

submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeEDGA–2022–011 and should be submitted on or before September 14, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>35</sup>

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*Assistant Secretary.*

[FR Doc. 2022–18189 Filed 8–23–22; 8:45 am]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–95529; File No. SR–CboeBZX–2022–038]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change To Amend Rule 11.28(a) To Extend the MOC Cut-Off Time

August 17, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on August 5, 2022, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, 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 BZX Exchange, Inc. (the “Exchange” or “BZX”) proposes to amend Rule 11.28(a) to extend the MOC Cut-Off Time from 3:35 p.m. Eastern Time to 3:49 p.m. Eastern Time. 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/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

Exchange Rule 11.28 (Cboe Market Close, a Closing Match Process for Non-BZX-Listed Securities) provides Members an optional closing match process for non-BZX-Listed securities known as Cboe Market Close (“CMC”). Currently, per Rule 11.28(a) (Order Entry) Members<sup>3</sup> may enter, cancel, or replace Market-on-Close (“MOC”) orders designated for participation in CMC beginning at 6:00 a.m. Eastern Time<sup>4</sup> up to 3:35 p.m. (“MOC Cut-Off Time”). The Exchange now proposes to move the MOC Cut-Off Time from 3:35 p.m. to 3:49 p.m. The Exchange is not proposing to make any other changes to the CMC process.

By way of background, on May 5, 2017, the Exchange filed a proposed rule change to adopt CMC, a match process for MOC orders in non-BZX listed securities and on December 1, 2017, filed Amendment No. 1<sup>5</sup> to that proposal (the “Original Proposal”).<sup>6</sup> On

<sup>3</sup> The term “Member” shall mean any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a “member” of the Exchange as that term is defined in Section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. See Rule 1.5(n), definition of “Member”.

<sup>4</sup> All times noted throughout are in Eastern Time.

<sup>5</sup> The only change in Amendment No. 1 was to rename the proposed closing match process as Cboe Market Close. Per the Commission, because Amendment No. 1 was a technical amendment and did not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 1 was not subject to notice and comment.

<sup>6</sup> See Securities Exchange Act Release No. 34–80683 (May 16, 2017), 82 FR 23320 (May 22, 2017) (SR–Bats–BZX–2017–34) (Notice of Filing of a Proposed Rule Change to Introduce Bats Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28).

January 17, 2018, the Commission, acting through authority delegated to the Division of Trading and Markets,<sup>7</sup> approved the Original Proposal (“Approval Order”).<sup>8</sup> On January 31, 2018, NYSE Group, Inc. (“NYSE”) and the Nasdaq Stock Market LLC (“Nasdaq”) filed petitions for review of the Approval Order (“Petitions for Review”). Pursuant to Commission Rule of Practice 431(e),<sup>9</sup> the Approval Order was stayed by the filing with the Commission of a notice of intention to petition for review.<sup>10</sup> On March 1, 2018, pursuant to Commission Rule of Practice 431, the Commission issued a scheduling order granting the Petitions of Review of the Approval Order, and provided until March 22, 2018, for any party or other person to file a written statement in support of, or in opposition to, the Approval Order.<sup>11</sup> On April 12, 2018, NYSE and Nasdaq submitted written statements opposing the Approval Order and BZX submitted a statement in support of the Approval Order.<sup>12</sup> On October 4, 2018, BZX filed Amendment No. 2<sup>13</sup> to the Original Proposal.

The Commission conducted a de novo review of the CMC proposal and associated public record, including

<sup>7</sup> 17 CFR 200.30–3(a)(12).

<sup>8</sup> See Securities Exchange Act Release No. 34–82522 (January 17, 2018), 83 FR 3205 (January 23, 2018) (SR–Bats–BZX–2017–34) (Notice of Filing of Amendment No. 1 and Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Introduce Cboe Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28).

<sup>9</sup> 17 CFR 201.431(e).

<sup>10</sup> See Letter to Christopher Solgan, Assistant General Counsel, Cboe Global Markets, Inc. (Jan. 24, 2018) (providing notice of receipt of notices of intention to petition for review of delegated action and stay of order), available at: <https://www.sec.gov/rules/sro/batsbzx/2018/sr-batsbzx-2017-34-letter-from-secretary-to-cboe.pdf>.

<sup>11</sup> See Securities Exchange Act Release No. 82794, 83 FR 9561 (Mar. 6, 2018). On March 16, 2018, the Office of the Secretary, acting by delegated authority, issued an order on behalf of the Commission granting a motion for an extension of time to file statements on or before April 12, 2018. See Securities Exchange Act Release No. 82896, 83 FR 12633 (Mar. 22, 2018).

<sup>12</sup> See Statement of NYSE Group, Inc., in Opposition to the Division’s Order Approving a Rule to Introduce Cboe Market Close (“NYSE Statement”); Statement of the Nasdaq Stock Market LLC in Opposition to Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Introduce Cboe Market Close (“Nasdaq Statement”); and Statement of Cboe BZX Exchange, Inc., in support of Commission Staff’s Approval Order (“BZX Statement”), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734.htm>.

<sup>13</sup> See Securities Exchange Act Release No. 34–84670 (November 28, 2018), 83 FR 62646 (December 4, 2018) (SR–BatsBZX–2017–34) (“Notice of Filing of Amendment No. 2 to Proposed Rule Change to Introduce Cboe Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28”).

<sup>35</sup> 17 CFR 200.30–3(a)(12), (59).

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

<sup>2</sup> 17 CFR 240.19b–4.

