

October 25, 2023

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549-1090

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees for File No. SR-CboeBYX-2023-013<sup>1</sup>; File No. SR-CboeBZX-2023-067<sup>2</sup>; File No. SR-CboeBZX-2023-068<sup>3</sup>; File No. SR-CboeEDGA-2023-015<sup>4</sup>; File No.

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<sup>1</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98393, Sep. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboebyx/2023/34-98393.pdf> (“Cboe BYX Exchange Port Fee Filing”); and *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*, SEC, Exch. Act Rel. No. 34-98647, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebyx/2023/34-98647.pdf>.

<sup>2</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98395, Sep. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98395.pdf> (“Cboe BZX Exchange Port Fee Filing I”); and *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*, SEC, Exch. Act Rel. No. 34-98646, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98646.pdf>.

<sup>3</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98389, Sept. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98389.pdf> (“Cboe BZX Exchange Port Fee Filing II”); and *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*, SEC, Exch. Act Rel. No. 34-98650, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98650.pdf>.

<sup>4</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98394, Sep. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedga/2023/34-98394.pdf> (“Cboe EDGA Exchange Port Fee Filing”); and *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*, SEC, Exch. Act Rel. No. 34-98652, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedga/2023/34-98652.pdf>.

SR-CboeEDGX-2023-057<sup>5</sup>; File No. SR-CboeEDGX-2023-058<sup>6</sup>; File No. SR-C2-2023-020<sup>7</sup>

Dear Ms. Countryman:

The Healthy Markets Association<sup>8</sup> writes to object to the above-referenced filings by the Cboe family of exchanges to yet again raise port fees,<sup>9</sup> and applaud the SEC for suspending the filings.

The Cboe Port Fee Filings do not provide sufficient information to support a finding by the Commission that the exchanges have met their obligations under the Exchange Act and Commission Rules. Accordingly, the Commission must disapprove them.

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<sup>5</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98396, Sep. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98396.pdf> (“Cboe EDGX Exchange Port Fee Filing I”); and *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*, SEC, Exch. Act Rel. No. 34-98653, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf>.

<sup>6</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98390, Sep. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98390.pdf> (“Cboe EDGX Exchange Port Fee Filing II”); and *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*, SEC, Exch. Act Rel. No. 34-98651, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98651.pdf>.

<sup>7</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98397, Sep. 14, 2023, available at <https://www.sec.gov/files/rules/sro/c2/2023/34-98397.pdf> (“Cboe C2 Exchange Port Fee Filing”); and *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*, SEC, Exch. Act Rel. No. 34-98649, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/c2/2023/34-98649.pdf>.

<sup>8</sup>The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

<sup>9</sup> Cboe BYX Exchange Port Fee Filing; Cboe BZX Exchange Port Fee Filing I; Cboe BZX Exchange Port Fee Filing II; Cboe EDGA Exchange Port Fee Filing; Cboe EDGX Exchange Port Fee Filing I; Cboe EDGX Exchange Port Fee Filing II; and Cboe C2 Exchange Port Fee Filing (collectively, “Cboe Port Fee Filings”).

# Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review exchange filings and determine that those filings are consistent with the Exchange Act,<sup>10</sup> including that an exchange's rules:

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”<sup>11</sup>
- not be “designed to permit unfair discrimination”;<sup>12</sup>
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;<sup>13</sup> and
- be designed “to protect investors and the public interest.”<sup>14</sup>

Rule 700(b)(3) of the Commission's Rules of Practice clearly establishes that:

The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b-4, the Form is designed to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements

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<sup>10</sup> See *Susquehanna Int'l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017) (“The SEC “shall approve” a self regulatory organization’s proposed rule change only “if it finds that such proposed rule change is consistent with” provisions of the Exchange Act.”). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, *available at* <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (declaring that in order for the Commission to “meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.”).

<sup>11</sup> 15 U.S.C. § 78f(b)(4).

<sup>12</sup> 15 U.S.C. § 78f(b)(5).

<sup>13</sup> 15 U.S.C. § 78f(b)(8).

