

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-100651; File No. SR-CboeEDGX-2024-035)

August 5, 2024

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend the Exchange’s Fee Schedule Related to Physical Port Fees

I. Introduction

On June 7, 2024, Cboe EDGX Exchange, Inc. (the “Exchange” or “EDGX”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change (File Number SR-CboeEDGX-2024-035) to increase fees for 10 gigabit (“Gb”) physical ports (“Proposal”). The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.<sup>3</sup> The proposed rule change was published for comment in the Federal Register on June 21, 2024.<sup>4</sup> Pursuant to Section 19(b)(3)(C) of the Act,<sup>5</sup> the Commission is hereby: (1) temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>4</sup> See Securities Exchange Act Release No. 100343 (June 14, 2024), 89 FR 52109 (“Notice”).

<sup>5</sup> 15 U.S.C. 78s(b)(3)(C).

## II. Background and Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule relating to physical connectivity fees by increasing the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port.<sup>6</sup> The Exchange states that, by way of background, a physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange's servers are located.<sup>7</sup> Prior to this proposed rule change, the Exchange assessed the following physical connectivity fees for Members and non-Members on a monthly basis: \$2,500 per physical port for a 1 Gb circuit and \$7,500 per physical port for a 10 Gb circuit.<sup>8</sup> The Exchange states the proposed fee change better enables it to continue to maintain and improve its market technology and services and also notes that the proposed fee amount, even as amended, continues to be in line with, or even lower than, amounts assessed by other exchanges for similar connections.<sup>9</sup> The Exchange also states that a single 10 Gb physical port can be used to access the Systems of the following affiliate exchanges: the Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc.

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<sup>6</sup> See Notice, 89 FR at 52109. The Exchange initially filed the proposed fee changes on July 3, 2023 (SR-CboeEDGX-2023-044). On September 1, 2023, the Exchange withdrew that filing and submitted SR-CboeEDGX-2023-057. On September 29, 2023, the Exchange states that the Securities and Exchange Commission issued a Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees. See Notice, 89 FR at 52109 n.3. On September 29, 2023, the Exchange filed the proposed fee change (SR-CboeEDGX-2023-62). On October 13, 2023, the Exchange withdrew that filing and, on business day October 16, 2023, submitted SR-CboeEDGX-2023-065. On December 12, 2023, the Exchange withdrew that filing and submitted SR-CboeEDGX-2023-079. On December 20, 2023, the Exchange withdrew that filing and submitted SR-CboeBZX-2023-081. On February 12, 2024, the Exchange withdrew that filing and submitted SR-CboeEDGX-2024-013. On April 9, 2024, the Exchange withdrew that filing and submitted SR-CboeEDGX-2024-020. On June 7, 2024, the Exchange withdrew that filing and submitted SR-CboeEDGX-2024-035.

<sup>7</sup> See Notice, 89 FR at 52109.

<sup>8</sup> See Notice, 89 FR at 52109.

<sup>9</sup> See Notice, 89 FR at 52109 (citing The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gb physical port. See also id. (citing New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange's 10 Gb physical port) are assessed \$22,000 per month, per port.)).

(options and equities platforms), Cboe EDGA Exchange, Inc., and Cboe C2 Exchange, Inc. (“Affiliate Exchanges”).<sup>10</sup> The Exchange states that only one monthly fee applies per 10 Gb physical port regardless of how many affiliated exchanges are accessed through that one port.<sup>11</sup>

### III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,<sup>12</sup> at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,<sup>13</sup> the Commission 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. A temporary suspension of the proposed rule changes is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

#### A. Exchange Statements In Support of the Proposal

In support of the Proposal, the Exchange states that it believes the proposed rule change is consistent with 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>14</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>15</sup> requirements that the

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<sup>10</sup> See Notice, 89 FR at 52109. The Affiliate Exchanges are also submitted contemporaneous substantively similar rule filings.

<sup>11</sup> See Notice, 89 FR at 52109. The Exchange states that conversely, other exchange groups charge separate port fees for access to separate, but affiliated, exchanges. See Notice, 89 FR at 52109 n.6 (citing Securities and Exchange Release No. 99822 (March 21, 2024), 89 FR 21337 (March 27, 2024) (SR-MIAX-2024-016)).

<sup>12</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>13</sup> 15 U.S.C. 78s(b)(1).

<sup>14</sup> See Notice, 89 FR at 52109; 15 U.S.C. 78f(b).

<sup>15</sup> See Notice, 89 FR at 52109; 15 U.S.C. 78f(b)(5).

rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.<sup>16</sup> Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.<sup>17</sup> The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act, which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities.<sup>18</sup>

The Exchange states that it operates in a highly competitive environment.<sup>19</sup> The Exchange states that on May 21, 2019, the SEC Division of Trading and Markets issued non-rulemaking fee filing guidance titled “Staff Guidance on SRO Rule Filings Relating to Fees” (“Fee Guidance”), which provided, among other things, that in determining whether a proposed fee is constrained by significant competitive forces, the Commission will consider whether there are reasonable substitutes for the product or service that is the subject of a proposed fee.<sup>20</sup> As described in further detail below, the Exchange believes substitutable products are in fact

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<sup>16</sup> See Notice, 89 FR at 52109.

<sup>17</sup> See Notice, 89 FR at 52109; 15 U.S.C. 78f(b)(5).

<sup>18</sup> See Notice, 89 FR at 52110; 15 U.S.C. 78f(b)(4).

<sup>19</sup> See Notice, 89 FR at 52110.

