



March 26, 2021

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

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

Re: File No. SR-CboeBZX-2021-017; File No. SR-CboeEDGX-2021-011; File No. SR-CboeBZX-2020-094; File No. SR-CboeBYX-2020-034; File No. SR-CboeEDGA-2020-032; File No. SR-CboeEDGX-2020-064; File No. SR-C2-2021-002; and File No. SR-CBOE-2021-010¹

Dear Ms. Countryman:

The Healthy Markets Association² appreciates the opportunity to object to the above-referenced filings regarding the Cboe's efforts to limit its exchanges' customers'

¹ *Notice of Filing and Immediate Effectiveness of a Proposal to Permit the Exchange to Look Back Only to July 2020 to Correct Certain Billing Errors which were Discovered in October 2020*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-91239, (Mar. 2, 2021), available at <https://www.sec.gov/rules/sro/cboebzx/2021/34-91239.pdf> (Cboe BZX Look Back Filing); *Notice of Filing and Immediate Effectiveness of a Proposal to Permit the Exchange to Look Back Only to July 2020 to Correct Certain Billing Errors which were Discovered in October 2020*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-9123, (Mar. 1, 2021), available at <https://www.sec.gov/rules/sro/cboeedgx/2021/34-91231.pdf> (collectively, "Look Back Filings"). See also *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Options and Equities Fees Schedules to Adopt a Provision Relating to Billing Errors and Fee Disputes*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-90897, (Jan. 11, 2021), available at <https://www.sec.gov/rules/sro/cboebzx/2021/34-90897.pdf> (Cboe BZX Billing Dispute Filing); *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish a Policy Relating to Billing Errors*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-90899 (Jan. 11, 2021), available at <https://www.sec.gov/rules/sro/cboebyx/2021/34-90899.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish a Policy Relating to Billing Errors*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-90900 (Jan. 11, 2021), available at <https://www.sec.gov/rules/sro/cboeedga/2021/34-90900.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish a Policy Relating to Billing Errors*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-90901 (Jan. 11, 2021), available at <https://www.sec.gov/rules/sro/cboeedgx/2021/34-90901.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish a Policy Relating to Billing Errors*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-91053, (Feb. 3, 2021), available at <https://www.sec.gov/rules/sro/cboe/2021/34-91053.pdf>; *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Establish a Policy Relating to Billing Errors*, Sec. and Exch. Comm'n, Exch. Act Rel. No. 34-91049 (Feb. 3, 2021), available at <https://www.sec.gov/rules/sro/c2/2021/34-91049.pdf> (collectively, "Billing Dispute Filings").

² To learn about Healthy Markets or our members, please see our website at <http://healthymarkets.org>.



rights to recourse for past and future billing errors, as well as effectively cut off responsibility for several years of recently discovered billing errors.

We sincerely appreciate Cboe's attempt to mitigate some of the potential negative impacts on some customers from its recent years-long billing errors. However, the filings are not limited to just waiving fees and expenses that might otherwise be due from customers for its recently discovered billing error, but would also purportedly abrogate rights of customers who may have claims against Cboe arising from these and future errors.

Because these filings are inconsistent with the Exchange Act and Commission Rules, we urge you to take action to suspend, disapprove, and if necessary, vacate them. We are also troubled that these filings, which fundamentally impact the rights and liabilities for Cboe's customers, were all made using the SEC's fast track process for generally non-controversial filings. We believe that this was a mis-use of the process, and urge you to take action to ensure that the Rule 19b-4 filing process is not used in the future to fast track material abrogations of investor and customer rights.

Lastly, Cboe's Billing Dispute Filings are unfortunately not novel. Very recently, several exchanges have adopted rules to severely limit their customers' rights in billing disputes. We urge you to review all exchanges' rules regarding billing dispute practices, and consider taking action to ensure these policies -- which facially appear to undermine both market integrity and investor protections -- are consistent with the Exchange Act and Commission Rules.

Background

According to Cboe,

in October 2020, the Exchange identified a billing error relating to certain fee codes. As a result of the discovery, the Exchange conducted a review of additional fee code configurations, which review was only recently completed. The review resulted in the discovery of additional billing errors relating to Exchange fee codes. These errors, along with the original error discovered in October 2020, resulted in various Members being over-rebated or under-billed, and to a lesser extent overbilled, over the course of several years.³

Generally, Cboe would be required to look back to customers it may have under-billed or over-rebated and ask for money. This could place a potential significant, unexpected burden on Cboe's customers that may be suddenly billed -- through no fault of their own -- for trading that may have occurred years ago. At the same time, Cboe would also be

³ Cboe BZX Exchange Look Back Filing, at 3.

required to go back to the customers it over-billed and under-rebated and credit or otherwise provide them with compensation.