<sup>14</sup> 15 U.S.C. § 78f(b)(5).

of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. **A mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient. Instead, the description of the 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.** Any failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.<sup>15</sup>

In 2017, the Court of Appeals for the District of Columbia Circuit invalidated the Commission's approval of another self-regulatory organization's rule change, explaining that the Administrative Procedure Act

requires us to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "unsupported by substantial evidence." To satisfy the "arbitrary and capricious" standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"<sup>16</sup>

Put simply, the exchange must provide sufficient details, and the Commission must do its own homework.

While there are often dozens of exchange filings per month, the difficulty in wading through the massive volume does not relieve the Commission of its legal obligation to "find" or "determine" that the rule meets the requirements of the Exchange Act.<sup>17</sup>

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<sup>15</sup> 17 C.F.R. §201.700(b)(3)(emphasis added); accord, *Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34-88261, Feb. 21, 2020, available at <https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf>.

<sup>16</sup> *Susquehanna*, at 445 (internal citations omitted).

<sup>17</sup> *Id.*, at 446. However, at least when it comes to exchange port fee filings, the Commission has rarely made any such determinations, and yet has simultaneously not frequently disapproved filings for failing to meet the requirements of the Exchange Act and Commission Rules. In fact, almost exactly five years ago, then-Commissioner Robert J. Jackson, Jr. declared that his staff had reviewed all 95 exchange connectivity filings from 2016 through September 2018, and found that not a single one had been rejected by the Commission or staff. Hon. Robert J. Jackson, Jr., *Unfair Exchange: The State of America's Stock Markets*, Sept. 19, 2018, at n.33, available at [https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets#\\_ftn33](https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets#_ftn33).

# Background on The Cboe Port Fee Filings

While the exchanges now comprising the Cboe family of exchanges have different origins, the history of their associated connectivity fees is a breathtaking display of a monopolist exploiting its market power.

For example, in 2010, the predecessor exchange to CboeEDGX filed to impose a new connectivity fee for a 10Gb connection of \$10,000 per year. In a terse, four-page order, the Commission staff (via delegated authority) approved that new fee.<sup>18</sup> The entire discussion and analysis of the implications of the fee spanned a whopping two paragraphs. Despite the paucity of analysis by the Commission staff, however, a significant new revenue stream was born for the exchange.

Just months after receiving permission to adopt the new physical port fees, the exchange filed to adopt monthly physical port fees of \$1000 per month for a 10Gb connection.<sup>19</sup> Unlike the initial port fees, however, these new monthly rates became effective without Commission action.<sup>20</sup>

In April 2013, the exchange filed to double the cost for a 10Gb connection to \$2000 per month.<sup>21</sup> Again, these new monthly rates were immediately effective.

In June 2015, the exchange filed to double the cost for a 10Gb connection again, to \$4000 per month.<sup>22</sup> Again, these new monthly rates were immediately effective.

In January 2017, the exchange filed to raise the cost for a 10Gb connection again, to \$6000 per month.<sup>23</sup> Again, these new monthly rates were immediately effective.

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<sup>18</sup> *Order Approving Proposed Rule Change to Amend the EDGX Fee Schedule to Impose Fees for Physical Ports Used to Connect to EDGX Exchange*, SEC, Exch. Act Rel. No. 34-62680, Aug. 10, 2010, available at <https://www.sec.gov/files/litigation/litreleases/2010/34-62680.pdf>.

<sup>19</sup> *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule*, SEC, SR-EDGX2010-21, Dec. 10, 2010, available at <https://www.sec.gov/files/litigation/litreleases/2010/34-63520.pdf>.

<sup>20</sup> The exchange discontinued the annual payment option in early 2013, leaving monthly payments as the only way to pay for connectivity. *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule*, SEC, Sec. Exch. Act Rel. No. 34-68831, Feb. 5, 2013, available at <https://www.sec.gov/files/litigation/litreleases/2013/34-68831.pdf>.

