

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-92493; File No. SR-CboeEDGX-2021-034]

### Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fee Schedule

July 26, 2021.

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 July 13, 2021, 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, 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 the 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 applicable to its equities trading platform (“EDGX Equities”) to introduce a new Retail Membership Program (the “Program”), which offers discounted membership fees, port fees and market data fees, along with the opportunity to receive enhanced rebates under new retail volume tiers, for up to 18 months for new retail member organizations.<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 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Exchange Act, to which market participants may direct their order flow. Based on publicly available information,<sup>5</sup> no single registered equities exchange has more than 16% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. Additionally, the competition for retail order flow is even more intense, particularly as it relates to exchange versus off-exchange venues.

The purpose of this filing is to encourage smaller, retail-oriented market participants that are not currently EDGX Equities members to become members by discounting certain fixed costs associated with EDGX Equities membership and providing an opportunity to receive enhanced rebates for retail transactions. By way of background, the Exchange currently charges member organizations certain fixed costs related to Exchange membership, including the membership fees and port fees, and also assesses fees for market data products, all of which are filed with the Commission and set forth in the Exchange’s Fee Schedule. Also, by way of background, the

Exchange operates a “Maker-Taker” model whereby it pays rebates to members that add liquidity and assesses fees to those that remove liquidity. The Exchange’s Fee Schedule sets forth the standard rebates and rates applied per share for orders that provide and remove liquidity, respectively. 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.

As discussed more fully below, the Exchange proposes to introduce the Program, which would offer significant discounts for up to 18 months following approval as a new member on membership fees, port fees and certain market data fees for new member organizations, subject to specific restrictions. These discounts would be available to smaller New Members for the duration of the Program but would be phased out the last six months of the Program as the New Member grows. The Program would also provide an opportunity for new members to receive enhanced rebates on their retail order flow, as described more fully below. The Exchange believes that the proposed Program would make membership easier for a greater number of market participants and provide increased incentives for retail equity trading firms that are not currently Exchange members to apply for Exchange membership. The Exchange believes that having more members trading on the Exchange would benefit investors through the additional display of liquidity and increased execution opportunities on the Exchange. In addition, the Exchange believes that incentivizing specifically smaller, retail broker-dealers to become members could increase the amount of retail order flow sent to a public exchange, thereby encouraging greater participation and liquidity.

The Exchange proposes to codify the Program under Footnote 3 of the Fee Schedule.<sup>6</sup> The Exchange also notes that

<sup>4</sup> The Exchange initially filed the proposed fee changes July 1, 2021 (SR-CboeEDGX-2021-032). On July 13, 2021, the Exchange withdrew that filing and submitted this proposal.

<sup>5</sup> See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (June 29, 2021), available at [https://markets.cboe.com/us/equities/market\\_statistics/](https://markets.cboe.com/us/equities/market_statistics/).

<sup>6</sup> The Exchange proposes to relocate the existing Retail Volume Tier program from Footnote 3 to Footnote 2 of the Fee Schedule (which currently is “Reserved”) and codify the new Retail Equities Membership Program under Footnote 3. The Exchange proposes to append a reference to Footnote 2 to fee code ZA in the Fee Codes and Associated Fee Table to reflect this change.

<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.

the Program is similar to a program adopted by another exchange that similarly provides discounts on membership, connectivity and market data fees for new members for the similar purpose of encouraging smaller, retail-oriented market participants to become members of the exchange.<sup>7</sup>

#### General Eligibility and Restrictions

To be eligible to participate in the Program, a new member organization must be approved as a Retail Member Organization<sup>8</sup> and must not have been approved as an EDGX Equities member organization within the eighteen (18) months prior to approval (“New Member”) as an RMO. Members that were approved as an RMO on or after January 1, 2021 are still eligible for the Program provided they were not approved as an EDGX Equities RMO member within the 18 months prior to their approval as an RMO. Additionally, at least 90% of a New Member’s submitted orders to EDGX Equities each month must be Retail Orders<sup>9</sup> in order to maintain eligibility in the program for that month. Eligibility for discounts begins in the month that a new membership application is approved.<sup>10</sup> A New Member is only eligible to enroll in the Program once. A New Member that is, or becomes, an “affiliate” of an existing member organization, defined as having at least 75% common ownership between the two entities as reflected on each entity’s Form BD, is

<sup>7</sup> See Securities Exchange Act Release No. 91626, (April 21, 2021) 86 FR 22287 (April 27, 2021) (SR–NYSE–2021–22). See also New York Stock Exchange Price List 2021, NYSE Membership On-Range Program.

