

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-79623; File No. SR-BatsBYX-2016-39]

Self-Regulatory Organizations; Bats BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Market Data Section of Its Fee Schedule To Adopt Fees for BYX Summary Depth and Amend Fees for BYX Depth

December 20, 2016.

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 14, 2016, Bats BYX Exchange, Inc. (“BYX” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “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: (i) Adopt fees for a new market data product called BYX Summary Depth; and (ii) amend the fees for BYX Depth.

The text of the proposed rule change is available at the Exchange’s Web site at www.batstrading.com, at the principal office of the Exchange, 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 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: (i) Adopt fees for a new market data product called BYX Summary Depth; and (ii) amend the fees for BYX Depth.

BYX Summary Depth

BYX Summary Depth is a data feed that will provide aggregated two-sided quotations for all displayed orders entered into the System⁵ for up to five (5) price levels for securities traded on the Exchange and for which the Exchange reports quotes under the Consolidated Tape Association (“CTA”) Plan or the Nasdaq/UTP Plan.⁶ BYX Summary Depth will also contain the individual last sale information, Market Status, Trading Status, and Trade Break messages. The individual last sale information will include the price, size, and time of execution. The last sale message will also include the cumulative number of shares executed on the Exchange for that trading day. The Exchange intends to begin to offer BYX Summary Depth on January 3, 2017.⁷

The Exchange now proposes to amend its fee schedule to incorporate fees for distribution of BYX Summary Depth to subscribers.⁸ The proposed fees include the following, each of which are described in detail below: (i) Distribution Fees for both Internal and External Distributors;⁹ (ii) Usage Fees

⁵ “System” is defined as the “the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.” See Exchange Rule 1.5(aa).

⁶ See Exchange Rule 11.22(k).

⁷ See *Reminder: Bats Global Markets to Introduce Bats Summary Depth Feeds on January 3, 2017*, http://cdn.batstrading.com/resources/release_notes/2017/Reminder-Bats-Global-Markets-to-Introduce-Bats-Summary-Depth-Feeds-on-Jan-3-2017.pdf.

⁸ The Exchange notes that its affiliated exchanges, Bats EDGX Exchange, Inc. (“EDGX”), Bats EDGA Exchange, Inc. (“EDGA”) and Bats BZX Exchange, Inc. (“BZX”, together with the Exchange, EDGX and EDGA, the “Bats Exchanges”), also intent to file proposed rule changes with Commission to adopt similar fees for their respective Summary Depth market data product.

⁹ A “Distributor” is defined as “any entity that receives the Exchange Market Data product directly

for both Professional¹⁰ and Non-Professional¹¹ Users; (iii) an Enterprise Fee; and (iv) a Digital Media Enterprise Fee.

Distribution Fees. As proposed, each Internal Distributor that receives BYX Summary Depth shall pay a fee of \$2,500 per month. The Exchange does not propose to charge any User fees for BYX Summary Depth where the data is received and subsequently internally distributed to Professional or Non-Professional Users. In addition, the Exchange proposes to charge also External Distributors that receive BYX Summary Depth a fee of \$2,500 per month.

User Fees. The Exchange proposes to charge External Distributors that redistribute BYX Summary Depth different fees for their Professional Users and Non-Professional Users. The Exchange will assess a monthly fee for Professional Users of \$2.50 per User. Non-Professional Users will be assessed a monthly fee of \$0.10 per User. The Exchange does not propose to charge per User fees to Internal Distributors.

External Distributors that receive BYX Summary Depth will be required to count every Professional User and Non-Professional User to which they provide BYX Summary Depth, the requirements for which are identical to that currently in place for other market data products offered by the Exchange.¹² Thus, the

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://www.bats.com/us/equities/membership/fee_schedule/byx/. An “Internal Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor’s own entity.” *Id.* An “External Distributor” is defined as “a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor’s own entity.” *Id.*

¹⁰ A “Professional User” is defined as “any User other than a Non-Professional User.” See the Exchange’s fee schedule available at http://www.bats.com/us/equities/membership/fee_schedule/byx/.

¹¹ A “Non-Professional User” is 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.*

¹² See Securities Exchange Act Release Nos. 74284 (February 18, 2015); 80 FR 9792 (February 24, 2015) (SR-BYX-2015-09) (proposing fees for the Bats One Feed); 75407 (July 9, 2015), 80 FR

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(i).

