

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82416; File No. SR-CboeBYX-2017-004)

December 28, 2017

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Market Data Fees

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 15, 2017, Cboe BYX Exchange, Inc. (“BYX” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. 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 Substance of the Proposed Rule Change

The Exchange filed a proposal to amend the Market Data section of its fee schedule to lower the Internal Distribution fees and to adopt per User fees for the Cboe One Summary Feed.

The text of the proposed rule change is available at the Exchange’s website at www.markets.cboe.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

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

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

1. Purpose

The Exchange proposes to amend the Market Data section of its fee schedule to lower the fee for Internal Distribution and to adopt separate fees for Professional⁵ and Non-Professional Users⁶ for the Cboe One Summary Feed.

The Cboe One Feed is an optional data feed that disseminates, on a real-time basis, the aggregate best bid and offer (“BBO”) of all displayed orders for securities traded on BYX and its

⁵ A “Professional User” is defined as “any User other than a Non-Professional User.” See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

⁶ A “Non-Professional User” is currently defined as “a natural person who is not: (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an “investment adviser” as that term is defined in Section 202(a)(11) of the Investment Advisers 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.” Id. See SR-CboeBYX-2017-003 (filed December 15, 2017) (amending the definition of Non-Professional User to harmonize it with that of its affiliate exchanges, Cboe Exchange, Inc. and C2 Exchange, Inc. as of January 2, 2018).

affiliated exchanges⁷ and for which they report quotes under the Consolidated Tape Association (“CTA”) Plan or the Nasdaq/UTP Plan.⁸ The Cboe One Feed also contains the individual last sale information for the Cboe Equity Exchanges (collectively with the aggregate BBO, the “Cboe One Summary Feed”). In addition, the Cboe One Feed contains optional functionality which enables recipients to receive aggregated two-sided quotations from the Cboe Equity Exchanges for up to five (5) price levels (“Cboe One Premium Feed”).

The Exchange proposes to amend its fee schedule to lower the fee for Internal Distribution for the Cboe One Summary Feed and to adopt separate fees for Professional and Non-Professional Users.⁹ The Exchange does not propose to amend the fees for the Cboe One Premium Feed.

Distribution Fees. Currently, each Internal Distributor that receives the Cboe One Summary Feed is charged a fee of \$10,000 per month. The Exchange now proposes to lower the fee for Internal Distribution to \$1,500 per month.

User Fees. Like it does today for External Distributors, the Exchange proposes to adopt per User fees for Internal Distributors that receive the Cboe One Summary Feed. The Exchange

⁷ BYX’s affiliated exchanges are Cboe EDGA Exchange, Inc. (“EDGA”), Cboe EDGX Exchange, Inc. (“EDGX”), and Cboe BZX Exchange, Inc. (“BZX”, together with EDGX, EDGA, and BYX, the “Cboe Equity Exchanges”).

⁸ See Exchange Rule 11.22(j). See also Securities Exchange Act Release No. 73918 (December 23, 2014), 79 FR 78920 (December 31, 2014) (File Nos. SR-EDGX-2014-25; SR-EDGA-2014-25; SR-BATS-2014-055; SR-BYX-2014-030) (Notice of Amendment No. 2 and Order Granting Accelerated Approval to Proposed Rule Changes, as Modified by Amendments Nos. 1 and 2, to Establish a New Market Data Product called the Cboe One Feed) (“Cboe One Approval Order”).

⁹ The Exchange also proposes a non-substantive, immaterial change to the fee table headings to conform to other heading within the Market Data Section of the fee schedule. In particular, the Exchange proposes to change the term “Distributor” to “Distribution” in both the Internal Distributor and External Distributor headings under the Cboe One Feed.

currently charges External Distributors that redistribute the Cboe One Summary Feed different fees for their Professional Users and Non-Professional Users. Those fees are \$10.00 per month for each Professional Users and \$0.25 per month for each Non-Professional Users. To date, the Exchange has not charged per User fees to Internal Distributors for the Cboe One Summary Feed. To offset the proposed reduction to the monthly Internal Distribution fee, the Exchange proposes to adopt per User fees for Internal Distribution, the amounts of each fee would be the same as the per User fees currently charged to External Distributors described above.

The Exchange also proposes to extend the current \$50,000 per month Enterprise Fee available to External Distributors of the Cboe One Summary Feed to Internal Distributors. In lieu of per User fees, the Enterprise fee will permit Internal Distributors who redistribute the Cboe One Summary Feed to an unlimited number of internal Professional and Non-Professional Users for a set fee of \$50,000 per month. For example, if an Internal Distributor had 15,000 Professional Users who each receive the Cboe One Summary Feed at \$10.00 per month, then that Internal Distributor will pay \$150,000 per month in Professional Users fees. Under the proposed Enterprise Fee, the Internal Distributor will pay a flat fee of \$50,000 for an unlimited number of internal Professional and Non-Professional Users of the Cboe One Summary Feed. An Internal Distributor that pays the Enterprise Fee will not have to report its number of such Users (as set forth below) on a monthly basis. However, every six months, an Internal Distributor must provide the Exchange with a count of the total number of natural person users of each product, including both Professional and Non-Professional Users. Like for External Distributors, the Enterprise Fee for Internal Distributors would be in addition to the applicable Distribution Fee.