<sup>20</sup> See Notice, 89 FR at 52110. (citing Chairman Jay Clayton, Statement on Division of Trading and Markets Staff Fee Guidance, June 12, 2019). The Exchange states that the Fee Guidance also recognized that “products need to be substantially similar but not identical to be substitutable.” Id.

available to market participants, including by third-party resellers of the Exchange’s physical connectivity, and the availability to trade all of the products offered at the Exchange at one of the 16 other equities exchanges that trade equities or other off-exchange trading platforms.<sup>21</sup>

The Exchange states that the 2019 Fee Guidance also acknowledged that platform competition may demonstrate a competitive environment and therefore constrain aggregate returns, regardless of the pricing of individual products, and that platforms often have joint products.<sup>22</sup> The Exchange states that exchanges themselves are platforms.<sup>23</sup> Particularly, the Exchange states that exchanges are multi-sided platforms that facilitate interactions between multiple sides of the market—buyers and sellers, companies and investors, and traders and market watchers—and their value is dependent on attracting users to the multiple sides of the platform.<sup>24</sup> As described in further detail below, the Exchange believes that competition among exchanges as trading platforms (and between exchanges and alternative trading venues) constrain exchanges from charging excessive fees for any exchange products, including trading, listings, connectivity and market data. As such, fees need not be analyzed from only one side, but rather can, and should, be considered within the larger context of the platform to test for anti-competitive behavior.<sup>25</sup> The Exchange states that nothing in the Exchange Act requires the individual examination of specific product fees in isolation.<sup>26</sup> Rather, the Exchange states that

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<sup>21</sup> See Notice, 89 FR at 52110. The Exchanges states that a substitute, or substitutable good, in economics and consumer theory refers to a product or service that consumers see as essentially the same or similar-enough to another product. See id. at n.12 (citing <https://www.investopedia.com/terms/s/substitute.asp>).

<sup>22</sup> See Notice, 89 FR at 52110 (citing Fee Guidance).

<sup>23</sup> See Notice, 89 FR at 52110. The Exchanges states that the Supreme Court in *Ohio v. American Express Co.* recognized that, as platforms facilitate transactions between two or more sides of a market, their value is dependent on attracting users to both sides of the platform (i.e., network effects). See id. at n.14 (citing *Ohio v. American Express Co.* 138 S. Ct. 2274, 585 U.S. 529 (2018)).

<sup>24</sup> See Notice, 89 FR at 52110.

<sup>25</sup> See Notice, 89 FR at 52110.

<sup>26</sup> See Notice, 89 FR at 52110.

the Act generally requires the rules of an exchange to provide for the “equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using its facilities.”<sup>27</sup>

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports.<sup>28</sup> Further, the Exchange states that the current 10 Gb physical port fee has remained unchanged since June 2018.<sup>29</sup> The Exchange explains that since its last increase over 6 years ago however, there has been notable inflation.<sup>30</sup> Particularly, the Exchange states that the dollar has had an average inflation rate of 3.76% per year between 2018 and today, producing a cumulative price increase of approximately 24.8% inflation since the fee for the 10 Gb physical port was last modified.<sup>31</sup> Moreover, the Exchange states that it historically does not increase fees every year, notwithstanding inflation.<sup>32</sup> Accordingly, the Exchange believes the proposed fee of \$8,500 is reasonable as it only represents an approximate 13% increase from the rate adopted six years ago, notwithstanding the cumulative inflation rate of inflation of 24.8%.<sup>33</sup> The Exchange states that were the Exchange to adjust fully for inflation, it would be proposing a monthly rate of \$9,360, which is 10% more than the Exchange is actually proposing.<sup>34</sup> To further demonstrate, the Exchange notes that

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<sup>27</sup> See Notice, 89 FR at 52110 (citing 15 U.S.C. 78f(b)(4)).

<sup>28</sup> See Notice, 89 FR at 52110.

<sup>29</sup> See Notice, 89 FR at 52110 (citing Securities and Exchange Release No. 83450 (June 15, 2018), 83 FR 28884 (June 21, 2018) (SR-CboeEDGX-2018-016)).

<sup>30</sup> See Notice, 89 FR at 52110.

<sup>31</sup> See Notice, 89 FR at 52110 (citing <https://www.officialdata.org/us/inflation/2010?amount=1>).

<sup>32</sup> See Notice, 89 FR at 52110.

<sup>33</sup> See Notice, 89 FR at 52110.

<sup>34</sup> See Notice, 89 FR at 52110.

\$8,500 in 2024 is equivalent to approximately \$6,800 in 2018, when adjusted for inflation.<sup>35</sup> Accordingly, the Exchange believes the proposed rate is also reasonable as it is nearly 20% lower than the rate adopted in 2018 (i.e., \$7,500) when adjusted for inflation.<sup>36</sup> The Exchange states it is also unaware of any standard that suggests any fee proposal that exceeds a certain yearly or cumulative inflation rate is unreasonable, and in any event, in this instance the increase is well below the cumulative rate.<sup>37</sup> The Exchange also believes its offerings are more affordable as compared to similar offerings at competitor exchanges.<sup>38</sup>

The Exchange also notes Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, let alone connect directly to, the Exchange.<sup>39</sup> The Exchange states that there is also no regulatory requirement that any market participant connect to any one particular exchange.<sup>40</sup> The Exchange explains that market participants may voluntarily choose to become a member of one or more of a number of different exchanges, of which, the Exchange is but one choice.<sup>41</sup> Additionally, the Exchange states that any Exchange member that is dissatisfied with the proposal is free to choose not to be a member of the Exchange and send order flow to another

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<sup>35</sup> See Notice, 89 FR at 52110.

<sup>36</sup> See Notice, 89 FR at 52110.

<sup>37</sup> See Notice, 89 FR at 52110.

<sup>38</sup> See Notice, 89 FR at 52110. The Exchange states that Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. Id. (citing The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange). See also id. (citing New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed \$22,000 per month, per port).

<sup>39</sup> See Notice, 89 FR at 52110.

