SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97437; File No. SR-CboeBZX-2023-020)

May 4, 2023

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the BZX Equities Fee Schedule to Add and Modify Certain Step-Up Tiers, Add a Non-Displayed Step-Up Tier and Modify Certain Fee Codes

I. Introduction

On March 6, 2023, Cboe BZX Exchange, Inc. (the "Exchange" or "EDGX") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change (File Number SR-CboeBZX-2023-020) to amend the BZX Equities Fee Schedule ("Fee Schedule") to add and modify certain Step-Up Tiers, add a Non-Displayed Step-Up Tier and to modify Fee Codes HB, HV and HY.[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the Federal Register on March 16, 2023.[5] The Commission has received no comment letters on the proposed rule change. Under Section

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

2 17 CFR 240.19b-4.

3 See Notice, infra note 5, at 16285.

4 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).

5 See Securities Exchange Act Release No. 97108 (March 10, 2023), 88 FR 16285 ("Notice"). The Exchange initially filed the proposed fee changes on March 1, 2023 (SR-CboeBZX-2023-017). However, on March 6, 2023, the Exchange withdrew that filing and submitted SR-CboeBZX-2023-020.

19(b)(3)(C) of the Act,[6] the Commission is hereby: (i) temporarily suspending File Number SR-CboeBZX-2023-020; and (ii) instituting proceedings to determine whether to approve or disapprove File Number SR-CboeBZX-2023-020.

II. Description of the Proposed Rule Change

The Exchange operates a "Maker-Taker" model whereby it pays credits to Members[7] that add liquidity and assesses fees to those that remove liquidity.[8] 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.[9] According to the Exchange, 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.[10]

The Exchange proposes to amend its Fee Schedule to add and modify certain Step-Up Tiers, add a Non-Displayed Step-Up Tier and to modify Fee Codes HB, HV and HY, which fee changes became effective on March 6, 2023.[11] With respect to the Exchange's Step-Up Tiers, the Exchange currently offers Step-Up Tiers (tiers 1 through 3) that provide Members an opportunity to receive an enhanced rebate from the standard rebate for liquidity adding orders that yield fee

6 15 U.S.C. 78s(b)(3)(C).

7 See BZX Rule 1.5(n). The term "Member" shall mean any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a "member" of the Exchange as that term is defined in Section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange.

8 See Notice, supra note 5, at 16286.

9 Id.

10 Id.

11 Id.

codes B, V, and Y where they increase their relative liquidity each month over a predetermined baseline.[12] The Exchange now proposes to add a new Tier 1 and renumber existing Tiers 1 through 3 (existing Step-Up Tiers 1, 2 and 3 would be renumbered to Tiers 2, 3 and 4 respectively, and will be referred to herein as "proposed Step-Up Tier" 2, 3 or 4, as applicable).[13] Specifically, proposed Tier 1 would provide for the following

- Proposed Tier 1 would offer an enhanced rebate of $0.0031 per share for qualifying orders (i.e., orders yielding fee codes B, V, or Y) where 1) Member has a Step-Up ADAV[14] from January 2023 ≥ 10,000,000 or Member has a Step-Up Add TCV[15] from January 2023 ≥ 0.10%; and 2) Member has an ADV[16] ≥ 0.60% of the TCV.[17]

Proposed Tiers 2 through 4 would have the same criteria and provide the same enhanced rebate as existing Tiers 1 through 3, respectively.[18]

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12 Id. See also Fee Schedule, Footnotes 2, Step-Up Tiers.

13 Id.

14 "Step-Up ADAV" means ADAV in the relevant baseline month subtracted from current ADAV. See Notice, supra note 5, at 16286.

15 "Step-Up Add TCV" means ADAV as a percentage of TCV in the relevant baseline month subtracted from current ADAV as a percentage of TCV. ADAV means average daily added volume calculated as the number of shares added per day. ADAV is calculated on a monthly basis. TCV means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply. Id.

16 "ADV" means average daily volume calculated as the number of shares added or removed, combined, per day. ADV is calculated on a monthly basis. Id.

