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SECURITIES AND EXCHANGE COMMISSION
[Release No. 34-86232; File No. SR-CboeBYX-2019-009]

June 28, 2019

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending the Fee Schedule Assessed on Members to Establish a Monthly Trading Rights Fee

I. Introduction

On May 2, 2019, Cboe BYX Exchange, Inc. (“BYX” or the “Exchange”) 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-2019-009) to amend the BYX fee schedule to establish a monthly Trading Rights Fee to be assessed on Members.³ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ The proposed rule change was published for comment in the Federal Register on May 16, 2019.⁵ The Commission has received no comment letters on the proposal. Under Section 19(b)(3)(C) of the Act,⁶ the Commission is hereby: (i) temporarily suspending the proposed rule change; and (ii) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Commission notes that the Exchange initially filed the proposed rule change on April 29, 2019 (SR-CboeBYX-2019-006). On May 2, 2019, the Exchange withdrew that filing and submitted the present proposal (SR-CboeBYX-2019-009).

⁴ 15 U.S.C. 78s(b)(3)(A).

⁵ See Securities Exchange Act Release No. 85841 (May 10, 2019), 84 FR 22199 (“Notice”).

⁶ 15 U.S.C. 78s(b)(3)(C).

II. Description of the Proposed Rule Change

The Exchange proposes to amend the Membership Fees section of the BYX fee schedule to establish a monthly Trading Rights Fee, which would be assessed on Members that trade more than a specified volume in U.S. equities.⁷ Specifically, the Exchange proposes to charge Members a Trading Rights Fee of \$250 per month for the ability to trade on the Exchange. A Member would not be charged the monthly Trading Rights Fee if it meets one of the following exceptions: (1) the Member has a monthly ADV⁸ of less than 100,000 shares, or (2) at least 90% of the Member's orders submitted to the Exchange per month are retail orders.⁹ The proposed Trading Rights Fee also would not be charged to new Members for the first three months of their membership.¹⁰

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹¹ at any time within 60 days of the date of filing of a proposed rule change pursuant to Section 19(b)(1) of the Act,¹² 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

⁷ See Notice, supra note 5, at 22199. The Commission notes that the Exchange's affiliates, Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., and Cboe EDGX Exchange, Inc., each also filed a proposed rule change to amend their fee schedules to establish a monthly Trading Rights Fee to be assessed on Members: CboeBZX-2019-041, CboeEDGA-2019-011, and CboeEDGX-2019-029, respectively.

⁸ "ADV" means average daily volume calculated as the number of shares added or removed, combined, per day. ADV is calculated on a monthly basis. See Notice, supra note 5, at 22199 n.4.

⁹ See Notice, supra note 5, at 22199.

¹⁰ For any month in which a firm is approved for Membership with the Exchange, the monthly Trading Rights Fee would be pro-rated in accordance with the date on which Membership is approved. Notice, supra note 5, at 22199-22200.

¹¹ 15 U.S.C. 78s(b)(3)(C).

¹² 15 U.S.C. 78s(b)(1).

interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. As discussed below, 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.

The Exchange asserts that the proposed Trading Rights Fee "is reasonable because it will assist in funding the overall regulation and maintenance of the Exchange."¹³ The Exchange also asserts that the proposed Trading Rights Fee is reasonable because the "cost of this membership fee is generally less than the analogous membership fees of other markets."¹⁴ The Exchange states that it believes the proposed Trading Rights Fee is equitable and not unfairly discriminatory because it will apply equally to all Members that do not meet the requirements of the exceptions.¹⁵

In regard to the proposed exceptions pursuant to which Members would not be charged the Trading Rights Fee, the Exchange states that it believes that both exceptions are reasonable. Specifically, the Exchange states that the proposed exception for Members that trade less than a monthly ADV of 100,000 shares is reasonable because it would allow such smaller Members to continue to trade at a lower cost.¹⁶ In addition, the Exchange states the exception is reasonable because such firms consume fewer regulatory resources.¹⁷

The Exchange also states that the second exception for Members that submit 90% or

¹³ See Notice, supra note 5, at 22200.