<sup>40</sup> See Notice, 89 FR at 52110.

<sup>41</sup> See Notice, 89 FR at 52110.

exchange.<sup>42</sup> The Exchange states that, moreover, direct connectivity is not a requirement to participate on the Exchange.<sup>43</sup> The Exchange also believes substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter (OTC) markets which do not require connectivity to the Exchange.<sup>44</sup> The Exchange states that there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees.<sup>45</sup> The Exchange states that, based on publicly available information, no single equities exchange has more than approximately 15% of the market share.<sup>46</sup> The Exchange states that further, low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers.<sup>47</sup> The Exchange explains that, for example, in 2020 alone, three new exchanges entered the market: Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and Miami International Holdings (MIAX Pearl).<sup>48</sup>

The Exchange states that there is no regulatory requirement that any market participant connect to any one equities exchange, nor that any market participant connect at a particular connection speed or act in a particular capacity on the Exchange, or trade any particular product

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<sup>42</sup> See Notice, 89 FR at 52110.

<sup>43</sup> See Notice, 89 FR at 52110.

<sup>44</sup> See Notice, 89 FR at 52110.

<sup>45</sup> See Notice, 89 FR at 52110.

<sup>46</sup> See Notice, 89 FR at 52110 (citing Cboe Global Markets U.S. Equities Market Volume Summary (June 6, 2024), available at [https://www.cboe.com/us/equities/market\\_statistics/](https://www.cboe.com/us/equities/market_statistics/)).

<sup>47</sup> See Notice, 89 FR at 52110.

<sup>48</sup> See Notice, 89 FR at 52110-11.



offered on an exchange.<sup>49</sup> The Exchange states that moreover, membership is not a requirement to participate on the Exchange.<sup>50</sup> The Exchange states that it is unaware of any one equities exchange whose membership includes every registered broker-dealer.<sup>51</sup> The Exchange explains, by way of example, that as of April 2024 Cboe BYX has 110 members that trade equities, Cboe EDGX has 124 members that trade equities, Cboe EDGA has 103 members and Cboe BZX has 132 members.<sup>52</sup> The Exchange states that there is also no firm that is a Member of the Exchange only.<sup>53</sup> The Exchange states that further, based on publicly available information regarding a sample of the Exchange's competitors, NYSE has 143 members, IEX has 129 members and MIAX Pearl has 51 members.<sup>54</sup>

The Exchange states that a market participant may also submit orders to the Exchange via a Member broker or a third-party reseller of connectivity.<sup>55</sup> The Exchange notes that third-party non-Members also resell exchange connectivity.<sup>56</sup> The Exchange explains that this indirect connectivity is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange connectivity fees), which alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.<sup>57</sup> The Exchange notes that it could,

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<sup>49</sup> See Notice, 89 FR at 52111.

<sup>50</sup> See Notice, 89 FR at 52111.

<sup>51</sup> See Notice, 89 FR at 52111.

<sup>52</sup> See Notice, 89 FR at 52111.

<sup>53</sup> See Notice, 89 FR at 52111.

<sup>54</sup> See Notice, 89 FR at 52111 (citing <https://www.nyse.com/markets/nyse/membership>; <https://www.iexexchange.io/membership>; [https://www.miaxglobal.com/sites/default/files/page-files/20230630\\_MIAX\\_Pearl\\_Equities\\_Exchange\\_Members\\_June\\_2023.pdf](https://www.miaxglobal.com/sites/default/files/page-files/20230630_MIAX_Pearl_Equities_Exchange_Members_June_2023.pdf)).

<sup>55</sup> See Notice, 89 FR at 52111.

<sup>56</sup> See Notice, 89 FR at 52111.

<sup>57</sup> See Notice, 89 FR at 52111. The Exchange states that third-party resellers of connectivity play an important role in the capital markets infrastructure ecosystem. For example, according to the Exchange,

but chooses not to, preclude market participants from reselling its connectivity.<sup>58</sup> Unlike other exchanges, the Exchange states that it also chooses not to adopt fees that would be assessed to third-party resellers on a per customer basis (i.e., fee based on number of Members that connect to the Exchange indirectly via the third-party).<sup>59</sup> The Exchange states that these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services.<sup>60</sup> The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party re-seller.<sup>61</sup> The Exchange explains that this allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity.<sup>62</sup> The Exchange states that these third-party sellers may also provide an additional value to market participants in addition to the physical port itself as they may also manage and monitor these connections, and clients of these third-parties may also be able to connect from the same colocation facility either

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third-party resellers can help unify access for customers who want exposure to multiple financial markets that are geographically dispersed by establishing connectivity to all of the different exchanges, so the customers themselves do not have to. The Exchange further states that many of the third-party connectivity resellers also act as distribution agents for all of the market data generated by the exchanges as they can use their established connectivity to subscribe to, and redistribute, data over their networks. The Exchange explains that this may remove barriers that infrastructure requirements may otherwise pose for customers looking to access multiple markets and real-time data feeds. The Exchange further explains that this facilitation of overall access to the marketplace is ultimately beneficial for the entire capital markets ecosystem, including the Exchange, on which such firms transact business. See id. at n.24.

<sup>58</sup> See Notice, 89 FR at 52111.

<sup>59</sup> See Notice, 89 FR at 52111 (citing Nasdaq Price List – U.S. Direct Connection and Extranet Fees, available at, US Direct-Extranet Connection (nasdaqtrader.com); and Securities Exchange Act Release Nos. 74077 (January 16, 2022), 80 FR 3683 (January 23, 2022) (SR-NASDAQ-2015-002); and 82037 (November 8, 2022), 82 FR 52953 (November 15, 2022) (SR-NASDAQ-2017-114)).

<sup>60</sup> See Notice, 89 FR at 52111.