Amendment No. 2, the Petitions for Review, and all comments and statements submitted by certain exchanges, issuers, and other market participants,<sup>14</sup> to determine whether the proposal was consistent with the requirements of the Act and the rules and regulations issued thereunder that are applicable to a national securities exchange.<sup>15</sup> The Commission noted that under Rule 700(b)(3) of the Commission's Rule of Practice, the "burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."<sup>16</sup>

Importantly, after reviewing the entire record, the Commission concluded that BZX met its burden to show that the proposed rule change was consistent with the Act, and pursuant to its January 21, 2020, order, set aside the Approval Order and approved BZX's CMC proposal, as amended ("Final Approval Order").<sup>17</sup> Notably, the Commission stated that the record "demonstrate[d] that Cboe Market Close should introduce and promote competitive forces among national securities exchanges for the execution of MOC orders"<sup>18</sup> and that "the record demonstrate[d] that Cboe Market Close should not disrupt the closing auction price discovery process nor should it materially increase the risk of manipulation of official closing prices".<sup>19</sup> For the reasons discussed more fully below, the Exchange believes that when applying the Commission's analysis in the Final Approval Order to the current proposal, such review would similarly conclude that this proposal is consistent with the Act and should be approved.

Since the Original Proposal various exchanges have extended the MOC cut-off times for their closing auctions, moving them closer to 4:00 p.m.<sup>20</sup>

Additionally, closing price match services offered by off-exchange venues have grown in popularity,<sup>21</sup> including alternative trading systems ("ATS") that offer a MOC cut-off time as close as 30-seconds before the primary exchanges' cut-off times, as well as MOC cut-off times aligned with those of NYSE, NYSE Arca, and Nasdaq.<sup>22</sup> As the market structure for closing auctions and closing price match offerings has continued to evolve, and in response to customer feedback and to better compete with off-exchange venues, the Exchange is proposing this rule change to align CMC's MOC Cut-Off time more closely with the other exchanges and off-exchange venues.

The Exchange notes that Members have requested a MOC Cut-Off Time that is closer to the end of Regular Trading Hours<sup>23</sup> so that they may retain control of their trading for a longer period and be better able to manage their trading at the close.<sup>24</sup> Generally

for the entry of MOC and LOC orders from 3:50 p.m. to 3:55 p.m.); *see also* Securities Exchange Act Release No. 34-85021 (January 31, 2019) (SR-NYSE-2018-58) (Order approving a rule change by Nasdaq) (The Commission approved a rule change by the NYSE to amend Rule 123C to extend the cut-off times for order entry and cancellation for participation in the closing auction, from 3:45 p.m. to 3:50 p.m.).

<sup>21</sup> *See infra*, "Price Discovery and Fragmentation", which describes the growth of off-exchange closing volume.

<sup>22</sup> For example, JP Morgan Securities' ATS, JPB-X, offers Close Price Match. This functionality utilizes a conditional order process to match orders and crosses them at the security's official closing prices, as determined by the closing auction at the primary exchange for a security. The Close Price Match time for an NMS stock is currently 30-seconds before the MOC cut-off time for that stock's primary exchange. Additionally, Instinet, LLC's ATS, CBX provides for three MOC Crossing Sessions, which consist of: a cross for securities where the primary listing exchange is the Nasdaq ("Nasdaq Cross"), a cross for securities where the primary listing exchange is the NYSE Arca ("Arca Cross"), and a cross for securities where the primary listing exchange is the NYSE ("NYSE Cross"). Subscribers may submit orders for the MOC Crosses at any time between 7:30 a.m. and the relevant crossing session's crossing time. *See* Form ATS-N, JPB-X, available at: [https://www.sec.gov/Archives/edgar/data/782124/000/xslATS-N\\_X01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/782124/000/xslATS-N_X01/primary_doc.xml); *see also* Form ATS-N, Instinet, LLC's ATS, CBX, available at: [https://www.sec.gov/Archives/edgar/data/310607/000031060722000009/xslATS-N\\_X01/primary\\_doc.xml](https://www.sec.gov/Archives/edgar/data/310607/000031060722000009/xslATS-N_X01/primary_doc.xml).

<sup>23</sup> The term "Regular Trading Hours" means the time between 9:30 a.m. and 4:00 p.m. Eastern Time. *See* Rule 1.2(w), definition of, "Regular Trading Hours."

<sup>24</sup> The Exchange notes that part of its rationale for extending CMC's MOC Cut-Off Time is substantively identical to that of other exchanges moving their cut-off times later, namely, NYSE and Nasdaq. *See* Securities Exchange Act Release No. 34-83988 (August 29, 2018), 86 FR 18580 (September 5, 2018) (SR-Nasdaq-2018-068) ("Specifically, the Exchange believes that extending the cutoff times for submitting on close orders will allow market participants to retain control over their orders for a longer period of time, and thereby assist those market participants in managing their

speaking, notional trading and trading volatility are typically at their highest towards the end of Regular Trading Hours. Accordingly, market participants often prefer to trade as close to 4:00 p.m. as possible, because doing so can provide them with more time to seek better priced liquidity for their orders in a variety of ways, including but not limited to, finding contra-side liquidity in the marketplace and trading directly against such interest, or guaranteeing a customer order at a price better than the national best bid or offer by committing capital to an order and filling it in a principal capacity, as well as continuing to trade orders algorithmically into the close, thus reducing the size of their outstanding orders that they may decide to commit to CMC or the primary auctions.

Additionally, Members have indicated that extending the MOC Cut-Off Time to 3:49 p.m. will help to make CMC a more comparable alternative to NYSE and Nasdaq, which have MOC cut-off times of 3:50 p.m.<sup>25</sup> and 3:55 p.m.,<sup>26</sup> respectively. For reasons discussed directly above, cut-off times closer to 4:00 p.m. are beneficial to market participants, and by extending CMC's MOC Cut-Off Time to 3:49 p.m., CMC will be better positioned to serve as a viable option for market participants to consider when deciding which venues to route their MOC orders, thus enhancing intermarket competition.

The Exchange also notes that today's market participants, including users of CMC,<sup>27</sup> are technologically equipped<sup>28</sup>

trading at the close."); *see also* Securities Exchange Act Release No. 34-84804 (December 12, 2018), 83 FR 64910 (December 18, 2018) (SR-NYSE-2018-58) ("The Exchange believes that extending the cut-off times for entry and cancellation of MOC and LOC Orders, cancellation of CO orders, as well as when the Exchange would begin disseminating Order Imbalance Information for the close would . . . allow market participants to retain control over their orders for a longer period of time, and thereby assist those market participants in managing their trading at the close.").

