

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90999; File No. SR-CboeBYX-2021-003)

January 27, 2021

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule to Eliminate Certain Routing Fee Codes

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 13, 2021, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to amend the fee schedule applicable to Members and non-Members of the Exchange pursuant to BYX Rules 15.1(a) and (c). Changes to the fee schedule pursuant to this proposal are effective upon filing. The text of the proposed rule change is provided in Exhibit 5.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange proposes to amend its fee schedule by eliminating certain routing fee codes.³

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Exchange Act, to which market participants may direct their order flow. Based on publicly available information,⁴ no single registered equities exchange has more than 16% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange

³ The Exchange initially filed the proposed fee changes January 4, 2021 (SR-CboeBYX-2021-001). On January 13, 2021, the Exchange withdrew that filing and submitted this proposal.

⁴ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (December 29, 2020), available at https://markets.cboe.com/us/equities/market_statistics/.

believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products, in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable.

The Exchange assesses fees in connection with orders routed away to various exchanges. As a result of minimal use in the last months, the Exchange proposes to eliminate the following routing fee codes currently under the Fee Codes and Associated Fees section of the Fee Schedule:

- Fee code 8, which is appended to Members' orders routed to NYSE American that adds liquidity and assesses a charge of \$0.00020 per contract; and
- Fee code MX, which is appended to Members' orders routed to NYSE American using the SLIM⁵ routing strategy and assesses a charge of \$0.00020 per contract.

The Exchange has observed a minimal amount of volume in recent months in orders yielding fee codes 8 or MX. In particular, over the last six months the Exchange observed that orders yielding fee code MX accounted for approximately only 0.12% of all routed order volume, and no orders yielding fee code 8 have been submitted since 2014. The Exchange believes that, because so few Users elect to route their orders with specifications to which fee codes 8 or MX, the current demand does not warrant the infrastructure and ongoing Systems maintenance required to support these separate fee codes. Therefore, the Exchange now proposes

⁵ The SLIM routing strategy is a routing strategy in which an order checks the System for available shares if so instructed by the entering User and then is sent to destinations on the applicable System routing table. See Rule 11.13(b)(3)(G); see also Cboe Routing Strategies, FIX/BOE Routing Tags and Instructions, available at: https://cdn.cboe.com/resources/features/Cboe_USE_RoutingStrategies.pdf.

to delete fee codes 8 and MX in the Fee Schedule.

In light of the proposed fee code deletions, the Exchange also proposes to update the description to which fee code X is applicable. Currently, the description for orders yielding fee code X applies to Members' orders routed to a displayed market to remove liquidity using Parallel D, Parallel 2D, ROUT, ROUX or Post to Away routing strategy. Fee code X assesses a charge of \$0.0030 per contract. Essentially, fee code X is designed to apply, and currently applies, to all other routed orders that are not otherwise specified under other fee codes in the Fee Schedule. However, as currently written, the description of orders that yield fee code X would not encompass those orders that currently yield fee codes 8 and MX. Therefore, the proposed rule change updates the description of orders that yield fee code X to "Routed." The Exchange notes that the corresponding fee will remain unchanged and is the standard rate routing fee assessed pursuant to the Standard Rates section of the Fee Schedule. As a result of the proposed description, Members will continue to be able to choose to route their orders with the same specifications to which fee codes 8 and MX currently apply —such orders will simply be assessed the fee currently in place for orders yielding fee code X (i.e., routed orders not otherwise specified under other fee codes in the Fee Schedule). The Exchange notes that the proposed description for fee code X does not alter any of the routed orders to which fee code X currently applies. The Exchange also notes that the proposed description for fee code X is consistent with the description associated with corresponding fee code X on the Exchange's affiliated equities exchanges, Cboe EDGX Exchange, Inc. ("EDGX") and Cboe EDGA Exchange Inc. ("EDGA").

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of

Section 6 of the Act,⁶ in general, and furthers the objectives of Section 6(b)(4),⁷ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities. The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5)⁸ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposed rule changes are reasonable, equitable and not unfairly discriminatory. The Exchange first notes that routing through the Exchange is optional. The Exchange believes the proposed rule change to remove fee codes 8 and MX is reasonable as the Exchange has observed a minimal amount of volume in orders yielding these fee codes and, therefore, the continuation of these fee codes does not warrant the infrastructure and ongoing Systems maintenance required to support separate fee codes for specific routed orders. As such, the Exchange also believes that is reasonable and equitable to assess routed orders which meet the specifications to which fee codes 8 and MX are currently applicable the slightly higher standard routing fee currently in place for all other routed orders that are not otherwise specified

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f.(b)(5).

under other fee codes in the Fee Schedule — via fee code X, as amended. The Exchange believes it is reasonable to update the description for orders that yield fee code X in a manner that reflects the intent of fee code X, which is to apply to routed orders not otherwise specified under other fees codes in the Fee Schedule, and will thus apply to routed orders that currently yield fee codes 8 and MX. The Exchange believes that the proposed updated description is reasonable because it does not alter any of the routed orders to which fee code X currently applies and will allow Members to continue to be able to choose to route their orders with the same specifications to which fee codes 8 and MX currently apply. The Exchange again notes that the proposed description for fee code X is consistent with the description associated with corresponding fee code X on the Exchange's affiliated equities exchanges.

The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because Members will continue to have the option to elect to route their orders in the same manner (i.e., routed to NYSE American that add liquidity and routed to NYSE American using the SLIM routing strategy), which will be automatically and uniformly be assessed the applicable standard rates in place for generally all other routed orders under fee code X. Further, if members do not favor the Exchange's pricing for routed orders, they can send their routable orders directly to away markets instead of using routing functionality provided by the Exchange. Routing through the Exchange is optional, and the Exchange operates in a competitive environment where market participants can readily direct order flow to competing venues or providers of routing services if they deem fee levels to be excessive. The Exchange believes that the updated description for orders that yield fee code X is equitable and not unfairly discriminatory because it does not impact the routed orders that currently yield fee code X; the same orders will continue to yield fee code X and will continue to be automatically and

uniformly assessed the corresponding fee.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe the proposed rule change will impose any burden on intramarket competition because all Members orders that would yield current fee codes 8 or MX, will automatically and uniformly be assessed the fees already in place for all other routed orders generally under fee code X. Fee code X, as amended, will continue to apply to the same routed orders as it currently does, which will continue to be automatically and uniformly assessed the corresponding fee. Ultimately, all routed orders will generally be assessed the same fee.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange again notes that orders that meet the specifications to which fee codes 8 or MX would currently apply, will yield the same fee codes and be assessed the same corresponding rates that are already in place in the Fee Schedule for routed orders generally, as previously filed with the Commission. Also, as previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 16% of the market share.⁹ Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange and

⁹ See supra note 4.

off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁰ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”¹¹ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

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

¹⁰ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹¹ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)¹² of the Act and subparagraph (f)(2) of Rule 19b-4¹³ thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such 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 shall institute proceedings under Section 19(b)(2)(B)¹⁴ of the Act 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 e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBYX-2021-003 on the subject line.

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(2).

¹⁴ 15 U.S.C. 78s(b)(2)(B).

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-2021-003. This file number should be included on the subject line if e-mail 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 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-CboeBYX-2021-003, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

J. Matthew DeLesDernier
Assistant Secretary

¹⁵ 17 CFR 200.30-3(a)(12).