⁴ 17 CFR 240.19b-4(f)(2).

External 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. External Distributors must report all Professional and Non-Professional Users in accordance with the following:

- In connection with an External Distributor's distribution of BYX Summary Depth, the Distributor should count as one User each unique User that the Distributor has entitled to have access to BYX Summary Depth.

However, where a device is dedicated specifically to a single individual, the Distributor should count only the individual and need not count the device.

- The External Distributor should identify and report each unique User. If a User uses the same unique method to gain access to BYX Summary Depth, the Distributor should count that as one User. However, if a unique User uses multiple methods to gain access to BYX Summary Depth (e.g., a single User has multiple passwords and user identifications), the External Distributor should report all of those methods as an individual User.

- External Distributors should report each unique individual person who receives access through multiple devices as one User so long as each device is dedicated specifically to that individual.

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

Each External Distributor will receive a credit against its monthly Distribution Fee for BYX Summary Depth equal to the amount of its monthly Usage Fees up to a maximum of the Distribution Fee for BYX Summary Depth. For example, an External Distributor will be subject to a \$2,500 monthly Distribution Fee where they receive BYX Summary Depth. If that External Distributor reports User quantities totaling \$2,500 or more of monthly usage of BYX Summary Depth, it will pay no net Distribution Fee, whereas if that same External Distributor were to report User quantities totaling \$1,500 of monthly usage, it will pay a net of \$1,000 for the Distribution Fee. External Distributors will remain subject to the per User fees discussed above.

Enterprise Fee. The Exchange also proposes to establish a \$20,000 per month Enterprise Fee that will permit a

recipient firm who receives BYX Summary Depth from an External Distributor to receive the data for an unlimited number of Professional and Non-Professional Users. For example, if a recipient firm had 15,000 Professional Users who each receive BYX Summary Depth at \$2.50 per month, then that recipient firm will pay \$37,500 per month in Professional Users fees. Under the proposed Enterprise Fee, the recipient firm will pay a flat fee of \$20,000 for an unlimited number of Professional and Non-Professional Users for BYX Summary Depth. A recipient firm must pay a separate Enterprise Fee for each External Distributor that controls the display of BYX Summary Depth if it wishes such User to be covered by an Enterprise Fee rather than by per User fees. A recipient firm that pays the Enterprise Fee will not have to report its number of such Users on a monthly basis. However, every six months, a recipient firm 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. Lastly, the proposed Enterprise Fee would be counted towards the Distribution Fee credit described above, under which an External Distributor receives a credit towards its Distribution Fee equal to the amount of its monthly BYX Summary Depth User fees.

Digital Media Enterprise Fee. The Exchange proposes to adopt a Digital Media Enterprise Fee of \$5,000 per month for BYX Summary Depth. As an alternative to proposed User fees discussed above, a recipient firm may purchase a monthly Digital Media Enterprise license to receive BYX Summary Depth from an External Distributor to distribute to an unlimited number of Professional and Non-Professional Users for viewing via television, Web sites, and mobile devices for informational and non-trading purposes only without having to account for the extent of access to the data or the report the number of Users to the Exchange. Lastly, the proposed Digital Media Enterprise Fee would be counted towards the Distribution Fee credit described above, under which an External Distributor receives a credit towards its Distribution Fee equal to the amount of its monthly BYX Summary Depth User fees.

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.¹³ Currently, the Exchange charges fees for both internal and external distribution of BYX Depth. The cost of BYX Depth for an Internal Distributor is currently \$1,000 per month. The Exchange also separately charges an External Distributor of BYX Depth a flat fee of \$2,500 per month. The Exchange does not currently charge Internal and External Distributors separate display User fees. The Exchange also charges a fee for Non-Display Usage¹⁴ by Trading Platforms¹⁵ by which subscribers to BYX Depth are charged a fee of \$2,000 per month. This fee is assessed in addition to existing Distribution fees. The Exchange now proposes to amend its fee schedule to incorporate Usage Fees for both Professional and Non-Professional Users and an Enterprise Fee for BYX Depth. Each of these changes are described in detail below.

