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Dated: March 2, 2021.

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-04656 Filed 3-5-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91239; File No. SR-CboeBZX-2021-017]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposal To Permit the Exchange To Look Back Only to July 2020 To Correct Certain Billing Errors Which Were Discovered in October 2020

March 2, 2021.

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 February 18, 2021, Cboe 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 and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ 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 proposal to permit the Exchange to look back only to July 2020 to correct certain billing errors which were discovered in October 2020. This rule change does not provide for any modifications to the text of the Exchange’s rules or fees schedule.

The text of the proposal 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 recently amended its equities and options fees schedules to adopt a provision relating to billing errors and fee disputes.⁵ Specifically, the Exchange adopted a provision that provides that all fees and rebates assessed prior to the three full calendar months before the month in which the Exchange becomes aware of a billing error shall be considered final. Particularly, the Exchange will resolve an error by crediting or debiting Members and Non-Members based on the fees or rebates that should have been applied in the three full calendar months preceding the month in which the Exchange became aware of the error, including to all impacted transactions that occurred during those months.⁶ The

Exchange will apply the three month look back regardless of whether the error was discovered by the Exchange or by a Member or Non-Member that submitted a fee dispute to the Exchange. The Exchange’s fees schedules also provide that all disputes concerning fees and rebates assessed by the Exchange would have to be submitted to the Exchange in writing and accompanied by supporting documentation. The purpose of this policy is to provide both the Exchange and Members and Non-Members subject to the Exchange’s fee schedule finality and the ability to close their books after a known period of time. The Exchange further notes that several other exchanges have adopted similar provisions in their rules.⁷

The Exchange proposes to apply the recently adopted billing policy to transactions impacted by billing errors that were discovered in October 2020. Particularly, in October 2020, the Exchange identified a billing error relating to certain fee codes. As a result of the discovery, the Exchange conducted a review of additional fee code configurations, which review was only recently completed. The review resulted in the discovery of additional billing errors relating to Exchange fee codes. These errors, along with the original error discovered in October 2020, resulted in various Members being over-rebated or under-billed, and to a lesser extent over-billed, over the course of several years. In the absence of applying the recently adopted billing policy to transactions impacted by the October 2020 billing errors, the Exchange would be required to credit or debit Members based on the fees or rebates that should have been applied to all impacted transactions, regardless of how far back the transactions occurred (which as noted above, is several years). If the Exchange were permitted to apply the current rule language to the billing errors discovered in October 2020 however, then the Exchange could limit its look back in correcting those errors to only those transactions that occurred

debiting Members based on the fees or rebates that should have been applied to any impacted transactions during November, 2020, December 2020 and January 2021. The Exchange notes that because it bills in arrears, the Exchange would be able to correct the error in advance of issuing the February 2021 invoice and therefore, transactions impacted through the date of discovery (in this example, February 4, 2021) and thereafter, would be billed correctly.

⁷ See e.g., Securities Exchange Act Release No. 87650 (December 3, 2019), 84 FR 67304 (December 9, 2019) (SR-NYSECHX-2019-024); Securities Exchange Act Release No. 84430 (October 16, 2018), 83 FR 53347 (October 22, 2018) (SR-NYSESTAT-2018-23); and Securities Exchange Act Release No. 79060 (October 6, 2016), 81 FR 70716 (October 13, 2016) (SR-ISEGemini-2016-11).

⁵ See Securities Exchange Act Release No. 90897 (January 11, 2021), 86 FR 4161 (January 15, 2021) (SR-CboeBZX-2020-094).

⁶ For example, if the Exchange becomes aware of a transaction fee billing error on February 4, 2021, the Exchange will resolve the error by crediting or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

in the three months preceding the discovery of the errors (*i.e.*, July 2020 through September 2020).⁸ Moreover, the benefit to the Exchange of limiting the impact of these particular errors to three months is much smaller as compared to the benefit that Members would receive. Specifically, the nature of these particular billing errors is such that in correcting the errors, more money would be owed to the Exchange by Members due to over-rebating or under-billing than is owed to Members by the Exchange due to overbilling. Accordingly, the Exchange believes it's appropriate and equitable to apply the three-month look back for corrective billing to the errors that were discovered in October 2020.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁰ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹¹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting its currently policy, the Exchange noted that it believed providing that all fees are final after 3 months is reasonable as both the Exchange and Members have an interest in knowing when its fee assessments are final and when reliance can be placed on those assessments. Indeed, without some deadline on fee disputes and billing errors, the Exchange and market participants would never be able to close their books with any confidence.

⁸ The Exchange corrected errors in advance of issuing the October 2020 invoice and therefore, transactions impacted through the date of discovery and thereafter, were billed correctly.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

¹¹ *Id.*

Furthermore, as noted above, a number of Exchanges similarly consider their fees final after a similar period of time.¹² As discussed above, in October 2020, the Exchange became aware of certain billings errors which resulted in various Members being over-rebated or under-billed, and to a lesser extent over-billed over the course of several years. The Exchange believes it's appropriate that Members that were impacted by these billing errors similarly be subject to the recently adopted billing policy to not resolve billing errors past three months from the time a billing error was discovered (in this case, not be invoiced for impacted transactions that occurred prior to July 2020).¹³ The Exchange does not think it is appropriate or equitable to have to correct billing errors for transactions that occurred prior to July 2020. As discussed, the Exchange believes it's reasonable and important for both Members and the Exchange to rely on the finality of fees and rebates assessed. Moreover, the proposed rule change would apply to all Members equally, in that the Exchange would be precluded from invoicing any Member for the correct amounts that should have been applied to trades that were otherwise billed incorrectly before July 2020. The Exchange also believes the proposal would be consistent with the protection of investors and the public interest because it would allow impacted market participants to benefit from the same rule recently adopted by the Exchange. Additionally, as discussed, Members would receive a greater benefit from the application of the current billing errors policy as compared to the Exchange with respect to these particular billing errors. Furthermore, the Exchange believes the proposal to limit the time period it must correct billing errors does not raise any new or novel issues that have not been already been considered by the Commission. Particularly, the proposal to limit how far back an exchange must go to correct billing errors is comparable to other policies and practices that have long been established at other exchanges.¹⁴

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. First, the

¹² See *supra* note 7.