¹⁴ See id. The Exchange notes, for example, that the Exchange's proposed Trading Rights Fee of \$250 a month is "substantially lower" than the monthly \$1,250 monthly Trading Rights Fee that Nasdaq assesses on its members. Id.

¹⁵ See id.

¹⁶ See id.

¹⁷ See id.

more of their orders per month as retail orders is reasonable because it would ensure that “retail broker members can continue to submit orders for individual investors at a lower cost, thereby continuing to encourage retail investor participation on the Exchange.”¹⁸

Finally the Exchange states that it believes that not charging a Trading Rights Fee for new Members is reasonable because it will incentivize firms to become Members of the Exchange and “bring additional liquidity to the market to the benefit of all market participants.”¹⁹

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.²⁰ 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.”²¹

Among other things, exchange proposed rule changes are subject to Section 6 of the Act, including Sections 6(b)(4), (5), and (8), which requires 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;²² (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

¹⁸ See id.

¹⁹ See id.

²⁰ 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”).

²¹ See id.

²² 15 U.S.C. 78f(b)(4).

discrimination between customers, issuers, brokers, or dealers;²³ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁴

In temporarily suspending the Exchange's fee change, the Commission intends to further consider whether assessing the proposed monthly Trading Rights Fee on certain Members 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.²⁵

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 changes.²⁶

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

The Commission is instituting proceedings pursuant to Sections 19(b)(3)(C)²⁷ and 19(b)(2)(B) of the Act²⁸ to determine whether the proposed rule change should be approved or

²³ 15 U.S.C. 78f(b)(5).

²⁴ 15 U.S.C. 78f(b)(8).

²⁵ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²⁶ 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).

²⁷ 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.

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 whether to disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁹ the Commission is providing notice of the grounds for possible disapproval under consideration:

- 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,”³⁰
- Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be “designed to perfect the operation of a free and open market and a national market system” and “protect investors and the public interest,” and not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers,”³¹ and
- 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].”³²

As noted above, the proposal imposes a new monthly Trading Rights Fee on certain Members. The Commission notes that the Exchange's statements in support of the proposed rule

²⁸ 15 U.S.C. 78s(b)(2)(B).

²⁹ 15 U.S.C. 78s(b)(2)(B).

³⁰ 15 U.S.C. 78f(b)(4).

³¹ 15 U.S.C. 78f(b)(5).

³² 15 U.S.C. 78f(b)(8).

change are general in nature and lack detail and specificity. For example, the Exchange asserts broadly that the proposed fee will fund overall regulation and maintenance of the Exchange, but does not explain why this increase in funding is necessary at this time or what is covered under this broad umbrella of “overall regulation and maintenance.”³³ Further, the rationale provided does not address how the proposed fee is an equitable allocation of fees, other than to note simply that it applies to all Members who do not qualify for an exception. 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.”³⁴ 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,³⁵ and 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.³⁶

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; be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly

³³ See Notice, supra note 5, at 22200.

³⁴ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³⁵ See id.

³⁶ See id.

discriminatory; or not impose an unnecessary or inappropriate burden on competition.³⁷

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 [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from publication in the Federal Register]. Although there do not appear to be any issues relevant to approval or disapproval which 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.³⁸

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 proposed rule change, 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-2019-009 on the subject line.

³⁷ See 15 U.S.C. 78f(b)(4), (5), and (8).

³⁸ 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-2019-009. 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-2019-009 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(3)(C) of the Act,³⁹ that File Number SR-CboeBYX-2019-009 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.⁴⁰

Eduardo A. Aleman
Deputy Secretary

³⁹ 15 U.S.C. 78s(b)(3)(C).

⁴⁰ 17 CFR 200.30-3(a)(57) and (58).