<sup>8</sup> A “Retail Member Organization” or “RMO” is a Member (or a division thereof) that has been approved by the Exchange under this Rule to submit Retail Orders. See EDGX Rule 11.21(a)(1).

<sup>9</sup> A “Retail Order” is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See EDGX Rule 11.21(a)(2). The Exchange will exclude from its calculation the 90% Retail Order threshold shares added, removed or routed on any day the Exchange’s system experiences a disruption that lasts for more than 60 minutes during Regular Trading Hours (“Exchange System Disruption”), on any day with a scheduled early market close, and on the last Friday in June (the “Russell Reconstitution Day”), consistent with the Exchange’s calculation of ADAV and ADV. See Exchange Fee Schedule, Definitions.

<sup>10</sup> An eligible RMO that was approved between January 1, 2021 and June 30, 2021 would be eligible to start receiving discounts and enhanced rebates beginning July 2021 (*i.e.*, would not apply to fees assessed prior to July 1, 2021) and the Program would terminate 18 months after July 2021 (*i.e.*, December 2022 would be the last month the firm is eligible to receive the discounts and enhanced rebates under the Program).

ineligible to participate in the Program. The Program would terminate after the 18th month of membership in the Program and the discounted fees discussed below will be charged to that member at the regular rate set forth in the Exchange’s fee schedule, as applicable, from that point forward.

#### Membership Fee

The Exchange currently assesses a yearly Membership Fee of \$2,500, which is generally assessed at the end of each year for membership in the following calendar year. For any month in which a firm is approved for membership with the Exchange after the renewal period, the Firm Membership Fee is pro-rated beginning on the date on which membership is approved. The pro-rated fee is calculated based on the remaining trading days in that year and assessed in the month following membership approval. The fee is also non-refundable in the event that the firm ceases to be a Member following the date on which fees are assessed.<sup>11</sup> The Exchange proposes to reduce the Membership Fee for a New Member as follows:

- *1–12 Months*: The Exchange proposes to waive the annual Membership Fee in its entirety for any New Member.
- *13–18 months*: For New Members that are still in the program at 13 months, the proposed discount will be based on a New Member’s Retail ADV<sup>12</sup> as a percentage of TCV<sup>13</sup> in December of the year the annual fee is assessed<sup>14</sup> as follows:

- A New Member that has Retail ADV of less than 0.10% of TCV will receive 100% discount on its annual Membership Fee (*i.e.*, the Exchange will waive the annual Membership Fee in its entirety)

- A New Member that has a Retail ADV greater than or equal to 0.10% of

<sup>11</sup> However, if a Member is pending a voluntary termination of rights as a Member pursuant to Exchange Rule 2.8 prior to the date any Membership Fee for a given year will be assessed, and the Member does not utilize the facilities of the Exchange during such time, then the Member is not obligated to pay the annual Membership Fee.

<sup>12</sup> “ADV” means average daily volume calculated as the number of shares added to, removed from, or routed by, the Exchange, or any combination or subset thereof, per day. ADV is calculated on a monthly basis.

<sup>13</sup> “TCV” means total consolidated volume calculated as the volume reported by all exchanges and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

<sup>14</sup> For example, for a New Member that is still in the Program between 13–18 months during 2022, the Exchange would use the New Member’s Retail ADV as a percentage of TCV in the month of December 2022 to determine what discount the New Member is eligible to receive for the annual Membership Fee assessed for 2023.

TCV will receive a 50% of the annual Membership Fee.