17 "TCV" means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply. The Exchange excludes from its calculation of TCV volume on any day that the Exchange experiences an Exchange System Disruption, on any day with a scheduled early market close and the Russell Reconstitution Day. See Fee Schedule, Definitions.

18 See Notice, supra note 5, at 16286.

The Exchange also proposes to amend footnote 2 to add a Non-Displayed Step-Up Tier, which will provide Members an opportunity to receive an enhanced rebate from the standard rebate for liquidity adding non-displayed orders that yield fee codes HB,[19] HV,[20] and HY[21] and meet certain required volume-based criteria.[22] The proposed criteria for the Non-Displayed Step-Up Tier is as follows:

- The proposed Non-Displayed Step-Up Tier would offer an enhanced rebate of $0.0025 per share for qualifying orders (i.e., orders yielding fee codes HB, HV, or HY) where 1) Member has a Step-Up ADAV from January 2023 ≥ 10,000,000 or Member has a Step-Up Add TCV from January 2023 ≥ 0.10%; and 2) Member has an ADV ≥ 0.60% of the TCV.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[23] at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,[24] the Commission summarily may temporarily suspend the change in the rules of a self-regulatory

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19 Orders yielding Fee Code "HB" are non-displayed orders adding liquidity to BZX (Tape B). See Fee Schedule, Fee Codes and Associated Fees. To reflect eligibility for the Non-Displayed Step-Up Tier for Fee Code HB, the Exchange added footnote to 2 to Fee Code HB.

20 Orders yielding Fee Code "HV" are non-displayed orders adding liquidity to BZX (Tape A). Id. To reflect eligibility for the Non-Displayed Step-Up Tier for Fee Code HV, the Exchange added footnote to 2 to Fee Code HV.

21 Orders yielding Fee Code "HY" are non-displayed orders adding liquidity to BZX (Tape C). Id. To reflect eligibility for the Non-Displayed Step-Up Tier for Fee Code HY, the Exchange added footnote to 2 to Fee Code HY.

22 See Notice, supra note 5, at 16286.

23 15 U.S.C. 78s(b)(3)(C).

24 15 U.S.C. 78s(b)(1).

organization ("SRO") 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change's consistency with the Act and the rules thereunder.

In support of the proposal, the Exchange argues that is 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.[25] The Exchange believes that its specific proposal reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members.[26] The Exchange states that the Step-Up Tiers in general are designed to provide Members with additional opportunities to receive enhanced rebates by increasing their order flow to the Exchange, which further contributes to a deeper, more liquid market and provides even more execution opportunities for active market participants.[27] According to the Exchange, like other Step-Up Tiers, the proposed Step-Up Tier 1 is designed to give members an additional opportunity to receive an enhanced rebate for orders meeting the applicable criteria.[28] Furthermore, the Exchange states that the proposed Non-Displayed Step-Up Tier is designed to increase the Members' provision of liquidity to the Exchange, which increases execution opportunities and provides for overall

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25 See Notice, supra note 5, at 16287.

26 Id.

27 See Notice, supra note 5, at 16286.

28 Id.

enhanced price discovery and price improvement opportunities on the Exchange.[29] The Exchange believes that increased overall order flow benefits all Members by contributing towards a robust and well-balanced market ecosystem.[30]

Additionally, the Exchange believes the proposed Step-Up Tier 1 and Non-Displayed Step-Up Tier are reasonable as they serve to incentivize Members to increase their liquidity-adding, displayed volume (Step-Up Tier 1) and liquidity-adding, non-displayed volume (Non-Displayed Step-Up Tier), which benefit all market participants by incentivizing continuous liquidity and thus, deeper, more liquid markets as well as increased execution opportunities.[31] The Exchange states that the proposed incentives to provide displayed liquidity are designed to incentivize continuous displayed liquidity, which signals other market participants to take the additional execution opportunities provided by such liquidity, while the proposed incentives to provide non-displayed liquidity will further contribute to a deeper, more liquid market and provide even more execution opportunities for active market participants at improved prices.[32] According to the Exchange, this overall increase in activity deepens the Exchange's liquidity pool, offers additional cost savings, supports the quality of price discovery, promotes market transparency, and improves market quality for all investors.[33]

The Exchange also believes the proposed Step-Up Tier 1 and Non-Displayed Step-Up Tier represent an equitable allocation of rebates and are not unfairly discriminatory because all

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29 Id.

