

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-NASDAQ-2020-007 and should be submitted on or before March 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

Jill M. Peterson,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88219; File No. SR-CboeEDGX-2020-008]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Introduce a Small Retail Broker Distribution Program

February 14, 2020.

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 February 4, 2020, Cboe EDGX Exchange, Inc. ("Exchange" or "EDGX") 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 EDGX Exchange, Inc. ("EDGX" or the "Exchange") is filing with the Securities and Exchange Commission (the "Commission") a proposed rule change to introduce a Small Retail Broker Distribution Program. 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/options/regulation/rule_filings/edgx/), 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 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 purpose of the proposed rule change is to introduce a pricing program that would allow small retail brokers that purchase top of book market data from the Exchange to benefit from discounted fees for access to such market data. The Small Retail Broker Distribution Program (the "Program") would reduce the distribution and consolidation fees paid by small broker-dealers that operate a retail business. In turn, the Program may increase retail investor access to real-time U.S. equity quote and trade information, and allow the Exchange to better compete for this business with competitors that offer similar optional products.

The Exchange initially filed to introduce the Program on August 1, 2019 ("Initial Proposal") to further

ensure that retail investors served by smaller firms have cost effective access to its market data products, and as part of its ongoing efforts to improve the retail investor experience in the public markets. The Initial Proposal was published in the **Federal Register** on August 20, 2019,³ and the Commission received no comment letters on the Initial Proposal. The Program remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the "Initial Suspension Order").⁴ The Initial Suspension Order also instituted proceedings to determine whether to approve or disapprove the Initial Proposal.⁵ On October 1, 2019, the Exchange re-filed its proposed rule change with additional information about the basis for the proposed fee change ("Second Proposal"). The Second Proposal was published in the **Federal Register** on October 15, 2019,⁶ and the Commission received no comment letters on the Second Proposal. The Program again remained in effect until the fee change was temporarily suspended pursuant to a suspension order (the "Second Suspension Order").⁷ The Second Suspension Order also instituted proceedings to determine whether to approve or disapprove the Second Proposal.⁸ On November 27, 2019, the Exchange re-filed its proposed rule change a third time with one revision to the requirements for participating in the Program and additional information about the basis for the proposed fee change ("Third Proposal"). The Third Proposal was published in the **Federal Register** on December 16, 2019.⁹ Today, the Exchange is withdrawing the Third Proposal, and replacing it with this proposed fee change as part of its ongoing efforts to continue to facilitate retail investor access to reasonably priced market data.

Current Fees

Today, the Exchange offers two top of book data feeds that provide real-time

³ See Securities Exchange Act Release No. 86678 (August 14, 2019), 84 FR 43246 (August 20, 2019) (SR-CboeEDGX-2019-048).

⁴ See Securities Exchange Act Release No. 87172 (September 30, 2019), 84 FR 53192 (October 4, 2019) (SR-CboeEDGX-2019-048).

⁵ *Id.*

⁶ See Securities Exchange Act Release No. 87295 (October 11, 2019), 84 FR 55624 (October 17, 2019) (SR-boeEDGX-2019-059).

⁷ See Securities Exchange Act Release No. 87635 (November 26, 2019), 84 FR 66242 (December 3, 2019) (SR-CboeEDGX-2019-059).

⁸ *Id.*

⁹ See Securities Exchange Act Release No. 87711 (December 10, 2019), 84 FR 68501 (December 16, 2019) (SR-CboeEDGX-2019-071).

²⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

U.S. equity quote and trade information to investors. First, the Exchange offers the EDGX Top Feed, which is an uncompressed data feed that offers top of book quotations and execution information based on equity orders entered into the System. The fee for external distribution of EDGX Top data is \$1,500 per month, and external distributors are also liable for a fee of \$4 per month for each Professional User, and \$0.10 per month for each Non-Professional User.

Second, the Exchange offers the Cboe One Summary Feed, which offers similar information based on equity orders submitted to the Exchange and its affiliated equities exchanges—*i.e.*, Cboe EDGA Exchange, Inc., Cboe BZX Exchange, Inc., and Cboe BYX Exchange, Inc. Specifically, the Cboe One Summary Feed is a data feed that contains the aggregate best bid and offer of all displayed orders for securities traded on the Exchange and its affiliated exchanges. The Cboe One Summary Feed also contains the individual last sale information for the Exchange and each of its affiliated exchanges, and consolidated volume for all listed equity securities. The fee for external distribution of the Cboe One Summary Feed is \$5,000 per month, and external distributors are also liable for a Data Consolidation Fee of \$1,000 per month, and User fees equal to \$10 per month for each Professional User, and \$0.25 per month for each Non-Professional User.¹⁰