Rather than engage in this messy process of reconciling its bills with customers, on December 31, 2020 (over two months after the initial billing error was discovered), Cboe filed to limit the ability of its customers to dispute fees.⁴ The Billing Dispute Filings offered no hint of the Cboe's years-long billing error. Instead, the Billing Dispute Filings were simply declared "non-controversial" and deemed "immediately effective upon filing." As of March 24, 2021, none of the Billing Dispute Filings appears to have received a comment.⁵

On February 18, 2021, Cboe made the Look Back Filings, which were for just two of its Exchanges.⁶ In these filings, which were also deemed immediately effective upon filing, Cboe disclosed that it had become aware of years-long billing errors, and that it would limit the look back for those billing errors to just July 2020.⁷

Standard of Review and Burden on the Exchange

The Commission is obligated to review SRO filings and determine that those filings are consistent with the Exchange Act,⁸ including, inter alia, that an exchange's rules:

- are an equitable allocation of reasonable dues, fees, and other charges;⁹ and
- "not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers."¹⁰

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.¹¹ 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

⁴ Billing Dispute Filings.

⁵ The filings for BZX, BYX, EDGA, EDGX were released for comment on January 11, 2021, while the filings for C2 and Cboe were released on February 3, 2021.

⁶ Cboe BZX Exchange Look Back Filing and Cboe EDGX Exchange Look Back Filing.

⁷ See Cboe BZX Exchange Look Back Filing, at 1.

⁸ See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017).

⁹ 15 U.S.C. § 78f(b)(4).

¹⁰ 15 U.S.C. § 78f(b)(5).

¹¹ Rule 700(b)(3), Commission Rules of Practice, Sec. and Exch. Comm'n, 17 CFR 201.700(b)(3).

consistent with the Act and the applicable rules and regulations.¹²

Further, in order for an Exchange filing to be deemed immediately effective upon filing pursuant to Rule 19b-4, the filing may not effectuate a change that would “significantly affect the protection of investors or the public interest.”¹³

Analysis

We begin our analysis with a discussion of the process used to effectuate the filings. We recognize the Cboe has followed the lead of other exchange families in disenfranchising their customers through the abbreviated Rule 19b-4 filing process.¹⁴ Those exchanges were wrong to use that process. The Commission was wrong to let them. And the Cboe is wrong for trying to do that again now. Rule 19b-4 cannot be used to effectuate a change that would “significantly affect the protection of investors or the public interest.”¹⁵

The Billing Dispute Filings materially reduce the ability of exchange customers to dispute fees and rebates to which they may rightly be entitled to recompense. Similarly, the Look Back Filings directly seek to limit rights of investors and other market participants who may otherwise seek compensation for Cboe’s billing errors. These filings undermine both the protection of investors and the public interest.

Further, Form 19b-4 states that

This form, including the exhibits, is intended to elicit information necessary for the public to provide meaningful comment on the proposed rule change ... for the Commission to determine whether the proposed rule change ... is consistent with the requirements of the Act and the rules and regulations thereunder ... and in accordance with the requirements for each type of filing. The self-regulatory organization must provide all the information called for by the form, including the exhibits, and must present the information in a clear and comprehensible manner.¹⁶

¹² *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>.

¹³ 17 C.F.R. § 240.19b-4(f)(6).

¹⁴ See, e.g., *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend the Fee Schedule of NYSE Chicago, Inc.*, Sec. and Exch. Comm’n, Exch. Act Rel. No. 34-87650, (Dec. 3, 2019), available at <https://www.sec.gov/rules/sro/nysechx/2019/34-87650.pdf> (adopting a sixty day cutoff for fee disputes).

¹⁵ 17 C.F.R. § 240.19b-4(f)(6).

¹⁶ Form 19b-4, Sec. and Exch. Comm’n, available at <https://www.sec.gov/files/form19b-4.pdf>.

The Billing Dispute Filings inexplicably declined to mention that Cboe was aware of years-long billing errors, which were likely to give rise to disputes. This information was unquestionably “necessary” for public consideration of whether and how to comment on the proposed rule change.

