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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87469; File No. SR-CboeEDGX-2019-068]

### **Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fee Schedule to Adopt a New Type of Tier Related to Automated Improvement Mechanism Customer Volume**

November 5, 2019

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> notice is hereby given that on November 1, 2019, Cboe EDGX Exchange, Inc. (“Exchange” or “EDGX”) 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 EDGX Exchange, Inc. (the “Exchange” or “EDGX”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change 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.

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

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

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 for its equity options platform ("EDGX Options"), effective November 1, 2019.

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 21% of the market share and currently the Exchange represents only 3% of the market share.<sup>3</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

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<sup>3</sup> See Cboe Global Markets U.S. Options Market Volume Summary (October 29, 2019), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

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's Fees Schedule sets forth standard rebates and rates applied per contract. For example, the Exchange provides a standard rebate of \$0.01 per contract for Customer orders that add liquidity in both Penny and Non-Penny Securities. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

For example, the Exchange currently offers four non-complex Customer Volume Tiers under Footnote 1 of the fee schedule which provide enhanced rebates between \$0.10 and \$0.21 per contract for qualifying Customer orders which meet certain total volume thresholds and yield fee codes "PC"<sup>4</sup> and "NM"<sup>5</sup>. Under the current non-complex Customer Volume Tiers, a Member receives a reduced fee between \$0.10 and \$0.21 per contract, where the Member has an ADV<sup>6</sup> in Customer orders greater or equal to a specified percentage of OCV<sup>7</sup> (Tiers 1 - 3). Members also have an opportunity to receive a reduced fee of \$0.21 per contract under Tier 4 where the

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<sup>4</sup> Appended to Customer Penny Pilot orders and provided a rebate of \$0.01.

<sup>5</sup> Appended to Customer non-Penny Pilot orders and provided a rebate of \$0.01.

<sup>6</sup> "ADV" means average daily volume calculated as the number of contracts added or removed, combined, per day. ADV is calculated on a monthly basis. See Cboe EDGX Options Exchange Fee Schedule.

<sup>7</sup> "OCV" means the total equity and ETF options volume that clears in the Customer range at the Options Clearing Corporation ("OCC") for the month for which the fees apply, excluding volume on any day that the Exchange experiences an Exchange System Disruption and on any day with a scheduled early market close. See Cboe EDGX Options Exchange Fee Schedule.

Member satisfies an additional criteria by also reaching another specified ADV threshold in Customer or Market Maker orders. The Exchange now proposes to adopt a new type of tier related to Customer volume under proposed footnote 9 (Automated Improvement Mechanism (“AIM”) Tier) applicable to orders yielding fee code “BC”, which are appended to Customer AIM Agency orders. The Exchange notes that orders yielding fee code BC are currently provided a rebate of \$0.14, and it now proposes to reduce this rebate to \$0.11 and, instead, offer a rebate of \$0.14 for such orders where a Member reaches the proposed AIM Tier.

Specifically, the proposed AIM Tier provides Members an additional opportunity and alternative means to receive a rebate for meeting the corresponding proposed criteria. Pursuant to the proposed changes, all orders yielding the fee code BC would receive a base rebate of \$0.11 and a Member would receive an enhanced rebate of \$0.14 on such orders where they have an ADV in Customer orders greater than or equal to .35% of the OCV. Members that achieve the proposed AIM Tier must therefore increase their overall Customer order flow, both adding and/or removing liquidity, as a percentage greater than or equal to 0.35% of the TCV. The Exchange believes the proposed enhanced rebates for both liquidity adding and removing Customer orders incentivizes increased overall order flow to the Book. The proposed tier provides both liquidity providing Members and liquidity executing Members on the Exchange an additional opportunity to receive a rebate. It is designed to provide Members that add liquidity by means of Customer orders on the Exchange a further incentive to contribute to a deeper, more liquid market, and Members executing Customer orders on the Exchange an incentive to increase transactions and take the execution opportunities provided by such increased liquidity. Increased overall Customer order flow benefits all market participants because it continues to attract liquidity to the Exchange by providing more trading opportunities, which attracts Market