User Fees. The Exchange proposes to charge Internal and External Distributors that redistribute BYX Depth different fees for their Professional Users and Non-Professional Users.¹⁶ The Exchange will assess a monthly fee for Professional Users of \$10.00 per User. Non-Professional Users will be assessed a monthly fee of \$1.00 per User. Distributors that receive BYX Depth will be required to count every Professional User and Non-Professional User to which they provide BYX Depth, the requirements for which are identical to that set forth above for BYX Summary Depth and as currently in place for other market data products offered by the Exchange.¹⁷

Enterprise Fee. The Exchange also proposes to establish a \$25,000 per month Enterprise Fee that will permit an Internal Distributor, External Distributor, or a recipient firm who receives BYX Depth from an External Distributor to receive the data for an

¹³ See Exchange Rule 11.22(a) and (c).

¹⁴ The term "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." See the Exchange's fee schedule available at http://www.bats.com/us/equities/membership/fee_schedule/byx/.

¹⁵ The term "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://www.bats.com/us/equities/membership/fee_schedule/byx/.

¹⁶ The Exchange notes that, unlike as proposed for BYX Summary Depth described above, both Internal and External Distributors of BYX Depth would be charged the same User fee for their Professional and Non-Professional Users.

¹⁷ See *supra* note 12 and accompanying text.

unlimited number of Professional and Non-Professional Users. For example, if a recipient firm had 15,000 Professional Users who each receive BYX Depth at \$10.00 per month, then that recipient firm will pay \$150,000 per month in Professional Users fees. Under the proposed Enterprise Fee, the recipient firm will pay a flat fee of \$25,000 for an unlimited number of Professional and Non-Professional Users for BYX Depth. Like proposed above for BYX Summary Depth, a recipient firm must pay a separate Enterprise Fee for each External Distributor that controls the display of BYX Depth if it wishes such User to be covered by an Enterprise Fee rather than by per User fees. A recipient firm that pays the Enterprise Fee will not have to report its number of such Users on a monthly basis. However, every six months, a recipient firm 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.

Implementation Date

The Exchange intends to implement the proposed fee change on January 3, 2017.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹⁸ in general, and furthers the objectives of Section 6(b)(4),¹⁹ 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 it is reasonable to charge different rates for BYX Depth and BYX Summary Depth as both products different levels of content (e.g., BYX Depth contains quotations for all individual orders while BYX Summary Depth contains the aggregation quotation information for all orders up to five (5) price levels). Lastly, the Exchange also believes that the proposed fees are reasonable and non-discriminatory because they will apply

uniformly to all recipients of Exchange data.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act²⁰ 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,²¹ 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.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange's customers and market data vendors will be subject to the proposed fees on an equivalent basis. BYX Summary Depth and BYX Depth are 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 Summary Depth and BYX Depth further ensures 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. If another exchange (or its affiliate) were to charge less to distribute its similar product than the Exchange charges to consolidate and distribute BYX Summary Depth and BYX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, BYX Summary Depth and 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.²²

BYX Summary Depth

Distribution Fee. The Exchange believes that the proposed Distribution Fees are also reasonable, equitably allocated, and not unreasonably discriminatory. The fees for Members and non-Members are uniform except with respect to reasonable distinctions with respect to internal and external distribution. The Exchange believes that the Distribution Fees for BYX Summary Depth are reasonable and fair in light of alternatives offered by other market centers. For example, BYX Summary Depth provides investors with

²² 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 Web site 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).

¹⁸ 15 U.S.C. 78f.

¹⁹ 15 U.S.C. 78f(b)(4).

²⁰ 15 U.S.C. 78k-1.

²¹ 17 CFR 242.603.

alternative market data and competes with similar market data product currently offered by the New York Stock Exchange, Inc. ("NYSE") and the Nasdaq Stock Market LLC ("Nasdaq").²³ Specifically, the NYSE charges an access fee of \$5,000 per month for NYSE OpenBook,²⁴ which is more than the External Distribution fee proposed herein for BYX Summary Depth.

User Fees. The Exchange believes that implementing the Professional and Non-Professional User fees for BYX Summary Depth are equitable and reasonable because they will result in greater availability to Professional and Non-Professional Users. Moreover, introducing a modest Non-Professional User fee for BYX Summary Depth is reasonable because it provides an additional method for retail investors to access BYX Summary Depth 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 recipient firms and Users. The fee structure of differentiated Professional and Non-Professional fees is utilized by the Exchange for the Bats 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.²⁵ Offering BYX Summary Depth to Non-Professional Users with the same data available to Professional Users results in greater equity among data recipients.

