

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88487; File No. SR-CboeBZX-2020-027]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Amend the Fee Schedule To Institute a Fee Code Applicable to the Cboe Market Close

March 26, 2020.

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 March 19, 2020, Cboe BZX Exchange, Inc. (“BZX” or “Exchange”) 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. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change to amend the fee schedule to institute a fee code applicable to the Cboe Market Close. 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 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 the fee schedule applicable to its equities trading platform (“BZX Equities”) to introduce a fee code for orders that participate in the Cboe Market Close.³ As proposed, orders executed in the Cboe Market Close would yield fee code “MC.” There would be no transaction fees associated with such orders.

The Exchange plans to implement the Cboe Market Close on March 6, 2020 as part of its ongoing efforts to improve market structure for the benefit of investors.⁴ The Cboe Market Close is an innovative closing match process for non-BZX Listed Securities that is designed to match buy and sell Market-On-Close (“MOC”) orders at the official closing price for such security published by the primary listing market. The Exchange is introducing the Cboe Market Close in response to requests from market participants, particularly buy-side firms, for an alternative to the primary listing exchanges’ closing auctions that still provides an execution at a security’s official closing price. Cboe Market Close is designed in response to industry persistence and interest in an alternative to the listing market’s closing auction.

As noted in the Approval Order, BZX stated that the fees for Cboe Market Close would be set and maintained over time at a rate less than the fee charged by the applicable listing exchange for its own respective closing mechanism. Accordingly, in conjunction with the upcoming implementation of the Cboe Market Close, the Exchange proposes to introduce a new fee code for orders that are executed in the Cboe Market Close, which would yield fee code “MC.” As proposed, there would be no fee to participate in the Cboe Market Close, thereby providing cost effective executions at the official closing price on a public exchange, and facilitating the execution of those orders at a lower rate than such orders would be charged

in a primary listing markets’ closing auction.⁵

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,⁶ in general, and furthers the objectives of Section 6(b)(4),⁷ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also 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. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their MOC orders to the Cboe Market Close, which the Exchange believes would facilitate the execution of those orders at the official closing price.

In particular, the Exchange believes the proposal is reasonable because it provides Members a free alternative for executing MOC orders at the official closing price. Currently, market participants may execute MOC orders on public exchanges at the official closing price only by participating in the primary listing market’s closing auction. As noted in the Approval Order, BZX stated that the fees for Cboe Market Close would be set and maintained over time at a rate less than the fee charged by the applicable listing exchange for its own respective closing mechanism. Accordingly, the proposal would allow all Members to participate in the Cboe Market Close without charge, and therefore at a price that is less than the applicable closing auction fees that would be incurred on the primary listing exchanges.⁸ The Exchange also believes the proposal is reasonable because fostering price

⁵ For example, Nasdaq offers tiered fees for both MOC and Limit-on-Close (“LOC”) order executions in its closing auction process ranging from \$0.0008 to \$0.0016 per executed share. See Nasdaq Crossing Network, Execution Fees for the Nasdaq Closing Cross, Tiers A through G of the Nasdaq Price List. NYSE offers tiered fees for MOC order executions in its closing auction process ranging from \$0.0004 to \$0.0010. See Executions at the Close Equity Per Share Charge—per transaction (both sides)—of the NYSE Price List.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4).

⁸ For example, Nasdaq offers tiered fees for executions in its closing auction process ranging from \$0.0008 to \$0.0016 per executed share. See Tiers A through G of the Nasdaq fee schedule <http://nasdaqtrader.com/Trader.aspx?id=PriceListTrading2>.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Exchange initially filed the proposed fee changes on March 5, 2020 (SR-CboeBZX-2020-022). On March 13, 2020, the Exchange withdrew that filing and re-filed (SR-CboeBZX-2020-024). On March 19, 2020, the Exchange withdrew that filing and submitted this filing.

⁴ The Commission approved the Cboe Market Close on January 21, 2020. See Securities Exchange Act Release No. 88008 (January 21, 2020) 85 FR 4726 (January 27, 2020) (the “Approval Order”) (SR-BatsBZX-2017-34).

competition for the execution of MOC orders may facilitate the ability for smaller and mid-size brokers to better compete for investors' MOC order flow. In turn, greater choice among, and participation by, broker-dealers in handling MOC orders should inure to the benefit of end investors. Further, the Exchange believes the proposal may increase execution quality competition for MOC orders by incentivizing other venues, including the primary listing exchanges, to continue to innovate and compete to attract MOC orders to their venues.

Additionally, the Exchange believes the proposal is equitable and not unfairly discriminatory because it would apply equally to all Members who choose to participate in the Cboe Market Close. The proposed fee change is designed to allow broad participation in the Cboe Market Close, and there would be no differentiation in fees charged to Members. Rather, the Exchange's proposal would allow all Members to participate in the Cboe Market Close without charge. In turn, this would allow any interested Member to participate in the Cboe Market Close on an equal and non-discriminatory basis.

Lastly, while the Exchange's proposal offers participation in the Cboe Market Close at no cost to Members, the Exchange will continue to surveil for potentially manipulative activities and will enhance its surveillance procedures and work with other SROs to detect and prevent manipulative activity through the use of Cboe Market Close.