- A New Member that has a Retail ADV greater than or equal to 0.20% of TCV will not receive any discount on the annual Membership Fee.

#### Physical Ports

The Program would next provide discounts on physical ports. By way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange’s servers are located. The Exchange currently assesses the following non-Disaster Recovery physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 gigabyte (“Gb”) circuit and \$7,500 per physical port for a 10 Gb circuit. The Exchange proposes to provide New Members the following physical port discounts:

- *1–12 Months*: The Exchange proposes to provide a 100% discount for one 1 Gb physical port (*i.e.*, waive the entire fee for one 1 Gb physical port each month). If a New Member purchases a 10 Gb physical port in lieu of a 1 Gb physical port, the Exchange will provide a credit in the amount of the fee for one 1 Gb physical port (currently \$2,500 per month).<sup>15</sup>

- *13–18 months*: For New Members that are still in the program at 13 months, the proposed discount each month will be based on a New Member’s Retail ADV as a percentage of TCV in that month as follows:

- A New Member that has Retail ADV of less than 0.10% of TCV will receive 100% discount on one 1 Gb physical port (if a New Member purchases a 10 Gb physical port in lieu of a 1 Gb physical port, the Exchange will provide a credit in the amount of the fee for one 1 Gb physical port).

- A New Member that has a Retail ADV greater than or equal to 0.10% of TCV will receive a 50% discount on one 1 Gb physical port (if a New Member purchases a 10 Gb physical port in lieu of a 1 Gb physical port, the Exchange will provide a credit in the amount of

<sup>15</sup> The Exchange notes that the credit provided for physical ports shall not be in excess of the cost of one 1 Gb physical port nor in excess of the total amount actually billed to a New Member as and for physical ports each month. For example, if a New Member purchases a 10 Gb physical port mid-month such that the New Member would be assessed a prorated rate of \$2,000 (instead of the full monthly \$7,500 fee), the Exchange will only credit the New Member \$2,000 (the amount the New Member was billed by the Exchange that month) and not \$2,500 (the cost of one 1 Gb physical port).

50% of the fee for one 1 Gb physical port (*i.e.*, \$1,250 per month)).<sup>16</sup>

- A New Member that has a Retail ADV greater than or equal to 0.20% of TCV will not receive any discount on its physical port fees.

**Logical Ports**

The Program would next provide discounts on its logical port fees. Currently, EDGX market participants may utilize a variety of logical connectivity ports. A logical port provides users with the ability within

the Exchange's system to accomplish a specific function through a connection, such as order entry, data receipt, or access to information. Currently, the Exchange assesses the following fees for the following logical ports (collectively referred to as "logical ports"):

Service	Cost per month
Logical Ports (excluding Purge Port, Multicast PITCH Spin Server Port or GRP Port) .....	\$550 per port.
Purge Ports .....	\$650 per port.
Multicast PITCH GRP Ports .....	\$550/primary (A or C Feed).
Multicast PITCH Spin Server Ports .....	\$550/set of primary (A or C feed).

The Exchange proposes to provide New Members the following logical port discounts (for up to 20 logical ports):<sup>17</sup>

- *1–12 Months:* The Exchange proposes to provide a 100% discount for up to 20 logical ports (*i.e.*, waive all fees for up to 20 logical ports).
- *13–18 months:* For New Members that are still in the program at 13 months, the proposed discount each month will be based on a New Member's Retail ADV as a percentage of TCV in that month as follows:
  - A New Member that has Retail ADV of less than 0.10% of TCV will receive 100% discount on up to 20 logical ports.

- A New Member that has a Retail ADV greater than or equal to 0.10% of TCV will receive a 50% discount on up to 20 logical ports.

- A New Member that has a Retail ADV greater than or equal to 0.20% of TCV will not receive any discount on its logical port fees.

