HMA | HEALTHY MARKETS ASSOCIATION
A MEMBER ORGANIZATION

June 25, 2025

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

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

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Introduce a Small Retail Broker Hosted Solutions Program the Cboe One Summary Feed and Top Data File No. SR-CboeBYX-2025-014[1]; File No. SR-CboeBZX-2025-071[2]; File No. SR-CboeEDGA-2025-015[3]; File No. . SR-CboeEDGX-2025-045[4]

Dear Ms. Countryman:

The Healthy Markets Association[5] writes to object to the above-referenced filings by the Cboe family of exchanges (collectively, "Cboe Filings"), which seek to offer special pricing to one set of potential brokers.

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[1] *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Introduce a Small Retail Broker Hosted Solutions Program and to Update the Existing Eligibility Requirements for the Small Retail Brokerage Distribution Program for the Cboe One Summary Feed and BYX Top Data May 29, 2025*, SEC, Exch. Act Rel. No. 34-103153, May 19, 2025, *available at* https://www.sec.gov/files/rules/sro/cboebyx/2025/34-103153.pdf ("BYX Filing").

[2] *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Introduce a Small Retail Broker Hosted Solutions Program and to Update the Existing Eligibility Requirements for the Small Retail Brokerage Distribution Program for the Cboe One Summary Feed May 29, 2025*, SEC, Exch. Act Rel. No. 34-103152, May 19, 2025, *available at* https://www.sec.gov/files/rules/sro/cboebzx/2025/34-103152.pdf ("BZX Filing").

[3] *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Introduce a Small Retail Broker Hosted Solutions Program and to Update the Existing Eligibility Requirements for the Small Retail Brokerage Distribution Program for the Cboe One Summary Feed*, SEC, Exch. Act Rel. No. 34-103156, May 19, 2025, *available at* https://www.sec.gov/files/rules/sro/cboeedga/2025/34-103156.pdf ("EDGA Filing").

[4] *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Introduce a Small Retail Broker Hosted Solutions Program and to Update the Existing Eligibility Requirements for the Small Retail Brokerage Distribution Program for the Cboe One Summary Feed and EDGX Top Data Feed*, SEC, Exch. Act Rel. No. 34-103155, May 19, 2025, *available at* https://www.sec.gov/files/rules/sro/cboeedgx/2025/34-103155.pdf.

[5] The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at http://healthymarkets.org.

The Cboe Filings do not provide sufficient information to support a finding by the Commission that the exchanges have met their obligations under the Exchange Act and Commission Rules.

Rather, the Cboe Filings facially seek to offer preferential treatment to one particular set of brokers, versus all others, apparently in violation of the Exchange Act's obligations. Accordingly, the Commission should suspend and initiate proceedings to disapprove the Cboe Filings.

Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review exchange filings and determine that those filings are consistent with the Exchange Act,[6] including 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]

Rule 700(b)(3) of the Commission's Rules of Practice clearly establishes that:

> The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b–4, the Form is designed to elicit information necessary for the public to

[6] See *Susquehanna Int'l Grp., LLP v . SEC*, 866 F.3d 442 (D.C. Cir. 2017)("The SEC "shall approve" a self regulatory organization's proposed rule change only "if it finds that such proposed rule change is consistent with" provisions of the Exchange Act."). *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.").
[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).

> provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. ***A mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient. Instead, the description of the 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.*** Any failure of the self-regulatory organization to provide the information elicited by Form 19b–4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.[11]

In 2017, the Court of Appeals for the District of Columbia Circuit remanded the Commission's approval of another self-regulatory organization's rule change, explaining that the Administrative Procedure Act

> requires us to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "unsupported by substantial evidence." To satisfy the "arbitrary and capricious" standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made."[12]

Put simply, the exchange must provide sufficient details, and the Commission must examine those details and independently determine that the exchange's rule meets the requirements of the Exchange Act. While we understand that this may be difficult, given

[11] 17 C.F.R. §201.700(b)(3)(emphasis added); *accord, Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34–88261, Feb. 21, 2020, *available at* https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf.
[12] *Susquehanna*, at 445 (internal citations omitted).

the often dozens of exchange filings per month, the Commission is nevertheless still obligated to "find" or "determine" that the rule meets the requirements of the Exchange Act.[13]

Analysis

The Cboe Filings would establish a "Small Retail Broker Hosted Solutions Program" that would

> provide fee waivers and lower data costs for both (i) Small Retail Brokers (as defined herein) that provide the Applicable Feeds to other Small Retail Brokers via its hosted solutions (the "Hosting Small Retail Broker Distributor") and (ii) the Small Retail Brokers that receive this data from a Hosting Small Retail Broker Distributor.[14]

As Cboe explains, the data that would be subject to the fee waivers and lower costs "benefits investors by facilitating their prompt access to real-time top-of-book information."[15]

We recognize that the Cboe Filings seek to expand upon existing discriminatory programs by the Cboe family of exchanges to lower the exchanges' otherwise exorbitant data costs.[16] However, none of these rules appear to be consistent with the language and clear intent of the Exchange Act.