Small Retail Broker Eligibility Requirements

The Exchange proposes to introduce a Program that would reduce costs for small retail brokers that provide top of book data to their clients. In order to be approved for the Small Retail Broker Distribution Program, Distributors would have to provide either the EDGX Top Feed or Cboe One Summary Feed (“EDGX Equities Exchange Data”) to a limited number of clients with which the firm has established a brokerage relationship, and would have to provide such data primarily to Non-Professional Data Users. Specifically, distributors would have to attest that they meet the following criteria: (1) Distributor is a broker-dealer distributing EDGX Equities Exchange Data to Non-Professional Data Users with whom the

¹⁰ The Exchange also offers an Enterprise license for the EDGX Top and Cboe One Summary Feeds. An Enterprise license permits distribution to an unlimited number of Professional and Non-Professional Users, keeping costs down for firms that provide access to a large number of subscribers. An Enterprise license is \$15,000 per month for the EDGX Top Feed, and \$50,000 per month for the Cboe One Summary Feed.

broker-dealer has a brokerage relationship; (2) At least 90% of the Distributor’s total Data User population must consist of Non-Professional Data Users, inclusive of those not receiving EDGX Equities Exchange Data; and (3) Distributor distributes EDGX Equities Exchange Data to no more than 5,000 Users.^{11 12}

These proposed requirements for participating in the Program are designed to ensure that the benefits provided by the Program inure to the benefit of small retail brokers that provide EDGX Equities Exchange Data to a limited number of subscribers. As explained later in this filing, distributors that provide EDGX Equities Exchange Data to a larger number of subscribers can benefit from the current pricing structure through scale, due to subscriber fees that are significantly lower than those charged by the Exchange’s competitors, and an Enterprise license that caps the total fees to be paid by firms that distribute market data to a sizeable customer base. The Exchange believes that offering similarly attractive pricing to small retail brokers, including regional firms both inside and outside of the U.S. that may not have the same established client base as the larger retail brokers, would make the Exchange’s data a more competitive alternative for those firms, and would help ensure that such information is widely available to a larger number of retail investors globally. The Program would also be available to retail brokers more generally, regardless of size, that wish to trial the Exchange’s top of book products with a limited number of subscribers before potentially expanding distribution to additional clients, potentially further increasing the accessibility of the Exchange’s market data to retail investors. The Program would be exclusive to the Exchange’s top of book offerings as retail investors typically do not need or use depth of book data to facilitate their equity investments, and their brokers typically do purchase such market data on their behalf.

¹¹ The Initial Proposal, Second Proposal, and Third Proposal would have allowed small retail brokers to participate in the Program if they distribute Cboe One Summary Feed Data to no more than 5,000 Non-Professional Users. The current proposal instead reflects a threshold of 5,000 Users—*i.e.*, including both Non-Professional and Professional Users.

¹² Distributors would have to meet these requirements for whichever product they would like to distribute pursuant to the Program. For example, a distributor that distributes Cboe One Summary Feed data pursuant to the Program, would be limited to distributing the Cboe One Summary Feed to no more than 5,000 Users.

Discounted Fees

Distributors that participate in the Program would be liable for lower distribution fees for access to the EDGX Top Feed, and lower distribution and consolidation fees for access to the Cboe One Summary Data Feed.¹³ First, the distribution fee charged for EDGX Top would be lowered by 50% from the current \$1,500 per month to \$750 per month for distributors that meet the requirements of the Program. Second, the distribution fee charged to these distributors for the Cboe One Summary Feed would be lowered by 30% from the current \$5,000 per month to \$3,500 per month. Finally, the Data Consolidation Fee charged for the Cboe One Summary Feed would be lowered by 65% from the current \$1,000 per month to \$350 per month. User fees for any Professional or Non-Professional Users that access EDGX Top or Cboe One Summary Feed data from a distributor that participates in the Program would remain at their current levels as the current subscriber charges are already among the most competitive in the industry.¹⁴

The Exchange believes that these fees, which represent a significant cost savings for small retail brokers, would help ensure that retail investors continue to have fair and efficient access to U.S. equity market data. While retail investors normally pay a fixed commission when buying or selling equities, and do not typically pay separate fees for market data, the Exchange believes that the proposed reduction in fees would make the Exchange’s data more competitive with other available alternatives, and may encourage retail brokers to make such data more readily available to their clients. In sum, the Exchange believes that the proposed fee reductions may facilitate more cost effective access to top of book data that is purchased on a voluntary basis by retail brokers and provided to their retail investor clients.

