This document is scheduled to be published in the
Federal Register on 10/03/2019 and available online at
https://federalregister.gov/d/2019-21471, and on **govinfo.gov**

8011-01p

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-87140; File No. SR-CboeBYX-2019-013]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee

September 27, 2019

I. Introduction

On August 1, 2019, Cboe BYX Exchange, Inc. ("BYX" or the "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] a proposed rule change (File Number SR-CboeBYX-2019-013) to amend the BYX fee schedule to establish a monthly Trading Rights Fee to be assessed on Members. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[3] The proposed rule change was published for comment in the Federal Register on August 21, 2019.[4] The Commission has received one comment letter on the proposal, and one response letter from the Exchange.[5] Under Section 19(b)(3)(C) of the Act,[6] the Commission is hereby: (i)

---

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 15 U.S.C. 78s(b)(3)(A).

4 See Securities Exchange Act Release No. 86685 (August 15, 2019), 84 FR 43627 ("Notice").

5 See Letters from: Theodore R. Lazo, Managing Director and Associate General Counsel, SIFMA, dated September 12, 2019 ("SIFMA Letter"); Adrian Griffiths, Assistant General Counsel, Cboe, dated September 25, 2019 ("Exchange Response Letter"). Comment letters are available on the Commission's website at: https://www.sec.gov/comments/sr-cboebyx-2019-013/srcboebyx2019013.htm.

6 15 U.S.C. 78s(b)(3)(C).

temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend the Membership Fees section of the BYX fee schedule to establish a monthly Trading Rights Fee, which would be assessed on Members that trade more than a specified volume in U.S. equities.[7] Specifically, the Exchange proposes to charge Members a Trading Rights Fee of $250 per month for the ability to trade on the Exchange.[8] A Member would not be charged the monthly Trading Rights Fee if it qualifies for one of the following waivers: (1) the Member has a monthly ADV[9] of less than 100,000 shares, (2) at least 90% of the Member's orders submitted to the Exchange per month are retail orders,[10] or (3) a new Member is within the first three months of their membership.[11]

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,[12] at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,[13] the Commission

---

7 See Notice, supra note 4, at 43627. The Commission notes that the Exchange's affiliates, Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc., each also filed a proposed rule change to amend their fee schedules to establish a monthly Trading Rights Fee to be assessed on Members: CboeBZX-2019-072, CboeEDGA-2019-014, and CboeEDGX-2019-050, respectively.

8 See id.

9 See id. "ADV" means average daily volume calculated as the number of shares added or removed, combined, per day. ADV is calculated on a monthly basis. See id. at n.5.

10 See Notice, supra note 4, at 43627.

11 See id. For any month in which a firm is approved for Membership with the Exchange, the monthly Trading Rights Fee would be pro-rated in accordance with the date on which Membership is approved. See id. at 43628.

12 15 U.S.C. 78s(b)(3)(C).

13 15 U.S.C. 78s(b)(1).

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

The Exchange asserts that the proposed Trading Rights Fee “is reasonable because it will assist in funding the overall regulation and maintenance of the Exchange” and will contribute to “ensuring that adequate resources are devoted to regulation.”[14] The Exchange also believes the proposed fee is reasonable because it “represents a modest charge” applied to firms that “have chosen to become members of the Exchange,” and such firms consume more regulatory resources and “benefit from the Exchange’s regulatory efforts by having access to a well-regulated market.”[15] The Exchange notes that its Regulatory Services Agreement (“RSA”) costs, which cover regulatory services in connection with market and financial surveillance, examinations, investigations, and disciplinary procedure, have increased 29.3%, while the Exchange’s overall regulatory costs have grown 134.2%, from 2016 to 2019.[16] The Exchange also asserts that the proposed Trading Rights Fee is reasonable because the “cost of this membership fee is generally less than the analogous membership fees of other markets” and that a number of national securities exchanges currently charge similar Trading Rights fees to assist

---

[14] See Notice, supra note 4, at 43629.

[15] See id.

[16] See id.

in funding their regulatory efforts.[17]

The Exchange states that it believes the proposed Trading Rights Fee is equitable and not unfairly discriminatory because it will apply equally to all Members that do not qualify for a waiver.[18] The Exchange further asserts that the proposed fee is equitable and not unfairly discriminatory because it will "contribute to a portion of the costs incurred by the Exchange in providing its Members with an efficient and well-regulated market, which benefits all Members."[19]

In regard to the proposed waivers pursuant to which Members would not be charged the Trading Rights Fee, the Exchange states that it believes that such waivers are reasonable.[20] Specifically, the Exchange states that the proposed waiver for Members that trade less than a monthly ADV of 100,000 shares is reasonable because it would allow such smaller Members to continue to trade at a lower cost.[21] In addition, the Exchange states the waiver is reasonable because such firms consume fewer regulatory resources.[22] The Exchange also asserts that the proposed ADV threshold of 100,000 is reasonable because the median ADV per firm per month on the Exchange is 276,309; therefore, the proposed ADV threshold would serve to capture "smaller volume firm outliers as compared to the overall ADV across all firms."[23]

---

17 See id. The Exchange notes, for example, that the Exchange's proposed Trading Rights Fee of $250 a month is "substantially lower" than the monthly $1,250 Trading Rights Fee that Nasdaq assesses on its members. Id.

