



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99320; File No. SR-CboeBYX-2024-001]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fee Schedule to Modify Historical Depth Data Fees

January 11, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 2, 2024, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) 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 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

Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/BYX/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

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

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

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

1. Purpose

The Exchange proposes to amend its Fees Schedule, effective January 2, 2024.

By way of background, the Exchange currently makes available for purchase Depth Data, which is a daily archive of the Exchange’s depth of book real-time feed, which provides depth-of-book quotations and execution information based on equity orders entered into the System.³ The Exchange also offers Historical Depth Data, which offers such data on a historical basis, i.e. T+1 or later, dating back to September 2019. The Depth Data and Historical Depth Data are available for purchase to Members and Non-Members on the Cboe LiveVol, LLC (“LiveVol”) website⁴, for internal use only; LiveVol is a wholly owned subsidiary of the Exchange’s parent company, Cboe Global Markets, Inc.

The Exchange’s options platform (“BYX Options”) [sic] and affiliated equities and options exchanges (i.e., Cboe Exchange, Inc. (“Cboe Options”), Cboe C2 Exchange, Inc. (“C2 Options”), Cboe EDGX Exchange, Inc. (“EDGX”), Cboe BZX Exchange, Inc. (“BZX”), and Cboe EDGA Exchange, Inc. (“EDGA”), (collectively, “Affiliates”) also offer similar data products.⁵ Particularly, each of the Exchange’s Affiliates offer a daily and historical archive of their depth of book real-time feed with execution information based on their trading activity that is substantially similar to the information provided by the Exchange through its Depth Data products.

Currently, the Exchange charges a fee of \$500 per month of Historical Depth Data accessed by a user. This fee has been in place, without change, since April 2010 when the

³ See BZX Fees Schedule and BZX Rule 11.22. Daily end-of-day delivery is provided via the DataShop SFTP. Files will typically become available after 10pm ET; see also BZX Rule 1.5, which defines “System.”

⁴ See <https://datashop.cboe.com/cboe-us-equities-pitch>.

⁵ See, for example, EDGX Fee Schedule, BZX Fee Schedule, EDGA Fee Schedule.

Exchange first began charging for access to historical quotation and transactions data from the Exchange's PITCH data feed ("Historical PITCH Data").⁶ In the time since, the Exchange has made a number of significant enhancements to its platform, including, among other things, implementing a more efficient means of data delivery (via SFTP rather than shipment of hard drives), which consequently increases the value of the market data product.

The Exchange now proposes to increase the fee from \$500 to \$1,000 per month of Historical Depth Data accessed by a user.⁷ As is currently the case, the data will be provided to data recipients for internal use only, and thus, no redistribution will be permitted.

The Exchange notes that the Depth Data products, including the Historical Depth Data, are completely voluntary products, in that the Exchange is not required by any rule or regulation to make the reports or services available and that potential subscribers may purchase it only if they voluntarily choose to do so. Further, the Exchange notes that other exchanges offer similar products for a fee.⁸

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.⁹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁰ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and

⁶ See Securities Exchange Act Release No. 74050 (January 14, 2015), 80 FR 2989 (January 21, 2015) (SR-BYX-2015-01); see also Securities Exchange Act Release No. 74402 (March 2, 2015), 80 FR 12242 (March 6, 2015) (SR-BYX-2015-12), pursuant to which "Historical PITCH" was renamed "Historical Depth."

⁷ As part of the proposed rule change, the Exchange proposes to establish a separate "Historical Depth" table in its Fees Schedule, and rename the current "BYX Historical Top, Historical Depth or Historical Last Sale Data" to "BYX Historical Top or Historical Last Sale Data." The Exchange also proposes to remove the fee related to delivery per 1TB drive of data as the Exchange does not provide 1TB drives anymore.

⁸ See, e.g., <https://www.nasdaqtrader.com/Trader.aspx?id=DPPriceListOptions#nom>; and https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Fee_Schedule.pdf.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

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. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹¹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹² 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.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) and broker-dealers increased authority and flexibility to offer new and unique market data to the public. The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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.”¹³

With respect to market data, the decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC* upheld the Commission’s reliance on the existence of competitive market mechanisms to evaluate the reasonableness and fairness of fees for proprietary market data:

“In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary

¹¹ Id.

¹² 15 U.S.C. 78f(b)(4).

