²¹ 17 CFR 200.30-3(a)(12).