

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84002; File No. SR-CboeBZX-2018-065)

August 30, 2018

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use on Cboe BZX Exchange, Inc.

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 August 16, 2018, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) 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 Exchange has designated the proposed rule change as one establishing or changing a member due, fee, or other charge imposed by the Exchange under Section 19(b)(3)(A)(ii) of the Act³ and Rule 19b-4(f)(2) thereunder,⁴ which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange filed a proposal to amend the fee schedule to institute a new fee for the distribution of data derived from BZX Top on third-party websites or other electronic platforms.

The text of the proposed rule change is available at the Exchange’s website at www.markets.cboe.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ 17 CFR 240.19b-4(f)(2).

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

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The purpose of the proposed rule change is to introduce a new pricing model to keep pace with an evolving practice. Other exchanges have pricing programs in place that allow Distributors make “Derived Data” available on a website or other electronic platform that is branded by a third party, or co-branded by a Distributor and a third party.⁵ The proposed rule change would implement a new pricing structure for use of Derived Data – i.e., the BZX Derived Data White Label Service Program (the “Program”) – that would compete with similar programs currently offered on other equities markets.

“Derived Data” is pricing data or other data that (i) is created in whole or in part from Exchange Data, (ii) is not an index or financial product, and (iii) cannot be readily reverse-engineered to recreate Exchange Data or used to create other data that is a reasonable facsimile or substitute for Exchange Data. The type of Derived Data subject to the proposed fee is taken

⁵ The Nasdaq Stock Market LLC (“Nasdaq”), for example, operates a program whereby it charges Distributors that employ a hosted display solution to distribute Derived Data taken from its Nasdaq Basic product. See Securities Exchange Act Release No. 79228 (November 3, 2016), 81 FR 78890 (November 9, 2016) (SR-NASDAQ-2016-144).

from BZX Top, which is a proprietary data product that provides top of book quotations and execution information for all equity securities traded on the Exchange.⁶

The Derived Data subject to the proposed fee is made available to subscribers within a White Label Service which is a type of hosted display solution in which a Distributor hosts or maintains a website or platform on behalf of a third-party entity. The service allows Distributors to make Derived Data available on a platform that is branded with a third-party brand, or co-branded with a third party and a Distributor. The Distributor maintains control of the application's data, entitlements and display.

The White Label Service may be used for a number of different purposes, to be determined by the Distributor. Possible uses include the display of information or data, or the creation of derivative instruments, such as swaps,⁷ swaptions,⁸ or contracts for difference.⁹ The specific use of the data will be determined by the Distributor, as the proposed fee will not depend on the purpose for placing the Derived Data on a White Label Service.

As proposed, a Distributor that provides a White Label Service for Derived Data taken from BZX Top is liable for the following fees instead of the fees normally applicable for the distribution of BZX Top. First, instead of the regular fee for external distribution, Distributors would be charged a tiered External Subscriber Fee based on the number of White Label Service Platforms (i.e., "External Subscribers") that receive Derived Data from the Distributor through a

⁶ See Rule 11.22(d).

⁷ A swap is a derivative contract in which two parties agree to exchange financial instruments.

⁸ A swaption, or swap option, is an option to enter into a swap at a specified time.

⁹ A contract for difference is an agreement to exchange the difference between the current value of an asset and its future value. If the price increases, the seller pays the buyer the amount of the increase. If the price decreases, the buyer pays the seller the amount of the decrease.

White Label Service. Specifically, Distributors would be charged a fee of: (1) \$300 per month for each External Subscriber if the Distributor makes Derived Data available to 1 – 5 External Subscribers; (2) \$250 per month for each External Subscriber if the Distributor makes Derived Data available to 6 – 10 External Subscribers; and (3) \$200 per month for each External Subscriber if the Distributor makes Derived Data available to 11 or more External Subscribers. The External Subscriber Fee is non-progressive and, as mentioned above, is based on the number of External Subscribers that receive Derived Data from the Distributor. For example, a Distributor providing Derived Data based on BZX Top to six External Subscribers would be charged a monthly fee of \$1,500 (i.e., 6 External Subscribers x \$250 each). Second, the Exchange would charge a monthly Professional User fee of \$4 per month for each Professional User, which is equivalent to the current Professional User fee for external distribution of BZX Top. There would be no monthly Non-Professional User fee for accessing Derived Data through a White Label Service.

