

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-82471; File No. SR-CboeBYX-2017-003)

January 9, 2018

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

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 27, 2017, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The 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 introduce new fees for Non-Display Usage of BYX Depth.

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 introduce new fees for Non-Display Usage⁵ of BYX Depth. BYX Depth is an uncompressed market data feed that provides depth-of-book quotations and execution information based on equity orders entered into the System.⁶ The Exchange currently charges subscribers to BYX Depth a fee of \$2,000 per month for Non-Display Usage of BYX Depth by its Trading Platforms.⁷ Non-Display Usage is defined as “any method of accessing a Market Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.”⁸ Trading Platforms include registered National Securities Exchanges,

⁵ See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

⁶ See Exchange Rule 13.8(a).

⁷ A Trading Platform is defined as “any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).” See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

⁸ See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

Alternative Trading Systems (“ATSS”), and Electronic Communications Networks (“ECNs”) as those terms are defined in the Exchange Act and regulations and rules thereunder. Previously, subscribers of BYX Depth that used the feed for Non-Display purposes but did not utilize the feed within a Trading Platform were charged the existing Distributors fees.

Forms of Non-Display Use include, but are not limited to, algorithmic or automated trading, order routing, surveillance, order management, risk management, clearance and settlement activities, and account maintenance.⁹ Non-Display Usage does not include any use of BYX Depth that relates solely to transportation, dissemination, and redistribution of BYX Depth, or that results in the output of BYX Depth solely for display. Non-display uses of data for non-trading purposes benefits data recipients by allowing users to automate functions, to achieve greater speed and accuracy, and to reduce costs of labor. While some non-trading uses do not directly generate revenues, they can substantially reduce a data recipient’s costs by automating many functions. Those functions can be carried out in a more efficient and accurate manner, with reduced errors and labor costs.

The Exchange now proposes to adopt a separate fee of \$1,000 per month to cover other forms of Non-Display Usage other than through a Trading Platform.¹⁰ The proposed fee would be assessed in addition to existing Distributor¹¹ fees and would supplement the existing Non-

⁹ See e.g., Nasdaq Rule IM-7023-1(c), U.S. Non-Display Information.

¹⁰ The Exchange also proposes a non-substantive change to the description of the BYX Depth Enterprise Fee to remove the word “External” before “Distributor” in the first and second sentences. This amendment does not change the application of the Enterprise Fee as the Exchange previously filed a proposed rule change to offer the Enterprise fee to both Internal and External Distributors. See Securities Exchange Act Release No. 79623 (December 20, 2016), 81 FR 95226 (December 27, 2016) (SR-BatsBYX-2016-39).

¹¹ A “Distributor” is defined as “any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.” See the Exchange’s fee schedule [available at \[http://markets.cboe.com/us/equities/membership/fee_schedule/byx/\]\(http://markets.cboe.com/us/equities/membership/fee_schedule/byx/\)](http://markets.cboe.com/us/equities/membership/fee_schedule/byx/).

Display Usage fee for Trading Platforms. Specifically, subscribers who are subject to the Non-Display Usage by Trading Platform fee but also utilize BYX Depth for other Non-Display purposes would be subject to both fees. However, subscribers who utilize BYX Depth for other Non-Display purposes and not within a Trading Platform would be subject only to the proposed fee for Non-Display Use.

Certain subscribers that use an Exchange approved Managed Non-Display Service Provider would be exempt from proposed Non-Display Usage Fee. To be approved as Managed Non-Display Service Provider, the Distributor must host subscriber's applications that utilize BYX Depth must within the Managed Non-Display Service Provider's space/cage; fully manage and control access to BYX Depth, and not permit further redistribution of the Exchange Data internally or externally.¹² In order to qualify for the exemption, the subscriber must meet the following requirements:

- any subscriber applications that utilize BYX Depth must be hosted within the Managed Non-Display Service Provider's space/cage;
- the subscriber's access to BYX Depth is fully managed and controlled by the Managed Non-Display Service Provider, and no further redistribution of the Exchange Data internally or externally is permitted; and
- the subscriber is supported solely by one Managed Non-Display Service Provider, is not hosted by multiple Managed Non-Display Service Providers, and does not have their own data center-hosted environment that also receives BYX Depth.