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 intramarket or intermarket 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 change would encourage the submission of MOC orders to a public exchange for execution at the official closing price.

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change allows all Members to participate in the Cboe Market Close without charge. The proposal is designed to encourage Members to participate in the Cboe Market Close, which the Exchange believes will benefit all Members by fostering price competition for the execution of MOC orders at the official

closing price, and may facilitate the ability for smaller and mid-size brokers to better compete for investors' MOC order flow. In turn, greater choice among, and participation by, broker-dealers in handling MOC orders should inure to the benefit of end investors.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The purpose of Cboe Market Close is to increase competition for the execution of MOC orders. Specifically, the Exchange believes the proposal may increase competition for MOC orders by incentivizing other venues, including the primary listing exchanges, to continue to innovate and compete to attract MOC orders to their venues.⁹ Further, as previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their MOC order flow, including primary listing markets and off-exchange venues and alternative trading systems.¹⁰

Lastly, the proposal is offered in conjunction with the launch of the Cboe Market Close which is designed to enhance competition for the execution of MOC orders at the official closing price. Market participants may only execute at the official closing price on a public exchange is through the primary listing market auction. Generally, more than 70% of execution volume at the official closing price occurs on the primary listing exchange. Therefore, the proposal is designed to enhance competition among exchanges by offering market participants an alternative option to execute MOC orders at the official closing price. Furthermore, market participants can readily choose to send their MOC orders to primary listing markets and off-exchange venues if they deem fee levels at those other venues to be more favorable. For example, recent studies have shown that Trade Reporting Facility ("TRF") volumes using the primary closing auction price have reached as high as 30% on some occasions.¹¹

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."¹² 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'. . . ."¹³ Accordingly, the Exchange does not believe the proposal imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁴ and paragraph (f) of Rule 19b-4¹⁵ 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.

¹² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹³ *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)).

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f).

⁹ *Supra* note 3.

¹⁰ *Id.*

¹¹ See BZX Statement in Support of the Division's Order Approving a Rule to Introduce Cboe Market Close, at 16 (April 12, 2018).

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 email to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2020-027 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-2020-027. 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 (<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. 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 File Number SR-CboeBZX-2020-027, and should be submitted on or before April 22, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88485; File No. SR-NYSE-2019-67]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Amend Chapter One of the Listed Company Manual To Modify the Provisions Related to Direct Listings

March 26, 2020.

I. Introduction

On December 11, 2019, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Chapter One of the Listed Company Manual ("Manual") to modify the provisions related to direct listings. On December 13, 2019, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, was published for comment in the **Federal Register** on December 30, 2019.³ On February 13, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission has received twelve comment letters on the proposed rule change, including a response from the

Exchange.⁶ This order institutes proceedings under Section 19(b)(2)(B) of the Exchange Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

Section 102.01B, Footnote (E) of the Manual states that the Exchange generally expects to list companies in connection with a firm commitment underwritten initial public offering ("IPO"), upon transfer from another market, or pursuant to a spin-off, but also allows for the possibility of using a direct listing, as described below.⁸ Currently, Footnote (E) states that the Exchange recognizes that companies that have not previously had their common equity securities registered under the Exchange Act, but which have sold common equity securities in a private placement, may wish to list their common equity securities on the Exchange at the time of effectiveness of a registration statement⁹ filed solely for the purpose of allowing existing shareholders to sell their shares.¹⁰ The Exchange has proposed to define this type of direct listing already contemplated by the Exchange's rules as a "Selling Shareholder Direct Floor Listing."¹¹ In addition, the Exchange has proposed to recognize an additional type of direct listing in which a company would sell shares itself in the opening auction on the first day of trading on the Exchange in addition to, or instead of, facilitating sales by selling shareholders (a "Primary Direct Floor

⁶ Comments received on the Notice are available on the Commission's website at: <https://www.sec.gov/comments/sr-nyse-2019-67/srnyse201967.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Section 102.01B, Footnote (E) of the Manual.

⁹ The reference to a registration statement refers to a registration statement effective under the Securities Act of 1933 ("Securities Act").

¹⁰ See Section 102.01B, Footnote (E) of the Manual. See also Securities Exchange Act Release No. 82627 (February 2, 2018), 3 FR 5650 (February 8, 2018) (SR-NYSE-2017-30) (approving proposed rule change to amend Section 102.01B of the Manual to modify the provisions relating to the qualifications of companies listing without a prior Exchange Act registration in connection with an underwritten IPO and amend the Exchange's rules to address the opening procedures on the first day of trading for such securities).

¹¹ See proposed Section 102.01B, Footnote (E) of the Manual. Under the proposal, the Exchange would remove a description of this type of direct listing as involving a company "whose stock is not previously registered under the Exchange Act, where such company is listing without a related underwritten offering upon effectiveness of a registration statement registered only the resale of shares sold by the company in earlier private placements." See *id.*

¹⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 87821 (December 20, 2019), 84 FR 72065 (December 30, 2019) ("Notice").

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 88190 (February 13, 2020), 85 FR 9891 (February 20, 2020). The Commission designated March 29, 2020, as the date by which it should approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change.