Market Background

The market for top of book data is highly competitive as national securities exchanges compete both with each other and with the securities information

¹³ New external distributors of the EDGX Top Feed or Cboe One Summary Feed are not currently charged external distributor fees for their first month of service. This would continue to be the case for external distributors that participate in the Program.

¹⁴ By comparison, The Nasdaq Stock Market LLC (“Nasdaq”) charges a subscriber fee for Nasdaq Basic that adds up to \$26 per month for Professional Subscribers and \$1 per month for Non-Professional Subscribers (Tapes A, B, and C). See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(b)(1).

processors (“SIPs”) to provide efficient, reliable, and low cost data to a wide range of investors and market participants. In fact, Regulation NMS requires all U.S. equities exchanges to provide their best bids and offers, and executed transactions, to the two registered SIPs for dissemination to the public. Top of book data is therefore widely available to investors today at a relatively modest cost. National securities exchanges may also disseminate their own top of book data, but no rule or regulation of the Commission requires market participants to purchase top of book data from an exchange.¹⁵ The EDGX Top Feed and Cboe One Summary Feed therefore compete with the SIP and with similar products offered by other national securities exchanges that offer their own competing top of book products. In fact, there are ten competing top of book products offered by other national securities exchanges today, not counting products offered by the Exchange’s affiliates.¹⁶

The purpose of the proposed rule change is to further increase the competitiveness of the Exchange’s top of book market data products compared to competitor offerings that may currently be cheaper for firms with a limited subscriber base that do not yet have the scale to take advantage of the lower subscriber fees offered by the Exchange. In turn, the Exchange believes that this change may benefit market participants and investors by spurring additional competition and increasing the accessibility of the Exchange’s top of book data.

As explained, the Exchange filed the Initial Proposal to introduce the Program in August in order to provide an attractive pricing option for small retail brokers. Although that filing was ultimately suspended by the Commission, as was the Second Proposal, the Exchange believes that its experience in offering the Program while it has been in effect reflect the competitive nature of the market for the creation and distribution of top of book data. Specifically, after the Exchange reduced the fees charged to small retail brokers pursuant to the Initial Proposal, Second Proposal, and Third Proposal, while each of those were in effect, it

¹⁵ By contrast, Rule 603(c) of Regulation NMS (the “Vendor Display Rule”) effectively requires that SIP data or some other consolidated display be utilized in any context in which a trading or order-routing decision can be implemented.

¹⁶ Competing top of book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, and IEX TOPS.

successfully onboarded three new customers due to the attractive pricing.¹⁷ These customers are now able to offer high quality and cost effective data to their retail investor clients. The Exchange has also been discussing the Program with a handful of additional prospective clients that are interested in providing top of book data to retail investors. Without the proposed pricing discounts, the Exchange believes that those customers and prospective customers may not be interested in purchasing top of book data from the Exchange, and would instead purchase such data from other national securities exchanges or the SIPs, potentially at a higher cost than would be available pursuant to the Program. The Program has therefore already been successful in increasing competition for such market data, and continued operation of the Program would serve to both reduce fees for such customers and to provide alternatives to data and pricing offered by competitors. Ultimately, the Exchange believes that it is critical that it be allowed to compete by offering attractive pricing to customers as increasing the availability of such products ensures continued competition with alternative offerings. Such competition may be constrained when competitors are impeded from offering alternative and cost effective solutions to customers.

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 also believes that the proposed rule change is consistent with Section 11(A) of the Act.²⁰ Specifically, the proposed rule change 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. In addition, the proposed rule change is consistent with Rule 603

¹⁷ See e.g., Cboe Innovation Spotlight, “dough—The commission-free online broker with premium content and insights,” available at https://markets.cboe.com/us/equities/market_data_products/spotlight/.

¹⁸ 15 U.S.C. 78f.

¹⁹ 15 U.S.C. 78f(b)(4).

²⁰ 15 U.S.C. 78k-1.

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 SROs 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. The Exchange believes that the proposed fee change would further broaden the availability of U.S. equity market data to investors, and in particular retail investors, consistent with the principles of Regulation NMS.

The Exchange operates in a highly competitive environment. Indeed, there are thirteen registered national securities exchanges that trade U.S. equities and offer associated top of book market data products to their customers. The national securities exchanges also compete with the SIPs for market data customers. 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.”²² The proposed fee change is a result of the competitive environment, as the Exchange seeks to amend its fees to attract additional subscribers for its proprietary top of book data offerings.