By omitting this information from the Billing Dispute Filings, Cboe deprived the public -- including Healthy Markets Association and our members -- of the opportunity to understand the immediate, direct motivation of Cboe in making the filings and its impact on its customers past and present, as well as the overall integrity of the markets. Healthy Markets Association and the public were deprived of that information well past the comment period called for by the 19b-4 process and the 30 day window for the Commission staff to easily take action to suspend and initiate proceedings to disapprove of them. Rather, it was not until the Look Back Filings were submitted that we were able to understand the motivations and impacts of the Billing Dispute Filings. To permit this scheme to stand would be to perversely reward exchanges for omitting material information from their filings.

Substantively, we acknowledge that other exchanges have recently been permitted to implement “billing dispute policies” that appear to contradict the requirements of the Exchange Act and the protection of investors. The Commission should have suspended and disapproved those filings. And we urge the Commission to take action against them now.

While that action (or inaction) is now past, the Commission is still bound to review these filings for consistency with the Exchange Act and Commission Rules. In this instance, Cboe has failed to establish that the Billing Dispute Filings and Look Back Filings meet that burden.

Despite the Exchange Act’s requirement that Cboe establish that its fees are equitably allocated, the Look Back Filings do not include any details regarding:

- how many customers are involved,
- the nature of the different customers involved;
- the amount of dollars involved for each customer or type of customer impacted;
or
- any distributional effects across various customers or types of customers.

Before the Commission can conclude that the filings would lead to equitable allocations of fees and expenses, the Commission (and public) would at a minimum need to know the size of the fees and how they are allocated. Cboe has not provided that information. Instead, the Cboe asserted that

the nature of these particular billing errors is such that in correcting the errors, more money would be owed to the Exchange by Members due to over-rebating or underbilling than is owed to Members by the Exchange due to

overbilling. Accordingly, the Exchange believes it's appropriate and equitable to apply the three-month look back for corrective billing to the errors that were discovered in October 2020.¹⁷

Simply declaring something equitable does not make it so.

While some Cboe customers may benefit by dramatically shortening the look back period, the differences in impacts on different customers may be significant. Some customers may benefit by shortening the look back, while others may be harmed. The Cboe makes no attempt to identify or address any disparate impacts on different firms. For example, based on the filings, it could be that two customers could be relieved of having to pay \$6 million each, while 10 other customers could be barred from collecting from the exchange \$1 million each. While “customers” of the Cboe might ultimately collectively receive greater relief if the period is blocked, there is a wide disparity between different customers. The distributional impact on different firms is completely unaddressed.

Similarly, the Billing Dispute Filings do not explain how abrogating rights of customers to dispute bills after three months will impact different customers. For example, the Billing Dispute Filings simply demand “that Members and Non-Members submit disputes in writing and provide supporting documentation” which “encourages them to promptly review their invoices so that any disputed charges can be addressed in a timely manner.”¹⁸ This clearly favors larger, more well-resourced customers, and appears to be both facially discriminatory and an undue burden on competition.

What about Cboe customers who don't have the necessary resources and ability to quickly and thoroughly track and reconcile their billing with Cboe? The filings never analyze the capabilities and disparate impacts on the exchanges' customers, but instead simply claim:

most Members and Non-Members that pay exchange fees are sophisticated entities, so it is appropriate to expect them to promptly review their invoices for errors and to be capable of identifying such errors.¹⁹

The unreasonableness of the expectation that customers will analyze their fees and rebates and promptly notify Cboe of any potential errors is illustrated by the fact that, *at the time Cboe made the Billing Dispute Filings*, it was already well aware that it had made billing errors involving multiple Members spanning several years, which had presumably been long un-identified by its customers or Cboe.

¹⁷ Cboe EDGX Look Back Filing, at 4.

¹⁸ Cboe BZX Billing Dispute Filing, at 3.

¹⁹ Cboe BZX Billing Dispute Filing, at 5.

We understand why Cboe may desire to “alleviate administrative burdens related to billing disputes, which could divert staff resources away from the Exchange’s regulatory and business purposes” and have “finality” so that it wouldn’t have to go through all the embarrassment, cost, and difficulties of rectifying its own billing errors.²⁰

But Cboe’s interest in avoiding costs and embarrassment isn’t what investors or the Commission should care about. Cboe has offered little justification to support arbitrarily disenfranchising specific customers arising from its years-long billing errors, and all of its customers rolling forward, of their regular rights to legal recourse. Nor has it justified why three months is an appropriate look back period, given that it is much, much shorter than what may otherwise apply. By contrast, statutes of limitations for many types of claims, for example, are typically measured in years. Not only are the periods much longer, but there is often a distinction between when a firm actually knows of a problem, versus when it is viewed as having constructively been aware of it. This sort of bifurcation of actual knowledge versus constructive knowledge carries through many types of legal claims and defenses. What would be the Commission’s rationale for ignoring this longstanding approach to liability and instead choosing to protect exchanges from their own failures at the expense of investors and others?

