

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–BOX–2023–10, and should be submitted on or before May 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023–07734 Filed 4–12–23; 8:45 am]

**BILLING CODE 8011–01–P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97261; File No. SR–ISE–2023–08]

### Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Designation of a Longer Period for Commission Action on a Proposed Rule Change To Make Permanent Certain P.M.-Settled Pilots

April 7, 2023.

On February 23, 2023, Nasdaq ISE, LLC (“Exchange”) 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> a proposed rule change to make permanent the pilot to permit the listing and trading of options based on 1/5 the value of the Nasdaq-100 Index and the Exchange’s nonstandard expirations pilot program. The proposed rule change was published for comment in the **Federal Register** on March 2, 2023.<sup>3</sup>

Section 19(b)(2) of the Act <sup>4</sup> provides that, within 45 days of the publication of notice of the filing of a proposed rule change, or within such longer period up to 90 days as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved. The 45th day after

publication of the notice for this proposed rule change is April 16, 2023.

The Commission is extending this 45-day time period. The Commission finds that it is appropriate to designate a longer period within which to take action on the proposed rule change so that it has sufficient time to consider the proposed rule change. Accordingly, the Commission, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> designates May 31, 2023, as the date by which the Commission shall either approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change (File No. SR–ISE–2023–08).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>6</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97262; File No. SR–CboeEDGX–2023–023]

### Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Concerning Order-to-Trade Ratio Fees for Market Makers

April 7, 2023.

Pursuant to Section 19(b)(1) <sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”),<sup>2</sup> and Rule 19b–4 thereunder,<sup>3</sup> notice is hereby given that on March 29, 2023, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) 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 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 EDGX Exchange, Inc. (the “Exchange” or “EDGX Options”) proposes to amend its Fee Schedule. 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/options/regulation/rule\\_filings/edgx/](http://markets.cboe.com/us/options/regulation/rule_filings/edgx/)), 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 its Fee Schedule to adopt Order-to-Trade Ratio Fees.<sup>4</sup>

The Exchange first 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. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 16% of the market share and currently the Exchange represents only approximately 6% of the market share.<sup>5</sup> Thus, in such a low-concentrated and highly competitive market, no single options exchange, including the Exchange, possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces

<sup>4</sup> The Exchange initially filed the proposed rule change on February 1, 2023 (SR–CboeEDGX–2023–009). On March 29, 2023, the Exchange withdrew that filing and submitted this proposal.

<sup>5</sup> See Cboe Global Markets U.S. Options Market Monthly Volume Summary (March 24, 2023), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

<sup>13</sup> 17 CFR 200.30–3(a)(12).

<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 No. 96979 (February 24, 2023), 88 FR 13182.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> *Id.*

<sup>6</sup> 17 CFR 200.30–3(a)(31).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b–4.

constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange proposes to adopt Order-to-Trade Ratio Fees. The proposed fees will be charged to market participants registered as Market Makers on EDGX Options based on the number of orders (including modification messages) entered compared to the number of orders traded in a calendar month. The calculation of the ratio will not include quotes or trades resulting from such quotes.<sup>6</sup> A Market Maker's order flow will be aggregated together with any affiliated Member sharing at least 75% common ownership. The proposed fees are as follows:

Tier	Order-to-trade ratio	Fee
Tier 1 .....	0 to 999 .....	\$0
Tier 2 .....	1,000 to 1,999 .....	2,500
Tier 3 .....	2,000 to 4,999 .....	5,000
Tier 4 .....	5,000 to 9,999 .....	10,500
Tier 5 .....	10,000 to 14,999 ...	35,000
Tier 6 .....	15,000 to 19,999 ...	100,000
Tier 7 .....	20,000 and above	150,000

The Exchange notes that Market Makers with incrementally higher order-to-trade ratios have the potential residual effect of exhausting system resources, bandwidth, and capacity. Higher order-to-trade ratios may, in turn, create latency and impact other Members' ability to receive timely executions. Recognizing Market Maker quoting activity is an important source of liquidity on exchanges, and that orders and executions often occur in large numbers, the purpose of this proposal is to focus on activity that is truly disproportionate while fairly allocating costs. The proposed fee structure has multiple thresholds, and the proposed fees are incrementally greater at higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The proposal contemplates that a Market Maker would have to exceed the high order to trade ratio of 999 before that Market Maker would be charged a fee under the proposed tiers. The Exchange believes that it is in the interests of all Members and market participants who access the

Exchange to not allow other market participants to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange also believes this proposal (and in particular the proposed high fee amounts associated with higher order-to-trade ratios) will reduce the incentive for Market Makers to engage in excessive order and trade activity that may require the Exchange to otherwise increase its storage capacity and will encourage such activity to be submitted in good faith for legitimate purposes.

The Exchange also represents that the proposed fees are not intended to raise revenue; rather, as noted above, it is intended to encourage efficient behavior so that market participants do not exhaust System resources. The Exchange also notes that it intends to provide Market Makers with daily reports, free of charge, which will detail their order and trade activity in order for those firms to be fully aware of all order and trade activity they (and their affiliates) are sending to the Exchange. This will allow Market Maker firms to monitor their behavior and determine whether it is approaching any of the order-to-trade thresholds that trigger the proposed fees.

