



**HEALTHY MARKETS**  
TRANSPARENCY & TRUST

November 18, 2019

Via Electronic Mail (rule-comments@sec.gov)

Vanessa Countryman  
Acting Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Release No. 34-87304; File No. SR-CBOE-2019-082

Dear Ms. Countryman:

The Healthy Markets Association<sup>1</sup> appreciates the opportunity to offer our comments to the above-referenced filing to dramatically alter the connectivity services and associated fees on Cboe Exchange.<sup>2</sup>

Unfortunately, the Filing is inadequate for the Commission to determine that the Exchange has established that the new fees are “reasonable”, “equitably allocated,” not “undue burdens” on competition, or “non-discriminatory.” Further and perhaps most importantly, this instant Filing seeks to explicitly link market data-related fees to transaction volumes. The Commission has rejected these types of linkages in the past. For example, eight years ago, the Commission ruled that linking data fees to transaction volumes was inconsistent with the Exchange Act.<sup>3</sup> We see no reason why the Commission should reverse that course now.

Thus, the law and past precedent demand that the Commission suspend the Filing and initiate proceedings to disapprove it.

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<sup>1</sup> The Healthy Markets Association is an investor-focused not-for-profit coalition working to educate market participants and promote data-driven reforms to market structure challenges. Our members, who range from a few billion to hundreds of billions of dollars in assets under management, have come together behind one basic principle: Informed investors and policymakers are essential for healthy capital markets. To learn more about Healthy Markets or our members, please see our website at <http://healthymarkets.org>.

<sup>2</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 87304; Oct. 14, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87304.pdf> (“Cboe Connectivity Proposal” or the “Filing”).

<sup>3</sup> *Order Disapproving a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 65362; Sep 21, 2011, available at <https://www.sec.gov/rules/sro/nasdaq/2011/34-65362.pdf> (“Nasdaq Data and Transaction Volume Linkage Disapproval Order”).

## Background on the Proposal

The 53-page filing by the Exchange explains that, as a result of physical systems changes, the Exchange is offering some significant modifications to its service offerings. First, it is “latency equalizing” the new physical ports.<sup>4</sup> Second, the new physical ports can accept both unicast and multicast connectivity (unlike the prior physical ports), which may allow some users to reduce the number of ports they use.<sup>5</sup>

But the impact of those changes will dramatically change not just its offerings, but also its fees:

the Exchange’s current connectivity architecture will be rendered obsolete, and as such, the Exchange must offer new functionality, including new logical connectivity, and adopt corresponding fees. In determining the proposed fee changes, the Exchange assessed the impact on market participants to ensure that the proposed fees would not create a financial burden and have an undue impact on any market participants, including smaller market participants. Indeed, the Exchange notes that it anticipates its post-migration connectivity revenue to be approximately 1.75% lower than today. In addition to providing a consistent technology offering across the Cboe Affiliated Exchanges, the upcoming migration will also provide market participants a latency equalized infrastructure, improving trading performance, and increased sustained order and quote per second capacity, as discussed more fully below.<sup>6</sup>

Unfortunately, these impacts of these changes on different market participants are not explored in any detail.

## The Cboe Connectivity Proposal Fails to Comply with the Exchange Act and Commission Rules

The Cboe Connectivity Proposal provides insufficient information for the Commission to conclude that the Exchange has established that its proposed changes are consistent with the Exchange Act.

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<sup>4</sup> Filing, at 4.

<sup>5</sup> Filing, at 5.

<sup>6</sup> Filing, at 2-3.

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,<sup>7</sup> including, inter alia, that an exchange's rules:

- “perfect the mechanism of a free and open market and a national market system,”<sup>8</sup>
- “protect investors and the public interest,”<sup>9</sup>
- “not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>10</sup> and
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act.<sup>11</sup>

The Commission's Rules of Practice clearly place the “burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder” on the Exchange proposing a rule change.<sup>12</sup> In addition

[t]he description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding, and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>13</sup>

The Cboe Connectivity Proposal offers almost none of this information. For example, before the filing became effective, the Exchange charged \$5,000 per month, per Physical Port for a 10 Gigabit connection.<sup>14</sup> That was increased to \$7,000 per month, per port.<sup>15</sup> There does not appear to be any specific justification for the massive increase. Rather, the Exchange explains that it

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<sup>7</sup> See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

<sup>8</sup> 15 U.S.C. § 78f(b)(5).