Lastly, if the Commission were to continue to permit the Billing Dispute Filings to remain effective, it would be dramatically reducing those exchanges’ accountability to their customers and incentivizing exchanges to be less careful with their billing and various fee practices. While larger, better-resourced firms may be equipped to double-check the Cboe’s billing practices, smaller firms are unlikely to be able to do so. The incentives are not in the best interest of investors or the public interest. Again, we urge the Commission to take immediate and decisive action.

Additional Considerations

If Cboe was willing to make Look Back Filings that included details regarding the number of firms impacted, the distributional effects on them and other customers, and other details, we could envision the Commission finding that the filings met the obligations of the Exchange Act and Commission Rules.

With respect to the Billing Dispute Filings, the Commission should carefully consider any potential unintended consequences of permitting exchanges to arbitrarily cut off claims from customers regarding billing errors. For example, how should the Commission ensure that exchanges are incentivized to properly bill their customers? How can the Commission better protect smaller exchange customers, who may not have the abilities to review large volumes of trading data, calculate their expected fees and rebates, and reconcile those against the numbers from the exchange? How can the Commission ensure that billing “errors” do not consistently advantage the largest firms?

²⁰ Cboe BZX Billing Dispute Filing, at 3.

The Commission should carefully consider all of the direct and indirect consequences of permitting exchanges to cut off their potential liability for improper billing practices after just sixty days or three months. This new practice is inconsistent with the Exchange Act and the interest of investors.

Lastly, the years-long billing errors are foreseeable, likely consequences of this unprecedented customization and complexity. Worse, as Cboe's recently discovered years long billing errors illustrate, customers are not able to readily validate the bills they receive from exchanges.

The Commission should revisit the proliferation of different, highly customized pricing tiers. We have previously commented that customized fee and rebate schedules for different types of order flow with different customers is contrary to the Exchange Act's requirements that fees be equitably allocated, non-discriminatory, and not undue burdens on competition.²¹ For example, a smaller firm's trading costs for any given trade on an exchange may be 30% or more of the costs of a larger competitor--for the exact same trade. This seems facially inconsistent with the Exchange Act.²²

Further, these pricing tiers are often determined at the end of a month, and retroactively applied to all trading during that month. This creates significant cost uncertainty for brokers and principal traders may not know the time they are making a routing decision what their trade may cost. Simplifying the fee structures and providing pre-trade fee certainty would enable exchange customers to more easily, independently validate their fee charges post-trade.

Pre-trade fee certainty would directly address broker routing conflicts because it would make it much easier for a broker to identify and potentially pass rebates and fees directly through to their investor-customers, and have that information contained on their trade-notice of execution messages.²³ Such pass-throughs are extremely difficult to administer today because, structurally, those fees are determined at the end of the month. Institutional investors often need to know fees at execution and assessed at settlement so that expenses can be directly allocated to the appropriate fund accurately.

²¹ See, e.g., Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Oct. 12, 2018, available at <https://www.sec.gov/comments/sr-nyse-2018-40/srnyse201840-4510950-175996.pdf>.

²² Remarks of Joe Wald, Clearpool Group, before the SEC Roundtable on Market Access and Market Data, Oct. 25, 2018, Transcript at 198, available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102518-transcript.pdf>. Accord, Remarks of Tyler Gellasch, Healthy Markets Association, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, Transcript at 280-281, available at <https://www.sec.gov/spotlight/equity-market-structure-roundtables/roundtable-market-data-market-access-102618-transcript.pdf>; see also, Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, Nov. 13, 2018, available at <https://www.sec.gov/comments/sr-nyse-2018-49/srnyse201849-4640899-176435.pdf>.

²³ For more on broker order routing abuses, see Letter from Tyler Gellasch, Healthy Markets Association, to Brent J. Fields, SEC, September 26, 2016, available at <https://www.sec.gov/comments/s7-14-16/s71416-19.pdf>.



Simplified pricing tiers that are known at the time a trade is made would correct this discriminatory structural impediment, and could go a long way to correcting many of the conflicts in the marketplace.

We once again urge the Commission to review exchanges' various fee and rebate structures to ensure that they comply with the plain meaning of the Exchange Act and Commission Rules. In our view, this would likely lead to a dramatic reduction in the number and variability of pricing options at exchanges.

Conclusion

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". The signature is fluid and cursive, with a long horizontal stroke at the end.

Tyler Gellasch
Executive Director