<sup>21</sup> *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule*, SEC, Exch. Act Rel. No. 34-69482, Apr. 30, 2013, available at <https://www.sec.gov/files/litigation/litreleases/2013/34-69482.pdf>.

<sup>22</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of EDGX Exchange, Inc.*, SEC, Exch. Act Rel. No. 34-75393, July 8, 2015, available at <https://www.sec.gov/files/litigation/litreleases/2015/34-75393.pdf>.

<sup>23</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Fees for Connectivity and its Communication and Routing Service Known as Bats Connect*, SEC, Exch. Act Rel. No. 34-79774, Jan. 11, 2017, available at <https://www.sec.gov/files/rules/sro/batsedgx/2017/34-79774.pdf>.



In November 2017, the exchange filed to raise the cost for a 10Gb connection again, to \$7000 per month.<sup>24</sup> Again, these new monthly rates were immediately effective.

In June 2018, the exchange filed to raise the cost for a 10Gb connection again, to \$7500 per month.<sup>25</sup> Again, these new monthly rates were immediately effective.

In September 2023, the exchange filed to raise the cost for a 10Gb connection again, to \$8500 per month.<sup>26</sup> While the new monthly rates were immediately effective, they were suspended by the Commission staff before the end of the first month.<sup>27</sup>

## Commission Suspension Order and Initiation of Proceedings

The Cboe Port Fee Filing Suspension Orders generally repeat the conclusory, generalized, and vague assertions by the various exchanges, and then ask the public:

- 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”;<sup>28</sup>
- 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

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<sup>24</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify its Fees for Physical Ports*, SEC, Exch. Act Rel. No. 34-82060, Nov. 13, 2017, available at <https://www.sec.gov/files/rules/sro/batsedgx/2017/34-82060.pdf>.

<sup>25</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for EDGX*, SEC, Exch. Act Rel. No. 34-83450, June 15, 2018, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2018/34-83450.pdf>.

<sup>26</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98390, Sept. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98390.pdf>.

<sup>27</sup> See, e.g., *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*, SEC, Exch. Act Rel. No. 34-98651, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98651.pdf> (regarding Cboe EDGX Exchange).

<sup>28</sup> See, e.g., *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*, SEC, Exch. Act Rel. No. 34-98653, at 8-9, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf> (regarding Cboe EDGX Exchange).

of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;<sup>29</sup> 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].”<sup>30</sup>

The answer to each of these questions is no.

To be clear, the cost of transmitting data quickly is materially lower than it was in 2010. The Cboe Port Fee Filings do not address this reality, however. Rather, each exchange simply asserts:

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.<sup>10</sup> Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.<sup>31</sup>

This argument is laughable. Overall macroeconomic inflation levels aren’t relevant here – as the exchanges’ own connectivity fees have shown. The cumulative increase in the Consumer Price Index from 2010 through 2015 was under 8.75%, while 10Gb connectivity for the current Cboe EDGX Exchange went from \$0 to \$10,000 to \$24,000 to \$48,000 per year (charged monthly) over that period.

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<sup>29</sup> See, e.g., *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*, SEC, Exch. Act Rel. No. 34-98653, at 9, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf> (regarding Cboe EDGX Exchange).

<sup>30</sup> See, e.g., *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*, SEC, Exch. Act Rel. No. 34-98653, at 9, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf> (regarding Cboe EDGX Exchange).

<sup>31</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98390, at 4, Sept. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98390.pdf>.

While we appreciate the Cboe's comedic foray into high school-level macroeconomic analysis, that's not what the Exchange Act requires. The Commission needs to know about the exchanges' specific costs so as to determine whether they are "reasonable."<sup>32</sup> The Cboe Port Fee Filings didn't provide that information.

The Commission needs to know that the fees the exchanges seek to impose do "not impose any burden on competition not necessary or appropriate."<sup>33</sup> The Cboe Port Fee Filings offer no analysis whatsoever related to how the new fees impact the competition between firms who may seek 10Gb connectivity to the exchanges, other than to admit that some firms may be elect to drop their subscriptions and connect through their own competitors (at what expense and business impact, is generally unaddressed).