<sup>61</sup> See Notice, 89 FR at 52111. The Exchange states that for example, a third-party reseller may purchase one 10 Gb physical port from the Exchange and resell that connectivity to three different market participants who may only need 3 Gb each and leverage the same single port. Id. at n.26.

<sup>62</sup> See Notice, 89 FR at 52111.

from their own racks or using the third-party's managed racks and infrastructure which may provide further cost-savings.<sup>63</sup> The Exchange believes such third-party resellers may also use the Exchange's connectivity as an incentive for market participants to purchase further services such as hosting services.<sup>64</sup> That is, the Exchange states, that even firms that wish to utilize a single, dedicated 10 Gb port (i.e., use one single 10 Gb port themselves instead of sharing a port with other firms), may still realize cost savings via a third-party reseller as it relates to a physical port because such reseller may be providing a discount on the physical port to incentivize the purchase of additional services and infrastructure support alongside the physical port offering (e.g., providing space, hosting, power, and other long-haul connectivity options).<sup>65</sup> The Exchange explains that this is similar to cell phone carriers offering a new iPhone at a discount (or even at no cost) if purchased in connection with a new monthly phone plan.<sup>66</sup> The Exchange states that these services may reevaluate reselling or offering Cboe's direct connectivity if they deem the fees to be excessive.<sup>67</sup> Further, as noted above, the Exchange does not receive any connectivity revenue when connectivity is resold by a third-party, which often is resold to multiple customers, some of whom are agency broker-dealers that have numerous customers of their own.<sup>68</sup> The Exchange states, for example, there are approximately 12 third parties who resell Exchange connectivity across the 7 Affiliated Exchanges, which are all accessible on the same network.<sup>69</sup> The Exchange explains that these third-party resellers collectively maintain

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<sup>63</sup> See Notice, 89 FR at 52111.

<sup>64</sup> See Notice, 89 FR at 52111.

<sup>65</sup> See Notice, 89 FR at 52111.

<sup>66</sup> See Notice, 89 FR at 52111.

<sup>67</sup> See Notice, 89 FR at 52111.

<sup>68</sup> See Notice, 89 FR at 52111.

<sup>69</sup> See Notice, 89 FR at 52111.

approximately 48 physical ports from the Exchange, but have collectively almost 200 unique customers downstream, connected through these multi-Exchange ports.<sup>70</sup> The Exchange states that therefore, given the availability of third-party providers that also offer connectivity solutions, the Exchange believes participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including trading firms that may be able to take advantage of lower costs that result from mutualized connectivity and/or from other services provided alongside the physical port offerings.<sup>71</sup> The Exchange states that because third-party resellers also act as a viable alternative to direct connectivity to the Exchange, the price that the Exchange is able to charge for direct connectivity to its Exchange is constrained.<sup>72</sup> The Exchange states that moreover, if the Exchange were to assess supracompetitive rates, members and non-members (such as third-party resellers) alike, may decide not to purchase, or to reduce its use of, the Exchange's direct connectivity.<sup>73</sup> The Exchange explains that disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange.<sup>74</sup> Further, the Exchange believes its offerings are more affordable as compared to similar offerings at competitor exchanges.<sup>75</sup>

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<sup>70</sup> See Notice, 89 FR at 52111.

<sup>71</sup> See Notice, 89 FR at 52111.

<sup>72</sup> See Notice, 89 FR at 52111.

<sup>73</sup> See Notice, 89 FR at 52111.

<sup>74</sup> See Notice, 89 FR at 52111.

<sup>75</sup> See Notice, 89 FR at 52111 (citing The Nasdaq Stock Market LLC ("Nasdaq"), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gbps Ultra fiber connection to the respective exchange, which is analogous to the Exchange's 10Gbps physical port. See also id. (citing New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gbps LX LCN Circuits (which are analogous to the Exchange's 10 Gbps physical port) are assessed \$22,000 per month, per port.)).

Accordingly, the Exchange states that vigorous competition among national securities exchanges provides many alternatives for firms to voluntarily decide whether direct connectivity to the Exchange is appropriate and worthwhile, and as noted above, no broker-dealer is required to become a Member of the Exchange, let alone connect directly to it.<sup>76</sup> The Exchange explains that in the event that a market participant views the Exchange's proposed fee change as more or less attractive than the competition, that market participant can choose to connect to the Exchange indirectly or may choose not to connect to that exchange and connect instead to one or more of the other 12 non-Cboe affiliated equities markets.<sup>77</sup> The Exchange states that market participants are free to choose which exchange to use to satisfy their business needs.<sup>78</sup> The Exchange states that, moreover, if the Exchange were to assess supracompetitive rates, members and non-members alike, may decide not to purchase, or to reduce their use of, the Exchange's direct connectivity.<sup>79</sup> The Exchange states that disincentivizing market participants from purchasing Exchange connectivity would only serve to discourage participation on the Exchange which ultimately does not benefit the Exchange.<sup>80</sup> The Exchange states that, for example, if the Exchange charges excessive fees, it may stand to lose not only connectivity revenues but also revenues associated with the execution of orders routed to it, and, to the extent applicable, market data revenues.<sup>81</sup> The Exchange believes that this competitive dynamic imposes powerful restraints on the ability of any exchange to charge unreasonable fees for connectivity.<sup>82</sup>

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<sup>76</sup> See Notice, 89 FR at 52111-12.

<sup>77</sup> See Notice, 89 FR at 52112.

<sup>78</sup> See Notice, 89 FR at 52112.

<sup>79</sup> See Notice, 89 FR at 52112.

<sup>80</sup> See Notice, 89 FR at 52112.

<sup>81</sup> See Notice, 89 FR at 52112.

<sup>82</sup> See Notice, 89 FR at 52112.