**Market Data**

By way of background, the Exchange offers various market data products, including the following, to new member organizations on a voluntary, subscription basis: Cboe One Summary Feed,<sup>18</sup> Cboe One Premium Feed,<sup>19</sup> EDGX Depth Feed<sup>20</sup> and EDGX Top

Feed<sup>21</sup> ("Market Data Product"). Each market data product allows a vendor to redistribute certain data elements included in the data feed on a real-time basis. For each product, the Exchange charges associated fees set forth in the Exchange's Fee Schedule.<sup>22</sup> The market data fees that would be eligible for the Program are External Distribution Fees for Cboe One Summary Feed, Cboe One Premium Feed, EDGX Depth Feed and EDGX Top Feed and the Data Consolidation Fee for the Cboe One Summary Feed ("Eligible Market Data Fees"). The current fees for Eligible Market Data Fees are as follows:

Market data product	External distribution fee	Data consolidation fee
Cboe One Summary .....	\$5,000/mo .....	\$1,000/mo.
Cboe One Premium .....	12,500/mo .....	N/A.
EDGX Depth .....	2,500/mo .....	N/A.
EDGX Top .....	1,500/mo .....	N/A.

The Exchange proposes to provide New Members the following market data discounts:

- *1–12 Months:* The Exchange proposes to provide a 100% discount on Eligible Market Data Fees for Cboe One Summary, EDGX Depth and EDGX Top Data Fees and 44% discount on Eligible Market Data Fees for Cboe One Premium Data Feed.

- *13–18 months:* For New Members that are still in the program at 13 months, the proposed discount each month will be based on a New Member's Retail ADV as a percentage of TCV in that month as follows:
  - A New Member that has Retail ADV of less than 0.10% of TCV will receive 100% discount on Eligible Market Data Fees for Cboe One Summary, EDGX

Depth and EDGX Top Data Fees and 44% discount on Eligible Market Data Fees for Cboe One Premium Data Feed.

- A New Member that has a Retail ADV greater than or equal to 0.10% of TCV will receive a 50% discount on Eligible Market Data Fees for Cboe One Summary, EDGX Depth and EDGX Top Data Fees and 22% discount on Eligible

<sup>16</sup> The 50% discount rate will be based upon the amount of fees billed for up to one 1 Gb Physical Port. For example, if a New Member qualifies only for a 50% discount one month, and that New Member is assessed \$750 for physical port fees that month due to proration, the New Member will be credited \$375.

<sup>17</sup> If a New Member purchases more than 20 logical ports, the Exchange will calculate the average cost per port and provide a credit based on the average cost for 20 ports. For example, if an Exchange member were to purchase 18 order entry Logical Ports and 4 Purge Ports, that member would normally be assessed \$12,500 per month for logical port fees (*i.e.*, \$9,900 for Logical Ports (\$550 × 18) + \$2,600 for Purge Ports (\$650 × 4)). Under the Program, if a New Member purchased 18 order

entry Logical Ports and 4 Purge Ports (and qualified for the 100% discount), that New Member would receive a discount of approximately \$11,363 (*i.e.*, average rate of \$568.18 (\$12,500 divided by 22 ports) × 20 ports) and therefore would only be assessed \$1,137 (*i.e.*, average rate of \$568.18 × 2 remaining ports) as and for logical ports that month.

<sup>18</sup> Cboe One Summary Feed is a data feed that disseminates, on a real-time basis, the aggregate best bid and offer ("BBO") of all displayed orders for securities traded on EDGX and its affiliated equities exchanges and also contains individual last sale information for the EDGX and its affiliated equities exchanges.

<sup>19</sup> Cboe One Premium Feed is a data feed that disseminates, on a real-time basis, the aggregate best bid and offer ("BBO") of all displayed orders for

securities traded on EDGX and its affiliated exchanges and contains optional functionality which enables recipients to receive aggregated two-sided quotations from EDGX and its affiliated equities exchanges for up to five (5) price levels.

<sup>20</sup> EDGX Depth is a data feed that contains all displayed orders for listed securities trading on the Exchange, order executions, order cancellations, order modifications, order identification numbers, and administrative messages.

<sup>21</sup> EDGX Top Feed is an uncompressed data feed that offers both top-of-book quotations and execution information based on equity orders entered into the System.