<sup>9</sup> 15 U.S.C. § 78f(b)(5).

<sup>10</sup> 15 U.S.C. § 78f(b)(5).

<sup>11</sup> 15 U.S.C. § 78f(b)(8).

<sup>12</sup> Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).

<sup>13</sup> *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 86236, at 7, June 28, 2019, available at <https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf>.

<sup>14</sup> Filing, at 2.

<sup>15</sup> Filing, at 3.

believes increasing the fee for the new 10 Gb Physical Port is reasonable because unlike the current 10 Gb Network Access Ports, the new Physical Ports provides a connection through a latency equalized infrastructure and also allows access to both unicast order entry and multicast market data with a single physical connection.<sup>16</sup>

The Exchange has never established that its prior fees of \$5000 per month per connection were compliant with the Exchange Act. It has not established the value of the new product. Nor has it established that a \$2000 per connection fee increase is compliant. Is that a “reasonable” increase, based on the changed technical specifications of the product offered? The Exchange doesn’t address the issue.

Rather than engaging in assessment of whether the fees are “reasonable,” “equitably allocated,” “undue burdens” on competition, or impermissibly discriminatory, the Exchange notes that the new fees are “in line with the amounts assessed by other exchanges for similar connections by its Affiliated Exchanges and other Exchanges.”<sup>17</sup> The Exchange is literally citing to the egregious fees charged by its own affiliates as supporting the imposition of these fees. By contrast, in a recent filing proposing substantially lower fees for logical ports, in seeking to demonstrate the fees were fair, reasonable, and not unreasonably discriminatory, another exchange operator provided substantial detail on the financial impact of the fees to the exchange and to member firms, with detail about the impact on different groups of member firms.<sup>18</sup> Cboe has not provided any of this type of detail.

Separately, the Exchange is modifying its doubling its data access fees.<sup>19</sup> Historically, the Exchange charged a “Port Fee [that] is payable by any Customer that receives data through a direct connection to CDS (“direct connection”) or through a connection to CDS provided by an extranet service provider (“extranet connection”).”<sup>20</sup> However, that fee was “only assessed once per data port.”<sup>21</sup> The Filing amends

the monthly CDS Port Fee to provide that it is payable “per source” used to receive data, instead of “per data port”. The Exchange also proposes to increase the fee from \$500 per data port/month to \$1,000 per data source/month.<sup>22</sup>

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<sup>16</sup> Filing, at 30.

<sup>17</sup> Filing, at 3.

<sup>18</sup> *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the IEX Fee Schedule, Pursuant to IEX Rules 15,119(a) and (c), to Charge a Fee of \$100 Per Month for Each Logical Order Entry Port in Excess of Five Per User*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 86236, August 9, 2019, available at <https://www.sec.gov/rules/sro/iex/2019/34-86626.pdf>.

<sup>19</sup> Filing, at 5-6.

<sup>20</sup> Filing, at 5.

<sup>21</sup> Filing, at 5.

<sup>22</sup> Filing, at 6.

**Thus, the Exchange is at least doubling its fee without explanation.** Nor is it readily understandable about what impact the change in terminology will have on the number of direct or indirect customers paying the fee.

That’s not all. The Exchange is also dramatically reworking its Logical Port offerings and fees, as detailed below.