30 Id.

31 See Notice, supra note 5, at 16287.

32 Id.

33 Id.

Members are eligible for those tiers and would have the opportunity to meet a tier's criteria and would receive the proposed rebate if such criteria is met.[34] Further, according to the Exchange, the proposed rebates are commensurate with the proposed criteria.[35] The Exchange states that the rebates reasonably reflect the difficulty in achieving the applicable criteria as proposed.[36] The Exchange also states that the proposed tier/rebate will not adversely impact any Member's ability to qualify for other reduced fee or enhanced rebate tiers.[37] Should a Member not meet the proposed criteria under the modified tier, the Member will merely not receive that corresponding enhanced rebate.[38]

Additionally, the Exchange states that relative volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and non-discriminatory because they are open to all Members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns.[39] According to the Exchange, competing equity exchanges offer similar tiered pricing structures, including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.[40]

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34 Id.

35 Id.

36 Id.

37 Id.

38 Id.

39 Id.

40 Id.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.[41] The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."[42]

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), requires the rules of an exchange to (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[43] (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;[44] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[45]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the proposal, in particular the proposed modifications to add and modify certain Step-Up Tiers and add a Non-Displayed Step-Up Tier, is consistent with the statutory requirements applicable to a national securities exchange under the Act. The Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules

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41 See 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

42 Id.

43 15 U.S.C. 78f(b)(4).

44 15 U.S.C. 78f(b)(5).

45 15 U.S.C. 78f(b)(8).

thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[46]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.[47]

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

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)[48] and 19(b)(2)(B) of the Act[49] to determine whether the proposed rule change 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, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

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46 See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

47 For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

48 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.

49 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,[50] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how the proposal is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;"[51]
- Whether the Exchange has demonstrated how the proposal is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to perfect the operation of a free and open market and a national market system" and "protect investors and the public interest," and not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers;"[52] and
- Whether the Exchange has demonstrated how the proposal is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[53]

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[50] 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 exchange consents to the longer period. See id.

[51] 15 U.S.C. 78f(b)(4).

[52] 15 U.S.C. 78f(b)(5).

[53] 15 U.S.C. 78f(b)(8).

As discussed in Section III above, the Exchange argues that all Members will be eligible for the proposed new tiers and have the opportunity to meet the tiers' criteria. The Exchange further states the proposal provides a reasonable means to incentivize Members to continue to send certain types of order flow to the Exchange. Because the proposed Step-Up Tier and Non-Displayed Step-Up Tier are designed to provide more favorable pricing to Members with volume increases over specified baseline months, questions are raised as to whether the Exchange has satisfied its burden to demonstrate that such tiers will, as the Exchange argues, continue to provide a reasonable means to incentivize Members to send certain types of order flow to the Exchange, in a manner consistent with the Act and the rules thereunder when the specified baseline months remain the same and may continue indefinitely.

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."[54] The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,[55] and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[56]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the

54 17 CFR 201.700(b)(3).

55 See id.

56 See id.

Act, specifically, with its requirements that the rules of a national securities exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers, and other persons using its facilities; are designed to perfect the operation of a free and open market and a national market system, and to protect investors and the public interest; are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act;[57] as well as any other provision of the Act, or the rules and regulations thereunder.

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 publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[58]

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

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57 See 15 U.S.C. 78f(b)(4), (5), and (8).

58 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposal 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 No. SR-CboeBZX-2023-020 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 File Number SR-CboeBZX-2023-020. 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. 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-2023-020 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,[59] that File Number SR-CboeBZX-2023-020 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[60]

Sherry R. Haywood,

Assistant Secretary

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59 15 U.S.C. 78s(b)(3)(C).

60 17 CFR 200.30-3(a)(57) and (58).