<sup>22</sup> See Cboe EDGX Equities Fee Schedule, Market Data Fees.

Market Data Fees for Cboe One Premium Data Feed.

○ A New Member that has a Retail ADV greater than or equal to 0.20% of TCV will not receive any discount on Eligible Market Data Fees.

A New Member that was a subscriber to any of the Eligible Market Data Fees within the prior 18 months before becoming approved as an RMO is ineligible for Program's Market Data fee discounts. Program discounts cannot be combined with any other discounts applicable to Eligible Market Data Fees. For example, the Exchange offers certain discounts under the Small Retail Broker Distribution Program.<sup>23</sup> As proposed, the discounts under the Small Retail Broker Distribution Program could not be used if a new Member is receiving the discounts under the Program for Eligible Market Data Fees.

#### Volume Tier Rebates

The Exchange next proposes to adopt new Retail Membership Program Volume Tiers that would provide an additional opportunity for New Members to receive enhanced rebates from the standard rebate for Retail Orders that add liquidity (*i.e.*, yielding fee code "ZA")<sup>24</sup> if the New Member meets certain volume thresholds. The proposed new tiers would be available to New Members for the duration of the 18-month program and is designed to encourage New Members to increase their order flow in order to receive an enhanced rebate on their liquidity adding retail orders. The Exchange first proposes to adopt Retail Membership Program Volume Tier 1 which would provide an enhanced rebate of \$0.0033 per share where a New Member adds a Retail Order ADV (*i.e.*, yielding fee code ZA) greater than or equal to 0.10% of the TCV. The Exchange also proposes to adopt Retail Membership Program Volume Tier 2 which would provide an enhanced rebate of \$0.0034 per share where a Member adds a Retail Order ADV (*i.e.*, yielding fee code ZA) of greater than or equal to 0.20%.<sup>25</sup> The proposed new tiers are designed to encourage New Members to increase retail order flow on the Exchange which

further contributes to a deeper, more liquid market and provides even more execution opportunities for active market participants at improved prices.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>26</sup> in general, and furthers the objectives of Section 6(b)(4) and 6(b)(5),<sup>27</sup> in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members, issuers and other persons using its facilities.

The Exchange operates in a highly competitive market in which market participants can and do move order flow or discontinue or reduce use of certain categories of products, in response to fee changes. Moreover, in the current competitive market environment, market participants also have a choice of where to become members. Accordingly, the Exchange believes that it is reasonable to offer discounted membership fees, physical and logical port fees and certain market data fees for up to 18 months for new RMOs in order to provide an incentive for smaller retail broker-dealers to apply for Exchange membership. The Exchange believes that providing an incentive for retail broker-dealers that are not currently Exchange members to apply for membership would encourage market participants to become members of the Exchange and bring additional liquidity to a public market. In addition, the Exchange believes that the proposal could result in additional retail liquidity to a public exchange, to the benefit of all market participants. The Exchange believes creating incentives and opportunities for new retail members on the Exchange protects investors and the public interest by increasing the competition and liquidity on a transparent public market.

The Exchange also notes that relative volume-based incentives and discounts have been widely adopted by exchanges, including the Exchange, and are reasonable, equitable and non-discriminatory because they are open on an equal basis to similarly situated members 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. Competing equity exchanges offer similar tiered pricing structures, including schedules of

rebates and fees that apply based upon members achieving certain volume and/or growth thresholds, as well as assess similar fees or rebates for similar types of orders, to that of the Exchange.