<sup>25</sup> *See* NYSE Rule 73.5(a)(8), Closing Auction Imbalance Freeze Time.

<sup>26</sup> *See* Nasdaq Rule 4702(b)(11)(A), Market On Close Order.

<sup>27</sup> Users of CMC are mainly broker-dealers that trade electronically, utilizing a variety of automated trading tools such as algorithmic strategies and routing protocols.

<sup>28</sup> The Exchange notes that today's equities markets involve the widespread use of automated trading algorithms and routing solutions, as well as market connectivity options with speeds often measured in microseconds. In this regard, a MOC Cut-Off Time of 3:49 p.m. should not present any operational or technological issues, in terms of timing, for Members desiring to reroute any unmatched CMC MOC orders to the primary exchanges. Should Members need additional time to decide whether to send their CMC MOC orders to other exchanges, Members may still cancel their

Continued

<sup>14</sup> *See* "Statements on File No. SR-BatsBZX-2017-34", available at: <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734.htm>.

<sup>15</sup> *See* Securities Exchange Act Release No. 34-88008 (January 21, 2020), 85 FR 4726 (January 27, 2020) (SR-BatsBZX-2017-34) ("Order Setting Aside Action by Delegated Authority and Approving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To Introduce Cboe Market Close, a Closing Match Process for Non-BZX Listed Securities Under New Exchange Rule 11.28").

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *See* Securities Exchange Act Release No. 34-84454 (October 19, 2018), 83 FR 53923 (October 25, 2018) (SR-Nasdaq-2018-068) (Order approving a rule change by NYSE) (The Commission approved a rule change by Nasdaq to move the cut-off times

to handle a 3:49 p.m. MOC Cut-Off time. As a general matter, today's market participants, including CMC users, rely on electronic smart order routers, order management systems, and trading algorithms, which make routing and trading decisions on an automated basis, in times typically measured in microseconds. In this regard, the Exchange believes that if a CMC user receives a message that their MOC order was not matched in CMC,<sup>29</sup> such CMC user will have more than enough time to reroute their MOC order to the primary exchange. Importantly, the Exchange discussed the proposed change with both current CMC users and potential new CMC users to gauge whether a MOC Cut-Off Time one-minute closer to the NYSE cut-off time, and six-minutes closer to the Nasdaq cut-off time, would present operational or technological challenges, and confirmed that CMC users can in fact manage the proposed change.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>30</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>31</sup> requirements that the rules of

an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>32</sup> 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 moving the MOC Cut-Off Time to 3:49 p.m. would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would allow Members to retain control over their orders for a longer period, thereby assisting market participants in managing their trading at the close. As discussed more fully above, market participants may prefer to trade as close to 4:00 p.m. as possible, because doing so can provide them with more time to seek better priced liquidity for their orders in a variety of ways, as well as give them more time to determine the size of their outstanding orders that they may decide to commit to CMC or the primary auctions.

Additionally, the Exchange believes that a MOC Cut-Off Time fifteen-minutes (15) prior to NYSE's cut-off time, and twenty-five-minutes (25) prior to Nasdaq's cut-off time, is no longer necessary. Rather, the Exchange notes that today's market participants are technologically equipped<sup>33</sup> to handle a 3:49 p.m. MOC Cut-Off time. As discussed above, today's market participants rely on electronic smart order routers, order management systems, and trading algorithms, which make routing and trading decision on an automated basis, in times often measured in microseconds. As such, Members are technologically equipped to efficiently respond to CMC's publication of matched shares and should they so choose, reroute any unmatched MOC orders to the respective primary closing auction. As noted above, the Exchange discussed the extension of the MOC Cut-Off Time with CMC users and confirmed that the proposed MOC Cut-Off Time will not

present them with any operational or technological issues.

Furthermore, the Exchange believes that the extension of cut-off times by the primary exchanges since CMC's proposal, as well as the growth of off-exchange venues<sup>34</sup> with cut-off times in such close proximity to the end of Regular Trading Hours is indicative of Members' desires for such offerings. Logically, such a change in market structure would not have occurred if Members did not already possess the operational and technological wherewithal to effectively manage the multitude of cut-off times offered by the exchanges and off-exchange venues.

Moreover, the Exchange believes that the proposed rule change will remove impediments to and perfect the mechanism of a free and open market and a national market system because extending the MOC Cut-Off Time to 3:49 p.m. would more closely align the CMC MOC Cut-Off Time to the cut-off times in place for the other exchanges.<sup>35</sup> For the reasons discussed more fully above, the primary exchanges' cut-off times are beneficial to market participants because of their proximity to 4:00 p.m. By moving the MOC Cut-Off Time closer to the other exchanges' cut-off times, CMC can become a comparable alternative for Members to route their unpriced MOC orders. Importantly, even with a MOC Cut-Off Time closer to the primary exchanges' cut-off times, CMC removes any perceived impact on the primary listing markets' close by publishing the number of matched order shares, by security, in advance of the primary markets' cut-off time. The total matched shares would still be disseminated by the Exchange free of charge via the Cboe Auction Feed, albeit at the new proposed MOC Cut-Off Time of 3:49 p.m. Because of the speeds and widespread use of market technology, this information can still be used by the primary markets' closing processes, and as discussed above, CMC users will still have ample time<sup>36</sup> to reroute any MOC orders not matched via CMC to reach the primary market to be included in their closing auction process.