Service	Cost per Month
Logical Ports (BOE, FIX) 1 to 5	\$750 per port
Logical Ports (BOE, FIX) > 5	\$800 per port
Logical Ports (Drop)	\$750 per port
BOE Bulk Ports 1 to 5	\$1,500 per port
BOE Bulk Ports 6 to 30	\$2,500 per port
BOE Bulk Ports >30	\$3,000 per port
Purge ports	\$850 per port
GRP Ports	\$750/primary (A or C Feed)
Multicast PITCH/Top Spin Server Ports	\$750/set of primary (A or C feed)

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We recognize that the Exchange is simultaneously modifying the capabilities of the services it is offering. However, it is unclear what relationship, if any, the fee changes have to the changes in service. This detail must be provided, if the Commission were to establish that the fees are consistent with the Exchange Act and that the Filing complies with Commission rules.

Lastly, and perhaps most importantly, the Filing would explicitly decrease connectivity fees for high-volume customers of the Exchange.<sup>24</sup> Historically, the Exchange has maintained an incentive program for market-makers that allows them to receive discounts transaction fees and trading permit fees.<sup>25</sup> The Filing proposes to change that to also allow market makers to “receive a discount on Bulk Port fees (instead of Trading Permits).”<sup>26</sup> The discount could be for up to 25% off the bulk port fees.<sup>27</sup> Further, through another incentive program, the Exchange is proposing to cut market makers’ bulk port fees by up to 40%, based on their prior month’s make percentage.<sup>28</sup>

The Commission has previously rejected attempts by Exchanges to link transaction volumes to data fees, on the grounds that the practice is inconsistent with the Exchange Act.<sup>29</sup> In January 2011, Nasdaq filed an immediately-effective filing in which it created

<sup>23</sup> Filing, at 7.

<sup>24</sup> Filing, at 13.

<sup>25</sup> Filing, at 13-14.

<sup>26</sup> Filing, at 14.

<sup>27</sup> Filing, at 14.

<sup>28</sup> Filing, at 14-16.

<sup>29</sup> Nasdaq Data and Transaction Volume Linkage Disapproval Order.

three levels of discounts for its depth of book data feed for some customers, based upon their trading with Nasdaq. As the filing explained:

Specifically, NASDAQ is reducing the costs of executing trades and of providing “depth of book” data products for NASDAQ member firms that service “non-professional” users with which the firm has a brokerage relationship. The more NASDAQ data a firm provides to retail investors, and the more that firm trades on NASDAQ, the lower its fees will be.<sup>30</sup>

Eight days later, the Commission suspended the filing.<sup>31</sup> In so doing, the Commission expressed concerns

that such a tying arrangement may not be consistent with the statutory requirements applicable to a national securities exchange under the Act... For instance, the Commission is concerned that the proposal may fail to satisfy the standards under the Exchange Act and the rules thereunder that require market data fees to be equitable, fair, and not unreasonably discriminatory.<sup>32</sup>

Much like today, the exchange argued that the data and transactions are “joint products” and that linking spending across those products was economically sensible.<sup>33</sup> Back then, SIFMA/NetCoalition argued that “platform competition theory” was “flawed as a matter of economics, because order-execution services and market data are bought and sold separately, at different times, in different proportions and by different consumers.”<sup>34</sup>

The Commission explicitly rejected Nasdaq’s logic, and found the linkage of data fees to transaction volumes proposed by Nasdaq to violate several aspects of the Exchange Act.

In particular, the Commission does not find that the proposed rule change is consistent with:

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<sup>30</sup> *The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 63745, Jan. 20, 2011, available at <https://www.sec.gov/rules/sro/nasdaq/2011/34-63745.pdf>.

<sup>31</sup> *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Link Market Data Fees and Transaction Execution Fees*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 63796, Jan. 28, 2011, available at <https://www.sec.gov/rules/sro/nasdaq/2011/34-63796.pdf>.

<sup>32</sup> *Id.*, at 4.

<sup>33</sup> See, *Nasdaq Data and Transaction Volume Linkage Disapproval Order*, at 5.

<sup>34</sup> *Id.*, at 6 (citing to Letter from Ira D. Hammerman, SIFMA, and Markham Erickson, NetCoalition to Elizabeth M. Murphy, SEC, Mar. 21, 2011, at 5 n.6).



