

proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁶

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Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98647; File No. SR-CboeBYX-2023-013]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend Its Fee Schedule Related to Physical Port Fees

September 29, 2023.

I. Introduction

On September 1, 2023, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² a proposed rule change (File Number SR-CboeBYX-2023-013) to amend its fee schedule to increase the monthly fee for 10 gigabit (“Gb”) physical ports. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the **Federal Register** on September 20, 2023.⁴ Pursuant to Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (1) temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Background and Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule. The Exchange proposes to increase the monthly fee for 10 Gb

physical ports from \$7,500 to \$8,500 per port. The Exchange currently assesses the following physical connectivity fees for Members⁶ and non-Members on a monthly basis: \$2,500 per physical port for a 1 Gb circuit and \$7,500 per physical port for a 10 Gb circuit.⁷ According to the Exchange, the physical ports may also be used to access the systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: Cboe BZX Exchange, Inc. (options and equities platforms), Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc. (options and equities platforms), and Cboe C2 Exchange, Inc.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,⁸ at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,⁹ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. The Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

In support of the proposal, the Exchange states its belief that the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports.¹⁰ The Exchange states that the current 10 Gb physical port fee has remained unchanged since June 2018.¹¹ The Exchange states that during this 5-year span there has been an average inflation rate of 3.9%, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹² In support of its claim of reasonableness, the Exchange compares its proposed rate increase from the rates

adopted five years ago of approximately 13% to the cumulative inflation rate of 21.1%.¹³

In further support of the proposal, the Exchange states that the proposed fee is reasonable, fair, and equitable, and not unfairly discriminatory.¹⁴ The Exchange believes that the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹⁵ The Exchange also states its belief that the fee is not unfairly discriminatory, because the fee would be assessed uniformly across all market participants that purchase the physical ports.¹⁶ The Exchange states that the fee is equitable because increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port as the 1 Gb physical port is 1/10 the size of the 10 Gb physical port and does not offer access to many of the products and services offered by the Exchange.¹⁷ The Exchange also states its belief the proposed fee is reasonable and appropriately allocated because, the Exchange states, market participants that purchase 10 Gb physical ports use the most bandwidth and therefore consume the most resources from the network.¹⁸

In further support of its proposed fee, the Exchange states that Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, or connect directly to, the Exchange.¹⁹ The Exchange also states its belief that substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter markets.²⁰ Additionally, the Exchange believes that low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.* The Exchange states there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees; and based on publicly available information, no single equities exchange has more than approximately 16% of the market share.

⁵⁶ 17 CFR 200.30-3(a)(57) and (58).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ See Securities Exchange Act Release No. 98393 (September 14, 2023), 88 FR 64933 (“Notice”).

⁵ 15 U.S.C. 78s(b)(3)(C).

⁶ The term “Member” means any registered broker or dealer that has been admitted to membership in the Exchange. See Exchange Rule 1.5(n).

⁷ A physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange’s servers are located.

⁸ 15 U.S.C. 78s(b)(3)(C).

⁹ 15 U.S.C. 78s(b)(1).

¹⁰ See Notice, *supra* note 4, at 64934.

¹¹ See *id.*

¹² See *id.*

and the products it offers.²¹ According to the Exchange, three new equities exchanges entered the market in 2020 (*i.e.*, Long Term Stock Exchange (LTSE), Members Exchange (MEMX), and MIAAX Pearl).²²

The Exchange states its belief that participation on the Exchange remains affordable (notwithstanding the proposed fee change) for all market participants, including smaller trading firms that may be able to take advantage of lower costs that result from mutualized connectivity.²³ The Exchange states that a market participant may submit orders to the Exchange via a Member broker or a third-party reseller of connectivity.²⁴ The Exchange notes that third-party non-Members also resell exchange connectivity, which the Exchange states is another viable alternative for market participants to trade on the Exchange without connecting directly to the Exchange (and thus not pay the Exchange's connectivity fees).²⁵ The Exchange states it does not preclude market participants from reselling its connectivity and has not adopted fees that would be assessed to third-party resellers on a per customer basis (*i.e.*, fee based on number of Members that connect to the Exchange indirectly via the third-party).²⁶ The Exchange notes that multiple Members are able to share a single physical port (and corresponding bandwidth) with other non-affiliated Members if purchased through a third-party reseller.²⁷ The Exchange states its belief that this allows resellers to mutualize the costs of the ports for market participants and provide such ports at a price that may be lower than the Exchange charges due to this mutualized connectivity.²⁸