Notwithstanding the foregoing, the Exchange still believes that the proposed fee increase is reasonable, equitably allocated and not unfairly discriminatory, even for market participants that determine to connect directly to the Exchange for business purposes, as those business reasons should presumably result in revenue capable of covering the proposed fee.<sup>83</sup>

The Exchange states that additionally, in connection with a proposed amendment to the National Market System Plan Governing the Consolidated Audit Trail (“CAT NMS Plan”) the Commission again discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models.<sup>84</sup> The Exchange states that the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.<sup>85</sup>

The Exchange states that, as noted above, exchanges also compete as platforms.<sup>86</sup> The Exchange explains that in the context of the competition among platforms, different exchanges operate a variety of different business models.<sup>87</sup> The Exchange further explains that, in fact, there are a number of ways an exchange can differentiate itself, such as by pricing structure, technology and functionality offerings, and products.<sup>88</sup> The Exchange states that market

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<sup>83</sup> See Notice, 89 FR at 52112.

<sup>84</sup> See Notice, 89 FR at 52112 (citing Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7-13-19)).

<sup>85</sup> See Notice, 89 FR at 52112 (citing Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7-13-19)).

<sup>86</sup> See Notice, 89 FR at 52112.

<sup>87</sup> See Notice, 89 FR at 52112.

<sup>88</sup> See Notice, 89 FR at 52112.

participants can access the exchange without purchasing anything from an exchange, instead using third-party routers and data.<sup>89</sup> The Exchange explains that for those whose business models necessitate the purchase of some mix of trading, connectivity, and data services, there are a variety of options at different price points, allowing market participants to exercise choice, and forcing exchanges to compete on their offerings and prices.<sup>90</sup> The Exchange states that further, all elements of the platform—trade executions, market data, connectivity, membership, and listings—operate in concert.<sup>91</sup> The Exchange explains that, for example, trade executions increase the value of market data; market data functions as an advertisement for on-exchange trading; listings increase the value of trade executions and market data; and greater liquidity on the exchange enhances the value of ports and connectivity services.<sup>92</sup> As such, the Exchange states that demand for one set of platform services depends on the demand for other services and therefore to make its platform attractive to multiple constituencies, an exchange must consider inter-side externalities.<sup>93</sup> The Exchange explains that in assessing competition for exchange services, exchanges must also consider not only explicit costs, such as fees for trading, market data, and connectivity, but the implicit costs, such as realized spreads, of trading on an exchange.<sup>94</sup> The Exchange states that, when accounting for explicit and implicit costs, research has found that competition has largely equalized all-in trading costs to users across exchanges.<sup>95</sup>

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<sup>89</sup> See Notice, 89 FR at 52112.

<sup>90</sup> See Notice, 89 FR at 52112.

<sup>91</sup> See Notice, 89 FR at 52112.

<sup>92</sup> See Notice, 89 FR at 52112.

<sup>93</sup> See Notice, 89 FR at 52112.

<sup>94</sup> See Notice, 89 FR at 52112.

<sup>95</sup> See Notice, 89 FR at 52112 (citing Mackintosh, Phil & Normyle, Michael. “How Exchanges Compete: An Economic Analysis of Platform Competition.” Nasdaq, March 2024, <https://www.nasdaq.com/How-Exchanges-Compete-An-Economic-Analysis-of-Platform-Competition>) (“Mackintosh and Normyle”).

The Exchange states that, for example, data has shown that venues with the highest explicit costs (typically inverted and fee-free venues) have the lowest implicit costs from markouts<sup>96</sup> and vice versa.<sup>97</sup> The Exchange states that implicit costs explain how venues with higher explicit costs manage to compete with seemingly much cheaper venues (and conversely, how exchanges with higher implicit costs use lower fees to compete).<sup>98</sup> The Exchange further states that additional research also confirms that market participants route trades in a way that not only accounts for explicit and implicit costs – but also very efficiently values opportunity costs, like lower odds of getting a fill on inverted venues.<sup>99</sup> As such, the Exchange believes the proposed fee change is reasonable as exchanges are constrained from charging excessive fees for any exchange product, including physical connectivity.<sup>100</sup>

The Exchange also believes the proposed fee increase is reasonable in light of recent and anticipated connectivity-related upgrades and changes.<sup>101</sup> The Exchange states that it and its affiliated exchanges recently launched a multi-year initiative to improve Cboe Exchange Platform performance and capacity requirements to increase competitiveness, support growth and advance a consistent world class platform.<sup>102</sup> The Exchange explains that the goal of the project, among other things, is to provide faster and more consistent order handling and matching

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<sup>96</sup> The Exchange explains that per-trade markout is a measure of theoretical profitability from the perspective of a liquidity provider. See Notice, 89 FR at 52112 n.31.

<sup>97</sup> See Notice, 89 FR at 52112 (citing Mackintosh and Normyle).

<sup>98</sup> See Notice, 89 FR at 52112. The Exchange states that, for example, research by Nasdaq found that it is over 60% more expensive to trade on the costliest exchange than on the cheapest. According to the Exchange, such a sizeable disparity suggests that there is another factor that keeps these exchanges in competition. Specifically, the Exchange states that when implicit costs are considered, the difference in cost to trade is minimized. See id.

<sup>99</sup> See Notice, 89 FR at 52112 (citing Bershova, Nataliya & Jaquet, Paul. (2019). Execution Quality and Fee Structure: Passive Lit Executions. Bernstein Electronic Trading, Execution Research).

<sup>100</sup> See Notice, 89 FR at 52112.

<sup>101</sup> See Notice, 89 FR at 52112.