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

¹² See e.g., Securities Exchange Act Release No. 76900 at fn. 8 (January 14, 2016), 81 FR 3506 (January 21, 2016) (SR-NYSE-2016-02). In this filing, the NYSE discontinued fees related to managed non-display for NYSE OpenBook. Id.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹³ in general, and furthers the objectives of Section 6(b)(4),¹⁴ 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 also believes that the proposed rule change is consistent with Section 11(A) of the Act¹⁵ 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,¹⁶ 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 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.

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78k-1.

¹⁶ See 17 CFR 242.603.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange's subscribers will be subject to the proposed fees on an equivalent basis. BYX Depth is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation 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 BYX Depth further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect such alternatives. That is, the Exchange competes with other exchanges (and their affiliates) that provide similar market data products. If another exchange (or its affiliate) were to charge less to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute BYX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, BYX Depth.

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.¹⁷

¹⁷ The Exchange believes that cost-based pricing would be impractical because it would

The proposed Non-Display fee for usage other than through a Trading Platform for BYX Depth is equitable and reasonable as the Exchange believes the proposed fee represents the value of the data provided by the feed and its use by market participants. The proposed fee changes reflects changing trends in the ways in which the industry uses market data. The proposed fee comport with the proliferation of the use of data for various non-display purposes and by non-display trading applications. It recognizes industry changes that have evolved as a result of numerous technological advances, the advent of trading algorithms and automated trading, different investment patterns, a plethora of new securities products, unprecedented levels of trading, decimalization, internationalization and developments in portfolio analysis and securities research. The Exchange believes the proposed fee reflects the value of the data provided.

The Exchange notes that fees for non-display use have become commonplace in the industry. Several exchanges impose them as does the UTP, CTA/CQ, and OPRA Plans. In

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).

addition, the fee proposed is less than similar fees currently charged by other exchanges for their depth-of-book data products. For example, NYSE Arca, Inc. (“NYSE Arca”) and the New York Stock Exchange, Inc. (“NYSE”) charge \$5,000 and \$6,000 per month, respectively, for its depth-of-book data used for non-display purposes.¹⁸

The proposed fee is also equitable and reasonable in that it ensures that heavy users of the BYX Depth pay an equitable share of the total fees. Currently, External Distributors pay higher fees than Internal Distributors based upon their assumed higher usage levels. The Exchange believes that non-display users are generally high users of the data, using it to power a trading algorithms and other trading relates systems for millions or even billions of trading messages per day.

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 BYX Depth 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

¹⁸ See the non-display fees for NYSE OpenBook and NYSE ArcaBook in the NYSE and NYSE Arca fee schedules available at <http://www.nyxdata.com/nysedata/default.aspx?tabid=518&folder=207656>

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.

In addition, BYX Depth competes with a number of alternative products. For instance, BYX Depth does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce depth-of-book information products, and many currently do, including Nasdaq, NYSE, and NYSE Arca.

In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on Exchange data products and the Exchange's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting the proposed data product fees. The proposed data product fees are, in part, responses to that pressure. The Exchange believes that the proposed fees would reflect an equitable allocation of its overall costs to users of its facilities.

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 and an equitable allocation of fees among all Users. The existence of alternatives to BYX Depth, including existing similar feeds by other exchanges, consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when 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.

The Exchange believes the adoption of the fee for Non-Display Usage for BYX Depth would increase competition amongst the exchanges that offer depth-of-book products. In addition, the proposed Non-Display Usage fee is less than similar fees currently charged by the NYSE and NYSE Arca for their depth-of-book data.¹⁹

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 Act²⁰ and paragraph (f) of Rule 19b-4 thereunder.²¹ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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:

¹⁹ See supra note 18.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f).

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-2017-003 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 CboeBYX-2017-003. 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, D.C. 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 CboeBYX-2017-003 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.²²

Eduardo A. Aleman
Assistant Secretary

²² 17 CFR 200.30-3(a)(12).