The Exchange lastly notes that other exchanges have adopted various fee programs that assess incrementally higher fees to Members that have incrementally higher order-to-trade ratios for similar reasons.<sup>7</sup> There is also an exchange that adopted a fee applicable to Market Makers that exceed a prescribed high threshold of quote messages.<sup>8</sup>

## 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.<sup>9</sup> Specifically,

<sup>7</sup> See e.g., Securities Exchange Act Release No. 60102 (June 11, 2009), 74 FR 29251 (June 19, 2009) (SR-NYSEArca-2009-50) (adopting fees applicable to Members (albeit not just Market Makers) based on the number of orders entered compared to the number of executions received in a calendar month). It appears that Nasdaq similarly assesses a penalty charge to its members that exceed certain "weighted order-to-trade ratios". See *Price List—Trading Connectivity*, NASDAQ, available at <https://www.nasdaqtrader.com/trader.aspx?id=pricelisttrading2>.

<sup>8</sup> See Securities Exchange Act Release No. 91406 (March 25, 2021), 86 FR 16795 (March 31, 2023) (SR-EMERALD-2021-10) (adopting an "Excessive Quoting Fee" to ensure that Market Makers do not over utilize the exchange's System by sending messages (albeit quotes instead of orders) to the MIAAX Emerald, to the detriment of all other Members of the exchange).

<sup>9</sup> 15 U.S.C. 78f(b).

the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>10</sup> 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)<sup>11</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>12</sup> which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

First, the Exchange 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 Exchange is only one of 16 options exchanges which market participants may direct their order flow and/or participate on as a Market-Maker, and it represents a small percentage of the overall market. Competing options exchanges similarly assess fees to deter Members, including in some cases only Market-Makers, from over utilizing the exchange's System by sending excessive messages.<sup>13</sup>

The Exchange believes the proposed fees are reasonable as Market Makers that do not exceed the high order to trade ratio of 999 will not be charged any fee under the proposed tiers. Quoting activity (and trades resulting from quotes) are also not included in the order-to-trade ratio, thereby ensuring Market Makers quoting activity, which acts as important source of liquidity, is not impeded by the proposal.<sup>14</sup> The Exchange believes it's reasonable, equitable and not unfairly discriminatory to assess higher fees for

<sup>10</sup> 15 U.S.C. 78f(b)(5).

<sup>11</sup> *Id.*

<sup>12</sup> 15 U.S.C. 78f(b)(4).

<sup>13</sup> See *supra* note 6.

<sup>14</sup> The Exchange is able to identify quoting activity versus other message activity because quotes come into the system via bulk messages.

<sup>6</sup> The term "quote" refers to bids and offers submitted in bulk messages. A bulk message means a single electronic message a user submits with an M (Market-Maker) capacity to the Exchange in which the User may enter, modify, or cancel up to an Exchange-specified number of bids and offers. A User may submit a bulk message through a bulk port as set forth in Exchange Rule 21.1(j)(3). See Rule 16.1 (definition of bulk message).

greater higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. This impact may also require the Exchange to purchase additional hardware to increase its storage capacity. The Exchange believes the proposed high fee amounts are reasonable as the Exchange believes them to commensurate with the proposed thresholds. Particularly, the proposed fee amounts that correspond to high order-to-trade ratios are designed to incentivize Market Makers to reduce excessive order and trade activity that the Exchange believes can be detrimental to all market participants at those levels and encourage such activity to be made in good faith and for legitimate purposes. Indeed, the Exchange believes that it is in the interests of all Members and market participants who access the Exchange to not allow Market Makers to exhaust System resources, but to encourage efficient usage of network capacity. The Exchange therefore also believes that the proposed order-to-trade ratio fees appropriately reflect the benefits to different firms of being able to send orders into the Exchange's System and also believes the proposed fee is one method of facilitating the Commission's goal of ensuring that critical market infrastructure has "levels of capacity, integrity, resiliency, availability, and security adequate to maintain their operational capability and promote the maintenance of fair and orderly markets."<sup>15</sup>

The Exchange also believes adopting order-to-trade ratio fees is reasonable as unfettered usage of System capacity and network resource consumption can have a detrimental effect on all market participants who access and use the Exchange. As discussed, high order-to-trade ratios may adversely impact system resources, bandwidth, and capacity which may, in turn, create latency and impact other Members' ability to receive timely executions. The Exchange believes the proposed fees are therefore reasonable as they are designed to focus on activity that is truly disproportionate while fairly allocating costs.