18 See id. at 43630.

19 See id.

20 The Exchange also asserts that the waivers are equitable and not unfairly discriminatory in the Notice. See id.

21 See id. at 43629.

22 See id.

23 See id.

The Exchange also states that the second waiver for Members that submit 90% or more of their orders per month as retail orders is reasonable because it would ensure that "retail broker members can continue to submit orders for individual investors at a lower cost, thereby continuing to encourage retail investor participation on the Exchange."[24] The Exchange also argues that increased liquidity in retail order flow could benefit all market participants by incentivizing other Members to send order flow to the Exchange and increasing overall liquidity, as well by positively impacting market quality by reflecting long-term investment intentions of retail participation.[25] The Exchange also asserts that the retail order volume threshold is reasonable because it would serve to capture broker-dealers that are primarily in the business of handling orders on behalf of retail investors, rather than larger broker-dealers that may route some retail orders on behalf of other broker-dealers, but for the most part are engaging in a significant amount of activity not related to servicing retail investors.[26]

Finally the Exchange states that it believes that not charging a Trading Rights Fee for new Members is reasonable because it would incentivize firms to become Members of the Exchange and bring additional liquidity to the market to the benefit of all market participants.[27] The Exchange asserts that the proposed waiver for new Members is also reasonable because "it will allow new firms the flexibility in resources needed to initially adjust to the Exchange's market-model and functionality."[28]

---

24 See id.

25 See id.

26 See id. at 43630.

27 See id. at 43629.

28 See id.

Regarding competition, the Exchange states that it believes the proposed rule change does not impose any burden on either intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.[29] The Exchange notes that, with regard to intramarket competition, the proposed rule change would apply equally to all Members that reach an ADV of 100,000 shares traded or greater, those in which less than 90% of their order volume is retail order volume per month, and those that are not within their first three months of new Membership on the Exchange.[30] In regard to intermarket competition, the Exchange states that it operates in a highly competitive market, and that this includes competition for exchange memberships.[31] The Exchange explains that Members have numerous venues on which they can participate, including other equities exchanges and off-exchange venues such as alternative trading systems.[32] The Exchange asserts that while trade-through and best execution obligations may require a firm to access the Exchange, no firm is compelled to be a Member of the Exchange in order to participate on the Exchange, and accordingly firms may freely choose to participate on the Exchange without holding a Membership.[33] The Exchange believes that if the proposed fee is unattractive to members, the Exchange is likely to lose membership and market share as a result.[34]

---

29 See id. at 43630.

30 See id.

31 See id.

32 See id. The Exchange states that it represents a small percentage of the overall market, and based on publicly available information, no single equities exchange has more than 20% market share, and no exchange group has more than 22% market share. See id. The Exchange references the Cboe Global Markets U.S. Equities Market Volume Summary (July 31, 2019), available at https://markets.cboe.com/us/equities/market_share. See id. at n.15.

33 See id. at 43630.

34 See id.

As noted above, the Commission received one comment letter on the proposed rule change.[35] SIFMA notes that the Exchange previously filed a proposed rule change to institute a trading rights fee, and the Commission suspended that filing.[36] SIFMA argues that, like the prior proposal, the Exchange did not provide sufficient information in the filing to support a finding that the proposal is consistent with the Act.[37] Specifically, SIFMA asserts that the Exchange should provide quantitative data showing its anticipated revenues, costs and profitability, as well as describe its methodology for estimating the baseline and expected costs and revenues.[38] Further, SIFMA argues that the Exchange should provide specific detail regarding the amount of its regulatory costs rather than information about broad percentage increases in such costs.[39] In addition, SIFMA believes the Exchange should provide specific detail about the amount of revenue it would expect to receive from the Trading Rights Fee, as well as the amount of revenue it receives from other sources that are intended to fund regulation, such as registration and licensing fees.[40]

SIFMA also asserts the Exchange's Trading Rights Fee would not be constrained by competition because broker-dealers must pay this fee prior to being able to satisfy their regulatory obligations and deciding where to route orders.[41] SIFMA notes that trade-through requirements under Regulation NMS, as well as broker-dealers' best execution obligations, effectively require direct or indirect access and connection to all registered exchanges, and each exchange remains

---

35 See supra note 5.

36 See SIFMA Letter, supra note 5, at 1.

37 See id.

38 See id. at 2.

39 See id.

40 See id.

41 See id.

the exclusive purveyor of those services.[42]