The proposed fee change would reduce fees charged to small retail brokers that provide access to two top of book data products: The EDGX Top Feed and the Cboe One Summary Feed. The EDGX Top Feed provides top of book quotations and transactions executed on the Exchange, and provides a valuable window into the market for securities traded on a market that accounts for about 5% of U.S. equity market volume today.²³ The Cboe One Summary Feed is a competitively-priced alternative to top of book data

²¹ See 17 CFR 242.603.

²² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

²³ See https://markets.cboe.com/us/equities/market_share/.

disseminated by SIPs, or similar data disseminated by other national securities exchanges.²⁴ It provides subscribers with consolidated top of book quotes and trades from four Cboe U.S. equities markets, which together account for about 17% of consolidated U.S. equities trading volume.²⁵ Together, these products are purchased by a wide variety of market participants and vendors, including data platforms, websites, fintech firms, buy-side investors, retail brokers, regional banks, and securities firms inside and outside of the U.S. that desire low cost, high quality, real-time U.S. equity market data. By providing lower cost access to U.S. equity market data, the EDGX Top and Cboe One Summary Feeds benefit a wide range of investors that participate in the national market system. Reducing fees for broker-dealers that represent retail investors and that may have more limited resources than some of their larger competitors would further increase access to such data and facilitate a competitive market for U.S. equity securities, consistent with the goals of the Act.

While the Exchange is not required to make any data, including top of book data, available through its proprietary market data platform, the Exchange believes that making such data available increases investor choice, and contributes to a fair and competitive market. Specifically, making such data publicly available through proprietary data feeds allows investors to choose alternative, potentially less costly, market data based on their business needs. While some market participants that desire a consolidated display choose the SIP for their top of book data needs, and in some cases are effectively required to do so under the Vendor Display Rule, others may prefer to purchase data directly from one or more national securities exchanges. For example, a buy-side investor may choose to purchase the Cboe One Summary Feed, or a similar product from another exchange, in order to perform investment analysis. The Cboe One Summary Feed represents quotes from four highly liquid equities markets. As a result, the Cboe One Summary Feed is within 1% of the national best bid and offer approximately 98% of the time,²⁶ and therefore serves as a valuable reference for investors that do not require a consolidated display that contains quotations for all U.S. equities

exchanges. Making alternative products available to market participants ultimately ensures increased competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange's top of book data fees as more or less attractive than the competition they can and frequently do switch between competing products. In fact, the competitiveness of the market for such top of book data products is one of the primary factors animating this proposed rule change, which is designed to allow the Exchange to further compete for this business.

Indeed, the Exchange has already successfully onboarded three new Distributors that have decided to purchase Cboe One Summary Data from the Exchange rather than purchasing top of book data from a competitor exchange. In addition, the Exchange is in discussions with a handful of other Distributors that are interested in procuring market data from the Exchange due to the attractive pricing offered pursuant to the Program. Distributors can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Further, firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other national securities exchanges. Making the Exchange's top of book data available at a lower cost, ultimately serves the interests of retail investors that rely on the public markets. The Exchange understands that the Commission is interested in ensuring that retail investors are appropriately served in the U.S. equities market. The Exchange agrees that it is important to ensure that our markets continue to serve the needs of ordinary investors, and the Program is consistent with this goal.

The Exchange believes that the proposed fees are reasonable as they represent a significant cost reduction for smaller, primarily regional, retail brokers that provide top of book data from EDGX and its affiliated equities exchanges to their retail investor clients. The market for top of book data is intensely competitive due to the availability of substitutable products that can be purchased either from other national securities exchanges, or from registered SIPs that make such top of book data publicly available to investors at a modest cost. The proposed fee reduction is being made to make the Exchange's fees more competitive with such offerings for this segment of market participants, thereby increasing the

availability of the Exchange's data products, and expanding the options available to firms making data purchasing decisions based on their business needs. The Exchange believes that this is consistent with the principles enshrined in Regulation NMS to "promote the wide availability of market data and to allocate revenues to SROs that produce the most useful data for investors."²⁷

Today, the Exchange's top of book market data products are among the most competitively priced in the industry due to modest subscriber fees, and a lower Enterprise cap, both of which keep fees at a relatively modest level for larger firms that provide market data to a sizeable number of Professional or Non-Professional Users. Distributors with a smaller user base, however, may choose to use competitor products that have a lower distribution fee and higher subscriber fees. The Program would help the Exchange compete for this segment of the market, and may broaden the reach of the Exchange's data products by providing an additional low cost alternative to competitor products for small retail brokers. While such firms may already utilize similar market data products from other sources, the Exchange believes that offering its own data to small retail brokers at lower distribution and data consolidation costs has the potential to increase choice for market participants, and ultimately increase the data available to retail investors when coupled with the Exchange's lower subscriber fees.