In addition, the proposed fees are reasonable when compared to similar

fees for comparable products offered by the NYSE and Nasdaq. Specifically, NYSE offers NYSE OpenBook for a monthly fee of \$60.00 per professional subscriber and \$15 per non-professional subscriber.²⁶ Nasdaq offers Nasdaq TotalView-Aggregated for a monthly fee of \$70.00 per professional subscriber and \$14 per non-professional subscriber.²⁷ The Exchange's proposed per User Fees for BYX Summary Depth are less than the NYSE and Nasdaq fees.

Enterprise Fee. The proposed Enterprise Fee for BYX Summary Depth is equitable and reasonable as the fees proposed are less than the enterprise fees currently charged for Nasdaq TotalView-Aggregated. Nasdaq charges an enterprise fee of \$100,000 per month for Nasdaq TotalView-Aggregated,²⁸ which is far greater than the proposed Enterprise Fee of \$20,000 per month for BYX Summary Depth. In addition, the Enterprise Fee proposed by the Exchange could result in a fee reduction for recipient firms with a large number of Professional and Non-Professional Users. If a recipient firm has a smaller number of Professional Users of BYX Summary Depth, then it may continue using the per User structure and benefit from the per User Fee reductions. By reducing prices for recipient firms with a large number of Professional and Non-Professional Users, the Exchange believes that more firms may choose to receive and to distribute BYX Summary Depth, 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 recipients that have large numbers of Professional and Non-Professional Users. Firms 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.

Digital Media Enterprise Fee. The Exchange believes that the proposed Digital Media Enterprise Fee for BYX Summary Depth provides for an equitable allocation of reasonable fees among recipients of the data and is not designed to permit unfair discrimination among customers, brokers, or dealers. In establishing the Digital Media Enterprise Fee, the Exchange recognizes that there is demand for a more seamless and easier-to-administer data distribution model that takes into account the expanded variety of media and communication devices that investors utilize today. The Exchange believes the Digital Media Enterprise Fee will be easy to administer because data recipients that purchase it would not be required to differentiate between Professional and Non-Professional Users, account for the extent of access to the data, or report the number of Users. This is a significant reduction on a recipient firm's administrative burdens and is a significant value to investors. For example, a television broadcaster could display BYX Summary Depth data during market-related programming and on its Web site or allow viewers to view the data via their mobile devices, creating a more seamless distribution model that will allow investors more choice in how they receive and view market data, all without having to account for and/or measure who accesses the data and how often they do so.

The proposed Digital Media Enterprise Fee is equitable and reasonable because it will also enable recipient firms to more widely distribute data from BYX Summary Depth to investors for informational purposes at a lower cost than is available today. For example, a recipient firm may purchase an Enterprise license in the amount of \$20,000 per month for to receive BYX Summary Depth from an External Distributor for an unlimited number of Professional and Non-Professional Users, which is greater than the proposed Digital Media Enterprise Fee. The Exchange also believes the amount of the Digital Media Enterprise Fee is reasonable as compared to the existing enterprise fees discussed above because the distribution of BYX Summary Depth data is limited to television, Web sites, and mobile devices for informational purposes only, while distribution of BYX Summary Depth data pursuant to an Enterprise license contains no such limitation. The Exchange also believes that the

²³ See Nasdaq Rule 7023(a)(1)(C) (describing Nasdaq TotalView is a depth-of-book data feed that includes all orders and quotes from all Nasdaq members displayed in the Nasdaq Market Center as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the Nasdaq Market Center). See also Nasdaq Book Viewer, a description of which is available at <https://data.nasdaq.com/BookViewer.aspx>. See NYSE OpenBook available at <http://www.nyxdata.com/openbook> (providing real-time view of the NYSE limit order book).

²⁴ See NYSE Market Data Pricing dated November 2016 available at <http://www.nyxdata.com/>. Nasdaq charges distribution fees ranging from \$375 for 1-39 subscribers to \$75,000 for more than 250 subscribers. See Nasdaq Rule 7023(b)(4).

²⁵ 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 BATS 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), 7047.

²⁶ See NYSE Market Data Pricing dated November 2016 available at <http://www.nyxdata.com/>.