The Commission needs to know that the fees the exchanges seek to impose are designed to not "permit unfair discrimination between customers, issuers, brokers, or dealers."<sup>34</sup> Yet, once again, the Cboe Port Fee Filings fail to provide the information needed to make that determination. The Cboe Port Fee Filings do not break down the exchanges' customers by types or sizes or analyze how they are impacted by the fees. For example, it may be that the increase causes smaller volume traders to elect to unsubscribe to the faster connections, leaving them with greater latencies and poorer execution qualities, or additional challenges and complexities because they start interpositioning other third-parties. In fact, the exchanges explicitly acknowledge these possibilities, and yet they do not offer any analysis regarding the actual impact of exercising those alternatives has on those exchange customers.

We note that the Commission has recently expressed concerns with discriminatory pricing by exchanges related to "volume-based exchange transaction pricing," which raise "competitive concerns among exchange members as well as among exchanges."<sup>35</sup> In its release to prohibit some discriminatory pricing practices, the Commission explicitly acknowledged that "lower volume members may find it difficult to compete for customer order flow because they are unable to pass through to customers the favorable exchange transaction pricing or lower commissions that are available to higher-volume members."<sup>36</sup>

It continued:

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<sup>32</sup> See *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

<sup>33</sup> 15 U.S.C. § 78f(b)(8).

<sup>34</sup> 15 U.S.C. § 78f(b)(5).

<sup>35</sup> *Volume-Based Exchange Transaction Pricing for NMS Stocks*, SEC, Exch. Act Rel. No. 34-98766, at 9, Oct. 18, 2023, available at <https://www.sec.gov/files/rules/proposed/2023/34-98766.pdf>.

<sup>36</sup> *Id.*, at 10.



As a result of volume-based exchange transaction pricing, lower-volume members may seek to route some or all of their orders through high-volume members to qualify for better exchange pricing. As that happens, the lower-volume members that are otherwise competing with the high-volume members become customers of their high-volume competitors. This dynamic can lead to order flow becoming increasingly concentrated among a small number of high-volume members, who then qualify for even higher tiers (i.e., tiers that feature lower fees or higher rebates) as a result of that flow, which further impacts the ability of lower-volume members to compete with them in a self-reinforcing cycle. This concentration impacts customers by reducing the number of exchange members capable of offering them competitive exchange transaction pricing.<sup>37</sup>

Notably, this exact same economic dynamic exists with the high (and rising) fixed costs of connectivity to exchanges. On a per-share traded basis, the costs for high volume traders are significantly lower than for low volume traders.

Yet, while the Cboe Port Fee Filings explicitly acknowledge that some brokers may elect to route through others for connectivity, they provide no material information nor analysis to address the impact of the imposition of the higher fees on different types and sizes of customers. For example, what is the impact on smaller brokers who remain connected to the exchanges? What is the impact on those who elect to route through other brokers, who are likely their direct competitors? What is the relative cost per share traded on each of the exchanges for different types and sizes of customers? None of that information is provided.

Of course, we aren't surprised to see Cboe attempt to raise fees across its family of exchanges without providing any meaningful data. After all, it (and its predecessors) met no Commission resistance when they increased 10Gb connectivity costs from \$0 to \$1000, to \$2000, to \$4000, to \$6000, to \$7000, to \$7500 per month from 2010 to 2018 – without ever providing sufficient relevant data or meaningful economic analysis with which the Commission could make the determinations that the filings complied with the Exchange Act's requirements.

If anything, that experience demonstrated that demand for exchange connectivity is extremely inelastic (as the vast majority of subscribers continued to subscribe with each hike) and the Commission would be extremely unlikely to intervene to ensure compliance with the Exchange Act.

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<sup>37</sup> *Id.*, at 10.