The Exchange also believes that the proposed fees are equitable and not unfairly discriminatory as the proposed fee structure is designed to decrease the price and increase the availability of U.S. equities market data to retail investors. The Program is designed to reduce the cost of top of book market data for broker-dealers that provide such data to Non-Professional Data User clients that make up a significant majority of the distributor's total subscriber population. While there is no "exact science" to choosing one eligibility threshold compared to another, the Exchange believes that having significantly more Non-Professional Data Users than Professional Data Users across a firm's entire business, *i.e.*, not limited exclusively to Data Users that are provided access to the Exchange's data products, is indicative of a broker-dealer that is primarily and actively engaged in the business of serving retail investors.

²⁷ See Regulation NMS Adopting Release, *supra* note 22, at 37503.

²⁴ See *e.g.*, *supra* note 14 (discussing Nasdaq Basic).

²⁵ *Id.*

²⁶ See https://markets.cboe.com/us/equities/market_data_services/cboe_one/.

This understanding is confirmed by an analysis conducted by the Exchange on the user population of its retail broker clients that purchase market data from the Exchange and its affiliated exchanges. To perform its analysis, the Exchange reviewed user populations for each broker dealer that it identified as primarily engaged in serving retail investors (*i.e.*, retail brokers), and for which the Exchange has reported usage broken down into Professional and Non-Professional Users.²⁸ This analysis showed that each retail broker identified currently provides market data from the Exchange or its affiliates to at least 90% Non-Professional Users, with the Professional/Non-Professional breakdown ranging from 90.9% Non-Professional Users on the low end to 100% Non-Professional Users on the high end. As a result of this analysis, the Exchange believes that a requirement that at least 90% of a broker-dealer's user population qualify as Non-Professional Users is appropriate to ensure that the benefits provided by the Program inure to the benefit of broker-dealers that primarily serve retail investors. Indeed, this belief is further supported by the Exchange's experience with the customers that currently participate in the Program, each of which are focused on providing trading services to ordinary investors.

As such, the Program would be broadly available to a wide range of retail brokers that either purchase EDGX Equities Exchange Data today, or that may choose to switch from competing products due to the potential cost savings. In addition to the subscribers that are currently participating in the Program, a number of distributors that currently purchase top of book data from one of the four Cboe U.S. equities exchanges, and many more prospective customers, could benefit from the Program. Each of these current or prospective retail broker customers would receive the same benefits in terms of reduced distribution and consolidation fees based on the product that they purchase from the Exchange.

The Commission has long stressed the need to ensure that the equities markets are structured in a way that meets the needs of ordinary investors. For example, the Commission's strategic plan for fiscal years 2018–2022 touts “focus on the long-term interests of our

²⁸ Broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. As a result, the Exchange has excluded those firms from this portion of its analysis. That said, the Exchange believes those firms may have a similar Professional/Non-Professional breakdown to other retail brokers.

Main Street investors” as the Commission's number one strategic goal.²⁹ The Program would be consistent with the Commission's stated goal of improving the retail investor experience in the public markets. Furthermore, national securities exchanges commonly charge reduced fees and offer market structure benefits to retail investors, and the Commission has consistently held that such incentives are consistent with the Act. The Exchange believes that the Program is consistent with longstanding precedent indicating that it is consistent with the Act to provide reasonable incentives to retail investors that rely on the public markets for their investment needs.

In addition, while the Program would be effectively limited to smaller firms that distribute data to no more than 5,000 Users, the Exchange does not believe that this limitation makes the fees inequitable, unfairly discriminatory, or otherwise contrary to the purposes of the Act. The Program is designed to ensure that small retail brokers have access to Exchange data at a modest cost, and therefore contains an eligibility cutoff based on the number of Users that would receive EDGX Equities Exchange Data. The retail broker clients identified by the Exchange provide data from the Exchange or its affiliates to an average of more than 160,000 Non-Professional Users, with a small handful of large retail brokers operating pursuant to an Enterprise license accounting for about 95% of those Non-Professional Users.³⁰ Many retail broker clients, however, have significantly smaller Non-Professional User populations, with retail brokers that are not operating pursuant to an Enterprise license providing data from the Exchange or its affiliates to an average of 8,845 Non-Professional Users. The 5,000 User threshold would therefore ensure that the benefits of the Program flow to small retail brokers, as intended, and not larger firms that already benefit from the current fee structure.