Like External Distributors of the Cboe One Summary Feed, Internal Distributors that

receive the Cboe One Summary Feed will be required to count every Professional User and Non-Professional User to which they provide the Cboe One Summary Feed, the requirements for which are identical to that currently in place for External Distributors of the Cboe One Summary Feed and other market data products offered by the Exchange.¹⁰ Thus, the Internal Distributor's count will include every person and device that accesses the data regardless of the purpose for which the individual or device uses the data. Internal Distributors must report all Professional and Non-Professional Users in accordance with the following:

- In connection with an Internal Distributor's distribution of the Cboe One Summary Feed, the Internal Distributor must count as one User each unique User that the Internal Distributor has entitled to have access to the Cboe One Summary Feed. However, where a device is dedicated specifically to a single individual, the Internal Distributor must count only the individual and need not count the device.
- The Internal Distributor must identify and report each unique User. If a User uses the same unique method to gain access to the Cboe One Summary Feed, the Internal Distributor must count that as one User. However, if a unique User uses multiple methods to gain access to the Cboe One Summary Feed (*e.g.*, a single User has multiple passwords and user identifications), the Internal Distributor must report each of those methods as an individual User.
- Internal Distributors must report each unique individual person who receives access through multiple devices as one User so long as each device is dedicated specifically

¹⁰ See Securities Exchange Act Release Nos. 74284 (February 18, 2015); 80 FR 9792 (February 24, 2015) (SR-BYX-2015-09) (proposing fees for the Cboe One Feed); 75407 (July 9, 2015), 80 FR 41532 (July 15, 2015) (SR-BYX-2015-30) (proposing user fees for the BYX Top and Last Sale data feeds); and 75786 (August 28, 2015), 80 FR 53353 (September 3, 2015) (SR-BYX-2015-36) (proposing fees for BYX Book Viewer).

to that individual.

- If an Internal Distributor entitles one or more individuals to use the same device, the Distributor must include only the individuals, and not the device, in the count.

Implementation Date

The Exchange intends to implement the proposed fees on January 2, 2018.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(4),¹² in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all recipients of Exchange data. The Exchange believes the proposed fees are competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients.

The Exchange believes that the proposed rule change is consistent with Section 11(A) of the Act¹³ in that it supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,¹⁴ which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78k-1.

¹⁴ 17 CFR 242.603.

are not unreasonably discriminatory. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange's customers and market data vendors who subscribe to the Cboe One Summary Feed will be subject to the proposed fees. The Cboe One Summary Feed is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation purchase this data or to make this data available. Accordingly, Distributors and Users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Moreover, the Exchange is not required to make any proprietary data products available or to offer any specific pricing alternatives to any customers.

In addition, the fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange's Statement on Burden on Competition, the existence of alternatives to the Cboe One Summary Feed further ensure that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when vendors and subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. For example, the Cboe One Summary Feed provides investors with alternative market data and competes with similar market data product currently offered by other exchanges. If another exchange (or its affiliate) were to charge less to

distribute its similar product than the Exchange charges to create the Cboe One Summary Feed, prospective Users likely would not subscribe to, or would cease subscribing to either market data product.

The Exchange notes that the Commission is not required to undertake a cost-of-service or rate-making approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.¹⁵

The Exchange believes that lowering the Internal Distribution fee for the Cboe One Summary Feed is equitable and reasonable because the lower fee coupled with the adoption of per User fees is designed to provide a price structure for Internal Distributors that is competitive and attracts additional subscribers to each market data feed. The Exchange also believes that it is

¹⁵ The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's website at <http://www.sec.gov/rules/concept/s72899/buck1.htm>. See also Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (SR-NYSE-2014-64) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish an Access Fee for the NYSE Best Quote and Trades Data Feed, Operative December 1, 2014).

reasonable to charge a lower fee to Internal Distributors than External Distributors because External Distributors redistribute the data to their subscribers for a fee while Internal Distributors do not.

The Exchange believes that implementing the Professional and Non-Professional User fees for the Cboe One Summary Feed are equitable and reasonable because they will result in greater availability to Professional and Non-Professional Users. The addition of per User fees also enables the fee for Internal Distribution, thereby lowering their overall costs where the number of Users they account for is low. Moreover, introducing a modest Non-Professional User fee is reasonable because it provides an additional method for Non-Professional investors to access the data by providing the same data that is available to Professional Users. The Exchange believes that the proposed fees are equitable and not unfairly discriminatory because they will be charged uniformly to Internal Distributors and Users. The Exchange notes that the amount of the per User fees for Internal Distribution equal those charged for External Distribution for the Cboe One Summary Feed.