²⁷ See Nasdaq Rule 7023(b)(2).

²⁸ See Nasdaq Rule 7023(c)(2) (stating that a distributor that is also a broker-dealer pays a monthly fee of \$100,000 for the right to provide Nasdaq TotalView and for display usage for internal distribution, or for external distribution to both professional and non-professional subscribers with whom the firm has a brokerage relationship.) Nasdaq also charges an enterprise fee of \$25,000 to provide Nasdaq TotalView to an unlimited number of non-professional subscribers only. See Nasdaq Rule 7023(c)(1).

proposed Digital Media Enterprise Fee is equitable and reasonable because it is less than similar fees charged by other exchanges.²⁹

BYX Depth

User Fees. The Exchange believes that implementing the Professional and Non-Professional User fees for BYX Depth are equitable and reasonable because they will result in greater availability to Professional and Non-Professional Users. Moreover, introducing a modest Non-Professional User fee for BYX Depth is reasonable because it provides an additional method for retail investors to access BYX Depth 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 recipient firms and Users. The fee structure of differentiated Professional and Non-Professional fees is utilized by the Exchange 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.³⁰ Offering BYX Depth to Non-Professional Users with the same data available to Professional Users results in greater equity among data recipients. The Exchange also believes it is equitable, reasonable, and not unfairly discriminatory to charge User fees to Internal Distributors, as such fees are currently charged by NYSE and Nasdaq.³¹

In addition, the proposed fees are reasonable when compared to similar fees for comparable products offered by the NYSE and Nasdaq. Specifically, NYSE offers NYSE OpenBook Ultra for a monthly fee of \$60.00 per professional subscriber and \$15 per non-professional subscriber.³² Nasdaq offers Nasdaq TotalView-ITCH for a monthly fee of \$70.00 per professional subscriber and \$14 per non-professional subscriber.³³ The Exchange's proposed per User Fees

for BYX Depth are less than the NYSE and Nasdaq fees.

Enterprise Fee. The proposed Enterprise Fee for BYX Depth is equitable and reasonable as compared to the enterprise fees currently charged for Nasdaq TotalView-ITCH. Nasdaq charges an enterprise fee of \$100,000 per month for Nasdaq TotalView-ITCH,³⁴ which is greater than the proposed Enterprise Fee of \$25,000 per month for BYX Depth. In addition, the Enterprise Fee proposed by the Exchange could result in a fee reduction for recipient firms with a large number of Professional and Non-Professional Users. If a recipient firm has a smaller number of Professional Users of BYX Depth, then it may continue using the per User structure and benefit from the per User Fee reductions. By reducing prices for recipient firms with a large number of Professional and Non-Professional Users, the Exchange believes that more firms may choose to receive and to distribute BYX Depth, 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 recipients that have large numbers of Professional and Non-Professional Users. Firms 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 BYX Depth and BYX Summary 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 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 Summary Depth and BYX Depth compete with a number of alternative products. For instance, BYX Summary Depth and BYX Depth do provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and Electronic Communication Networks ("ECN") that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce last sale information products, and many currently do, including Nasdaq and NYSE. In addition, market participants can gain access to BYX last sale and depth-of-book quotations, though integrated with the prices of other markets, on feeds made available through the SIPs.

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 and BYX Summary Depth, including existing similar feeds by other exchanges, consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set

²⁹ Nasdaq offers proprietary data products for distribution over the internet and television under alternative fee schedules that are subject to maximum fee of \$50,000 [sic] per month. See Nasdaq Rule 7039(b). The NYSE charges a Digit Media Enterprise fee of \$40,000 per month for the NYSE Trade Digital Media product. See Securities Exchange Act Release No. 69272 (April 2, 2013), 78 FR 20983 (April 8, 2013) (SR-NYSE-2013-23).

³⁰ See *supra* note 24.

³¹ See *supra* notes 24 and 25 (not limiting the application of user fees to external distribution only).

³² See *supra* note 25.

³³ See *supra* note 26.

³⁴ See *supra* note 27.

