



September 30, 2020

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

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

Re: SR-CBOE-2019-082; SR-CBOE-2019-111; SR-CBOE-2020-005;
SR-CBOE-2020-028; SR-CBOE-2020-048; SR-CBOE-2020-064; and
SR-CBOE-2020-086

Dear Ms. Countryman:

The Healthy Markets Association¹ appreciates the opportunity to supplement our comments to the above-referenced proposals regarding Cboe Exchange connectivity and data-related fees.²

¹ To learn 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. 34-87304, File No. SR-CBOE-2019-082, Oct. 15, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87304.pdf> ("Initial Filing", filed on October 2, 2019 and withdrawn November 29, 2019); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec.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; File No. SR-CBOE-2019-111, Dec. 12, 2019, available at <https://www.sec.gov/rules/sro/cboe/2019/34-87727.pdf> ("Second Filing," filed on November 29, 2019 and withdrawn on Jan. 28, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec.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; File No. SR-CBOE-2020-005, Feb. 11, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88164.pdf> ("Third Filing," filed on January 28th and withdrawn on March 27, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec.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, File No. SR-CBOE-2020-028, Apr. 8, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88586.pdf> ("Fourth Filing," filed March 27, 2020 and withdrawn on May 21, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec.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. 34-88984; File No. SR-CBOE-2020-048, June 1, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-88984.pdf> ("Fifth Filing," filed May 21, 2020, refiled "to correct an error on May 22, 2020, and withdrawn on July 2, 2020); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule in Connection with Migration*, Sec.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. 34-89239; File No. SR-CBOE-2020-064, July 7, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-89239.pdf> ("Sixth Filing," filed July 2, 2020 and withdrawn



Nearly one year ago, on October 7, 2019, the Cboe Exchange completed migrating its trading platform to the same system used by its other affiliated exchanges. According to the Exchange,

As a result of this migration, the Exchange’s pre-migration connectivity architecture was rendered obsolete, and as such, the Exchange now offers new functionality, including new logical connectivity, and therefore proposes to adopt corresponding fees.³

Beginning on October 2, 2019, the Exchange began a series of filings to impose new fees and fee structures. In total, the Exchange has made more than seven filings imposing new connectivity-related fees. We have previously objected twice.⁴ Since our Second Objection, the Exchange has continued to make filings, withdraw them, and then refile them. According to the Exchange, despite the repeated withdrawals, “the proposed fees have been effective, and thus have been paid by Trading Permit Holders, for approximately eleven months.”⁵

By engaging in this pattern of filing, withdrawing, and refiling, the Exchange is able to continue to collect revenues for fees while still being able to avoid having its fees suspended or facing proceedings that could lead to the then-effective filing’s disapproval.

Ultimately, the information provided by the Exchange is inadequate to establish the Seventh Filing’s compliance with the Exchange Act and Commission rules. Accordingly, the Commission should suspend the filing, and initiate proceedings to disapprove it, much like it did with arguably less controversial connectivity fee filings by BOX.⁶

Further, the Commission should take action to stop the Exchange -- and other exchanges -- from continuing to abuse the Commission’s procedures for fee filings.

September 2, 2020); and *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. 34-89826; File No. SR-CBOE-2020-086, Sept. 10, 2020, available at <https://www.sec.gov/rules/sro/cboe/2020/34-89826.pdf> (“Seventh Filing,” filed September 2, 2020)

³ See Sixth Filing, at 2-3.

⁴ 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”) and Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, SEC, May 5, 2020, available at <https://www.sec.gov/comments/sr-cboe-2020-028/srcboe2020028-7152089-216415.pdf> (“Second Objection”).

⁵ Seventh Filing, at 7.

⁶ See, e.g., *In the Matter of BOX Exchange LLC*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-88493, Mar. 27, 2020, available at <https://www.sec.gov/rules/sro/box/2020/34-88493.pdf> (Commission order affirming disapproval previously made by staff via delegated authority).

Background

The Cboe family of exchanges has, over a very short period of years, significantly increased its connectivity fees.⁷ In October 2019, the Exchange migrated its trading platform to utilize the same system as its affiliated exchanges.⁸ The Exchange made a number of filings with the Commission related to its migration.⁹ While several of those filings relate to technical issues, there is one set of filings that has proven uniquely challenging--the Exchange's efforts to "update and simplify its fee structure with respect to access and connectivity and adopt new access and connectivity fees."¹⁰

In fact, since October of 2019, the Exchange has issued a torrent of filings alternatively imposing, withdrawing, and then reimposing higher connectivity fees and improperly

⁷ 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 Gellach, 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-americas-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).

⁸ Filing, at 2.

⁹ 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").