Accordingly, the Exchange believes the proposed New Retail Membership Program Volume Tiers are reasonable as they provide New Members an opportunity to receive enhanced rebates for their liquidity adding retail orders. The Exchange believes that the proposed enhanced rebates under the Retail Membership Program Volume Tiers 1 and 2 are reasonable as they are in line with existing rebates under the existing Retail Volume Tiers, which similarly provide enhanced rebates to RMOs on their liquidity adding retail orders if they meet certain thresholds. Additionally, the Exchange believes the proposed rebates are commensurate with the proposed criteria. That is, the rebate reasonably reflects the difficulty in achieving the corresponding criteria as amended. The proposed Retail Membership Program Volume Tiers are designed as an incentive to any and all New Members interested in meeting the proposed tier criteria to submit additional adding retail order flow to the Exchange. The Exchange notes that greater add volume order flow provides for deeper, more liquid markets and execution opportunities, and greater remove volume order flow increases transactions on the Exchange, which incentivizes liquidity providers to submit additional liquidity and execution opportunities, thus, providing an overall increase in price discovery and transparency on the Exchange.

The Exchange believes that the proposal is also equitable and not unfairly discriminatory. In the prevailing competitive environment, members, including retail-focused members, are free to disfavor Exchange membership and the Exchange's pricing if they believe that alternatives offer them better value. The proposed discounted access to Exchange services for up to 18 months and proposed New Retail Membership Program Volume Tiers do not permit unfair discrimination because the proposed changes would apply to all similarly situated members, who would all benefit from the lower and discounted fees, as well as proposed enhanced rebates, on an equal basis. Indeed, the Exchange believes the proposed Program is equitable and not unfairly discriminatory because it's open to all eligible New Members. The Exchange also believes it's equitable and not unfairly discriminatory to apply the Program only to qualifying New

<sup>23</sup> See Cboe EDGX Equities Fee Schedule, Market Data Fees, Small Retail Broker Distribution Program.

<sup>24</sup> Orders yielding fee code "ZA" are Retail Orders that add liquidity and are assessed a standard rebate of \$0.00320 per share.

<sup>25</sup> The Exchange notes that should a New Member qualify for a higher rebate under the existing Retail Volume Tiers, the New Member would receive that higher rebate (*e.g.*, if a New Member adds a Retail Order ADV (*i.e.*, yielding fee code ZA) of greater than or equal to 0.45%, the New Member would receive the enhanced rebate of \$0.0037 per share under Retail Volume Tier 2).

<sup>26</sup> 15 U.S.C. 78f.

<sup>27</sup> 15 U.S.C. 78f(b)(4) and (5).

Members because it is designed to encourage new retail market participants to become RMOs on the Exchange that may not otherwise do so due in part to the costs associated with becoming members of an exchange. Also, the Exchange believes it's equitable and not unfairly discriminatory to apply the proposed Program only to RMOs. As noted above, competition for retail order flow is intense and the Exchange has historically adopted a variety of incentives to encourage retail participation on the Exchange, including offering enhanced rebates for retail order flow.<sup>28</sup> Moreover the proposed Program is designed to incentivize increased Retail Order flow on the Exchange, which orders are generally submitted in smaller sizes and tend to attract Market Makers, as smaller size orders are easier to hedge. Increased Market Maker activity facilitates tighter spreads, signaling an additional corresponding increase in order flow from other market participants, which contributes towards a robust, well-balanced market ecosystem. Increased overall order flow benefits all investors by deepening the Exchange's liquidity pool, potentially providing even 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. The Exchange additionally notes that while the Program is applicable only to New Members (that are RMOs), the Exchange does not believe this application is discriminatory as the Exchange offers alternative incentives for non-RMO order flow and also provides existing RMOs opportunities to receive enhanced rebates under existing volume tiers.<sup>29</sup> Similarly, the Exchange believes it's equitable and not unfairly discriminatory to reduce the available discounts for membership, physical and logical ports, and market data fees for New Members that reach a certain

<sup>28</sup> For example, the Exchange offers a higher standard rebate for Retail Orders that add liquidity (*i.e.*, orders yielding fee code "ZA") of \$0.00320 per share in lieu of the standard liquidity adding rebate of \$0.00160 per share. The Exchange also offers further enhanced rebates for qualifying RMOs under the existing Retail Volume Tiers. See EDGX Equities Fees Schedule, Fee Codes and Associated Fees and current Footnote 3, respectively.