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 increase in pricing of BYX Depth and the proposed pricing of the BYX Summary Feed would continue to enable a competing vendor to create a competing product to the Exchange's Bats One Feed on the same price and latency basis as the Exchange. The Bats One Feed is a data feed that disseminates, on a real-time basis, the aggregate BBO of all displayed orders for securities traded on each of the Bats Exchanges and for the Bats Exchanges report quotes under the CTA Plan or the Nasdaq/UTP Plan. The Bats One Feed also contains the individual last sale information for the Bats Exchanges (collectively with the aggregate BBO, the "Bats One Summary Feed"). In addition, the Bats One Feed contains optional functionality which enables recipients to receive aggregated two-sided quotations from the Bats Exchanges for up to five (5) price levels ("Bats One Premium Feed").³⁵ The Exchange uses the following data feeds to create the Bats One Feed, each of which are available to vendors: EDGX Depth, EDGA Depth, BYX Depth, and the BZX Depth.

When adopting the Bats One Feed, the Exchange represented that a vendor could create a competing product based in the data feed used to construct the Bats One Feed on the same cost and latency basis as the Exchange.³⁶ Therefore, the Exchange designed the pricing of these products so that their aggregate cost is not greater than the Bats One Feed, thereby enabling a vendor to create a competing product to the Bats One Feed on the same cost basis as the Exchange. However, the Exchange now proposes to increase the cost of BYX Depth, which when combined with the proposed increases by its affiliates for their depth products, would cause their aggregate cost to be higher than the Bats One Premium

Feed.³⁷ However, to ensure that a vendor could continue to create a competing product to the Bats One Premium Feed at no greater cost, that vendor could now utilize BYX Summary Depth, as well as the Summary Depth feeds of BZX, EDGA, and EDGX to create a competing product to the Bats One Premium Feed for less cost and on the same latency basis as the Exchange.³⁸ The Exchange has designed the content and pricing of BYX Summary Depth, and related products by its affiliates, so that a vendor could utilize those feeds, in lieu of the Bats Exchange's existing depth-of-book products, to construct a competing product on the same cost and latency basis as the Exchange. The pricing the Exchange and its affiliates propose to charge for Summary Depth feeds would be lower than the cost to obtain the Bats One Premium Feed.³⁹ Such pricing would continue to enable a vendor to receive each of the Bats Exchange's Summary Depth feeds and offer a similar product to the Bats One Premium Feed on a competitive basis and at no greater cost than the Exchange.

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 Act⁴⁰ and paragraph (f) of Rule 19b-4 thereunder.⁴¹ At any time within 60 days of the filing of the proposed rule change, the Commission summarily may

³⁷ The Exchange notes that a vendor seeking to create a product to compete with the Bats One Summary Feed may continue to utilize each of the Bats Exchange's Top and Last Sale data feeds, the aggregate cost of which is less than the Bats One Summary Feed.

³⁸ While the proposed BYX Summary Depth feed does not contain the symbol summary or consolidated volume data included in the Bats One Feed, a vendor could include this information in a competing product as this information is easily derivable from the proposed feeds or can be obtained from the securities information processors on the same terms as the Exchange.

³⁹ While the aggregate cost of each of the Bats Exchange's Summary Depth Products equals the cost of the Bats One Premium Feed, the cost of the Bats One Feed continues to be greater because subscribers are required to pay an additional \$1,000 aggregation fee. See the Exchange's fee schedule available at http://www.bats.com/us/equities/membership/fee_schedule/byx/.

⁴⁰ 15 U.S.C. 78s(b)(3)(A).

⁴¹ 17 CFR 240.19b-4(f).

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:

Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-BatsBYX-2016-39 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-BatsBYX-2016-39. 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 Web site (<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 Web site 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 such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BatsBYX-2016-39, and should be submitted on or before January 17, 2017.

³⁵ See Exchange Rule 11.22(i). 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 Amendments 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 Bats One Feed) ("Bats One Approval Order").

³⁶ *Id.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴²

Eduardo A. Aleman,

Assistant Secretary.

[FR Doc. 2016–31115 Filed 12–23–16; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–79615; File No. SR–BX–2016–069]

Self-Regulatory Organizations; NASDAQ BX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rule 4770 (Compliance With Regulation NMS Plan To Implement a Tick Size Pilot)

December 20, 2016.