¹⁰ Filing, at 3; see also, February Filing, at 3. December Filing, at 3.

linking market data-related fees to transaction volumes.¹¹ Each time, the fees are imposed and collected. Thereafter, the filings imposing the fees are withdrawn¹² and immediately replaced.¹³

Filing	Date of Filing	Date Withdrawn	Filing Link	Length (pgs)
Initial Filing	Oct. 2, 2019	Nov. 29, 2019	https://www.sec.gov/rules/sro/cboe/2019/34-87304.pdf	53
Second Filing	Nov. 29, 2019	Jan. 28, 2020	https://www.sec.gov/rules/sro/cboe/2019/34-87727.pdf	57
Third Filing	Jan. 28, 2020	Mar. 27, 2020	https://www.sec.gov/rules/sro/cboe/2020/34-88164.pdf	62
Fourth Filing	Mar. 27, 2020	May 21, 2020	https://www.sec.gov/rules/sro/cboe/2020/34-88586.pdf	63
Fifth Filing	May 21, 2020	July 2, 2020	https://www.sec.gov/rules/sro/cboe/2020/34-88984.pdf	65
Sixth Filing	July 2, 2020	Sept. 2, 2020	https://www.sec.gov/rules/sro/cboe/2020/34-89239.pdf	73
Seventh Filing	Sept. 2, 2020		https://www.sec.gov/rules/sro/cboe/2020/34-89826.pdf	74

The Exchange is not only seeking to increase its fees without sufficient justification, but would also link market data-related costs to firms with their trading volumes--something which the Commission has previously explicitly rejected as inconsistent with the Exchange Act.¹⁴

The Seventh Filing Fails to Comply with the Exchange Act and Commission Rules

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

¹¹ In total, the filings essentially seeking to impose the same connectivity fees have been submitted seven times.

¹² We do not see the withdrawn filings on the SEC's website, and question whether those may be clearly, publicly provided separately.

¹³ See Filing, at 3-4, n.6.

¹⁴ 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>.

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,¹⁵ including, inter alia, that an exchange's rules:

- are an equitable allocation of reasonable dues, fees, and other charges;¹⁶
- “not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;¹⁷ and
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act.¹⁸

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.¹⁹ 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.²⁰

Despite our First Objection and Second Objection, and having six prior attempts, the Seventh 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.²¹ That was increased to \$7,000 per month, per port.²² 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

¹⁵ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

¹⁶ 15 U.S.C. § 78f(b)(4).

¹⁷ 15 U.S.C. § 78f(b)(5).

¹⁸ 15 U.S.C. § 78f(b)(8).

¹⁹ Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).

²⁰ *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>.

²¹ Initial Filing, at 2.

²² Initial Filing, at 3.

and multicast market data with a single physical connection.
²³

In its Seventh Filing, the Exchange explains that “it has also received feedback from a number of market participants that the Exchange’s proposed fee changes are regarded as reasonable.”²⁴ That unsupported anecdote is not what the law and Commission rules require. The law and Commission rules require the Commission to determine that the fees are reasonable, and quite a bit more.

Unfortunately, the Commission still does not have sufficient information to make that determination. Further, to the extent that it does have information, that evidence suggests that the fees are facially non-compliant with the Exchange Act.

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 Seventh Filing was submitted to the Commission on September 2, 2020, 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.”²⁵ The date has already passed. Did that happen or not? What has happened since? The Seventh Filing itself doesn’t explain, despite the fact that the Seventh Filing was made nearly *seven months after* the anticipated event.

At the same time, the Seventh Filing does explain that some of its prior statements in its earlier versions regarding projected revenues were inaccurate. For example, the Seventh 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 October Filing.²⁶ 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-related 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 First Objection:

Rather than engaging in assessment of whether the fees are “reasonable,” “equitably allocated,” “undue burdens” on

²³ Seventh Filing, at 49.

²⁴ Seventh Filing, at 7.

²⁵ Seventh Filing, at 9 (emphasis added).

²⁶ See, e.g., Seventh Filing, at 3, n.6.

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.²⁷

Lastly, we note that the Commission has suspended and denied connectivity fee filings by BOX.²⁸ We have objected to many of those filings as well.²⁹ In fact, over the past few years, the Commission effectively engaged in hand-to-hand combat with BOX regarding its imposition of heightened connectivity fees. BOX repeatedly exploited the Commission’s procedures to continue imposing fees that have been substantively suspended or disapproved. Essentially, each time BOX’s fees met resistance from the Commission (or staff), the exchange appealed or made a new, substantively similar filing. Because the exchange fee 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.”³⁰ Unquestionably, the Cboe has looked to the experience of its smaller competitor and is now replicating the charade.

²⁷ First Objection, at 4 (internal citations omitted).

²⁸ *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>.

²⁹ 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).

³⁰ 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>.



This Seventh 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.

We urge you to suspend the Seventh Filing, initiate proceedings to disapprove it, and take action against the Exchange for abusing the filing process in a manner that is facially inconsistent with the protection of investors and fair and efficient markets.

Conclusion

We urge the Commission to deny the Seventh Filing 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 (202) 909-6138.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch
Executive Director