



May 5, 2020

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

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

Re: Release No. 34-88586; File No. SR-CBOE-2020-028

Dear Ms. Countryman:

The Healthy Markets Association¹ appreciates the opportunity to offer our comments to the above-referenced proposal regarding market data fees.² While this Filing is technically different than the Exchange's first, second, or third attempts to impose the new connectivity fees and improperly link market data fees to transaction volumes, the basis for our objections is little different than when we first objected to them in November of last year.³ While the Filing is ten pages longer than its first iteration,⁴ the additional volume is largely immaterial, and information essential to evaluating the merits of the Filing is still not provided.

Ultimately, the information provided by the Exchange is inadequate to establish the Filing's compliance with the Exchange Act and Commission rules. Accordingly, the Commission should suspend the filing, and initiate proceedings to disapprove it. Further, the Commission should take action to stop the Exchange from continuing to abuse the Commission's procedures to keep charging customers the improper fees.

¹ 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>.

² *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. 34-88586, Apr. 8, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88586.pdf> ("Cboe Fee Proposal" or the "Filing").

³ Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, Nov. 18, 2019, available at <https://www.sec.gov/comments/sr-cboe-2019-082/srcboe2019082-6437608-198687.pdf> ("First Objection"). This objection was in response to the Exchange's first attempt to impose the fees. *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> ("October Filing").

⁴ Compare October Filing (at 53 pages) and Filing (at 63 pages).

Background

The Cboe family of exchanges has, over a very short period of years, significantly increased its connectivity fees.⁵ In the instant filing, the Cboe is not only seeking to increase its fees without sufficient justification, but would also link market data costs to firms with their trading volumes—something which the Commission has previously explicitly rejected as inconsistent with the Exchange Act.⁶

In October 2019, the Exchange migrated its trading platform to utilize the same system as its affiliated exchanges.⁷ The Exchange made a number of filings with the Commission related to its migration.⁸ While several of those filings relate to technical issues, there is one set of filings that has proven uniquely challenging—the Exchange’s

⁵ In June 2018, for example, the Cboe imposed significant new connectivity fee hikes on its Cboe BYX, Cboe BZX, Cboe EDGA, Cboe EDGX, C2 and CBOE exchanges. Those filings raised connectivity fees for 1 gigabit connections from \$2000 to \$2500 per month, and for 10 gigabit connections from \$7000 to \$7500 per month. We objected to those filings, which we argued were inconsistent with the Exchange Act. Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, Sec. and Exch. Commission, July 26, 2018, available at <https://www.sec.gov/comments/sr-cboebyx-2018-006/cboebyx2018006-4127982-171758.pdf>. Despite our objections, the Commission did not suspend or disapprove the filings. The impact of the fee hikes on individual customers of some of the exchanges have been enormous. As then-Commissioner Robert J. Jackson, Jr. explained in 2018, one of the Cboe’s exchanges (now Cboe EDGX) “has raised the price on its standard 10GB connection five times since 2010—in total, leaving the price of the connection seven times higher than it was in that year.” Remarks of Hon. Robert J. Jackson, Jr. before the Healthy Markets Association and George Mason University, Sept. 19, 2018, n.32, available at <https://www.sec.gov/news/speech/jackson-unfair-exchange-state-america-stock-markets> (citing See EDGX Notices of Filing and Immediate Effectiveness SR-CboeEDGX-2018-016, SR-BatsEDGX-2017-47, SR-BatsEDGX-2017-02, SR-EDGX-2015-29, SR-EDGX-2013-14, and SR-EDGX2010-21).

⁶ See, e.g., *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>.

⁷ Filing, at 2.

⁸ See, e.g., *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> (“October Filing”); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend and Consolidate Various Exchange Rules Relating to Trading Permit Holder Membership, Registration and Participants and Move Those Rules from the Currently Effective Rulebook to Proposed Chapter 3 of the Shell Structure for the Exchange’s Rulebook that will Become Effective Upon the Migration of the Exchange’s Trading Platform to the Same System Used by the Cboe Affiliated Exchanges*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-87377, Oct. 21, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87377.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fee Schedule*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-87546, Nov. 15, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87546.pdf>; *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. 34-87727, Dec. 12, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87727.pdf> (re-imposing the \$7000 fees for 10 gigabit connectivity) (“December Filing”); *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. 34-88164, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88164.pdf> (re-imposing the \$7000 fees for 10 gigabit connectivity) (“February Filing”).

efforts to “update and simplify its fee structure with respect to access and connectivity and adopt new access and connectivity fees.”⁹

In fact, since October, the Exchange has issued a torrent of filings alternatively imposing, withdrawing, and then reimposing higher connectivity fees and improperly linking market data fees to transaction volumes.¹⁰ Each time, the fees are imposed and collected. Thereafter, the filings imposing the fees are withdrawn¹¹ and immediately replaced.¹² In each instance, the filings imposing the new fees are nearly identical to the filings that were withdrawn.¹³

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

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

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,¹⁴ including, inter alia, that an exchange’s rules:

- are an equitable allocation of reasonable dues, fees, and other charges;¹⁵
- “not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;¹⁶ and
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act.¹⁷

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.¹⁸ 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

⁹ Filing, at 3; see also, February Filing, at 3. December Filing, at 3.

