



July 26, 2019

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

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

Re: Release No. 34-86232 File No. SR-CboeBYX-2019-009;
Release No. 34-86233 File No. SR-CboeBZX-2019-041;
Release No. 34-86236 File No. SR-CboeEDGA-2019-011; and
Release No. 34-86231 File No. SR-CboeEDGX-2019-029

Dear Ms. Countryman:

The Healthy Markets Association¹ appreciates the opportunity to offer our comments to the above-referenced suspension orders by the Commission.² Healthy Markets applauds the Commission for taking action on the above-referenced filings, even without the benefit of public comments.

As we have commented before, the self-regulatory organizations have dramatically increased the number of rule filings since the 1990s, with more than 1500 rule filings in

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 *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, Exch. Act Rel. No. 86232; Jun. 28, 2019, available at <https://www.sec.gov/rules/sro/cboebyx/2019/34-86232.pdf>; *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, Exch. Act Rel. No. 86233; Jun. 28, 2019, available at <https://www.sec.gov/rules/sro/cboebzx/2019/34-86233.pdf>; *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, Exch. Act Rel. No. 86236; Jun. 28, 2019, available at <https://www.sec.gov/rules/sro/cboeedga/2019/34-86236.pdf>; *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, Exch. Act Rel. No. 86231; Jun. 28, 2019, available at <https://www.sec.gov/rules/sro/cboeedgx/2019/34-86231.pdf>.



2017.³ This deluge of rule changes has overwhelmed both regulators and market participants. For example, from 2016 until mid-2018, the exchanges submitted a whopping 95 filings related to connectivity. Almost no comments were received. And not a single one was suspended by the Commission or staff.⁴ Similar statistics with other types of filings by the exchanges such as pricing tiers and market data fees have also become all-too-familiar with many market participants.

Historically, despite the clear obligations of the federal securities laws and Commission rules, the Commission had not appeared to scrutinize most exchange filings.

That seems to have changed. Over this past year, the Commission has remanded more than 400 market data-related filings to which Bloomberg and SIFMA had objected. And the Commission has blocked market data fee increases for the SIP, and it has stopped some connectivity fees. But in each instance, the Commission has responded to objections raised by market participants or trade groups (including Healthy Markets).⁵

The Commission's exercise of its authority to review and independently exercise its judgment about whether exchange filings are consistent with the Exchange Act⁶ and Commission rules should not depend upon whether a market participant or other party first (1) identified the proposed change amidst a flood of other changes, and (2) was able to marshal the necessary resources to file an appropriately informed comment. Any Commission reliance on receiving comments before taking action on an exchange

³ See, e.g., Letter from Tyler Gellasch, Healthy Markets Association, to Vanessa Countryman, Sec. and Exch. Comm'n, Mar. 25, 2019, available at <https://www.sec.gov/comments/265-28/26528-5194574-183610.pdf>.

⁴ Remarks of the Hon. Robert J. Jackson, Jr., Sec. and Exch. Comm'n, before the George Mason Law and Economics Center and the Healthy Markets Association, at n. 33, Sept. 19, 2018, available at <https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets>.

⁵ That said, we acknowledge the Commission staff's recent issuance of guidance on SRO rule filings, which appears to outline a framework within which the staff would review rule filings. *Staff Guidance on SRO Rule Filings Related to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees> ("Staff Guidance").

⁶ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017); *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, available at <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (declaring that in order for the Commission to "meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition."). We note that another exchange family has recently argued that "Section 19(b)(3) does not "require" the Commission "to make a finding as a prerequisite to" the non-suspension of an immediately effective SRO rule filing." Letter from Elizabeth King, NYSE, to Brent J. Fields, SEC, at 1, n. 2, Nov. 21, 2018, available at <https://www.sec.gov/comments/sr-nyse-2018-49/srnyse201849-4670738-176530.pdf>. NYSE inaccurately suggests that the statutory permission granted to the exchanges to have certain types of filings become immediately effective upon filing also separately relieves the Commission of the obligation of the requirement to ensure that those filings are consistent with the Exchange Act. No part of the Exchange Act, including the relevant amendments included pursuant to Section 916 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, so relieves the Commission of this obligation.



rule filing would put smaller market participants at a distinct and persistent regulatory disadvantage.

The law and Commission rules demand otherwise. Commission is obligated, amongst other things, to ensure that an exchange's rules:

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”⁷
- not be “designed to permit unfair discrimination”;⁸
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;⁹ and
- be designed “to protect investors and the public interest.”¹⁰

In the current instance, when the above-referenced filings are lined up against the Staff Guidance, it is very clear that they facially do not meet the requirements of the Act or Commission rules, and therefore should be denied.

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", written in a cursive style.

Tyler Gellasch
Executive Director

⁷ 15 U.S.C. § 78f(b)(4).

⁸ 15 U.S.C. § 78f(b)(5).

⁹ 15 U.S.C. § 78f(b)(8).

¹⁰ 15 U.S.C. § 78f(b)(5).