¹³ Since the errors were discovered in October 2020, the three preceding months that would be corrected are July, August, and September 2020.

¹⁴ See *supra* note 7.

Exchange notes the proposal is not intended to address any competitive issue, but rather provide finality to Members with respect to billing errors that were just recently discovered and extend to them the applicability of a recently adopted billing practice that considers all fees final after three months. Further, the Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply equally to all Members. The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed change only affects transactions that occurred on the Exchange. Additionally, other exchanges have long established policies in which fees shall be considered final after a specified period of time.

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

No comments were solicited or received on the proposed rule change.

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

Because the foregoing proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and; (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6)¹⁶ 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

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeBZX-2021-017 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-2021-017. 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; 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-CboeBZX-2021-017 and should be submitted on or before March 29, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

J. Matthew DeLesDernier,
Assistant Secretary.

[FR Doc. 2021-04677 Filed 3-5-21; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91236; File No. SR-NYSEArca-2020-56]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Disapproving a Proposed Rule Change To Amend NYSE Arca Rules 5.2-E(j)(3), 5.2-E(j)(8), 5.5-E(g)(2), 8.600-E, and 8.900-E

March 2, 2021.

I. Introduction

On June 18, 2020, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") 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 certain listing requirements relating to maintaining a minimum number of beneficial holders and minimum number of shares outstanding. The proposed rule change was published for comment in the **Federal Register** on July 7, 2020.³

On August 17, 2020, pursuant to Section 19(b)(2) of the Exchange Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On October 2, 2020, the Commission instituted proceedings to determine whether to approve or disapprove the proposed rule change.⁶ On December 15, 2020, the Commission designated a longer period for Commission action on the proposed rule change.⁷ The Commission received one comment letter on the proposed rule change.⁸

¹⁷ 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. 89197 (June 30, 2020), 85 FR 40720 ("Notice").

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 89584, 85 FR 51817 (Aug. 21, 2020).

⁶ See Securities Exchange Act Release No. 90075, 85 FR 63597 (Oct. 8, 2020) ("OIP").

⁷ See Securities Exchange Act Release No. 90672, 85 FR 83135 (Dec. 21, 2020).

⁸ The comment on the proposed rule change can be found on the Commission's website at: <https://www.sec.gov/comments/sr-nysearca-2020-56/srnysearca202056-8163217-226939.pdf>.

This order disapproves the proposed rule change because, as discussed below, NYSE Arca has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), and, in particular, the requirement that the rules of a national securities exchange be designed "to prevent fraudulent and manipulative acts and practices" and "to protect investors and the public interest."⁹

II. Description of the Proposal

As described in detail in the Notice and OIP, the Exchange proposes to amend the listing standards governing the listing and trading of Investment Company Units, Exchange-Traded Fund Shares, Managed Fund Shares, and Managed Portfolio Shares (collectively, "Fund Shares").¹⁰ Specifically, NYSE Arca proposes to: (1) Remove the listing requirement that, following the initial twelve-month period after commencement of trading of a series of Fund Shares on the Exchange, such series have at least 50 beneficial holders ("Beneficial Holders Rule"); and (2) replace the existing minimum number of shares requirements ("Minimum Shares Outstanding Rules")¹¹ with a requirement that a series of Fund Shares have at least one creation unit outstanding on an initial and continued listing basis.¹²

The Exchange states that Beneficial Holders Rule as it pertains to Fund Shares listed on NYSE Arca is no longer necessary. The Exchange contends that the requirements of Rule 6c-11 under the 1940 Act and, in particular, the website disclosure requirements of Rule

www.sec.gov/comments/sr-nysearca-2020-56/srnysearca202056-8163217-226939.pdf.

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ See NYSE Arca Rules 5.2-E(j)(3) and 5.5-E(g)(2) (Investment Company Units); 5.2-E(j)(8) (Exchange-Traded Fund Shares); 8.600-E (Managed Fund Shares); and 8.900-E (Managed Portfolio Shares).

¹¹ See Commentary .01(d) to NYSE Arca Rule 5.2-E(j)(3) (requiring a minimum of 100,000 shares of a series of Investment Company Units to be outstanding at commencement of trading); NYSE Arca Rule 5.2-E(j)(8)(e)(1)(A) (requiring the Exchange to establish a minimum number of Exchange-Traded Fund Shares to be outstanding at the time of commencement of trading); NYSE Arca Rule 8.600-E(d)(1)(A) (requiring the Exchange to establish a minimum number of Managed Fund Shares to be outstanding at the time of commencement of trading); and NYSE Arca Rule 8.900-E(d)(1)(A) (requiring the Exchange to establish a minimum number of Managed Portfolio Shares to be outstanding at the time of commencement of trading).

¹² The Exchange represents that the term "creation unit" would have the same meaning as defined in Rule 6c-11(a)(1) under the Investment Company Act of 1940 ("1940 Act").