The fee structure of differentiated Professional and Non-Professional fees is utilized by the Exchange for the Cboe One Feed and has long been used by other exchanges for their proprietary data products, and by the Nasdaq UTP and the CTA and CQ Plans in order to reduce the price of data to retail investors and make it more broadly available.¹⁶ Offering the Cboe One Summary Feed to Non-Professional Users with the same data available to Professional Users

¹⁶ See Securities Exchange Act Release Nos. 74285 (February 18, 2015), 80 FR 9828 (February 24, 2015) (SR-BATS-2015-11); 74283 (February 18, 2015), 80 FR 9809 (February 24, 2015) (SR-EDGA-2015-09); 74282 (February 17, 2015), 80 FR 9487 (February 23, 2015) (SR-EDGX-2015-09); and 74284 (February 18, 2015), 80 FR 9792 (February 24, 2015) (SR-BYX-2015-09) (“Initial Cboe One Feed Fee Filings”). See also, e.g., Securities Exchange Act Release No. 20002, File No. S7-433 (July 22, 1983) (establishing nonprofessional fees for CTA data); and Nasdaq Rules 7023(b) and 7047.

results in greater equity among data recipients.

The proposed expansion of the Enterprise Fee to Internal Distributors of the Cboe One Summary Feed is reasonable because it could result in a fee reduction for Internal Distributors with a large number of Professional and Non-Professional Users. If an Internal Distributor has a smaller number of Professional Users of the Cboe One Summary Feed, then it may continue using the per User structure. By reducing prices for Internal Distributors with a large number of Professional and Non-Professional Users, the Exchange believes that more Internal Distributors may choose to receive and to distribute the Cboe One Summary Feed, thereby expanding the distribution of this market data for the benefit of investors.

The Exchange further believes that the proposed Enterprise Fee is reasonable because it will simplify reporting for certain Internal Distributors that have large numbers of Professional and Non-Professional Users. Internal Distributors that pay the proposed Enterprise Fee will not have to report the number of Users on a monthly basis as they currently do, but rather will only have to count natural person users every six months, which is a significant reduction in administrative burden. Finally, the Exchange believes that it is equitable and not unfairly discriminatory to establish an Enterprise Fee because it reduces the Exchange's costs and the Distributor's administrative burdens in tracking and auditing large numbers of Users.

(B) Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's ability to price the Cboe One Summary Feed is constrained by: (i) competition among exchanges, other trading platforms, and Trade Reporting Facilities ("TRF") that compete with each other in a variety of dimensions; (ii) the existence of inexpensive real-time consolidated data and market-specific data and free delayed data; and (iii) the inherent

contestability of the market for proprietary data.

The Exchange and its market data products are subject to significant competitive forces and the proposed fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow. The Cboe One Summary Feed will enhance competition because it not only provides content that is competitive with the similar products offered by other exchanges, but will provide pricing that is competitive as well. The Cboe One Summary Feed provides investors with an alternative option for receiving market data and competes directly with similar market data products currently offered by the NYSE and Nasdaq.¹⁷

In addition, when establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees

¹⁷ See Nasdaq Basic, <http://www.nasdaqtrader.com/Trader.aspx?id=nasdaqbasic> (data feed offering the BBO and Last Sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center, as well as trades reported to the FINRA/Nasdaq Trade Reporting Facility ("TRF")); Nasdaq NLS Plus, <http://www.nasdaqtrader.com/Trader.aspx?id=NLSplus> (data feed providing last sale data as well as consolidated volume from the following Nasdaq OMX markets for U.S. exchange-listed securities: Nasdaq, FINRA/Nasdaq TRF, Nasdaq OMX BX, and Nasdaq OMX PSX); Securities Exchange Act Release No. 73553 (November 6, 2014), 79 FR 67491 (November 13, 2014) (SR-NYSE-2014-40) (Notice of Amendment No. 1 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment No.1, To Establish the NYSE Best Quote & Trades ("BQT") Data Feed); <https://www.nyse.com/market-data/real-time/nyse-bqt> (data feed providing unified view of BBO and last sale information for the NYSE, NYSE Arca, and NYSE MKT).

and an equitable allocation of fees among all Users. The existence of alternatives to the Cboe One Summary Feed 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.

Lastly, the Exchange represents that the proposed pricing of the Cboe One Summary Feed provides investors with alternative market data and competes with similar market data product currently offered by other exchanges.¹⁸ In addition, the Exchange notes the concerns regarding whether a competing vendor could create a similar product on the same price basis as the Exchange are not present here. The proposed changes are limited to fees for Internal Distributers who use the data for internal use only and not for the redistribution and sale to external parties.

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

The Exchange has neither solicited nor received written 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 Act¹⁹ and paragraph (f) of Rule 19b-4 thereunder.²⁰ 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,

¹⁸ Id.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f).

for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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. Please include File Number SR-CboeBYX-2017-004 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-CboeBYX-2017-004. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeBYX-2017-004 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.²¹

Robert W. Errett
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).