Large broker-dealers and/or vendors that distribute the Exchange's data products to a sizeable number of investors benefit from the current fee

²⁹ See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018–2022, available at https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf.

³⁰ As explained, broker dealers with an Enterprise license are required to report total user populations but not whether each user is a Professional or Non-Professional User. See *supra* note 28. To perform this analysis, the Exchange therefore assumed that retail brokers qualifying for the enterprise cap had a similar breakdown of Professional/Non-Professional Users as retail brokers that reported this information.

structure, which includes lower subscriber fees and Enterprise licenses. Due to lower subscriber fees, distributors that provide EDGX Equities Exchange Data to more than 5,000 Users already enjoy cost savings compared to competitor products. The Program would therefore ensure that small retail brokers that distribute top of book data to their retail investor customers could also benefit from reduced pricing, and would aid in increasing the competitiveness of the Exchange's data products for this key segment of the market.

The table below illustrates the impact of the proposed pricing on firms that qualify for the Program, both compared to the Exchange's current pricing, and compared to the fees charged for a competitor product, *i.e.*, Nasdaq Basic. As shown, Cboe One Summary Feed Data provided pursuant to the Program would be cheaper than Nasdaq Basic for firms with more than 1,200 Users, and the benefits of the pricing structure would continue to scale up to firms with 5,000 Users.³¹ Further, EDGX Top Data, which is already subject to a lower distribution fee than Nasdaq Basic, would become even more cost effective. After 5,000 Users the firm would no longer be eligible for the Small Retail Broker Distribution Program but would already enjoy significant cost savings compared to Nasdaq Basic under the current pricing structure. The Exchange therefore believes that the Program would allow the Exchange to better compete with competitors for smaller firms that currently pay a lower fee under, for example, the Nasdaq Basic pricing model, while also ensuring that larger firms continue to receive attractive pricing that is already cheaper than top of book data offered by the main competitor product. The Exchange believes this supplemental information further validates its assessment that the proposed fee reduction is reasonable, equitable, and not unfairly discriminatory. Without the proposed fee reduction, small retail brokers that would otherwise qualify for the reduced fees proposed would be subject to either higher fees for accessing Exchange top of book data, or may switch to competitor offerings that are also less cost effective, but at current fees levels,

³¹ For purposes of illustration, the examples included in the table assume that the small retail broker provides Cboe One Summary Data solely to Non-Professional Users, which pursuant to the requirements of the Program must make up at least 90% of the Distributor's total subscriber population, and may, in practice, make up an even larger proportion of the user population.

cheaper than the current Cboe One Summary fee.

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		1,200		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	1,200	\$ 6,000.00	\$3,850.00	\$3,850	0.00		
EDGX Top	1,200	\$ 1,500.00	\$ 750.00	\$3,850	3100.00		

		3,350		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	3,350	\$ 6,000.00	\$3,850.00	\$6,000	2150.00		
EDGX Top	3,350	\$ 1,500.00	\$ 750.00	\$6,000	5250.00		

		7,500		Nasdaq Basic		Difference vs. Nasdaq Basic	
Product	Non-Professional User Qty	Standard Model Total Fee	SRBP Total Fee	Total Fee	Total Fee	Total Fee	Total Fee
Cboe One Summary	7,500	\$ 6,000.00	\$3,850.00	\$10,150	4150.00		
EDGX Top	7,500	\$ 1,500.00	\$ 750.00	\$10,150	9400.00		

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The Exchange also notes that the proposed fees for the Cboe One Summary Feed are designed in a manner that would allow a market data vendor to offer a similar competing product that includes data from the Exchange and its affiliated equities exchanges. Specifically, the Distribution fees proposed for the Cboe One Summary Feed are equivalent to the fees that would be charged to a small retail broker for access to the top of book feeds offered by the individual exchanges. In addition, Distributors of the Cboe One Summary Feed are liable for a Data Consolidation Fee that is designed to reflect the value of the consolidation of the data. Thus, the pricing for the Cboe One Summary Feed would enable a vendor to receive the underlying data feeds and offer a similar product on a competitive basis and with no pricing

disadvantage relative to the exchanges. The examples below illustrate the fees that would be associated with the Cboe One Summary Feed compared with the fees that would be charged for a competing product that incorporates top of book information taken from the Exchange and its affiliated equities exchanges.³²

Example 1: Vendor Distributes Cboe One Summary Feed to Two Small Retail Brokers

A vendor that distributes the Cboe One Summary Feed to one or more clients for further internal or external distribution would be liable for an External Distribution Fee of \$5,000 per

month and a Data Consolidation Fee of \$1,000 per month.³³ In addition, each small retail broker that receives data from the vendor would be liable for its own Distribution Fees, which would be reduced to \$3,500 per month pursuant to the Program, and Data Consolidation Fees, which would be reduced to \$350 per month. These amounts would be paid directly by each small retail broker to the Exchange pursuant to a license agreement despite the fact that such clients are utilizing the services of a

³² All Distributors that receive an uncontrolled data feed, including small retail brokers that qualify for the Program, would have to license directly with the Exchange, and would be responsible for paying any applicable fees, but would be able to access such market data through the services of a vendor.