Additionally, the proposed rule change would more closely align CMC's MOC Cut-Off Time with that of off-exchange venues that offer cut-off times aligned with those currently offered by the primary exchanges, and as little as

CMC MOC orders any time prior to 3:49 p.m. or may voluntarily choose to not participate in CMC. See generally "Staff Report on Algorithmic Trading in U.S. Capital Markets" (August 5, 2020), available at [https://www.sec.gov/tm/reports-and-publications/special-studies/algo\\_trading\\_report\\_2020](https://www.sec.gov/tm/reports-and-publications/special-studies/algo_trading_report_2020). ("Over the past decade, the 'manual handling of institutional orders is increasingly rare and has been replaced by sophisticated institutional order execution algorithms and smart order routing systems'") ("The secondary market for U.S.-listed equity securities that has developed within this structure is now primarily automated. The process of trading has changed dramatically primarily as a result of developments in technologies for generating, routing, and executing orders, as well as by the requirement imposed by law and regulation.") ("Modern equity markets are connected in part by the data flowing between market centers. An enormous volume of data is available to market participants. In recent years, there has been an exponential growth in the amount of market data that is available, the speed with which it is disseminated, and the computer power used to analyze and react to price movements.")

<sup>29</sup> The CMC Closing Match Process—i.e., the matching of all buy and sell MOC orders entered into the System by time priority at the MOC Cut-Off Time, the electronic notification to Members of any unmatched MOC orders, and the dissemination by the Exchange of the total size of all buy and sell orders matched via CMC via the Cboe Auction Feed—generally occurs within microseconds. As such, a MOC Cut-Off Time one-minute prior to the primary exchanges' cut-off times is a sufficient period of time for Members to reroute their unmatched MOC orders to the primary exchanges, should they choose to do so.

<sup>30</sup> 15 U.S.C. 78f(b).

<sup>31</sup> 15 U.S.C. 78f(b)(5).

<sup>32</sup> *Id.*

<sup>33</sup> *Supra* note 28.

<sup>34</sup> *Supra* note 22.

<sup>35</sup> As noted above, NYSE's cut-off time is 3:50 p.m., and Nasdaq's cut-off time is 3:55 p.m. NYSE Arca's cut-off time for MOC orders is 3:59 p.m. See "Trading Information—Closing Auctions", available at: <https://www.nyse.com/market/nyse-arca/trading-info>.

<sup>36</sup> *Supra* note 28.

30-seconds prior to market close.<sup>37</sup> As such, the Exchange believes that the proposed rule change is supported by both ample precedent as well as current market structure, and should not present any new or novel issues that market participants must consider when managing their trading and determining which exchange or off-exchange venue to route their MOC orders.

#### Price Discovery<sup>38</sup>

The Exchange believes that the proposed rule change is consistent with the Section 6(b)(5) requirements.<sup>39</sup> As previously noted by the Exchange,<sup>40</sup> CMC accepts and matches only unpriced MOC orders. By matching only unpriced MOC orders, and not Limit-On-Close (“LOC”) orders and executing those matched MOC orders that naturally pair off with each other and effectively cancel each other out, CMC is designed to avoid impacting price discovery. While the proposed rule change would have CMC accept MOC orders up to 3:49 p.m., such extension will not change this underlying

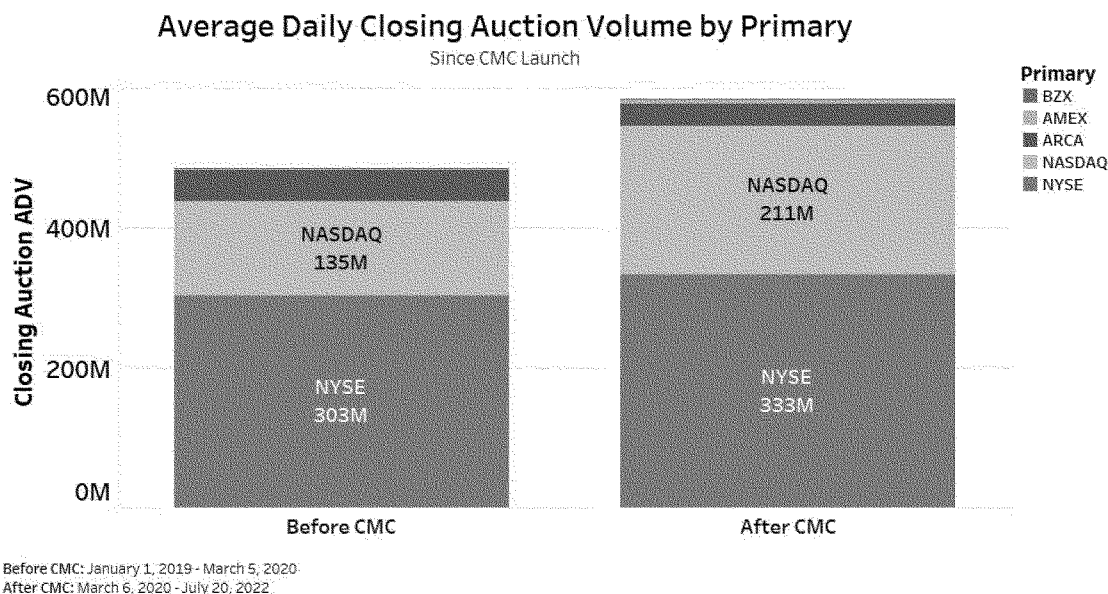
functionality. As previously noted by the Exchange,<sup>41</sup> matched MOC orders are merely recipients of price formation and do not directly contribute to the price formation process. Indeed, in its Final Approval Order for CMC, even the Commission noted that unpriced, paired-off MOC orders do not directly contribute to setting the official closing price of securities on the primary listing exchanges but, rather, are inherently the recipients of price formation information.<sup>42</sup>

Moreover, the Exchange believes that even if extending the MOC Cut-Off Time to 3:49 p.m. reduces the number of MOC orders routed to a security’s primary listing market, CMC is designed to remove any perceived adverse impact on the primary listing markets’ close because the total matched shares would still be disseminated by the Exchange free of charge via the Cboe Auction Feed prior to the primary exchanges’ cut-off times. Additionally, because of the technological capabilities of today’s market participants discussed more fully above, this information can still be

incorporated by the primary markets’ closing processes, and CMC users will still have ample time<sup>43</sup> to reroute any MOC orders not matched via CMC to the primary markets to be included in their closing auction processes.