# Staff Guidance Regarding SRO Fee Filings

In 2019, amidst efforts by the Commission to finally impose structure around the then-rapidly rising market data and connectivity costs for investors, the Commission staff adopted significant guidance for exchanges seeking to meet their burdens under the Exchange Act.<sup>38</sup>

Some exchanges have generally sought to comply with that guidance, as the details they have generally provided and (and length) of their respective filings clearly demonstrate. For example, a recent MIAX filing to impose physical port fees is 87 pages long,<sup>39</sup> *roughly eight times longer than these ostensibly similarly intended Cboe Port Fee Filings*. Similarly, IEX's filing in 2019 to raise its port fees to a whopping \$100 (or 1/75th the fees then being charged by Cboe EDGX Exchange for its 10Gb connection) was far lengthier and more detailed than the instant filings.<sup>40</sup> While we take no position regarding the adequacy of the MIAX or IEX filings, it is indisputable that they contain significantly more relevant information for the Commission and the public to assess than Cboe Port Fee Filings.

We are also disappointed that, rather than hold all exchanges to the standards of the Exchange Act, the Commission has incentivized and effectively encouraged exchanges to play "Whack-a-Mole" with connectivity filings. For example, over a year ago, we wrote to the Commission to object to the Seventh MEMX Connectivity filing, which had been filed after several prior versions of the same fee filing had been submitted, fees had been charged to customers, and then the filings were withdrawn (only to be immediately replaced).<sup>41</sup>

Two years ago, we pleaded with the Commission to stop its tepid and inconsistent application of the law, explaining that

there is little evidence that the Commission and staff have materially reviewed or analyzed the vast majority of these

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<sup>38</sup> *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

<sup>39</sup> *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule to Modify Certain Connectivity and Port Fees*, SEC, Exch. Act Rel. No. 34-98752, Oct. 13, 2023, available at <https://www.sec.gov/files/rules/sro/miax/2023/34-98752.pdf>.

<sup>40</sup> *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the IEX Fee Schedule, Pursuant to IEX Rules 15.110(a) and (c), to Charge a Fee of \$100 Per Month for Each Logical Order Entry Port in Excess of Five Per User*, SEC, Exch. Act Rel. No. 34-86626, Aug. 9, 2019, available at <https://www.sec.gov/files/rules/sro/iex/2019/34-86626.pdf>.

<sup>41</sup> Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Sept. 20, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/09/9-20-22-MEMX-Connectivity-Filing-SR-MEMX-2022-26-1.pdf>.

filings for compliance with the Exchange Act and Commission Rules.

Again, to assess the filings related to market data and connectivity filings, the Commission and staff would ostensibly need to know who is using the product or service, the costs to them, and how the product or service impacts not just those firms, but those firms in relation to those that do not purchase it. It would need to have sufficient information to determine if the costs for the products or services are “reasonable” and “equitably allocated.” It would need to determine if the products or services (or costs associated with them) are discriminatory or impose undue burdens on competition.

For example, a market maker could not readily compete in today’s marketplace without access to the fastest connections or depth-of-book information. So while an exchange may charge for those products, the Commission should consider the competitive advantages those products convey. It hasn’t. And yet, the products likely create a classic cost-based barrier to entry for not only smaller market participants but also the formation of new investment strategies that could diversify price and liquidity competition making the markets more fair, orderly, and efficient.

Further, market data and connectivity-related revenues may be used to subsidize other programs of the exchanges, including paying rebates to some traders that may even exceed transaction fees collected for those trades. As we discussed above, of course, those rebates themselves tend to be greatest for the largest and most connected firms. Unfortunately, the Commission and staff have also not explored these connections when evaluating market data or connectivity-related SRO fee filings.<sup>42</sup>

None of this information or analysis is provided in the Cboe Port Fee Filings. If the Commission is to fulfill its obligation to ensure that exchange filings are consistent with the Exchange Act, it needs to know significantly more information than the exchanges have provided in these Cboe Port Fee Filings.

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<sup>42</sup> Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Oct. 29, 2021, *available at* <https://www.sec.gov/comments/sr-cboeedga-2021-017/srcboeedga2021017-9360012-261666.pdf>.

## Conclusion

We urge the Commission to apply the law and its rules, and disapprove the facially deficient Cboe Port Fee Filings. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Tyler Gellasch  
President and CEO

Cc: Hon. Gary Gensler, Chair