In fact, the programs to preferentially aid "Small Retail Brokers" highlight the much bigger concern we have with the generally monopolistic expansion of products and fees for access to critical market data. Extremely high market data costs are not, in fact, "reasonable dues, fees, and other charges."[17] They do, in fact, impose a "burden on competition [that is] not necessary or appropriate."[18]

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[13] *Susquehanna*, at 446. However, at least when it comes to exchange port fee fillings, the Commission has rarely made any such determinations, and yet has simultaneously not frequently disapproved filings for failing to meet the requirements of the Exchange Act and Commission Rules. In fact, almost exactly five years ago, then-Commissioner Robert J. Jackson, Jr. declared that his staff had reviewed all 95 exchange connectivity filings from 2016 through September 2018, and found that not a single one had been rejected by the Commission or staff. Hon. Robert J. Jackson, Jr., *Unfair Exchange: The State of America's Stock Markets*, Sept. 19, 2018, at n.33, *available at* https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets#_ftn33.

[14] BYX Filing, at 2. *Accord*, BZX Filing, at 2; EDGA Filing, at 2; EDGX Filing, at 2.

[15] BYX Filing, at 2. *Accord*, BZX Filing, at 2; EDGA Filing, at 3; EDGX Filing, at 3.

[16] *See, e.g.*, EDGX Filing, at 3 (The Small Retail Broker Distribution Program "provides a discounted Distribution Fee of $750/month for EDGX Top Data Feed and $3,500/month for Cboe One Summary Data Feed as well as a discounted Data Consolidation Fee of $350/month for Cboe One Summary Data for eligible participant.").

[17] See, 15 U.S.C.§ 78f(b)(4).

[18] See, 15 U.S.C.§ 78f(b)(8).

The exchanges – by creating the Small Retail Broker programs – have acknowledged that their standard data fees are burdens on competition and that their fees are unreasonable.

The Cboe family of exchanges is proposing to solve that market problem, which appears to also violate the Exchange Act, by adopting a solution that also appears to violate the Exchange Act.

Of course, we might generally be receptive to arguments that "Small Retail Broker" programs to discount those fees would make those fees more "reasonable" and promote competition. But they are also facially discriminatory. So the exchanges should presumably seek to argue that the discrimination is appropriate, given the other impacts. Unfortunately, none of the Cboe Filings clearly articulates and supports that line of arguments.

The Commission has previously rejected unsubstantiated filings that would offer discriminatory prices on data-related costs.

For example, following objections from the Healthy Markets Association[19] and SIFMA, on May 1, 2018, the Commission summarily abrogated filings by the Consolidated Tape Association related to "Enterprise Caps," which imposed upper limits on the data fees that could be imposed on large brokers.[20] In abrogating the rule, the Commission explained that it:

> believes that the Amendment raises questions as to whether the changes will result in fees that are fair and reasonable, not unreasonably discriminatory, and that will not impose an undue or inappropriate burden on competition under Section 11A of the Act. The Commission does not believe that the Participants have provided sufficient information regarding, or adequate justification for, the changes described in the Amendment. While the Participants represent that they used certain data to calibrate the fee changes to achieve a revenue neutral outcome none of that data is provided in the Amendment, nor do the Participants provide any such information in their response. The Commission is also concerned that the Participants provided little information concerning the basis for, the anticipated revenue effects of, and the effects on market

[19] Letter from Tyler Gellasch, HMA, to Brent J. Fields, SEC, Apr. 11, 2018, *available at* https://healthymarkets.wpengine.com/wp-content/uploads/2018/05/04-11-18-HM-letter-Market-Data-Reforms.pdf.

[20] *Order of Summary Abrogation of the TwentyThird Charges Amendment to the Second Restatement of the CTA Plan and the Fourteenth Charges Amendment to the Restated CQ Plan*, SEC, 83 Fed. Reg. 20126 (May 7, 2018), *available at* https://www.govinfo.gov/content/pkg/FR-2018-05-07/pdf/2018-09579.pdf ("Enterprise Fee Amendment Abrogation").

> participants from, the Amendment. The Participants have not provided sufficient information for the changes to be closely scrutinized for fairness and reasonableness and the Amendment lacks support for the basis of, as well as the application and likely effect of, the fees to determine that the Amendment is not unreasonably discriminatory.[21]

That argument applies with equal force to the Cboe Filings at issue here.

Conclusion

The Commission should suspend the facially deficient Cboe Filings and initiate proceedings to disapprove them.

Further, the Commission should consider suspending any subsequent filings that are substantively similar to the instant filings or alternatively consider them as amendments to these filings. The exchanges should not be permitted to circumvent the law or Commission Rules by continuing to extract fees based upon filings that are inconsistent with the law and Commission Rules.

Thank you for your consideration.

Sincerely,

Tyler Gellasch
President and CEO

[21] Enterprise Fee Amendment Abrogation, at 20128.