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 December 13, 2016, NASDAQ BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II 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

The Exchange proposes to amend Rule 4770 (Compliance with Regulation NMS Plan to Implement a Tick Size Pilot) relating to the handling to certain Order Types in Test Group Three Pilot Securities in connection with the Regulation NMS Plan to Implement a Tick Size Pilot Program (“Plan” or “Pilot”).³ Relatedly, BX also proposes to delete Commentary .14, which addresses the current handling of those Order Types. Finally, BX proposes to add language to Rule 4770(d)(1) to clarify the treatment of orders in a Test Group Three Security entered through the RASH or FIX protocols.

The text of the proposed rule change is available on the Exchange’s Web site at <http://nasdaqbx.cchwallstreet.com/>, at the principal office of the Exchange, 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 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

On September 7, 2016, the Exchange filed with the Securities and Exchange Commission (“SEC” or “Commission”) a proposed rule change (“Proposal”) to adopt paragraph (d) to Exchange Rule 4770 to describe changes to system functionality necessary to implement the Plan. The Exchange also proposed amendments to Rule 4770(a) and (c) to clarify how the Trade-at exception may be satisfied. The SEC published the Proposal in the **Federal Register** for notice and comment on September 20, 2016.⁴ BX subsequently filed three Partial Amendments to clarify aspects of the Proposal. The Commission approved the Proposal, as amended, on October 7, 2016.⁵

In SR–BX–2016–050, BX had initially proposed a re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Group Three Pilot Securities.⁶ BX subsequently determined that it would

⁴ See Securities Exchange Act Release No. 78838 (September 14, 2016), 81 FR 64566 (September 20, 2016) (Notice of filing of SR–BX–2016–050).

⁵ See Securities Exchange Act Release No. 79076 (October 7, 2016) (Order approving SR–BX–2016–050).

⁶ As originally proposed, Rule 4770(d)(2) stated that Price to Comply Orders in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO until such time as the Price to Comply Order is able to be ranked and displayed at its original entered limit price. Rule 4770(d)(3) stated that, if market conditions allow, a Non-Displayed Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO up (down) to the Order’s limit price. Rule 4770(d)(4) stated that, if market conditions allow, the Post-Only Order in a Test Group Three Pilot Security will be adjusted repeatedly in accordance with changes to the NBBO or the best price on the BX Book, as applicable until such time as the Post-Only Order is able to be ranked and displayed at its original entered limit price.

not offer this re-pricing functionality for Price to Comply Orders, Non-Displayed Orders, and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Pilot securities. As part of Partial Amendment No. 2 to SR–BX–2016–050, BX proposed to delete the relevant language from Rule 4770 related to this re-pricing functionality.

In that amendment, BX noted that this change would only impact the treatment of Price to Comply Orders, Non-Displayed Orders, and Post-Only orders that are submitted through the OUCH and FLITE protocols in Test Group Three Pilot Securities, as these types of Orders that are currently submitted to BX through the RASH or FIX protocols are already subject to this re-pricing functionality and will remain subject to this functionality under the Pilot.

In the Amendment, BX further noted that its systems are currently programmed so that Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Pilot Securities may be adjusted repeatedly to reflect changes to the NBBO and/or the best price on the BX book. BX stated that it was re-programming its systems to remove this functionality for Price to Comply Orders, Non-Displayed Orders and Post-Only Orders entered through the OUCH and FLITE protocols in Test Group Three Pilot Securities. In the Amendment, BX stated that it anticipated that this re-programming shall be completed no later than November 30, 2016. If it appeared that this functionality would remain operational by October 17, 2016, BX indicated that it would file a proposed rule change with the SEC and will provide notice to market participants sufficiently in advance of that date to provide effective notice. The rule change and the notice to market participants will describe the current operation of the BX systems in this regard, and the timing related to the re-programming.

On October 17, 2016, BX filed a proposal to extend the date by which it would complete the re-programming of its systems to eliminate the re-pricing functionality in Test Group Three Pilot Securities for Price to Comply Orders, Price to Display Orders, Non-Displayed Orders, and Post-Only Orders that are entered through the OUCH or FLITE protocols.⁷ In that proposal, BX stated

⁷ See Securities Exchange Act Release No. 79154 (October 25, 2016), 81 FR 75468 (October 31, 2016) (SR–BX–2016–054).

Subsequent to the approval of SR–BX–2016–050, BX become aware that this re-pricing functionality

⁴² 17 CFR 200.30–3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (“Approval Order”).