#### Fragmentation<sup>44</sup>

Another matter addressed by the Commission in their review of the Initial Proposal was fragmentation, and whether CMC would fragment the markets beyond what currently occurs through off-exchange close price matching venues.<sup>45</sup> Importantly, as illustrated in the chart below, an analysis by the Exchange shows that the closing auction volume on both NYSE and Nasdaq has increased since the launch of CMC on March 6, 2022. As such, the Exchange believes that the initial fragmentation concerns raised by commenters during the Initial Proposal have not materialized, and that merely extending the MOC Cut-Off Time, while leaving all other CMC functionality intact, will not result in increased market fragmentation.



**Source: Internal Exchange Data**

<sup>37</sup> *Supra* note 22.

<sup>38</sup> As part of this proposed rule change the Exchange is addressing several questions considered by the Commission in connection with the Exchange’s Original Proposal, including price discovery and fragmentation, market complexity and operational risk, and manipulation. Importantly, in considering these questions, the Commission found that based on CMC’s design and the record before the Commission, that the proposal was consistent with Section 6(b)(5) of the Act. *Supra* note 15.

<sup>39</sup> The Exchange notes that the Commission, in its Final Approval Order, carefully analyzed and considered CMC and its potential effects, if any, on the primary listing exchanges’ closing auctions, including their price discovery functions. Importantly, the Commission found that, based on CMC’s design, CMC should not disrupt the price discovery process in the closing auctions of the primary listing exchanges. *Supra* note 15.

<sup>40</sup> See Letter from Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, Bats Global Markets, Inc. (August 2,

2017), available at: <https://www.sec.gov/batsbzx-2017-34/batsbzx201734-2162452-157801.pdf>; see also Letter from Joanne Moffic-Silver (October 11, 2017), available at: <https://www.sec.gov/comments/sr-batsbzx-2017-34/batsbzx201734-2634580-161229.pdf>.

<sup>41</sup> *Id.*

<sup>42</sup> *Supra* note 15.

<sup>43</sup> *Supra* note 28.

<sup>44</sup> *Supra* note 38.

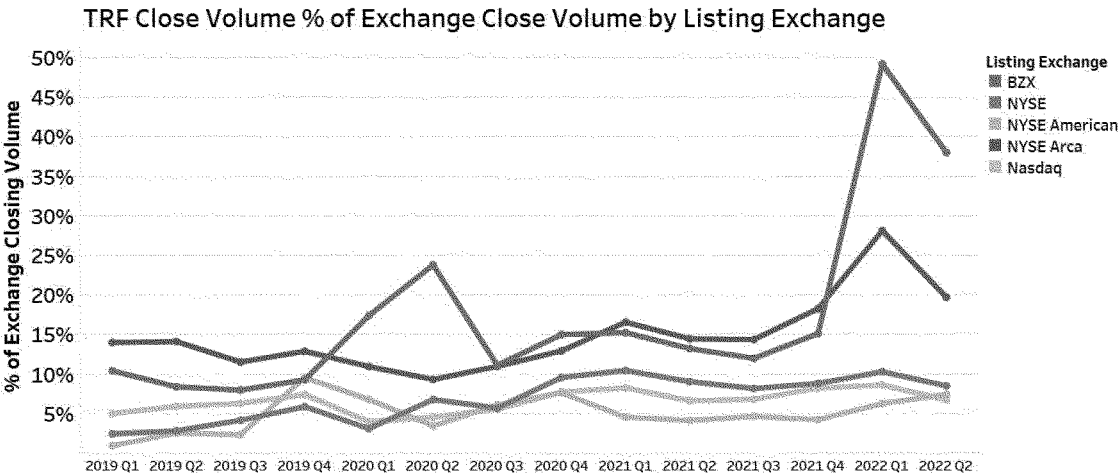
<sup>45</sup> *Supra* note 15.

The Exchange also notes that even if the proposed rule change results in fewer MOC orders participating in the primary exchanges’ closing auctions, that the fragmentation of MOC orders already occurs in today’s markets on off-exchange venues. As illustrated in the

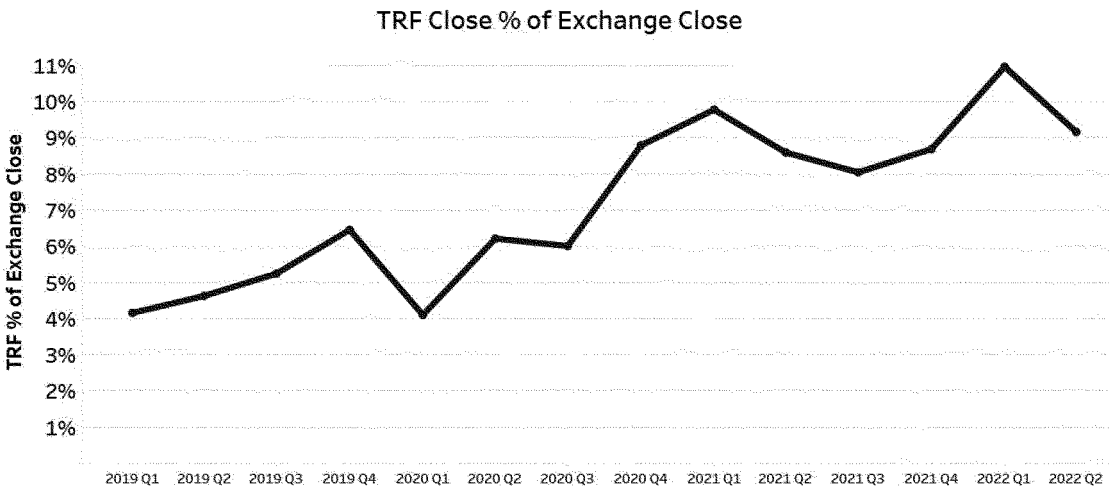
first two charts below, a growing proportion of trading volume at the close occurs on *off-exchange venues*, where the TRF close volume, as a percent of Exchange close volume, has risen steadily since January 2019.<sup>46</sup> In the third chart the Exchange also

studied the top ten most actively traded securities during the same time period and found that a significant portion of the total closing volume is executed off-exchange, following the dissemination of the official closing price.