³³ Typically, a vendor's business involves distributing market data to a wide range of customers, which would likely include a number of firms that do not qualify for the Program (e.g., other vendors, larger broker-dealers, etc.). In both examples, the fees charged to the vendor would permit it to distribute to each of those downstream customers without paying additional fees for each customer.

vendor to facilitate their access to the data.

Example 2: Vendor Distributes Competing Product to Two Small Retail Brokers

Similar to Example 1, a vendor that consolidates and distributes top of book data taken from the Exchange and its affiliated equities exchanges would be liable for External Distribution Fees of \$5,000 per month—*i.e.*, \$2,500 for BZX Top, \$1,000 per month for BYX Top, and \$1,500 for EDGX Top, and \$0 per month for EDGA Top. Unlike Example 1, however, the vendor would be performing its own consolidation of the data incorporated from the four top of book feeds, and would not be liable for the Data Consolidation Fee. Similarly, each of the small retail brokers would pay their own Distribution Fees to the Exchange, which would be reduced to \$3,500 under the Program—*i.e.*, \$2,500 per month for BZX Top, \$250 per month for BYX Top, \$750 per month for EDGX Top, and \$0 per month for EDGA Top. Similar to the vendor, the small retail brokers would not pay any Data Consolidation Fee. As a result, a vendor could offer its own competing product at a price that is competitive with the Exchange's pricing.³⁴

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

The Exchange does not believe that the proposed rule change would result in 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, and its ability to price these data products is constrained by: (i) Competition among exchanges that offer similar data products to their customers; and (ii) the existence of inexpensive real-time consolidated data disseminated by the SIPs. Top of book data is disseminated by both the SIPs and the thirteen equities exchanges. There are therefore a number of alternative products available to market participants and investors. In this competitive environment potential subscribers are free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as broker-dealers or vendors look to purchase the cheapest top of book data product, or

quality, as market participants seek to purchase data that represents significant market liquidity. In order to better compete for this segment of the market, the Exchange is proposing to reduce the cost of top of book data provided by small retail brokers to their retail investor clients. The Exchange believes that this would facilitate greater access to such data, ultimately benefiting the retail investors that are provided access to such market data.

The Exchange does not believe that this price reduction would cause any unnecessary or inappropriate burden on intermarket competition as other exchanges and data vendors are free to lower their prices to better compete with the Exchange's offering. Indeed, as explained in the basis section of this proposed rule change, the Exchange's decision to lower its distribution and consolidation fees for small retail brokers is itself a competitive response to different fee structures available on competing markets. The Exchange therefore believes that the proposed rule change is pro-competitive as it seeks to offer pricing incentives to customers to better position the Exchange as it competes to attract additional market data subscribers. The Exchange also believes that the proposed reduction in fees for small retail brokers would not cause any unnecessary or inappropriate burden on intramarket competition. Although the proposed fee discount would be largely limited to small retail broker subscribers, larger broker-dealers and vendors can already purchase top of book data from the Exchange at prices that represent a significant cost savings when compared to competitor products that combine higher subscriber fees with lower fees for distribution. In light of the benefits already provided to this group of subscribers, the Exchange believes that additional discounts to small retail brokers would increase rather than decrease competition among broker-dealers that participate on the Exchange. Furthermore, as discussed earlier in this proposed rule change, the Exchange believes that offering pricing benefits to brokers that represent retail investors facilitates the Commission's mission of protecting ordinary investors, and is therefore consistent with the Act.

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

No written comments were either solicited or received.

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 Act³⁵ and paragraph (f) of Rule 19b-4³⁶ 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2020-008 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-CboeEDGX-2020-008. 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 (<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

³⁴ The discounted Data Consolidation Fee should continue to allow a vendor that takes top of book feeds from the Exchange and its affiliated equities exchanges to offer a competing product at a similar cost. In this regard, the Exchange notes that Nasdaq similarly charges a \$350 data consolidation fee for Nasdaq Last Sale Plus. See Nasdaq Rules, Equity 7, Pricing Schedule, Section 139(e)(1).