¹⁰ In total, the filings essentially seeking to impose the same connectivity fees have been submitted four times over the course of six months. See, October Filing, December Filing, February Filing, and Filing.

¹¹ We do not see the withdrawn filings on the SEC’s website, and question whether those may be clearly, publicly provided separately.

¹² See Filing, at 3-4, n.6.

¹³ Compare October Filing, December Filing, February Filing, and Filing.

¹⁴ See *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

¹⁵ 15 U.S.C. § 78f(b)(4).

¹⁶ 15 U.S.C. § 78f(b)(5).

¹⁷ 15 U.S.C. § 78f(b)(8).

¹⁸ Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm’n, 17 CFR 201.700(b)(3).

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.¹⁹

Despite our November objections, and having three prior attempts, the Filing still offers almost none of this information. For example, before the fees first became effective, the Exchange charged \$5,000 per month, per Physical Port for a 10 Gigabit connection.²⁰ That was increased to \$7,000 per month, per port.²¹ There does not appear to be any specific justification for the massive increase. Rather, the Exchange explains that it

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 with faster switches and also allows access to both unicast order entry and multicast market data with a single physical connection.²²

In fact, the only difference in this justification since October has been the addition of the words “with faster switches.”²³ Somewhat ironically, the language in the Filing is still conditional. The “current” network from October is not still the “current” network in March (now April). For one thing, the changes have been implemented for months. What has the change been? The Filing again ignores the reality of the passage of time.

The relevant language in each of the successive Cboe filings related to these fees is also simply cut and re-pasted, despite the passage of time. For example, the Filing was submitted to the Commission on March 27th, and yet the document explains “Through January 31, 2020, Cboe Options market participants *will continue* to have the ability to connect to Cboe Options’ trading system via the current Network Access Ports.”²⁴ The date has already passed. Did that happen or not? What has happened since? The Filing itself doesn’t explain, despite the fact that the Filing is made nearly *two months after* the anticipated event.

At the same time, the Filing does explain that some of its prior statements in its earlier versions of the Filing regarding projected revenues were inaccurate. For example, the Filing attempts to dismiss concerns that the Exchange raised revenues in February 2020 by imposing the new fees, as opposed to losing revenues, as it predicted in its

¹⁹ *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>.

²⁰ October Filing, at 2.

²¹ October Filing, at 3.

²² Filing, at 39.

²³ Contrast, Filing, at 39 with October Filing, at 30.

²⁴ Filing, at 4 (emphasis added).



October Filing.²⁵ The Commission should not offer its approval of Filings that are so rife with errors.

Unfortunately, aside from these errors and inadequacies, the Exchange has simply failed to provide relevant information.

Separately, the Exchange has still not explained why it should be permitted to link market data fees to transaction volumes, even though such a linkage would disproportionately favor large traders over smaller ones. In fact, when the Commission previously considered such a linkage several years ago in a filing by Nasdaq, the Commission staff determined that it was inconsistent with the Exchange Act. As we wrote in our November Letter:

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.” 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. Cboe has not provided any of this type of detail.²⁶

Lastly, we note that the Commission has suspended and denied remarkably similar connectivity fee filings by BOX.²⁷ We have objected to many of those filings as well.²⁸ In fact, over the past two years, the Commission has effectively engaged in hand-to-hand combat with BOX regarding its imposition of heightened connectivity fees. BOX has repeatedly exploited the Commission’s procedures to continue imposing fees that have

²⁵ See, e.g., Filing, at 3, n.5.

²⁶ November Letter, at 4 (internal citations omitted).

²⁷ *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. 34-84168, Sept. 17, 2018, available at <https://www.sec.gov/rules/sro/box/2018/34-84168.pdf>.

²⁸ Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Aug. 23, 2018, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-4258035-173056.pdf>; Letter from Tyler Gellasch, Healthy Markets Association to Brent J. Fields, SEC, Sept. 4, 2018, available at <https://www.sec.gov/comments/sr-miax-2018-19/srmiax201819-4300775-173209.pdf> (regarding the MIAX filing).



been substantively suspended or disapproved. Essentially, each time BOX's fees have met resistance from the Commission (or staff), the exchange has appealed or made a new, substantively similar filing. Because the filings are immediately effective (and appeals of staff actions generally stay the staff's determinations), BOX has been able to continue to collect fees from its customers. We have previously written to the Commission expressing our concerns that "BOX is exploiting the Commission's procedures in a manner that is contrary to the Commission's intent, protecting investors, the public interest, and the law."²⁹

Now, it seems that Cboe has decided to engage in a similar charade.

This Filing is far more novel, broader in scope, unsupported, and facially inconsistent with the Exchange Act and Commission Rules than those expressly disapproved BOX filings.

Conclusion

We urge the Commission to deny the Cboe Fee Proposal and reaffirm its commitment to ensuring that all SRO fee filings comply with both the Exchange Act and Commission Rules. Further, we urge the Commission to take prompt action to preclude Cboe and other exchanges from continuing to exploit the Commission's procedures to assess fees that are inconsistent with the Exchange Act.

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

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch".

Tyler Gellasch
Executive Director

²⁹ Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, at 2, Mar. 19, 2019, available at <https://www.sec.gov/comments/sr-box-2018-24/srbox201824-5151485-183409.pdf>.