Makers. An increase in Market Maker activity, in turn, facilitates tighter spreads, signaling additional corresponding increase in order flow from other market participants, which contributes towards a robust, well-balanced market ecosystem. In addition to this, although the proposed based rebate for orders yielding fee code BC is lower than the current base rebate for such orders, Members still have an opportunity to receive a base rebate for such orders, which is in line with similar fees for Customer orders in place on other options exchanges.<sup>8</sup> Members will now be able to achieve the higher rebate for orders yield fee code BC pursuant to the proposed AIM Tier described above, which is tied to the levels of a Member's Customer order flow. Therefore, the reduced base rebate for orders yielding fee code BC is balanced by the rebate opportunity pursuant to the proposed AIM Tier and helps support the Exchange's objective in implementing the proposed tier to encourage an overall increase in Customer order flow and facilitate improved market quality on the Exchange.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,<sup>9</sup> in general, and furthers the requirements of Section 6(b)(4),<sup>10</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. The Exchange 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

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<sup>8</sup> See MIA X Options Section 1(a)(iii), Priority Customer Rebate Program, which provides a base rebate of \$0.10 for Customer Price Improvement Mechanism ("PRIME") Agency orders, which are comparable to orders yielding fee code BC on the Exchange (i.e. Customer AIM Agency orders).

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

<sup>10</sup> 15 U.S.C. 78f(b)(4).

incentives to be insufficient. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members.

In particular, the Exchange believes the proposed tier is reasonable because it provides an additional opportunity for Members to receive a rebate by providing a different set of criteria they for which they can compete. The Exchange notes that volume-based incentives and discounts have been widely adopted by exchanges<sup>11</sup>, including the Exchange<sup>12</sup>, and are reasonable, equitable and non-discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume and/or growth thresholds. These competing pricing schedules, moreover, are

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<sup>11</sup> See e.g., Cboe BZX U.S. Options Exchange Fee Schedule, Footnotes 1 and 12, Customer Penny Pilot and Non-Penny Pilot Add Volume Tiers which provide enhanced rebates for Customer orders where Members meet certain volume thresholds; see also supra note 8.

<sup>12</sup> See e.g., Cboe EDGX U.S. Options Exchange Fee Schedule, Footnote 1, Customer Volume Tiers, which provide enhanced rebates between \$0.10 and \$0.21 per contract for non-complex Customer Penny and Non-Penny orders where Members meet certain volume thresholds.

presently comparable to those that the Exchange provides, including pricing incentives tied to comparable tiers.<sup>13</sup>

Moreover, the Exchange believes the proposed AIM Tier is a reasonable means to encourage Members to increase Customer volume on the Exchange. Particularly, the Exchange believes the proposed tier is reasonable because it will encourage increased Customer volume, thus a deeper, more liquid market, and an increase in transaction opportunities for all market participants provided by the increased Customer liquidity. As stated, increased Customer order flow provides continued liquidity to the Exchange, in that it provides additional transaction opportunities which attract Market Makers. Increased Market Maker activity facilitates tighter spreads and signals an increase in additional order flow from other market participants. In turn, these increases benefit all Members by contributing towards a robust and well-balanced market ecosystem. Also, increased overall order flow benefits all investors by deepening the Exchange's liquidity pool, providing greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency, and improving investor protection. Additionally, the Exchange believes the proposed reduction in the base rebate for orders yielding fee code BC is reasonable because Members still have an opportunity to receive a rebate for such orders, albeit at a lesser amount. Moreover, the reduced base rebate is still higher than offered at other exchanges for similar transactions.<sup>14</sup> As described above, the Exchange will continue to offer an opportunity to receive the \$0.14 rebate, but will now tie it to a requirement to increase Members' Customer

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<sup>13</sup> See e.g., Cboe BZX U.S. Options Exchange Fee Schedule, Footnotes 1 and 12, Customer Penny Pilot and Non-Penny Pilot Add Volume Tiers, which provide enhanced rebates between \$0.35 - \$1.05 per contract where Members, among other things including a cross-asset threshold, meet a specified level of ADAV in Customer orders as a percentage of OCV.