<sup>102</sup> See Notice, 89 FR at 52112.



performance for options, while ensuring quicker processing time and supporting increasing volumes and capacity needs.<sup>103</sup> The Exchange states that, for example, the Exchange recently performed switch hardware upgrades.<sup>104</sup> The Exchange explains that, particularly, the Exchange replaced existing customer access switches with newer models, which the Exchange believes resulted in increased determinism, and the recent switch upgrades also increased the Exchange's capacity to accommodate more physical ports by nearly 50%.<sup>105</sup> The Exchange states that network bandwidth was also increased nearly two-fold as a result of the upgrades, which among other things, can lead to reduce message queuing.<sup>106</sup> The Exchange also believes these newer models result in less natural variance in the processing of messages.<sup>107</sup> The Exchange notes that it incurred costs associated with purchasing and upgrading to these newer models, of which the Exchange has not otherwise passed through or offset.<sup>108</sup>

The Exchange states that as of April 1, 2024, market participants also having the option of connecting to a new data center (i.e., Secaucus NY6 Data Center ("NY6")), in addition to the current data centers at NY4 and NY5.<sup>109</sup> The Exchange states that it made NY6 available in response to customer requests in connection with their need for additional space and capacity.<sup>110</sup> The Exchange explains that in order to make this space available, the Exchange expended significant resources to prepare this space, and will also incur ongoing costs with respect to

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<sup>103</sup> See Notice, 89 FR at 52112.

<sup>104</sup> See Notice, 89 FR at 52112.

<sup>105</sup> See Notice, 89 FR at 52112.

<sup>106</sup> See Notice, 89 FR at 52112.

<sup>107</sup> See Notice, 89 FR at 52112.

<sup>108</sup> See Notice, 89 FR at 52112.

<sup>109</sup> See Notice, 89 FR at 52112-13.

<sup>110</sup> See Notice, 89 FR at 52113.

maintaining this offering, including costs related to power, space, fiber, cabinets, panels, labor and maintenance of racks.<sup>111</sup> The Exchange states it also incurred a large cost with respect to ensuring NY6 would be latency equalized, as it is for NY4 and NY5.<sup>112</sup>

The Exchange states that it also has made various other improvements since the current physical port rates were adopted in 2018.<sup>113</sup> The Exchange states that, for example, the Exchange has updated its customer portal to provide more transparency with respect to firms' respective connectivity subscriptions, enabling them to better monitor, evaluate and adjust their connections based on their evolving business needs.<sup>114</sup> The Exchange explains that it also performs proactive audits on a weekly basis to ensure that all customer cross connects continue to fall within allowable tolerances for Latency Equalized connections.<sup>115</sup> Accordingly, the Exchange states that it has expended, and will continue to expend, resources to innovate and modernize technology so that it may benefit its Members and continue to compete among other equities markets.<sup>116</sup> The Exchange explains that its ability to continue to innovate with technology and offer new products to market participants allows the Exchange to remain competitive in the equities space which currently has 16 equities markets and potential new entrants.<sup>117</sup> The Exchange states that if the Exchange were not able to assess incrementally higher fees for its connectivity, it would effectively impact how the Exchange manages its technology and hamper the Exchange's ability to continue to invest in and fund access services

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<sup>111</sup> See Notice, 89 FR at 52113.

<sup>112</sup> See Notice, 89 FR at 52113.

<sup>113</sup> See Notice, 89 FR at 52113.

<sup>114</sup> See Notice, 89 FR at 52113.

<sup>115</sup> See Notice, 89 FR at 52113.

<sup>116</sup> See Notice, 89 FR at 52113.

<sup>117</sup> See Notice, 89 FR at 52113.

in a manner that allows it to meet existing and anticipated access demands of market participants.<sup>118</sup> The Exchange explains that disapproval of fee changes such as the proposal herein, could also have the adverse effect of discouraging an exchange from improving its operations and implementing innovative technology to the benefit of market participants if it believes the Commission would later prevent that exchange from recouping costs and monetizing its operational enhancements, thus adversely impacting competition.<sup>119</sup>

The Exchange also believes the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.<sup>120</sup> Indeed, the Exchange believes assessing fees at a lower rate than fees assessed by other exchanges for analogous connectivity (which were similarly adopted via the rule filing process and filed with the Commission) is reasonable.<sup>121</sup> The Exchange states that the proposed fee is also the same as is concurrently being proposed for its Affiliate Exchanges.<sup>122</sup> Further, the Exchange states that Members are able to utilize a single port to connect to all of its Affiliate Exchanges and will only be charged one single fee (i.e., a market participant will only be assessed the proposed \$8,500 even if it uses that physical port to connect to the Exchange and another (or even all 6) of its Affiliate Exchanges).<sup>123</sup> Particularly, the Exchange believes the proposed monthly per port fee is reasonable, equitable and not unfairly discriminatory since as the Exchange has determined to

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<sup>118</sup> See Notice, 89 FR at 52113.

<sup>119</sup> See Notice, 89 FR at 52113.

<sup>120</sup> See Notice, 89 FR at 52113 (citing The Nasdaq Stock Market LLC (“Nasdaq”), General 8, Connectivity to the Exchange. Nasdaq and its affiliated exchanges charge a monthly fee of \$15,000 for each 10Gb Ultra fiber connection to the respective exchange, which is analogous to the Exchange’s 10Gb physical port. See also id. (citing New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago Inc., NYSE National, Inc. Connectivity Fee Schedule, which provides that 10 Gb LX LCN Circuits (which are analogous to the Exchange’s 10 Gb physical port) are assessed \$22,000 per month, per port.)).

<sup>121</sup> See Notice, 89 FR at 52113.

<sup>122</sup> See Notice, 89 FR at 52113.

