

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³¹

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92169; File No. SR-CBOE-2021-038]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule Relating to the Sale of Historical Intraday Open-Close Volume Data

June 14, 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 June 1, 2021, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) 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 Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to amend its Fees Schedule relating to the sale of historical Intraday Open-Close volume data. 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://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), 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 Fees Schedule to offer a free trial during the months of June and July 2021 for an ad-hoc request of three (3) historical months of Intraday Open-Close historical data to all Cboe Options Trading Permit Holders (“TPHs”) and non-TPHs who have never before subscribed to the Intraday Open-Close historical files.

By way of background, the Exchange historically offered Open-Close Data, which is an end-of-day volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), price, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). The Open-Close Data is proprietary Cboe Options trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed. The recently adopted Intraday Open-Close Data provides similar information to that of Open-Close Data but is produced and updated every 10 minutes during the trading day. Data is captured in “snapshots” taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period.³ The Intraday Open-Close Data provides a volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), and transaction type (opening or closing). The customer and professional customer volume are further broken down into

³ For example, subscribers to the intraday product will receive the first calculation of intraday data by approximately 9:42 a.m. ET, which represents data captured from 9:30 a.m. to 9:40 a.m. Subscribers will receive the next update at 9:52 a.m., representing the data previously provided together with data captured from 9:40 a.m. through 9:50 a.m., and so forth. Each update will represent the aggregate data captured from the current “snapshot” and all previous “snapshots.”

trade size buckets (less than 100 contracts, 100–199 contracts, greater than 199 contracts). The Intraday Open-Close Data is also proprietary Cboe Options trade data and does not include trade data from any other exchange.

Cboe LiveVol, LLC (“LiveVol”), a wholly owned subsidiary of the Exchange’s parent company, Cboe Global Markets, Inc., makes the Intraday Open-Close Data available for purchase to TPHs and non-TPHs on the LiveVol DataShop website (datashop.cboe.com). Customers may currently purchase Intraday Open-Close Data on a subscription basis (monthly or annually) or by ad hoc request for a specified month (e.g., request for Intraday Open-Close Data for month of January 2021). The Exchange seeks only to adopt a free trial for historical ad hoc requests for Intraday Open-Close Data for new purchasers. Currently, ad hoc requests for historical Intraday Open-Close Data are available to all customers at the same price and in the same manner. The current charge for this historical Intraday Open-Close Data covering all of the Exchange’s securities (Equities, Indexes & ETF’s) is \$1,000 per month. The Exchange now proposes to adopt a free trial available during the months of June and July 2021 to provide up to three (3) historical months of Intraday Open-Close Data to any TPH or non-TPH that has not previously subscribed to this offering.⁴ The Exchange believes the proposed trial will serve as an incentive for new users to start purchasing Intraday Open-Close historical data. Particularly, the Exchange believes it will give potential subscribers the ability to use and test the data offering before signing up for additional months. The Exchange also notes another exchange offers a free trial for new subscribers of a similar data product.⁵ Lastly, the purchase of Intraday Open-Close historical data is discretionary and not compulsory.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with

⁴ For example, if a TPH or non-TPH that has never made an ad-hoc request for a specified month of Intraday Open-Close historical data wishes to purchase Intraday Open-Close Data for the months of January, February and March 2021 during the month of June 2021, the historical files for those months would be provided free of charge. If a new user wishes to purchase Intraday Open-Close historical data for the months of January, February, March and April 2021 during the month of June 2021, then the data for January, February and March 2021 would be provided free of charge, and the new user would be charged \$1,000 for the April 2021 historical file.

⁵ See Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

³¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 believes that the proposed rule change is consistent with the objectives of Section 6(b)(5)⁸ 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, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes that the proposed free trial for any TPH or non-TPH who has not previously purchased Intraday Open-Close historical data is reasonable because such users would not be subject to fees for up to 3 months' worth of Intraday Open-Close historical data. The Exchange believes the proposed free trial is also reasonable as it will give potential subscribers the ability to use and test the Intraday Open-Close historical data prior to purchasing additional months and will therefore encourage and promote new users to purchase the Intraday Open-Close historical data. The Exchange believes that the proposed discount is equitable and not unfairly discriminatory because it will apply equally to all TPHs and non-TPHs who have not previously purchased Intraday Open-Close historical data. Lastly, as noted above, another exchange offers a free trial to new users for a similar data product¹⁰ and purchase of this data product is discretionary and not compulsory.

