

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-79709; File No. SR-CBOE-2016-092)

December 29, 2016

Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Fees for the Complex Order Book Data Feed

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 19, 2016, Chicago Board Options Exchange, Incorporated (the “Exchange” or “CBOE”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

Chicago Board Options Exchange, Incorporated (the “Exchange” or “CBOE”) proposes to amend user fees for the Complex Order Book (“COB”) Data Feed. The text of the proposed rule change is available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend user fees for the COB Data Feed. This data feed is made available by CBOE’s affiliate Market Data Express, LLC (“MDX”). The Exchange proposes to make the following fee changes effective January 1, 2017.

COB Data Feed: The COB Data Feed is a real-time data feed that includes data regarding the Exchange’s Complex Order Book and related complex order information. The COB Data Feed contains the following information for all CBOE-traded complex order strategies (multi-leg strategies such as spreads, straddles and buy-writes): (i) outstanding quotes and standing orders on each side of the market with aggregate size, (ii) data with respect to executed trades (“last sale data”), and (iii) totals of customer versus non-customer contracts.<sup>3</sup>

Fees

MDX currently charges Customers<sup>4</sup> of the COB Data Feed a Data Fee of \$100 per month plus applicable User Fees (as described below). The Data Fee for the COB Data Feed is waived for Customers of the CBOE BBO and Book Depth Data Feeds.<sup>5</sup>

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<sup>3</sup> The data is made available during “Regular Trading Hours” as defined in CBOE Rule 1.1(qqq) and “Extended Trading Hours” as defined in CBOE Rule 1.1(rrr).

<sup>4</sup> A Customer is any person, company or other entity that, pursuant to a market data agreement with MDX, is entitled to receive data, either directly from MDX or through an authorized redistributor (i.e., a Customer or an extranet service provider), whether that data is distributed externally or used internally. The MDX fee schedule for CBOE data is located at <https://www.cboe.org/MDX/CSM/OBOOKMain.aspx>.

<sup>5</sup> Such COB Data Feed Customers are still subject to User Fees.

MDX charges a Customer User Fees of \$25 per month per Device<sup>6</sup> or user ID for receipt of the data by “Professional Users”<sup>7</sup>. There is no charge for receipt of the data by “Non-Professional Users”<sup>8</sup>. User Fees are subject to a cap of \$2,000 per month (i.e., a Customer pays no more than \$2,000 in User Fees for a given month). The Exchange proposes to delete this fee cap from the MDX fee schedule for CBOE data.

The Exchange also proposes to make a few clean-up changes to the MDX fee schedule for CBOE data, including removing a couple references to a January 1, 2016 effective date for prior fee changes and removing the \$1 per month User Fee for COB Data Feed Non-Professional Users, which was eliminated effective January 1, 2015.

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<sup>6</sup> A “Device” means any computer, workstation or other item of equipment, fixed or portable, that receives, accesses and/or displays data in visual, audible or other form.

<sup>7</sup> A “Professional User” is any natural person recipient of Data who is not a Non-Professional User (as defined below). User Fees for Professional Users are payable for both “internal” Professional Users (Devices or user IDs of employees of a Customer) and “external” Professional Users (Devices or user IDs of Professional Users who receive the Data from a Customer and are not employed by the Customer). (Non-Professional Users must be external since a person who uses the COB Data Feed for a commercial purpose cannot be a Non-Professional User.)

<sup>8</sup> A “Non-Professional User” 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 Securities and Exchange 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 201(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.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>9</sup> Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>10</sup> which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The Exchange also believes the proposed rule change is consistent with the Section 6(b)(5)<sup>11</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposal to delete the monthly cap on User Fees for receipt of the COB Data Feed is equitable and not unfairly discriminatory because it would apply equally to all Customers. The Exchange believes the User Fees, without a fee cap, are reasonable because they are similar to fees that other markets charge for similar products. For example, NYSE Arca charges \$20 per month to each Professional User and \$1 per month to each Non-Professional User for receipt of the Arcabook for Arca Options – Complex data feed. The Exchange believes NYSE Arca does not cap its user fees.<sup>12</sup> Similarly, NYSE MKT charges \$20 per month to each Professional User and \$1 per month to each Non-Professional User for receipt of the Arcabook for Amex Options Options – Complex data feed. The Exchange believes NYSE

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(4).

<sup>11</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> See NYSE Market Data Pricing Guide available at [www.nyxdata.com/doc/241907](http://www.nyxdata.com/doc/241907).

MKT does not cap its user fees. The Exchange also believes removing the fee cap is reasonable in that it is not anticipated to materially affect the amount of User Fees any Customer pays.

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), upheld reliance by the Securities and Exchange Commission (“Commission”) upon the existence of competitive market mechanisms to set reasonable and equitably allocated fees for proprietary market data:

In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’

Id. At 535 (quoting H.R. Rep. No. 94-229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323). The court agreed with the Commission's conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”<sup>13</sup>

As explained below in the Exchange's Statement on Burden on Competition, the Exchange believes that the need to attract order flow from market participants provides an effective constraint on the market data fees that the Exchange, through MDX, has the ability and the incentive to charge. In addition, the existence of alternatives to this data product, such as proprietary data from other sources, as described below, further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can select such alternatives.