<sup>123</sup> See Notice, 89 FR at 52113.

not charge multiple fees for the same port.<sup>124</sup> Indeed, the Exchange notes that several ports are in fact purchased and utilized across one or more of the Exchange's affiliated Exchanges (and charged only once).<sup>125</sup>

The Exchange also believes that the proposed fee change is not unfairly discriminatory because it would be assessed uniformly across all market participants that purchase the physical ports.<sup>126</sup> The Exchange believes increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port is equitable as the 1 Gb physical port is 1/10<sup>th</sup> the size of the 10 Gb physical port and therefore does not offer access to many of the products and services offered by the Exchange (e.g., ability to receive certain market data products).<sup>127</sup> The Exchange explains that, thus, the value of the 1 Gb alternative is lower than the value of the 10 Gb alternative, when measured based on the type of Exchange access it offers.<sup>128</sup> The Exchange states that, moreover, market participants that purchase 10 Gb physical ports utilize the most bandwidth and therefore consume the most resources from the network.<sup>129</sup> The Exchange also anticipates that firms that utilize 10 Gb ports will benefit the most from the Exchange's investment in offering NY6 as the Exchange anticipates there will be much higher quantities of 10 Gb physical ports connecting from NY6 as compared to 1 Gb ports.<sup>130</sup> Indeed, the Exchange notes that 10 Gb physical ports account for approximately 90% of physical ports across the NY4, NY5, and NY6 data centers, and to date, 80% of new port connections in NY6

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<sup>124</sup> See Notice, 89 FR at 52113.

<sup>125</sup> See Notice, 89 FR at 52113.

<sup>126</sup> See Notice, 89 FR at 52113.

<sup>127</sup> See Notice, 89 FR at 52113.

<sup>128</sup> See Notice, 89 FR at 52113.

<sup>129</sup> See Notice, 89 FR at 52113.

<sup>130</sup> See Notice, 89 FR at 52113.

are 10 Gb ports.<sup>131</sup> As such, the Exchange believes the proposed fee change for 10 Gb physical ports is reasonably and appropriately allocated.<sup>132</sup>

The Exchange states that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals.<sup>133</sup> The Exchange states that, moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition - rather than government order - to determine prices.<sup>134</sup> The Exchange explains that the principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities.<sup>135</sup> The Exchange states that Congress intended that this “national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed,” and that other provisions of the Act confirm that intent.<sup>136</sup> The Exchange states that, for example, the Act provides that an exchange must design its rules “to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.”<sup>137</sup> The Exchange further states that, likewise, the Act grants the Commission authority to amend or repeal “[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.”<sup>138</sup> The Exchange explains that, in short, the promotion of free and open competition was a core congressional

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<sup>131</sup> See Notice, 89 FR at 52113.

<sup>132</sup> See Notice, 89 FR at 52113.

<sup>133</sup> See Notice, 89 FR at 52113.

<sup>134</sup> See Notice, 89 FR at 52113.

<sup>135</sup> See Notice, 89 FR at 52113.

<sup>136</sup> See Notice, 89 FR at 52113 (citing H.R. Rep. No. 94-229, at 92 (1975) (Conf. Rep.) (emphasis added)).

<sup>137</sup> See Notice, 89 FR at 52113 (citing 15 U.S.C. 78f(b)(5)).

<sup>138</sup> See Notice, 89 FR at 52113 (citing 15 U.S.C. 78f(8)).

objective in creating the national market system.<sup>139</sup> The Exchange states that, indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system.<sup>140</sup> Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure.<sup>141</sup> The Exchange believes that, finally, and importantly, that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.<sup>142</sup> Indeed, the Exchange believes that classification of costs could likely not be done without on-going debate over formulas for allocation,<sup>143</sup> continual auditing, and considerable expense.<sup>144</sup> The Exchange also believes cost-based analysis could create disincentives to reduce costs through efficient

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<sup>139</sup> See Notice, 89 FR at 52113 (citing 15 U.S.C. 78k-1(a)(1)(C)(ii) (purposes of Exchange Act include to promote “fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets”); Order, 73 FR at 74781 (“The Exchange Act and its legislative history strongly support the Commission’s reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.”)).

<sup>140</sup> See Notice, 89 FR at 52113.

<sup>141</sup> See Notice, 89 FR at 52113-14.

<sup>142</sup> See Notice, 89 FR at 52114.

<sup>143</sup> See Notice, 89 FR at 52114, n.40 (citing letter from Brian Sopinsky, General Counsel, Susquehanna International Group, LLP (“SIG”), to Vanessa Countryman, Secretary, Commission, dated February 7, 2023, letters from Gerald D. O’Connell, SIG, to Vanessa Countryman, Secretary, Commission, dated March 21, 2023, May 24, 2023, July 24, 2023 and September 18, 2023, *and* letters from John C. Pickford, SIG, to Vanessa Countryman, Secretary, Commission, dated January 4, 2024, and March 1, 2024 and letters from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc., to Vanessa Countryman, Secretary, Commission, dated November 8, 2023 and January 2, 2024. See also Securities Exchange Act Release No. 93883 (December 30, 2021), 87 FR 523 (January 5, 2022) (SR-IEX-2021-14) (Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Its Fee Schedule for Market Data Fees) and Securities Exchange Act Release No. 94888 (May 11, 2022), 87 FR 29892 (May 17, 2022) (SR-PEARL-2022-18) (Notice of Filing of a Proposed Rule Change To Amend the MIAX PEARL Options Fee Schedule To Increase Certain Connectivity Fees and To Increase the Monthly Fees for MIAX Express Network Full Service Port; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change)).

