

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87631; File No. SR-CboeBYX-2019-015)

November 26, 2019

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Introduce a Small Retail Broker Distribution Program

I. Introduction

On October 1, 2019, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the BYX fee schedule to introduce a Small Retail Broker Distribution Program (the “Program”). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the Federal Register on October 21, 2019.⁴ The Commission received no comment letters regarding the proposed rule change. Under Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (i) temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A).

⁴ See Securities Exchange Act Release No. 87305 (October 15, 2019), 84 FR 56210 (“Notice”).

⁵ 15 U.S.C. 78s(b)(3)(C).

II. Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule to introduce a pricing program that would allow certain Distributors⁶ to purchase top of book market data from the Exchange at discounted fees. Currently, the Exchange offers two top of book data feeds that provide quote and trade information. First, the Exchange charges a fee of \$1,000 per month for external distribution of BYX Top Feed⁷ and a fee of \$1 per month for each Professional User and \$0.025 per month for each Non-Professional User.⁸ Second, the Exchange charges \$5,000 per month for external distribution of Cboe One Summary

⁶ A Distributor of an Exchange market data product is any entity that receives the Exchange market data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party. See BYX Fee Schedule.

⁷ BYX Top is an uncompressed data feed that offers top of book quotations and execution information based on equity orders entered in the Exchange. See Notice, supra note 4, 84 FR at 56210.

⁸ A “Professional User” of an Exchange market data product is any user other than a Non-Professional User. See BYX Fee Schedule. A “Non-Professional User” of an Exchange market data product is a natural person or qualifying trust that uses data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an “investment adviser” as that term is defined in Section 202(a)(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States. Id.

Feed⁹ and a Data Consolidation Fee of \$1,000 per month. The Exchange also charges a fee \$10 per month for each Professional User and \$0.25 for each Non-Professional User.

Under the Exchange's proposal, Distributors that qualify for the Program would be charged a discounted fee of \$250 per month for the distribution of BYX Top Feed and \$3,500 per month for the distribution of Cboe One Summary Feed. Distributors that qualify for the Program would also be charged a discounted Data Consolidation Fee of \$350 for Cboe One Summary Feed. The Exchange would continue to charge the current Professional and Non-Professional User fees for both data feeds.

In order to qualify for the Program, a Distributor must meet the following criteria for each respective data feed: (i) Distributor is a broker-dealer distributing BYX Top Data Feed or Cboe One Summary Feed to Non-Professional Data Users with whom the broker-dealer has a brokerage relationship; (ii) more than 50% of the Distributor's total subscriber population must consist of Non-Professional subscribers, inclusive of any subscribers not receiving BYX Top Data/Cboe One Summary Feed; and (iii) Distributor distributes BYX Top Data/Cboe One Summary Feed to no more than 5,000 Non-Professional Data Users.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹⁰ at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,¹¹ the Commission

⁹ Cboe One Summary Feed is a data feed that offers top of book quotations and execution information based on equity orders submitted to the Exchange and its affiliated equities exchanges, i.e., Cboe BZX Exchange, Inc., Cboe EDGX Exchange, Inc., and Cboe EDGA Exchange, Inc. See Notice, supra note 4, 84 FR at 56210.

¹⁰ 15 U.S.C. 78s(b)(3)(C).

¹¹ 15 U.S.C. 78s(b)(1).

summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

A fee change to introduce the Program was originally filed on August 1, 2018. That proposal, CboeBYX-2019-012, was published for comment in the Federal Register on August 20, 2019.¹² The Commission received no comment letters regarding the proposed rule change. On September 30, 2019, the Division of Trading and Markets (the “Division”), acting on behalf of the Commission by delegated authority, issued an order temporarily suspending CboeBYX-2019-012 pursuant to Section 19(b)(3)(C) of the Act¹³ and simultaneously instituting proceedings under Section 19(b)(2)(B) of the Act¹⁴ to determine whether to approve or disapprove that proposal.¹⁵

The Exchange continues to assert that the proposed fees for the Program “are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from BYX and its affiliated exchanges to their retail investor clients.”¹⁶ The Exchange also asserts that the “proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S.