(1) Section 6(b)(4) of the Act which, among other things, requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities;”

(2) Section 6(b)(5) of the Act which, among other things, requires that the rules of a national securities exchange be “not designed to permit unfair discrimination between customers, issuers, brokers, or dealers;”

(3) Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act];” and (4) Section 11A of the Act and Rules 603(a)(1) and 603(a)(2) of Regulation NMS which, among other things, require NASDAQ to distribute market data on terms that are “not unreasonably discriminatory.”<sup>35</sup>

That logic holds true today with the instant Filing.

Unfortunately, the Cboe Connectivity Proposal before you today offers effectively no analysis, much less attempted to justify, how its determinations are consistent with the Exchange Act. For example, the Exchange simply concludes that it

believes the proposed change to AVP continues to allow the Exchange to provide TPHs that have both Market-Maker and agency operations reduced Market-Maker costs via the credits, albeit credits on BOE Bulk Port fees instead of Trading Permit fees.<sup>36</sup>

But why? And how are these fees (and the differences between them),

- reasonable,
- equitably allocated,
- not undue burdens on competition, or
- non-discriminatory?

Facially, the proposed changes appear to be inconsistent with each requirement of the Exchange Act. However, apart from broad generalizations and conclusory statements, the Exchange has offered no data or analysis to support either its logic or its conclusion that any of the changes detailed in the Filing comply with the Exchange Act.

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<sup>35</sup> Nasdaq Data and Transaction Volume Linkage Disapproval Order, at 11-12.

<sup>36</sup> Filing, at 14.

## Concerns with Preferential Treatment of Large Exchange Families

We are concerned that, if the Commission were to not suspend the filing and initiate proceedings to approve or disapprove it, the Commission would be further establishing a double-standard for exchange filings.

Specifically, last year, the Commission permitted the Cboe family of exchanges to dramatically increase their connectivity fees, despite our objections that the filings were inconsistent with the Exchange Act.<sup>37</sup> Just weeks later, the Commission halted remarkably similar connectivity fee filings by two, much smaller exchange operators (MIAX and BOX).<sup>38</sup>

For the past year, the Commission has engaged in deep regulatory battle with those two smaller exchange operators, pressing them to provide greater information to support their fee changes. And yet, this instant Filing by the much larger Cboe offers almost no details regarding the usage of its data products or the costs or impacts of its proposed changes on its various types of customers. Put simply, the Filing itself appears to ignore the Commission's plain language of its disapproval order for BOX, as well as the suggested outline provided in the staff's SRO Fee Guidance.

We hope the Commission will treat this instant Filing in a manner that is consistent with the law, and comparable to how it has treated other unsubstantiated filings in the recent past. We sincerely hope the Commission will not continue to allow the Cboe to enjoy lesser scrutiny than its smaller competitors.

## Conclusion

The Cboe Connectivity Proposal is sweeping in scope and poses novel issues for the Commission, including explicitly tying the cost of access for data to transaction volumes. The Exchange has effectively offered no evidence to support the determination that the new fees and offerings are consistent with the Exchange Act and Commission Rules. As a result, we urge the Commission to initiate proceedings to disapprove the Filing.

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<sup>37</sup> Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Comm'n, July 26, 2018, available at <https://www.sec.gov/comments/sr-cboebyx-2018-006/cboebyx2018006-4127982-171758.pdf>.

<sup>38</sup> *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule Regarding Connectivity Fees for Members and Non-Members*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 84175, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/miax/2018/34-84175.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Amend the Fee Schedule on the BOX Market LLC Options Facility to Establish BOX Connectivity Fees for Participants and Non-Participants Who Connect to the BOX Network*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 84168, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-84168.pdf>.





Thank you for your consideration. Should you have any questions or would like to discuss these matters further, please contact Chris Nagy at [REDACTED] or me at [REDACTED].

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch". The signature is fluid and cursive, with a long horizontal stroke at the end.

Tyler Gellasch  
Executive Director