Finally, the Exchange states that the proposed fees would not cause any unnecessary or inappropriate burden on intermarket competition because proposed fee is lower than some fees for similar connectivity on other exchanges and therefore may stimulate intermarket competition by attracting additional firms to connect to the Exchange or at least should not deter interested

participants from connecting directly to the Exchange.²⁹ The Exchange also states that if the changes proposed herein are unattractive to market participants, the Exchange can, and likely will, see a decline in connectivity via 10 Gb physical ports as a result.³⁰ Furthermore, the Exchange states that it operates in a highly competitive market in which market participants can determine whether or not to connect directly to the Exchange based on the value received compared to the cost of doing so.³¹ The Exchange also states that the proposed rule change would not cause any unnecessary or inappropriate burden on intramarket competition because it will apply to all similarly situated Members equally (*i.e.*, all market participants that choose to purchase the 10 Gb physical port).³² Additionally, the Exchange stated that it does not believe its proposed pricing will impose a barrier to entry to smaller participants and notes that its proposed connectivity pricing is associated with relative usage of the various market participants.³³

To date, the Commission has not received any comment letters on the proposed rule change.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange's present proposal, they are required to provide a statement supporting the proposal's basis under the Act and the rules and regulations thereunder applicable to the exchange.³⁴ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement "should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements."³⁵

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange's facilities;³⁶ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or

dealers;³⁷ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.³⁸

In temporarily suspending the Exchange's proposed rule change, the Commission intends to further consider whether the proposal to increase the monthly fee for 10 Gb physical ports from \$7,500 to \$8,500 per port for the Exchange is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.³⁹

Therefore, the Commission finds that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.⁴⁰

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

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)⁴¹ and 19(b)(2)(B) of the Act⁴² to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of

²¹ See *id.*

²² See *id.*

²³ See *id.*

²⁴ See *id.*

²⁵ See *id.* at 64934–64935. The Exchange states this alternative is already being used by non-Members and further constrains the price that the Exchange is able to charge for connectivity to its Exchange.

²⁶ See *id.* at 64935. The Exchange states its belief these third-party resellers may purchase the Exchange's physical ports and resell access to such ports either alone or as part of a package of services.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.*

³⁰ See *id.*

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See 17 CFR 240.19b-4 (Item 3 entitled "Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change").

³⁵ See *id.*

³⁶ 15 U.S.C. 78f(b)(4).

³⁷ 15 U.S.C. 78f(b)(5).

³⁸ 15 U.S.C. 78f(b)(8).

³⁹ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

⁴⁰ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁴¹ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

⁴² 15 U.S.C. 78s(b)(2)(B).

whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,⁴³ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;⁴⁴

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;⁴⁵ and

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”⁴⁶

As discussed in Section III above, the Exchange made various arguments in support of their proposal. The Commission believes that there are questions as to whether the Exchange has provided sufficient information to demonstrate that the proposed fees are consistent with the Act and the rules thereunder.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”⁴⁷ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁴⁸ and

⁴³ *Id.* Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. *See id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. *See id.*

⁴⁴ 15 U.S.C. 78f(b)(4).

⁴⁵ 15 U.S.C. 78f(b)(5).

⁴⁶ 15 U.S.C. 78f(b)(8).

⁴⁷ 17 CFR 201.700(b)(3).

⁴⁸ *See id.*

any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁴⁹

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with its requirements that exchange fees be reasonable and equitably allocated, not be unfairly discriminatory, and not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.⁵⁰

V. Commission’s Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2023. Rebuttal comments should be submitted by November 8, 2023. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.⁵¹

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

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

Electronic Comments

- Use the Commission’s internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR–CboeBYX–2023–013 on the subject line.

⁴⁹ *See id.*

⁵⁰ *See* 15 U.S.C. 78f(b)(4), (5), and (8).

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

Paper Comments

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

All submissions should refer to file number SR–CboeBYX–2023–013. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission’s internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–CboeBYX–2023–013 and should be submitted on or before October 25, 2023. Rebuttal comments should be submitted by November 8, 2023.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,⁵² that File No. SR–CboeBYX–2023–013, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵³

Sherry R. Haywood,
Assistant Secretary.

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⁵² 15 U.S.C. 78s(b)(3)(C).

⁵³ 17 CFR 200.30–3(a)(57).