In response, the Exchange reiterated several of the arguments for the proposed rule change that were provided in the Notice. In addition, the Exchange states that contrary to SIFMA's assertions, the instant filing contains significantly more information and analysis in regard to the proposed fee, including information related to increases in regulatory costs.[43] The Exchange indicates that the proposed fee would defray only a portion of these increasing costs.[44] The Exchange also asserts that in regard to competition, broker-dealers are not compelled to become members of any particular exchange, and a number of broker-dealers are able to meet their business and compliance needs by trading via other arrangements.[45]

The Exchange originally filed a proposal to implement a Trading Rights Fee on May 2, 2019.[46] That proposal, CboeBYX-2019-009, was published for comment in the Federal Register on May 16, 2019.[47] On June 28, 2019, pursuant to Section 19(b)(3)(C) of the Act, the Commission: (i) temporarily suspended the proposed rule change; and (ii) instituted proceedings to determine whether to approve or disapprove the proposed rule change.[48] The instant filing proposes an identical Trading Rights Fee and raises similar concerns as to whether it is consistent with the Act.[49]

---

42 See id.

43 See Exchange Response Letter, supra note 5, at 2.

44 See id.

45 See id.

46 See Securities Exchange Act Release No. 85841 (May 10, 2019), 84 FR 22199.

47 See id.

48 See Securities Exchange Act Release No. 86232 (June 28, 2019), 84 FR 32227 (July 5, 2019).

49 See id.

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.[50] 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."[51]

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;[52] (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;[53] and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[54]

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether assessing the proposed monthly Trading Rights Fee on certain Members is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers,

---

50 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").

51 See id.

52 15 U.S.C. 78f(b)(4).

53 15 U.S.C. 78f(b)(5).

54 15 U.S.C. 78f(b)(8).

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.[55]

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule changes.[56]

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

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)[57] and 19(b)(2)(B) of the Act[58] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[59] the Commission is providing notice of the grounds for possible disapproval under consideration:

- Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange "provide for the equitable allocation of reasonable dues, fees, and other

---

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

56 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).

57 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.

58 15 U.S.C. 78s(b)(2)(B).

59 15 U.S.C. 78s(b)(2)(B).

charges among its members and issuers and other persons using its facilities,"[60]

- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be "designed to perfect the operation of a free and open market and a national market system" and "protect investors and the public interest," and not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers,"[61] and
- Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."[62]

As noted above, the proposal imposes a new monthly Trading Rights Fee on certain Members. The Commission notes that the Exchange's statements in support of the proposed rule change are general in nature and lack detail and specificity. For example, while the Exchange asserts that the proposed fee will fund overall regulation and maintenance of the Exchange and provides broad figures illustrating the percentage by which RSA and regulatory costs have increased from 2016 to 2019, the Exchange has not described how the proposed fee would address these regulatory increases.[63] Further, the rationale provided does not address how the proposed fee is an equitable allocation of fees beyond noting that it applies to all Members who do not qualify for a waiver, and broadly asserting that the proposed fee should benefit "all Members" by contributing to the provision of "an efficient and well-regulated market" for

---

60 15 U.S.C. 78f(b)(4).

61 15 U.S.C. 78f(b)(5).

62 15 U.S.C. 78f(b)(8).

63 See Notice, supra note 4, at 43629.

Members.[64]

As discussed above, one commenter asserts, among other concerns, that the Exchange's cost-based discussion is not sufficiently detailed to support its claims that the proposed Trading Rights Fee is consistent with the requirements of the Act, and that the Exchange has not offered sufficient detail to establish that the proposed fee would be constrained by significant competitive forces.[65] The commenter indicates that, among other things, additional information addressing both revenues and costs is lacking in the Exchange's proposal.

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."[66] The description of a proposed rule change, its 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,[67] 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.[68]

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated; be designed to perfect the mechanism of a free and open market and the

---

64 See id. at 43630.

65 See SIFMA Letter, supra note **Error! Bookmark not defined.**, at 1-2

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

67 See id.

68 See id.

national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.[69]

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by [INSERT DATE 21 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS FROM PUBLICATION IN THE *FEDERAL REGISTER*]. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.[70]

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

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

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or

---

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

70 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBYX-2019-013 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-CboeBYX-2019-013. 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-2019-013 and should be submitted on or before [INSERT DATE 21 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS FROM DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,[71] that File Number SR-CboeBYX-2019-013 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.[72]

Eduardo A. Aleman,
Deputy Secretary.

---

[71] 15 U.S.C. 78s(b)(3)(C).

[72] 17 CFR 200.30-3(a)(57) and (58).

[FR Doc. 2019-21471 Filed: 10/2/2019 8:45 am; Publication Date: 10/3/2019]