<sup>144</sup> See Notice, 89 FR at 52114.

operation or innovation.<sup>145</sup> Moreover, the Exchange believes that the industry could experience frequent rate increases based on escalating expense levels.<sup>146</sup> The Exchange lastly cautions that as disputes arise regarding the appropriate measure and calculation of relevant costs and allocation of common costs, the Commission could find itself engaging in the kind of rigid ratemaking not contemplated by Section 11A of the Exchange Act and which, according to the Exchange, the Commission has historically sought to avoid.<sup>147</sup>

The Exchange also 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.<sup>148</sup> The Exchange states that the proposed fee change will not impact intramarket competition because it will apply to all similarly situated Members equally (i.e, all market participants that choose to purchase the 10 Gb physical port).<sup>149</sup> Additionally, the Exchange does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants.<sup>150</sup> For example, the Exchange states that market participants with modest capacity needs can continue to buy the less expensive 1 Gb physical port (which cost is not changing) or may choose to obtain access via a third-party re-seller.<sup>151</sup> The Exchange states that while pricing may be increased for the larger capacity physical ports, such options provide far

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<sup>145</sup> See Notice, 89 FR at 52114.

<sup>146</sup> See Notice, 89 FR at 52114.

<sup>147</sup> See Notice, 89 FR at 52114.

<sup>148</sup> See Notice, 89 FR at 52114.

<sup>149</sup> See Notice, 89 FR at 52114.

<sup>150</sup> See Notice, 89 FR at 52114.

<sup>151</sup> See Notice, 89 FR at 52114.

more capacity and are purchased by those that consume more resources from the network.<sup>152</sup> Accordingly, the Exchange states that the proposed connectivity fees do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation reflects the network resources consumed by the various size of market participants – lowest bandwidth consuming members pay the least, and highest bandwidth consuming members pays the most.<sup>153</sup>

The Exchange states that the proposed fee is also still lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested participants from connecting directly to the Exchange.<sup>154</sup> Further, if the changes proposed herein are unattractive to market participants, the Exchange states that it can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result.<sup>155</sup> The Exchange states that it operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.<sup>156</sup> The Exchange states that market participants have numerous alternative venues that they may participate on and direct their order flow, including 12 non-Cboe affiliated equities markets, as well as off-exchange venues, where competitive products are available for trading.<sup>157</sup> Moreover, the Exchange states that the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the

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<sup>152</sup> See Notice, 89 FR at 52114.

<sup>153</sup> See Notice, 89 FR at 52114.

<sup>154</sup> See Notice, 89 FR at 52114.

<sup>155</sup> See Notice, 89 FR at 52114.

<sup>156</sup> See Notice, 89 FR at 52114.

<sup>157</sup> See Notice, 89 FR at 52114.



securities markets.<sup>158</sup> Specifically, the Exchange states that in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>159</sup> The Exchange states that the fact that this market is competitive has also long been recognized by the courts.<sup>160</sup> Accordingly, the Exchange does not believe its proposed change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>161</sup>

#### B. Suspension

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.<sup>162</sup> 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.”<sup>163</sup>

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<sup>158</sup> See Notice, 89 FR at 52114.

<sup>159</sup> See Notice, 89 FR at 52114 (citing Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005)).

<sup>160</sup> See Notice, 89 FR at 52114. The Exchange states that in *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’....” (citing *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21))).

<sup>161</sup> See Notice, 89 FR at 52114.

<sup>162</sup> 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”).

<sup>163</sup> See id.

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), 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;<sup>164</sup> (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;<sup>165</sup> and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.<sup>166</sup>

In temporarily suspending the Exchange’s proposed rule change, the Commission intends to further consider whether the Proposal to increase its 10 Gb physical port connectivity fee is consistent with the statutory requirements applicable to a national securities exchange under the Act. The Commission will consider, among other things, whether the Exchange has provided sufficient information to demonstrate that the Exchange is subject to significant competitive forces when setting the proposed port connectivity fees. 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.<sup>167</sup>

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<sup>164</sup> 15 U.S.C. 78f(b)(4).

<sup>165</sup> 15 U.S.C. 78f(b)(5).

<sup>166</sup> 15 U.S.C. 78f(b)(8).

<sup>167</sup> See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

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 change.<sup>168</sup>

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

In addition to temporarily suspending the Proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)<sup>169</sup> and 19(b)(2)(B) of the Act<sup>170</sup> to determine whether the Exchange's 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 encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>171</sup> the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how the proposed fee is consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities

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<sup>168</sup> 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).

<sup>169</sup> 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.

<sup>170</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>171</sup> Id. Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See id.

exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;<sup>172</sup>

- Whether the Exchange has demonstrated how the proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>173</sup> and
- Whether the Exchange has demonstrated how the proposed fee is consistent with 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].”<sup>174</sup>

As discussed in Section III above, the Exchange made various arguments in support of the Proposal. There are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposed fee is consistent with the Act and the rules thereunder. The Commission will specifically consider, among other things, whether the Exchange has provided sufficient evidence to demonstrate that the proposed fee is reasonable and equitably allocated, is not unfairly discriminatory, and does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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.”<sup>175</sup> The description of a proposed rule change, its

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<sup>172</sup> 15 U.S.C. 78f(b)(4).

<sup>173</sup> 15 U.S.C. 78f(b)(5).

<sup>174</sup> 15 U.S.C. 78f(b)(8).

<sup>175</sup> 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,<sup>176</sup> 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.<sup>177</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fee is consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>178</sup>

#### 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 AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>179</sup>

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<sup>176</sup> See *id.*

<sup>177</sup> See *id.*

<sup>178</sup> See 15 U.S.C. 78f(b)(4), (5), and (8).

<sup>179</sup> 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

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 changes.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-CboeEDGX-2024-035 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-CboeEDGX-2024-035. This file number should be included on the subject line if email 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 (<https://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

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Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeEDGX-2024-035 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,<sup>180</sup> that File No. SR-CboeEDGX-2024-035, 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.<sup>181</sup>

**Sherry R. Haywood**

*Assistant Secretary*

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<sup>180</sup> 15 U.S.C. 78s(b)(3)(C).

<sup>181</sup> 17 CFR 200.30-3(a)(57).