<sup>29</sup> For example, the Exchange provides opportunities to all Members to receive an enhanced rebate on their order flow under the existing Add/Remove Volume Tiers. See EDGX Fee Schedule, Footnote 1. Additionally, RMOs may receive enhanced rebates for retail order flow under the existing Retail Volume Tiers. See EDGX Fee Schedule, current Footnote 3.

threshold of Retail ADV as a percentage of TCV during months 13–18 of the Program. As noted above, the proposed Program is designed to encourage new smaller, retail-oriented broker dealers to become members of the Exchange to become RMOs on the Exchange. The Exchange therefore believes it is reasonable and appropriate to reduce available discounts for non-transaction fees once a New Member has become more established and has grown to such degree that they are able to achieve the specified levels of Retail ADV as a percentage of TCV. Moreover, the Exchange notes that such members continue to be eligible to receive the enhanced rebates under the new Retail Membership Program Volume Tiers, as well as the further enhanced rebates under the existing Retail Volume Tiers, which directly corresponds to increased Retail ADV as a percentage of TCV. Accordingly, the Exchange believes that once a New Member is able to meet the specified thresholds, such New Members have less need to avail themselves of non-transaction fee discounts.

Lastly, the Exchange notes another exchange has adopted a similar 18-month program that provides for similar discounts on membership, connectivity and market data fees for the purpose of incentivizing smaller, retail-oriented broker dealers to become members of the Exchange.<sup>30</sup> For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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

The Exchange does not believe that the proposed rule changes will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Instead, as discussed above, the Exchange believes that the proposed changes would increase competition by reducing the cost of operating as an Exchange member, which the Exchange believes will enhance market quality through the submission of additional retail liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for members. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering integrated competition among orders, which promotes "more efficient pricing of

individual stocks for all types of orders, large and small."<sup>31</sup>

*Intramarket Competition.* The proposed changes are designed to attract additional Members and retail order flow to the Exchange. The Exchange believes that the proposed changes would continue to incentivize market participants to become Exchange members and direct order flow, especially retail order flow, to the Exchange. As discussed above, greater liquidity benefits all market participants on the Exchange by encouraging market participants to become Exchange members and send orders to the Exchange, thereby providing more trading opportunities and contributing to robust levels of liquidity on the Exchange, which benefits all market participants. The proposed lower fees and discounts would be available to all similarly situated market participants, and, as such, the proposed change would not impose a disparate burden on competition among market participants on the Exchange. As noted, the proposal would apply to all similarly situated members on the same and equal terms, who would benefit from the changes on the same basis. Moreover, the Exchange believes that it is appropriate to limit the proposed Program to New Member RMOs as the Exchange is attempting to increase retail participation and as discussed above, the presence of Retail Orders on EDGX has the potential to benefit all market participants. The Exchange notes that competition for retail order flow is particularly fierce and in that context, the Exchange believes that it is appropriate to provide additional incentives for retail-oriented broker dealers to become Members submit retail order flow. Accordingly, the proposed change would not impose a disparate burden on competition among market participants on the Exchange.

*Intermarket Competition.* 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 other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more

<sup>30</sup> See note 7, *supra*.

<sup>31</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

than 16% of the market share.<sup>32</sup> Therefore, no exchange possesses significant pricing power in the execution of 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, 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>33</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>34</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 neither solicited nor received comments on the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>35</sup> and paragraph (f) of Rule

19b-4<sup>36</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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CboeEDGX-2021-034 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-2021-034. 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-CboeEDGX-2021-034, and should be submitted on or before August 20, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2021-16228 Filed 7-29-21; 8:45 am]

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-92496; File No. SR-Phlx-2021-42]

### **Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Opening Process**

July 26, 2021.

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 July 19, 2021, Nasdaq PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### **I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange proposes to amend Phlx Options 3, Section 8, “Options Opening Process.”

The text of the proposed rule change is available on the Exchange’s website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

<sup>37</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>32</sup> *Supra* note 4. [sic].

<sup>33</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>34</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)).

<sup>35</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>36</sup> 17 CFR 240.19b-4(f).