The Program is entirely optional, in that it applies only to Distributors that opt to use Derived Data from BZX Top to create a White Label Service, as described herein. It does not impact or raise the cost of any other Exchange product, nor does it affect the cost of BZX Top, except in instances where Derived Data is made available on a White Label Service. A Distributor that provides a White Label Service for BZX Top data that is not Derived Data or distributes Derived Data through a platform other than a White Label Service would be liable for the fees normally applicable for the distribution of BZX Top.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹⁰ in general, and furthers the objectives of Section 6(b)(4),¹¹ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its members and other recipients of Exchange data. The Exchange believes that the proposed rates are equitable and non-discriminatory in that they apply uniformly to all recipients of Exchange data. The Exchange believes the proposed fees are competitive with those charged by other venues and, therefore, reasonable and equitably allocated to recipients.

The Exchange also believes that the proposed rule change is consistent with Section 11(A) of the Act¹² in that it supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets and (ii) the availability to brokers, dealers, and investors of information with respect to quotations for and transactions in securities. Furthermore, the proposed rule change is consistent with Rule 603 of Regulation NMS,¹³ which provides that any national securities exchange that distributes information with respect to quotations for or transactions in an NMS stock do so on terms that are not unreasonably discriminatory. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

¹⁰ 15 U.S.C. 78f.

¹¹ 15 U.S.C. 78f(b)(4).

¹² 15 U.S.C. 78k-1.

¹³ See 17 CFR 242.603.

The Exchange notes that the Commission is not required to undertake a cost-of-service or rate-making approach. The Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for non-core market data would be so complicated that it could not be done practically.¹⁴

The Exchange believes that the introduction of a fee for the use of Derived Data on White Label Services is reasonable because: (i) all proprietary data fees are constrained by the Exchange's need to compete for order flow; and (ii) proprietary data fees are subject to market competition from substitute products. The proposed rule change would provide an alternate fee structure for providing BZX Top market data to Distributors that make Derived Data available to External Subscribers on White Label Services. The Exchange believes that this will encourage additional Distributors to subscribe to BZX Top market data due to the lower cost associated with Derived Data provided under the Program. Nasdaq already has a similar pricing structure in

¹⁴ The Exchange believes that cost-based pricing would be impractical because it would create enormous administrative burdens for all parties, including the Commission, to cost-regulate a large number of participants and standardize and analyze extraordinary amounts of information, accounts, and reports. In addition, it is impossible to regulate market data prices in isolation from prices charged by markets for other services that are joint products. Cost-based rate regulation would also lead to litigation and may distort incentives, including those to minimize costs and to innovate, leading to further waste. Under cost-based pricing, the Commission would be burdened with determining a fair rate of return, and the industry could experience frequent rate increases based on escalating expense levels. Even in industries historically subject to utility regulation, cost-based ratemaking has been discredited. As such, the Exchange believes that cost-based ratemaking would be inappropriate for proprietary market data and inconsistent with Congress's direction that the Commission use its authority to foster the development of the national market system, and that market forces will continue to provide appropriate pricing discipline. See Appendix C to NYSE's comments to the Commission's 2000 Concept Release on the Regulation of Market Information Fees and Revenues, which can be found on the Commission's website at <http://www.sec.gov/rules/concept/s72899/buck1.htm>. See also Securities Exchange Act Release No. 73816 (December 11, 2014), 79 FR 75200 (December 17, 2014) (SR-NYSE-2014-64) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Establish an Access Fee for the NYSE Best Quote and Trades Data Feed, Operative December 1, 2014).

place for providing Derived Data through a hosted display solution.¹⁵ The Exchange believes that Distributors of BZX Top market data would benefit from a similar solution. Furthermore, the proposed fees are lower than those currently in place on Nasdaq, which charges a fee of \$400 per month for each hosted display solution under their program,¹⁶ and may be further lowered for Distributors of BZX Top Derived Data based on the number of External Subscribers.