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Source: Internal Exchange Data



Source: Internal Exchange Data

Rank	Symbol	Primary exchange	TRF close % inc. PRP <sup>47</sup>
1	AAPL	Nasdaq	9
2	T	NYSE	6
3	BAC	NYSE	10
4	INTC	Nasdaq	5
5	MSFT	Nasdaq	7
6	F	NYSE	9
7	PFE	NYSE	5
8	CSCO	Nasdaq	5
9	CMCSA	Nasdaq	7

<sup>46</sup> The Exchange conducted an analysis of off-exchange/Trade Reporting Facility (“TRF”) closing volume that occurs after market close, 4:00 p.m. Eastern Time, where the price is equal to the closing price and for which such trades are reported

with a Prior Reference Price (“PRP”) trade reporting modifier. The TRF is a trade reporting facility where FINRA members may report trades in Nasdaq-listed and other exchange-listed securities, that were executed otherwise than on an exchange.

The first two charts represent TRF executed volume at the close with the “PRP” flag that equals the closing auction price, divided by total on exchange auction volume.

Rank	Symbol	Primary exchange	TRF close % inc. PRP <sup>47</sup>
10 .....	WFC .....	NYSE .....	9

Source: Internal Exchange Data.

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Accordingly, the Exchange believes that approving this proposal will allow the Exchange to compete on a more equal playing field with off-exchange venues for closing volume already being executed away from the primary listing venues. In better competing with off-exchange venues, CMC can help increase transparency, reliability, and price discovery by encouraging market participants that would otherwise seek to match MOC orders off-exchange to re-direct their MOC orders to BZX, a public exchange. Moreover, by attracting such order flow, CMC can help to increase the amount of volume at the close executed on systems subject to the resiliency requirements of Regulation SCI.<sup>48</sup>

#### Market Complexity and Operational Risk<sup>49</sup>

The Exchange believes that the proposed rule change is simple and straightforward, and as such will not significantly increase market complexity or operational risk. The Exchange seeks only to extend the MOC Cut-Off Time to 3:49 p.m., leaving all other aspects of the CMC process intact. Members will

not have to consider new operational requirements of monitoring and consuming a new data feed or consider the utilization of a new order type or implementation of new Exchange code. Rather, Members may continue to monitor the same data feed as they do today, the Cboe Auction Feed, and simply look for the publication of the CMC information at the new proposed MOC Cut-Off Time.

Additionally, as discussed more fully above, the Exchange discussed this proposal with current CMC users prior to submitting this proposal and learned that CMC users are technologically equipped to manage a MOC Cut-Off Time closer to the primary exchanges' cut-off times, and that they can respond to CMC's publication of matched shares and quickly reroute any unmatched MOC orders to the respective primary closing auction. Moreover, CMC is a voluntary offering, and Members may freely decide whether to participate.

Furthermore, as noted throughout, both off-exchange venues and other exchanges already offer MOC cut-off times that are closer in time to the end of Regular Trading Hours. Specifically, as mentioned above, in 2018 Nasdaq received approval to move the cut-off times for the entry of MOC and Limit-On-Close ("LOC") orders from 3:50 to 3:55 p.m.<sup>50</sup> Similarly, in 2018 the NYSE received approval from the SEC to extend their cut-off times for order entry and cancellation for participation their closing auction, from 3:45 p.m. to 3:50 p.m.<sup>51</sup> NYSE also offers discretionary orders, which unlike MOC/LOC orders that are subject to NYSE's 3:50 p.m. cut-off, may be entered for participation in the closing auction until 3:59:50.<sup>52</sup> Additionally, market participants may

enter MOC orders for participation in NYSE Arca's closing auction up to 3:59 p.m..<sup>53</sup> Finally, various off-exchange venues offer closing match processes with cut-off times aligned with those of the primary exchanges, and even as close to 30-seconds before market close, 4:00 p.m.<sup>54</sup>

Accordingly, the Exchange believes that market participants are well accustomed to managing the various cut-off times in today's marketplace, and in incorporating these timelines into their trading decisions. The number of exchanges and off-exchange venues with extended cut-off times indicates that market participants find value in their ability to retain control of their trading heading into the end of Regular Trading Hours, and the exchanges and off-exchange venues have responded to such demand. Certainly, market participants would not desire cut-off times closer to the end of Regular Trading Hours if they could not technologically and operationally manage their trading accordingly. Therefore, the extension of CMC's MOC Cut-Off Time should not present market participants with any novel operational or technological complexities.

#### Manipulation<sup>55</sup>

The Exchange does not expect that the proposed extension of the MOC Cut-Off Time to 3:49 p.m. will result in an increase of manipulative activity due to information asymmetries, or raise any unique manipulation concerns relative to how CMC exists today with a current MOC Cut-Time of 3:35 p.m. Specifically, any information CMC participants may be able to glean from their paired-off MOC orders, or from their unmatched MOC orders, is still limited in nature. For instance, any information that CMC participants may learn from receiving unmatched MOC order messages is still limited in nature because the CMC participant would still only know the unexecuted size of its own order.<sup>56</sup> Moreover, even if a

<sup>47</sup> As defined above, "PRP".