³⁵ 15 U.S.C. 78s(b)(3)(A).

³⁶ 17 CFR 240.19b-4(f).

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-CboeEDGX-2020-008 and should be submitted on or before March 12, 2020.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁷

Jill M. Peterson,
Assistant Secretary.

[FR Doc. 2020-03417 Filed 2-19-20; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-88207; File No. SR-NASDAQ-2019-090]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Nasdaq Rule 5704 and Other Related Amendments

February 13, 2020.

On November 8, 2019, The Nasdaq Stock Market LLC ("Exchange" or "Nasdaq") filed with the Securities and Exchange Commission ("Commission" or "SEC"), 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 to, among other things, adopt new Nasdaq Rule 5704 to list and trade Exchange Traded Fund Shares. The proposed rule change was published for comment in the **Federal Register** on November 22, 2019.³

On December 17, 2019, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed

rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On February 6, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and replaced the proposed rule change in its entirety.⁶ The Commission has received no comment letters on the proposed rule change.

The Commission is publishing this notice and order to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

I. Exchange's Description of the Proposal, as Modified by Amendment No. 1

The Exchange proposes to adopt new Nasdaq Rule 5704 to list and trade shares of securities issued by an exchange-traded fund, as defined herein, as well as amendments to Nasdaq Rule 4120 (Limit Up-Limit Down Plan and Trading Halts) and Nasdaq Rule 5615 (Exemptions from Certain Corporate Governance Requirements), and to discontinue the quarterly reports currently required with respect to Managed Fund Shares under Nasdaq Rule 5735(b). This Amendment No. 1 replaces and supersedes the original filing in its entirety.

The text of the proposed rule change is available on the Exchange's website at <http://nasdaq.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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes Nasdaq Rule 5704 to establish generic listing standards that permit the listing and trading of shares ("Exchange Traded Fund Shares") of exchange-traded funds ("ETFs" as defined below) that meet the criteria established by the Commission in its adoption of Rule 6c-11⁸ ("Rule 6c-11") under the Investment Company Act of 1940, as amended (1940 Act"), to operate without obtaining an exemptive order from the SEC under the 1940 Act.⁹ This will help to accomplish the SEC's goal in adopting Rule 6c-11 to allow such ETFs to come directly to market without the cost and delay of obtaining exemptive relief while still protecting the interests of investors and other market participants. Rule 6c-11 will provide exemptions applicable to both index-based and transparent actively managed ETFs. Rule 6c-11 will enhance the regulatory framework through streamlining existing procedures and reducing the costs and time frames associated with bringing ETFs to market. This, in turn, will also serve to enhance competition among ETF issuers and ultimately reduce investor costs.¹⁰

⁸ Specifically, Rule 6c-11 applies to open-end funds that (i) issue and redeem creation units to and from authorized participants in exchange for a basket of securities and other assets (and any cash balancing amount), and (ii) whose shares are listed on a national securities exchange and trade at market-determined prices. Rule 6c-11 does not apply to leveraged, inverse, non-transparent, share classes, or exchange-traded funds structured as unit investment trusts.

⁹ See Release No. 33-10695; IC-33646; File No. S7-15-18 (Exchange-Traded Funds) (September 25, 2019), 84 FR 57162 (October 24, 2019) ("Adopting Release").

¹⁰ The SEC said in the Adopting Release that Rule 6c-11 "will modernize the regulatory framework for ETFs to reflect our more than two decades of experience with these investment products. The rule is designed to further important Commission objectives, including establishing a consistent, transparent, and efficient regulatory framework for ETFs and facilitating greater competition and innovation among ETFs." See Adopting Release at 57163. The SEC also said that in reference to the impact of Rule 6c-11 that: "We believe rule 6c-11 will establish a regulatory framework that: (1) Reduces the expense and delay currently associated with forming and operating certain ETFs unable to rely on existing orders; and (2) creates a level playing field for ETFs that can rely on the rule. As such, the rule will enable increased product competition among certain ETF providers, which can lead to lower fees for investors, encourage financial innovation, and increase investor choice in the ETF market." See Adopting Release at 57204.

⁵ See Securities Exchange Act Release No. 87776, 84 FR 70610 (Dec. 23, 2019). The Commission designated February 20, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁶ Amendment No. 1 to the proposed rule change is available at: <https://www.sec.gov/comments/sr-nasdaq-2019-090/srnasdaq2019090-6786146-208249.pdf>.

⁷ 15 U.S.C. 78s(b)(2)(B).

³⁷ 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. 87559 (Nov. 18, 2019), 84 FR 64574.

⁴ 15 U.S.C. 78s(b)(2).