¹³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’”¹⁴

The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”¹⁵

More recently, the Commission confirmed that it applies a “market-based” test in its assessment of market data fees, and that under that test:

the Commission considers whether the exchange was subject to significant competitive forces in setting the terms of its proposal for [market data], including the level of any fees. If an exchange meets this burden, the Commission will find that its fee rule is consistent with the Act unless there is a substantial countervailing basis to find that the terms of the rule violate the Act or the rules thereunder.¹⁶

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered equities exchanges that trade equities. Based on publicly available information, no single equities exchange has more than 13% of the equity market share.¹⁷ Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supercompetitive fees. In the event that a market participant views one exchange’s data product as more attractive than the competition, that market participant can, and often does, switch between similar products. The proposed fees are a result of the competitive environment of the U.S. equities industry as the Exchange seeks to increase fees for Historical Depth Data, while continuing to attract purchasers.

¹⁴ See NetCoalition v. SEC, 615 F.3d 525, 535 (D.C. Cir. 2010) (“NetCoalition I”) (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

¹⁵ Id. at 535.

¹⁶ See Securities Exchange Act Release No. 34-90217 (October 16, 2020), 85 FR 67392 (October 22, 2020) (SR-NYSENAT-2020-05) (Order Approving a Proposed Rule Change to Establish Fees for the NYSE National Integrated Feed) (internal quotation marks omitted), quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74781 (December 9, 2008) (NYSE ArcaBook Approval Order).

¹⁷ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (December 8, 2023), available at https://www.cboe.com/us/equities/market_statistics/.

The Exchange's Historical Depth Data is a competitively priced alternative to historical depth of book data disseminated by other national securities exchanges. The Exchange's Depth Data products, including Historical Depth Data, benefits a wide range of investors that participate in the national market system. As noted above, Nasdaq and NYSE have a similar Depth Data offerings for a charge.¹⁸ The Exchange therefore believes that the proposed fees are reasonable and set at a level to compete with other equity exchanges that offer similar reports. Indeed, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. As such, if a market participant views another exchange's potential report as more attractive, then such market participant can merely choose not to purchase the Exchange's Historical Depth Data offering and instead purchase another exchange's similar data product, which offers similar data points, albeit based on other market's trading activity.

Further, the Exchange believes the fees are reasonable, as even with the proposed fee increase, they continue to represent a relatively modest fee for historical depth of book data that has proven valuable for investors. The Exchange believes the fee, as proposed, remains reasonable, as the moderate increase is the first increase to the fee since its introduction in 2010.

The Exchange also believes that the proposed fee is reasonable because it is reasonably aligned with the value and benefits provided to users that choose to purchase Historical Depth Data from the Exchange. As discussed above, Historical Depth Data may be beneficial to Members and non-Members as it may provide helpful trading information regarding investor sentiment that may allow market participants to make more informed trading decisions and may be used to create and test trading models and analytical strategies and provide comprehensive insight into trading on the Exchange. As noted above, the Exchange has made a number of significant enhancements to its platform, including, among other things, implementing a more

¹⁸ See supra note 8.

efficient means of data delivery (via SFTP rather than shipment of hard drives), which consequently increases the value of the market data product.

In addition, the Exchange believes that the proposed fees are equitable and not unfairly discriminatory because they will apply to all similarly situated Members and non-Members that choose to purchase Historical Depth Data equally. As stated, Historical Depth Data is completely optional and not necessary for trading. Rather, the Exchange voluntarily makes Historical Depth Data available, and users may choose to purchase the data based on their own individual business needs. Potential purchasers may purchase Historical Depth Data at any time if they believe it to be valuable or may decline to purchase it. Moreover, several other exchanges offer a similar data product which offer the same type of data content through similar reports.¹⁹

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

The Exchange 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. The Exchange operates in a highly competitive environment in which the Exchange must continually adjust its fees to remain competitive. Because competitors are free to modify their own fees in response, the Exchange believes that the degree to which fee changes in this market may impose any burden on competition is extremely limited. As discussed above, the Exchange's Historical Depth Data offering is subject to direct competition from several other exchanges that offer similar data products. The proposed rule changes are grounded in the Exchange's efforts to compete more effectively. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes this proposed rule change permits fair competition among national securities exchanges.

Additionally, the Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the

¹⁹ See supra note 8.

purposes of the Act. The proposed Historical Depth Data fees will apply equally to Members and non-Members who purchase Historical Depth Data. Moreover, purchase of Historical Depth Data is optional.

Finally, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, similar products are offered by Nasdaq and NYSE. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, 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.” The fact that this market is competitive has also long been recognized by the courts. 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’ ...”. Accordingly, the Exchange does not believe its proposal imposes any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

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

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²⁰ and paragraph (f) of Rule 19b-4²¹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBYX-2024-001 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-2024-001. 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>).

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f).

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 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-CboeBYX-2024-001 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Sherry R. Haywood,
Assistant Secretary

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