<sup>48</sup> See Letter from Joanne Moffic-Silver, Executive Vice President, General Counsel, and Corporate Secretary, Bats Global Markets, Inc., a Cboe Company (Oct. 11, 2017) ("The Proposal is further consistent with the Commission's assertion that closing auctions are critical SCI systems . . . [CMC] would provide a much needed, seamless, and easy way for the industry to address the single point of failure risk that exists for closing auctions today, especially when a primary listing market is experiencing system issues and lacks full operational capability. As Bats previously asserted, in the event of a system's disruption at the primary listing market, [CMC] could provide an alternative pool of liquidity to which market participants could send MOC orders for execution at the official closing price. Therefore, it promotes just and equitable principles of trade and competition among national securities exchanges. [CMC] would also remove impediments to and perfect the mechanism of a free and open market and a national market system by providing a mechanism for market participants to execute their orders at the official closing price should a system disruption on the primary listing market prevent them from entering orders."); ("Furthermore, [CMC] would operate on the Exchange's reliable SCI systems . . . significant MOC liquidity is conducted today by off-exchange venues. These venues are not SCI systems and, therefore, not subject to Regulation SCI's enhanced resiliency requirements. [CMC] could attract MOC orders from these off-exchange venues and its reliable SCI system, furthering the Commission's presumed desire for liquidity at the close to be conducted on SCI systems.")

<sup>49</sup> *Supra* note 38.

<sup>50</sup> *Supra* note 20.

<sup>51</sup> *Id.*

<sup>52</sup> See NYSE Rule 7.31 (c)(2)(C); see also "The Floor Broker's Modern Trading Tool", available at: <https://www.nyse.com/article/trading/d-order> ("While D Orders are available for use throughout the trading day, most executions occur in the closing auction, where they're known as Closing D Orders. At 3:55 p.m., Closing D Order interest eligible to participate in the closing auction is added to the order imbalance feed at their discretionary price range. Closing D Orders can also be submitted, modified or cancelled up to 3:59:50 p.m. These distinct features of Closing D Orders are designed to facilitate the Floor Broker's traditional agency role on behalf of larger institutional interest, allowing Floor Brokers to work in conjunction with their customer to find larger liquidity opportunities.").

<sup>53</sup> See "Closing Auction Timeline", available at: <https://www.nyse.com/markets/nyse-arca/trading-info>.

<sup>54</sup> *Supra* note 22.

<sup>55</sup> *Supra* note 38.

<sup>56</sup> The Exchange notes that in its Final Approval Order, even the Commission noted that, "In particular, a market participant would only be able to determine the direction of the imbalance and

Member chose to participate in CMC only to gather information about the direction of an imbalance and use such information to manipulate the closing price, the Member's orders were still eligible for execution. Thus, in addition to any such information being of limited use, the Member's actions still do not provide them with free information unavailable to other market participants because the Member's orders were eligible to for execution, subjecting the Member to economic risk.

Furthermore, as with the current MOC Cut-Off Time, the proposed extension does not present any information asymmetries that do not already exist in today's markets, as the very nature of trading creates short term asymmetries of information to those who are parties to a trade.<sup>57</sup> Indeed, as noted by the Commission, any party to a trade gains valuable insight regarding the depth of the market when an order is executed or partially executed.<sup>58</sup> Additionally, NYSE imbalance information is already disseminated to NYSE floor brokers, who are permitted to share with their customers specific data from the imbalance feed.<sup>59</sup> Even in this case, though, the Commission stated that the value of such information is limited because the imbalance information does not represent overall supply and demand for a security, is subject to change, and is only one relevant piece of information.<sup>60</sup> Similarly, because any information gleaned by a CMC participant is limited only to the unexecuted size of their order, and relative to the depth of only the BZX pool of liquidity, the Exchange believes that the proposed extension of the MOC Cut-Off Time does not create an increased risk of manipulative trading activity.

While this proposal would result in the total shares for buy and sell orders in CMC being disseminated closer in time to the primary exchanges' cut-off

times, this change does not suddenly make the value of such information more valuable or useful in terms of enhancing opportunities for gaming and manipulating the official closing price. The proposed MOC Cut-off Time is one-minute prior to NYSE's cut-off time of 3:50 p.m., and six-minutes prior to Nasdaq's cut-off time of 3:55 p.m. As noted above, today's markets are marked by technological solutions which typically operate in durations of microseconds. In this context, the separation between the CMC MOC Cut-Off Time and that of NYSE's and Nasdaq's is a substantial duration of time, during which much can change in the marketplace, thus limiting the value of information, if any, that can be gleaned from CMC's dissemination of matched shares at 3:49 p.m. Moreover, there are currently controls and processes in place to monitor for manipulative trading activity, such as the supervisory responsibilities and capabilities of exchanges and the expansive cross market surveillance conducted by FINRA. Following approval of this proposal, the Exchange, FINRA and others will continue to surveil for potential manipulative activity and when appropriate, bring enforcement actions against market participants engaged in manipulative trading activity.

#### *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. Rather, the proposed rule change seeks merely to extend the MOC Cut-Off Time from 3:35 p.m. to 3:49 p.m., enabling all Members to manage their trading for a longer period. The Exchange is not proposing to make any other changes to the CMC process. Moreover, CMC is a voluntary closing match process, and Members are not required to participate in the CMC. Additionally, the proposed rule change applies to equally to all Members. Importantly, based on feedback from CMC users, the proposed MOC Cut-Off Time will not prevent CMC's current user's from participating in CMC, as CMC's current users are technologically equipped to manage a 3:49 p.m. MOC Cut-Off Time, and should they choose to do so, reroute MOC orders not matched in CMC to the primary exchanges' closing auctions.

Furthermore, 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. As noted above, the proposed rule change more closely aligns the CMC MOC Cut-Off Time to the cut-off times of other exchanges, while still providing CMC participants with an opportunity to reroute any of their unpaired MOC orders to the primary exchanges. In this regard, the proposed rule change may make CMC a more viable alternative to the primary auctions and should therefore promote competition amongst the exchanges. Additionally, the proposed MOC Cut-Off Time may also enable the Exchange to more effectively compete with off-exchange venues that have cut-off times much closer in time to the market close and comprise a growing percentage of closing volume.