The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to all Market Makers registered on EDGX Options. While the Exchange has no way of predicting with

certainly how the proposed changes will impact Market Maker activity, based on trading activity from the prior months the Exchange would expect that, absent any changes to Member behavior, the vast majority of Members would fall within proposed Tier 1 (and thus not be subject to any new fees). With respect to Market Makers that exceed this threshold, the Exchange anticipates, absent any change in behavior, approximately two Members to fall within Tier 2, one Member to fall within Tier 3, no Members to fall within Tiers 4, 5 or 6 one Member to fall within Tier 7. Since the implementation of the proposed fee on February 1, 2023, the Exchange notes that it has observed a decrease in order-to-trade ratios by Market Makers, which the Exchange believes demonstrates that the proposed fee is working as designed. Particularly, in February 2023, only two Market Makers were assessed the proposed order-to-trade ratio fees; particularly one Market Maker fell within Tier 2 and one Market-Maker fell within Tier 4 (down from anticipated Tier 7). Additionally, as discussed above, the Exchange believes it's equitable and not unfairly discriminatory to assess incrementally higher fees for Market Makers that have higher order-to-trade ratios because the potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. In addition, the Exchange believes that excluding quoting activity from the calculation of the ratio for the proposed fees is not unfairly discriminatory because it will ensure Market Makers are able to continue providing important liquidity to the Exchange and meet their quoting obligations. The Exchange also believes its equitable and not unfairly discriminatory to only assess the proposed fees to Market Makers because Market Makers on the Exchange are the only market participants that are exceeding proposed Tier 1, which is the only tier in which no fee is assessed (said another way, no other market participant has an order-to-trade ratio high enough to trigger a fee). For example, most market participants that route customer orders to the Exchange currently have order-to-trade ratios lower than 10. The Exchange also believes it's equitable and not unfairly discriminatory to aggregate a Market Maker's order flow with any affiliated Member sharing at least 75% common ownership even if such affiliated Member is not a Market Maker in order to prevent Market Makers from shifting their order flow and trading activity to

their non-Market Maker affiliate in order to circumvent the proposed fees.

The Exchange lastly believes that its proposal is reasonable, equitably allocated and not unfairly discriminatory because it is not intended to raise revenue for the Exchange; rather, it is intended to encourage efficient behavior so that Market Makers do not exhaust System resources, while balancing the increase in order-to-trade ratio has seen from some market participants.

#### *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 that is not necessary or appropriate in furtherance of the purposes of the Act. In particular, 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 fees applies uniformly to all Market Makers registered on EDGX Options. Further, any Market Maker who exceeds the order-to-trade ratio of 999 will be subject to a fee under the proposed tiers. As noted above, the Exchange also believes its not unfairly discriminatory to only assess the proposed fees to Market Makers because Market Makers on the Exchange are the only market participants that are exceeding an order-to-trade ratio of 999 (*i.e.*, Tier 1). The Exchange believes it's equitable and not unfairly discriminatory to aggregate a Market Maker's order flow with any affiliated Member sharing at least 75% common ownership even if such affiliated Member is not a Market Maker in order to prevent Market Makers from shifting their order flow and trading activity to their non-Market Maker affiliate in order to circumvent the proposed fees. As such, the Exchange believes that the proposed change neither favors nor penalizes one or more categories of market participants in a manner that would impose an undue burden on competition. Rather, the proposal seeks to benefit all market participants by encouraging the efficient utilization of the Exchange's network while taking into account the important liquidity provided by Market Makers. As discussed above potential impact on exchange systems, bandwidth and capacity becomes greater with increased order-to-trade ratios. The Exchange also anticipates that the vast majority of Market Makers on the Exchange will not be subject to any fees under the proposed tiers. Accordingly, the Exchange believes that the proposed

<sup>15</sup> See Securities Exchange Act Release No. 73639 (November 19, 2014), 79 FR 72251 (December 5, 2014) (File No. S7-01-13) (Regulation SCI Adopting Release).

Order-to-Trade Ratio Fees does not favor certain categories of market participants in a manner that would impose a burden on competition.

The Exchange also 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. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues they may participate on and direct their order flow, including 15 other options exchanges. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 16% of the market share. Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchanges if they deem fee levels at those other venues to be more favorable. Moreover, 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.” 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’. . . .” Accordingly, the Exchange does not believe its proposed fee change 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 is effective upon filing pursuant to Section 19(b)(3)(A) <sup>16</sup> of the Act and subparagraph (f)(2) of Rule 19b-4 <sup>17</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such 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 shall institute proceedings under Section 19(b)(2)(B) <sup>18</sup> of the Act 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGX-2023-023 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-CboeEDGX-2023-023. 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 (<https://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-CboeEDGX-2023-023, and should be submitted on or before May 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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**SURFACE TRANSPORTATION BOARD**

[Docket No. FD 36688]

**Green Mountain Railroad Corporation—Trackage Rights Exemption—New England Central Railroad, Inc.**

Green Mountain Railroad Corporation (GMRC) has filed a verified notice of exemption under 49 CFR 1180.2(d)(7) for acquisition of overhead trackage rights over approximately 61.4 miles of rail line owned by New England Central Railroad, Inc. (NECR), between milepost 14.46 at White River Junction, Vt., and milepost 99.0 at Millers Falls, Mass. (the Line).<sup>1</sup>

<sup>19</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> GMRC notes that, due to the Line's history, the mileposts are not indicative of the Line's total route miles and the stated distance is accurate although the mileposts could suggest otherwise.

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>17</sup> 17 CFR 240.19b-4(f)(2).

<sup>18</sup> 15 U.S.C. 78s(b)(2)(B).