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. 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 rule change will apply to all TPHs and non-TPHs who have never made an ad-hoc request to purchase Intraday Open-Close historical data. Moreover, purchase of Intraday Open-Close historical files is discretionary and not compulsory.

The Exchange does not believe that the proposed rule changes 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 applies only to Cboe Options. Furthermore, another exchange currently offers a similar free trial to new users of a similar data product.¹¹

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)¹² of the Act and subparagraph (f)(2) of Rule 19b-4¹³ 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)¹⁴ 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CBOE-2021-038 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-CBOE-2021-038. 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-CBOE-2021-038 and should be submitted on or before July 15, 2021.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

⁹ *Id.*

¹⁰ See Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

¹¹ See Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(2).

¹⁴ 15 U.S.C. 78s(b)(2)(B).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92207; File Nos. SR-BX-2021-018; SR-C2-2021-008; SR-CBOE-2021-030; SR-CboeBYX-2021-011; SR-CboeBZX-2021-034; SR-CboeEDGA-2021-010; SR-CboeEDGX-2021-024; SR-GEMX-2021-03; SR-ISE-2021-08; SR-MRX-2021-05; SR-NASDAQ-2021-029; SR-PHLX-2021-25]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe C2 Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Cboe Exchange, Inc.; Nasdaq BX, Inc.; Nasdaq GEMX, LLC; Nasdaq ISE, LLC; Nasdaq MRX, LLC; NASDAQ PHLX LLC and The NASDAQ Stock Market LLC; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Adopt a Fee Schedule To Establish Fees for Industry Members Related to the National Market System Plan Governing the Consolidated Audit Trail

June 17, 2021.

I. Introduction

On April 21, 2021, Cboe BYX Exchange, Inc. (“CboeBYX”), Cboe BZX Exchange, Inc. (“CboeBZX”), Cboe C2 Exchange, Inc. (“C2”), Cboe EDGA Exchange, Inc. (“Cboe EDGA”), Cboe EDGX Exchange, Inc. (“Cboe EDGX”), Cboe Exchange, Inc. (“Cboe”), NASDAQ BX, Inc. (“BX”), Nasdaq GEMX, LLC (“GEMX”), Nasdaq ISE, LLC (“ISE”), Nasdaq MRX, LLC (“MRX”), NASDAQ PHLX LLC (“Phlx”), The NASDAQ Stock Market LLC (“Nasdaq”) (collectively, the “Nasdaq and Cboe Participants”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) ¹ and Rule 19b-4 thereunder,² proposed rule changes ³ to

adopt a fee schedule to establish fees for Industry Members ⁴ related to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan” or “Plan”).⁵ The proposed rule changes were immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁶ The proposed rule changes were published for comment in the **Federal Register** on May 10, 2021.⁷ The Commission has received no comments on the proposed rule changes.

Pursuant to Section 19(b)(3)(C) of the Act, the Commission is hereby: (1) Temporarily suspending the proposed rule changes; and (2) instituting proceedings to determine whether to approve or disapprove the proposals.

II. Summary of the Proposed Rule Changes ⁸

In July 2012, the Commission adopted Rule 613 of Regulation NMS, which required national securities exchanges and national securities associations (“Participants”) ⁹ to jointly develop and

91755 (May 4, 2021), 86 FR 25035 (May 10, 2021) (SR-ISE-2021-08); 91756 (May 4, 2021), 86 FR 24979 (May 10, 2021) (SR-GEMX-2021-03); 91757 (May 4, 2021), 86 FR 24911 (May 10, 2021) (SR-C2-2021-008); 91758 (May 4, 2021), 86 FR 25004 (May 10, 2021) (SR-CboeEDGX-2021-024); 91759 (May 4, 2021), 86 FR 24956 (May 10, 2021) (SR-CboeEDGA-2021-010); 91760 (May 4, 2021), 86 FR 24966 (May 10, 2021) (SR-CBOE-2021-030); 91761 (May 4, 2021), 86 FR 25016 (May 10, 2021) (SR-CboeBYX-2021-011); and 91762 (May 4, 2021), 86 FR 24931 (May 10, 2021) (SR-CboeBZX-2021-034).