For the reasons cited above, the Exchange believes the proposed User Fees for receipt of the COB Data Feed are equitable, reasonable and not unfairly discriminatory. In addition, the

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<sup>13</sup> NetCoalition, 615 F.3d at 535 (Quoting Securities Exchange Act Release No. 59039 (December 9, 2008), 73 FR 74770 (December 9, 2008) at 74771).

Exchange believes that no substantial countervailing basis exists to support a finding that the proposed fees for the COB Data Feed fail to meet the requirements of the Act.

B. Self-Regulatory Organization's Statement on Burden on Competition

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

An exchange's ability to price its proprietary market data feed products is constrained by (1) the existence of actual competition for the sale of such data, (2) the joint product nature of exchange platforms, and (3) the existence of alternatives to the Exchange's proprietary data.

The Existence of Actual Competition. The Exchange believes competition provides an effective constraint on the market data fees that the Exchange, through MDX, has the ability and the incentive to charge. CBOE has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on CBOE to act reasonably in setting its fees for market data, particularly given that the market participants that will pay such fees often will be the same market participants from whom CBOE must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high data fees would risk alienating many of the same customers on whose orders it depends for competitive survival. CBOE currently competes with thirteen options exchanges (including CBOE's affiliate, C2 Options Exchange) for order flow.<sup>14</sup>

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<sup>14</sup> The Commission has previously made a finding that the options industry is subject to significant competitive forces. See e.g., Securities Exchange Act Release No. 59949 (May 20, 2009), 74 FR 25593 (May 28, 2009) (SR-ISE-2009-97) (order approving ISE's proposal to establish fees for a real-time depth of market data offering).

In addition, in the case of products that are distributed through market data vendors, the vendors themselves provide additional price discipline for proprietary data products because they control the primary means of access to certain end users. These vendors impose price discipline based upon their business models. For example, vendors that assess a surcharge on data they sell are able to refuse to offer proprietary products that their end users do not or will not purchase in sufficient numbers. Similarly, Customers will not offer the COB Data Feed unless this product will help them maintain current users or attract new ones. For example, a broker-dealer will not choose to offer the COB Data Feed to its retail customers unless the broker-dealer believes that the retail customers will use and value the data and the provision of such data will help the broker-dealer maintain the customer relationship, which allows the broker-dealer to increase its revenues. Professional users will not request this feed from Customers unless they can use the data for profit-generating purposes in their businesses. All of these factors operate as constraints on pricing proprietary data products.

Joint Product Nature of Exchange Platform. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, proprietary market data and trade executions are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platforms where the order can be posted, including the execution fees, data quality, and price and distribution of data products. Without a platform to post quotations, receive orders and execute trades, exchange data products would not exist.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's platform for posting quotes, receiving orders and executing trades, and the cost of regulating the

exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs.

Moreover, an exchange's broker-dealer customers view the costs of transaction executions and market data as a unified cost of doing business with the exchange. A broker-dealer will only choose to direct orders to an exchange if the revenue from the transaction exceeds its cost, including the cost of any market data that the broker-dealer chooses to buy in support of its order routing and trading decisions. If the costs of the transaction are not offset by its value, then the broker-dealer may choose instead not to purchase the product and trade away from that exchange.

Analyzing the cost of market data product production and distribution in isolation from the cost of all of the inputs supporting the creation of market data and market data products will inevitably underestimate the cost of the data and data products because it is impossible to obtain the data inputs to create market data products without a fast, technologically robust, and well-regulated execution system, and system and regulatory costs affect the price of both obtaining the market data itself and creating and distributing market data products. It would be equally misleading, however, to attribute all of an exchange's costs to the market data portion of an exchange's joint products. Rather, all of an exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

The level of competition and contestability in the market is evident in the numerous alternative venues that compete for order flow, including 14 options self-regulatory organization



(“SRO”) markets, as well as various forms of alternative trading systems (“ATs”), including dark pools and electronic communication networks (“ECNs”) and internalizing broker-dealers. Competition among trading platforms can be expected to constrain the aggregate return that each platform earns from the sale of its joint products, but different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platforms may choose to pay rebates to attract orders, charge relatively low prices for market data products (or provide market data products free of charge), and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market data products, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

The Existence of Alternatives. CBOE is constrained in pricing the COB Data Feed by the availability to market participants of alternatives to purchasing this product. CBOE must consider the extent to which market participants would choose one or more alternatives instead of purchasing the exchange’s data. Other options exchanges can and have produced their own complex order book market data products, and thus are sources of potential competition for MDX. For example, as noted above, NYSE Arca and NYSE MKT offer market data products that compete with the COB Data Feed.

The large number of SROs, ATs and internalizing broker-dealers that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for

proprietary data products. Each SRO, ATS, and broker-dealer is currently permitted to produce and sell proprietary data products, and many currently do.

Further, data products are valuable to professional users only if they can be used for profit-generating purposes in their businesses and valuable to non-professional users only insofar as they provide information that such users expect will assist them in tracking prices and market trends and making trading decisions.

The existence of numerous alternatives to the Exchange's products, including proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>15</sup> and paragraph (f) of Rule 19b-4<sup>16</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change 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. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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<sup>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f).

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, 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](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2016-092 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-CBOE-2016-092. 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 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the

Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2016-092, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>17</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>17</sup> 17 CFR 200.30-3(a)(12).