As proposed, if a Distributor uses a White Label Service to display Derived Data, the Distributor will be charged a fee that is tiered based on the number of External Subscribers that are provided access to that data instead of the higher fee normally charged for external distribution. The Exchange believes that this fee is equitable and not unfairly discriminatory because the Exchange will apply the same fees to all similarly situated Distributors based on the number of External Subscribers provided access to Derived Data through a White Label Service. Furthermore, the proposed fees will only apply to Distributors that elect to participate in the Program by distributing Derived Data through a White Label Service. BZX Top market data is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation to make this data available. Distributors of BZX Top are not required to participate in the proposed Program, which is merely an alternative option being proposed by the Exchange to potentially lower costs for market data that is Derived Data. Accordingly, Distributors can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Firms have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Moreover, the Exchange is not required to

¹⁵ See supra note 5.

¹⁶ Id.

make any proprietary data products available or to offer any specific pricing alternatives to any customers.

In addition to the tiered distribution fee described above, the Exchange will continue to charge a small fee for Professional Users but would eliminate Non-Professional User fees for data provided under the Program. The Exchange believes that it is equitable and not unfairly discriminatory to charge a fee for Professional Users but no fee for Non-Professional Users. Non-Professional Users are already subject to a heavily discounted fee for BZX Top market data relative to Professional Users. Differential fees for Professional and Non-Professional Users are widely used by the Exchange and other exchanges for their proprietary market data as this reduces costs for retail investors and makes market data more broadly available.

In addition, the fees that are the subject of this rule filing are constrained by competition. As explained below in the Exchange's Statement on Burden on Competition, the existence of alternatives to the proposed program further ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect such alternatives. That is, the Exchange competes with other exchanges and their affiliates that provide similar market data products. If another exchange or its affiliate were to charge less for a similar product than the Exchange charges under the proposed fee structure, prospective subscribers likely would not subscribe to, or would cease subscribing to, the Program.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The Exchange's ability to price this data product is constrained by: (i) competition among exchanges, other trading platforms, and Trade Reporting Facilities ("TRF") that compete

with each other in a variety of dimensions; (ii) the existence of inexpensive real-time consolidated data and market-specific data and free delayed data; and (iii) the inherent contestability of the market for proprietary data.

The Exchange and its market data products are subject to significant competitive forces and the proposed fees represent responses to that competition. To start, the Exchange competes intensely for order flow. It competes with the other national securities exchanges that currently trade equities, with electronic communication networks, with quotes posted in FINRA's Alternative Display Facility, with alternative trading systems, and with securities firms that primarily trade as principal with their customer order flow.

The proposed fees apply to data derived from BZX Top, which is subject to competition from the Nasdaq, NYSE, and other exchanges that offer similar products, including exchanges that provide similar pricing options for Derived Data made available on a White Label Service. In sum, the availability of a variety of alternative sources of information imposes significant competitive pressures on Exchange data products and the Exchange's compelling need to attract order flow imposes significant competitive pressure on the Exchange to act equitably, fairly, and reasonably in setting the proposed data product fees. The proposed data product fees are, in part, responses to that pressure. The Exchange believes that the proposed fees would reflect an equitable allocation of its overall costs to users of its facilities.

In addition, when establishing the proposed fees, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. The Exchange believes that it has considered all relevant factors and has not considered irrelevant factors in order to establish fair, reasonable, and not unreasonably discriminatory fees and an equitable allocation of fees among all subscribers. The existence of alternatives to BZX

Top, including existing similar feeds by other exchanges, consolidated data, and proprietary data from other sources, ensures that the Exchange cannot set unreasonable fees, or fees that are unreasonably discriminatory, when subscribers can elect these alternatives or choose not to purchase a specific proprietary data product if its cost to purchase is not justified by the returns any particular vendor or subscriber would achieve through the purchase.

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 Act¹⁷ and paragraph (f) of Rule 19b-4 thereunder.¹⁸ 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.

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-CboeBZX-2018-065 on the subject line.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

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-CboeBZX-2018-065. 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 this filing will also 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-CboeBZX-2018-065 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.¹⁹

Eduardo A. Aleman
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).