¹² See Securities Exchange Act Release No. 86670 (August 14, 2019), 84 FR 43207.

¹³ 15 U.S.C. 78s(b)(3)(C).

¹⁴ 15 U.S.C. 78s(b)(2)(B).

¹⁵ See Securities Exchange Act Release No. 87166 (September 30, 2019), 84 FR 53197.

¹⁶ See Notice, supra note 4, 84 FR at 56213.

equities market data to retail investors.”¹⁷ Finally, the Exchange states that while the proposed fees are limited to smaller firms that distribute data to no more than 5,000 Non-Professional data users, it does not believe that the proposed fees for the Program are inequitable or unfairly discriminatory.¹⁸

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.¹⁹ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”²⁰

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;²¹ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;²² and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²³

¹⁷ Id.

¹⁸ Id.

¹⁹ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

²⁰ See id.

²¹ 15 U.S.C. 78f(b)(4).

²² 15 U.S.C. 78f(b)(5).

²³ 15 U.S.C. 78f(b)(8).

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether the establishment of the Program is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁴

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.²⁵

IV. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)²⁶ and 19(b)(2)(B) of the Act²⁷ to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and

²⁴ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²⁵ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁶ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

²⁷ 15 U.S.C. 78s(b)(2)(B).

encourages interested persons to provide additional comment on the proposed rule change to inform the Commission’s analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁸ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities,”²⁹
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers,”³⁰ and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”³¹

As noted above, the proposal establishes new discounted fees for Distributors of the Exchange’s two top of book data feeds. The Commission notes that the Exchange’s statements in support of the proposed rule change are general in nature and lack detail and specificity. The Exchange states that it operates in a highly competitive environment, and its ability to price top of book data products is constrained by (i) competition among other national securities

²⁸ 15 U.S.C. 78s(b)(2)(B).

²⁹ 15 U.S.C. 78f(b)(4).

³⁰ 15 U.S.C. 78f(b)(5).

³¹ 15 U.S.C. 78f(b)(8).

exchanges that offer similar data products to their customers; and (ii) real-time consolidated data disseminated by the securities information processors.³² The Exchange also states that the proposed Program would reduce fees charged to small retail brokers that provide access to two top of book data products, the BYX Top Feed and the Cboe One Summary Feed.³³ The Exchange notes that it has one distributor that qualifies and is taking advantage of the Program's pricing,³⁴ and notes that Program's fees are often lower than Nasdaq's fees.³⁵ The Exchange also notes that "[w]hile there is no 'exact science' to choosing one eligibility threshold compared to another, the Exchange believes that having more Non-Professional Data Users across a firm's entire business . . . is indicative of a broker-dealer that is primarily engaged in the business of serving retail investors."³⁶ The Exchange states that larger broker-dealers and/or vendors benefit from lower subscriber fees and enterprise licenses, that Distributors that provide data to more than 5,000 Non-Professional data users "enjoy cost savings compared to competitor products," and that the proposed fees would "ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing . . ."³⁷

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change."³⁸ The description of a proposed rule change, its

³² See Notice, supra note 4, 84 FR at 56214.

³³ See id. at 56212.

³⁴ See id. at 56211.

³⁵ See id. at 56213-14.

³⁶ Id. at 56213.

³⁷ Id.

³⁸ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

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,³⁹ 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.⁴⁰

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.⁴¹

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule

³⁹ See id.

⁴⁰ See id.

⁴¹ See 15 U.S.C. 78f(b)(4), (5), and (8).

19b-4, any request for an opportunity to make an oral presentation.⁴²

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Interested persons are invited to submit written data, views, and arguments concerning the proposed rule change, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBYX-2019-015 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBYX-2019-015. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the

⁴² 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBYX-2019-015 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,⁴³ that File No. SR-CboeBYX-2019-015 be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁴

Jill M. Peterson
Assistant Secretary

⁴³ 15 U.S.C. 78s(b)(3)(C).

⁴⁴ 17 CFR 200.30-3(a)(57) and (58).