<sup>14</sup> See supra note 8.

order flow. Accordingly, balancing the reduced base rebate for orders yielding fee code BC with the higher rebate opportunity for such orders helps support Exchange's objective in implementing an incentive to encourage an increase in Customer order flow and contribution to enhanced market quality on the Exchange.

The Exchange also believes that the proposed rebate amount and criteria under the AIM Tier does not represent a significant departure from the rebates currently offered, or required criteria, under the Exchange's existing Customer Volume Tiers. For example, under existing non-complex Customer Volume Tier 1 (applicable to orders yielding fee code PC or NC which are provided a standard rebate of \$0.01), if a Member has a daily average volume (ADV) of 0.35% or greater than the OCV the Member receives a rebate of \$0.10 per share. The Exchange believes the proposed tier criteria and rebate of \$0.14 is comparable to this existing tier, especially given that orders yielding fees code PC or NC receive a standard rebate of \$0.01 as compared to the \$0.11 base rebate (as proposed) for orders yielding fee code BC.

The Exchange believes that the proposed tier represents an equitable allocation of fees and is not unfairly discriminatory because it applies uniformly to all Members. All Members are eligible for the proposed AIM tier, would have the opportunity to meet the tier's criteria (which the Exchange believes is less stringent than other existing Customer Volume tiers),<sup>15</sup> and would receive the proposed rebate if such criteria is met. While the Exchange has no way of knowing whether this proposed rule change would definitively result in any particular Member qualifying for the proposed tier or if it would otherwise impact Member activity, the Exchange anticipates at least three Members meeting, or being reasonably able to meet, the proposed criteria.

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<sup>15</sup> See e.g., Cboe EDGX U.S. Options Exchange Fee Schedule, Footnote 1, Customer Volume Tiers 2-4, which require a Member to have an ADV of over 0.35% (as proposed in the AIM Tier) of the OCV.

Accordingly, the Exchange believes the proposed tier is reasonably designed to provide an incentive for Members interested in meeting the tier criteria to submit additional Customer volume to achieve the proposed rebate. The Exchange lastly notes that the proposed tier will not adversely impact any Member's pricing or their ability to qualify for other tiers. Rather, should a Member not meet the proposed criteria, the Member will merely not receive the proposed reduced fee. Furthermore, the proposed rebate would uniformly apply to all Members that meet the required criteria under proposed AIM Tier. Likewise, the Exchange believes that the proposed reduction in the base rebate for orders yielding fee code BC represents an equitable allocation of rebates and is not unfairly discriminatory because it is balanced by the higher rebate for such orders provided under the proposed AIM Tier and Members will continue to have the opportunity to receive a base rebate on such orders which will also continue to uniformly apply to all such orders.

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 additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all Members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>16</sup>

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<sup>16</sup> Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

The Exchange believes the proposed rule change does impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed change applies to all Members equally in that all Members are eligible for the proposed tier, have a reasonable opportunity to meet the tier's criteria and will all receive the proposed rebate if such criteria is met. Additionally, the proposed change is designed to attract additional order flow to the Exchange. The Exchange believes that the proposed tier would incentivize market participants to direct both liquidity providing and executable order flow to the Exchange. Greater overall order flow benefits all market participants on the Exchange by providing more trading opportunities and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem, which benefits all market participants.

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. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 21% of the market share.<sup>17</sup> Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues 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,

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<sup>17</sup> See supra note 3.

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.”<sup>18</sup> 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’ ....”<sup>19</sup> 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 has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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<sup>18</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>19</sup> *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)).

### 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 Act<sup>20</sup> and paragraph (f) of Rule 19b-4<sup>21</sup> 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.

### 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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGX-2019-068 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.

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<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f).

All submissions should refer to File Number SR-CboeEDGX-2019-068. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-2019-068 and should be submitted on or before **[INSERT DATE 21 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]**.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

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<sup>22</sup> 17 CFR 200.30-3(a)(12).

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