#### *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**

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be 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-CboeBZX-2022-038 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.

would have difficulty determining the magnitude of any imbalance, as it would only know the unexecuted size of its own order. In addition, the information would only be with regard to the pool of liquidity on BZX and would provide no insight into imbalances on the primary listing exchange, competing auctions, ATSS, or other off-exchange matching services which, as described above, can represent a significant portion of trading volume at the close." *Supra* note 15.

<sup>57</sup> The Exchange further notes that in its approval order, even the Commission noted that, "Further, the Commission believes information asymmetries as those described by commenters exist today and are inherent in trading, including with respect to closing auctions. For example, any party to a trade gains valuable insight regarding the depth of the market when an order is executed or partially executed." *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



All submissions should refer to File Number SR–CboeBZX–2022–038. 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–CboeBZX–2022–038 and should be submitted on or before September 14, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>61</sup>

**Jill M. Peterson,**

*Assistant Secretary.*

[FR Doc. 2022–18097 Filed 8–23–22; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–95546; File No. SR–CboeBZX–2022–044]

### Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a New Data Product To Be Known as the Short Volume Report

August 18, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the

“Act”),<sup>1</sup> and Rule 19b–4 thereunder,<sup>2</sup> notice is hereby given that on August 9, 2022, Cboe BZX Exchange, Inc. (“Exchange” or “BZX”) filed with the Securities and Exchange Commission (“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 BZX Exchange, Inc. (the “Exchange” or “BZX”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to Exchange Rule 11.22(f) to introduce a new data product to be known as the Short Volume Report. 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/equities/regulation/rule\\_filings/bzx/](http://markets.cboe.com/us/equities/regulation/rule_filings/bzx/)), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange seeks to amend Rule 11.22 to adopt paragraph 11.22(f), which introduces a new data product, the Short Volume Report. A description of each market data product offered by the Exchange is provided in Exchange Rule 11.22 and proposed Rule 11.22(f) provides that the Short Volume Report is an end-of-day report that summarizes certain equity trading activity on the

Exchange, and includes trade date,<sup>3</sup> total volume,<sup>4</sup> sell short volume,<sup>5</sup> and sell short exempt volume,<sup>6</sup> by symbol.<sup>7</sup> The Short Volume Report will be available for purchase to both BZX Members (“Members”)<sup>8</sup> as well as non-Members.<sup>9</sup>

The Exchange notes that the data fields included in the Short Volume Report are essentially identical to the fields included by the New York Stock Exchange LLC (“NYSE”) in their Daily Short Volume file.<sup>10</sup> Specifically, the NYSE Daily Short Volume file also includes trade date,<sup>11</sup> symbol,<sup>12</sup> short exempt volume,<sup>13</sup> short volume,<sup>14</sup> and total volume.<sup>15</sup> The proposed Short Volume Report is also similar to Nasdaq's Daily Short Sale Volume file<sup>16</sup>

<sup>3</sup> “Trade date” is the date of the trading activity.

<sup>4</sup> “Total volume” is the total share volume of all order executions.

<sup>5</sup> “Sell Short volume” is the total share volume of all short order executions, (Sell Short + Sell Short Exempt).

<sup>6</sup> “Short exempt volume” is the total share volume of all short exempt order executions.

<sup>7</sup> Symbol refers to the Cboe formatted symbol in which the trading activity occurred. See [https://cdn.cboe.com/resources/membership/US\\_Symbology\\_Reference.pdf](https://cdn.cboe.com/resources/membership/US_Symbology_Reference.pdf).

<sup>8</sup> The term “Member” shall mean any registered broker or dealer that has been admitted to membership in the Exchange. A Member will have the status of a “member” of the Exchange as that term is defined in Section 3(a)(3) of the Act. Membership may be granted to a sole proprietor, partnership, corporation, limited liability company or other organization which is a registered broker or dealer pursuant to Section 15 of the Act, and which has been approved by the Exchange. See Exchange Rule 1.5(n), definition of “Member”.

<sup>9</sup> The Exchange intends to submit a separate filing to establish fees for the Short Volume Report.

<sup>10</sup> See NYSE Daily Short Volume Client Specification, available at: [https://www.nyse.com/publicdocs/nyse/data/Daily\\_Short\\_Volume\\_Client\\_Spec\\_v1.3.pdf](https://www.nyse.com/publicdocs/nyse/data/Daily_Short_Volume_Client_Spec_v1.3.pdf). The NYSE Daily Short Volume includes trade date, symbol, short exempt volume, short volume, and total volume. Unlike NYSE, the proposed Short Volume Report will not include the trading exchange, as the proposed report includes short sale volume only for transactions executed on BZX. Additionally, NYSE's Daily Short Volume file specifies that short volume is comprised of the sum of, (sell short volume + sell short exempt volume + sell short with slide). While the Exchange does not specifically flag sell short with slide transactions, such transactions are recognized simply as sell short or sell short exempt and are thus included in the Exchange's sell short and sell short exempt volume.

<sup>11</sup> NYSE “Trade date” is the date of trading session activity.

<sup>12</sup> NYSE “Symbol” is defined in the NYSE Symbology Specification, available at: [https://www.nyse.com/publicdocs/nyse/data/Daily\\_Short\\_Volume\\_Client\\_Spec\\_v1.3.pdf](https://www.nyse.com/publicdocs/nyse/data/Daily_Short_Volume_Client_Spec_v1.3.pdf).

<sup>13</sup> NYSE “Short Exempt Volume” is the total share volume of all Short Exempt order executions.

<sup>14</sup> NYSE “Short Volume” is the total share volume of all short order executions, (Sell Short + Sell Short Exempt + Sell Short with Slide).

<sup>15</sup> NYSE “Total Volume” is the total share volume of all order executions.

<sup>16</sup> See Specifications for Daily Short Sale Volume file, available at: <https://www.nasdaqtrader.com/>

Continued

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>61</sup> 17 CFR 200.30–3(a)(12).