⁴ The CAT NMS Plan defines “Industry Member” as “a member of a national securities exchange or a member of a national securities association.” See CAT NMS Plan, *infra* note 5, at Section 1.1.

⁵ The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (November 15, 2016), 81 FR 84696 (November 23, 2016). The CAT NMS Plan functions as the limited liability company agreement of the jointly owned limited liability company formed under Delaware state law through which the Participants conduct the activities of the CAT (“Company”). On August 29, 2019, the Participants replaced the CAT NMS Plan in its entirety with the limited liability company agreement of a new limited liability company named Consolidated Audit Trail, LLC, which became the Company. See Securities Exchange Act Release No. 87149 (September 27, 2019), 84 FR 52905 (October 3, 2019).

⁶ 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).

⁷ See *supra* note 3.

⁸ For a more detailed description of the proposed rule changes, see Notice, *supra* note 3.

⁹ The Participants include BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors’ Exchange LLC, Long-Term Stock

submit to the Commission a national market system plan (“NMS plan”) to create, implement, and maintain a consolidated audit trail (“CAT”) ¹⁰ that would capture customer and order event information for orders in NMS securities. On November 15, 2016, the Commission approved the CAT NMS Plan required by Rule 613.¹¹ Under the CAT NMS Plan, the Operating Committee of a newly formed company—CAT NMS, LLC, of which each Participant is a member—has the discretion (subject to the funding principles set forth in the CAT NMS Plan) to establish funding for the Company to operate the CAT, including establishing fees to be paid by the Participants and Industry Members.¹²

The Plan specified that, in establishing the funding of the Company, the Operating Committee shall establish “a tiered fee structure in which the fees charged to: (i) CAT Reporters that are Execution Venues, including ATSs, are based upon the level of market share; (ii) Industry Members’ non-ATS activities are based upon message traffic; and (iii) the CAT Reporters with the most CAT-related activity (measured by market share and/or message traffic, as applicable) are generally comparable (where, for these comparability purposes, the tiered fee structure takes into consideration affiliations between or among CAT Reporters, whether Execution Venues and/or Industry Members).” ¹³ Under the Plan, such fees are to be implemented in accordance with various funding principles, including an “allocation of the Company’s related costs among Participants and Industry Members that is consistent with the Exchange Act taking into account . . . distinctions in the securities trading operations of Participants and Industry Members and their relative impact upon the Company resources and operations” and the “avoid[ance of] any disincentives such as placing an inappropriate burden on competition and reduction in market quality.” ¹⁴

Exchange, Inc., MEMX LLC, Miami International Securities Exchange LLC, MIAx Emerald, LLC, MIAx PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

¹⁰ See Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (August 1, 2012).

¹¹ See *supra* note 5.

¹² See CAT NMS Plan, *supra* note 5, at Section 11.1(b).

¹³ *Id.* at Section 11.2(c). See Article XI of the CAT NMS Plan for additional detail. *Id.* at Article XI.

¹⁴ *Id.* at Section 11.2(b) and (e).

¹⁵ 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 Nos. 91750 (May 4, 2021), 86 FR 25045 (May 10, 2021) (SR-BX-2021-018) (“Notice”); 91751 (May 4, 2021), 86 FR 24941 (May 10, 2021) (SR-PHLX-2021-25); 91752 (May 4, 2021), 86 FR 24921 (May 10, 2021) (SR-NASDAQ-2021-029); 91753 (May 4, 2021), 86 FR 24994 (May 10, 2021) (SR-MRX-2021-05);