

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-95844; File No. SR-CboeBYX-2022-021)

September 20, 2022

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 7, 2022, Cboe BYX Exchange, Inc. (“Exchange” or “BYX”) 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 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” or “BYX Equities”) is filing with the Securities and Exchange Commission (“Commission”) a proposed rule change to amend its Fee Schedule. 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.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 aspects 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 to adopt monthly fees assessed to Users³ that elect to subscribe to the Short Volume Report, effective, August 24, 2022.⁴

On August 9, 2022, the Exchange introduced a new data product known as the Short Volume Report.⁵ The Short Volume Report, which will be available on August 24, 2022, is an end-of-day report that provides certain equity trading activity on the Exchange, and includes trade date, total volume, sell short volume, and sell short exempt volume, by symbol.⁶ In addition to the daily subscription, a Member⁷ or non-Member may purchase the Short Volume Report on a historical monthly basis, which provides the end-of-day report for each day during a given calendar month.

³ A “User” of an Exchange Market Data product is a natural person, a proprietorship, corporation, partnership, or entity, or device (computer or other automated service), that is entitled to receive Exchange data. See the BYX Equities Exchange Fee Schedule at https://www.cboe.com/us/equities/membership/fee_schedule/byx/.

⁴ The Exchange initially filed the proposed fee changes on August 24, 2022 (SR-CboeBYX-2022-020). On September 7, 2022, the Exchange withdrew that filing and submitted this filing.

⁵ See Securities Exchange Act No. 95548 (August 18, 2022) 87 FR 52087 (August 24, 2022) (SR-CboeBYX-2022-019).

⁶ See Exchange Rule 11.22(f).

⁷ See Exchange Rule 1.5(n).

The Exchange proposes to adopt fees applicable to Users that subscribe to the Short Volume Report. As proposed, the Exchange would assess a monthly⁸ fee of \$50 per month to an Internal Distributor⁹ and a fee of \$75 per month to an External Distributor¹⁰ of the Short Volume Report. External Distributors, unlike Internal Distributors, are typically compensated for the distribution of short sale data through subscription fees or other mechanisms. Some External Distributors incorporate short sale data into their own proprietary products, which they sell to downstream users. These distributors may not charge separately for data included in the Short Volume Report, but nevertheless gain value from the data by incorporating it into their product. The higher price for External Distributors reflects the additional value these distributors gain from the product.

The Exchange also proposes to adopt fees for the Short Volume Report provided on a historical basis. The Short Volume Report will be available for each calendar month dating back to January 2015, and Users of such data will be assessed a fee of \$25 per month of data. Data provided via the historical Short Volume Report is for only display use redistribution (e.g., the data may be provided on the User's platform). Therefore, Users of the historical data may not charge separately for data included in the Short Volume Report or incorporate such data into

⁸ The monthly fees for the Short Volume Report end-of-day reports are assessed based on a 30-day period. For example, if a User subscribes to the Short Volume Report on September 15, 2022, the monthly fee will cover the period of September 15, 2022 through October 15, 2022. If the User cancels its subscription prior to October 15, 2022, the User will not be charged for (or have access to) Short Volume Reports for the remainder of October.

⁹ An "Internal Distributor" of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity. Supra note 3.

¹⁰ An "External Distributor" of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor's own entity. Supra note 3.

their product. Nonetheless, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to charge a fee for display use redistribution that reflects the value these distributors gain from the historical product.

The Exchange anticipates that a wide variety of market participants will purchase the proposed Short Volume Report, including, but not limited to, active equity trading firms and academic institutions. For example, the Exchange notes that academic institutions may utilize the Short Volume Report data and as a result promote research and studies of the equities industry to the benefit of all market participants. The Exchange further believes the proposed Short Volume Report may provide helpful trading information regarding investor sentiment that may allow market participants to make more informed trading decisions and may be used to create and test trading models and analytical strategies and provide comprehensive insight into trading on the Exchange.

The Exchange notes that the Short Volume Report is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make the reports or services available and that potential subscribers may purchase it only if they voluntarily choose to do so. Further, the Exchange notes that other exchanges offer similar products for a fee.¹¹

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹² Specifically, the Exchange believes the proposed rule change is

¹¹ See the “Nasdaq Short Sale Volume Reports” portion of the Nasdaq Fee Schedule at <http://www.nasdaqtrader.com/TraderB.aspx?id=MDDPricingALLN>.

¹² 15 U.S.C. 78f(b).

consistent with Sections 6(b)(4) and 6(b)(5) of the Act,¹³ in particular, in that it provides for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility, and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In adopting Regulation NMS, the Commission granted self-regulatory organizations (“SROs”) 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. The Exchange believes that the Short Volume Report further broadens the availability of U.S. equity market data to investors consistent with the principles of Regulation NMS. The Short Volume Report also promotes increased transparency through the dissemination of short volume data. The Short Volume Report benefits investors by providing access to the Short Volume Report data, which may promote better informed trading, as well as research and studies of the equities industry.

The Exchange operates in a highly competitive environment. Indeed, there are currently 16 registered equities exchanges that trade equities. Based on publicly available information, no single equities exchange has more than 16% of the equity market share.¹⁴ The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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

¹³ 15 U.S.C. 78f(b)(4) and (5).

¹⁴ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (September 6, 2022), available at https://www.cboe.com/us/equities/market_statistics/.

successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁵ Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange’s data product as more attractive than the competition, that market participant can, and often does, switch between similar products. The proposed fees are a result of the competitive environment of the U.S. equities industry as the Exchange seeks to adopt fees to attract purchasers of the recently introduced Short Volume Report.

The Exchange believes that the proposed fee for the Short Volume Report is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the value and benefits provided to Users that choose to subscribe to the Short Volume Report on the Exchange. As discussed above, the Short Volume Report may be beneficial to Members and non-Members as it may provide helpful trading information regarding investor sentiment that may allow market participants to make more informed trading decisions and may be used to create and test trading models and analytical strategies and provide comprehensive insight into trading on the Exchange. Therefore, the Exchange believes that it is reasonable to assess a modest fee to Users that subscribe to the Short Volume Report.

The Exchange further believes the proposed fee is reasonable because the amount assessed is less than the analogous fees charged by competitor exchanges. For example, the Nasdaq Stock Market LLC (“Nasdaq”) charges \$750 to Internal Distributors and \$1,250 to

¹⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

External Distributors of the Nasdaq Short Sale Volume Reports provided on both a daily and historical monthly basis. Additionally, the New York Stock Exchange LLC (“NYSE”) and its affiliated equity markets (the “NYSE Group”) also charge for the TAQ NYSE Group Short Sales (Monthly File) and TAQ NYSE Group Short Volume (Daily File). Specifically, NYSE Group charges an access fee of \$1,000 per month for an ongoing subscription that includes 12 months of back history, then additional back history charged at \$500 per data content month. NYSE Group also charges a back history fee, of \$1,000 per data content month for the first 12 months of history, then additional back history charged at \$500 per data content month. The Exchange therefore believes that the proposed fees are reasonable and set at a level to compete with other equity exchanges that offer similar reports. Indeed, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange’s data product, which as noted, is entirely optional. Although each of these similar data products provide only proprietary trade data and not trade data from other exchanges, it’s possible investors are still able to gauge overall investor sentiment across different equities based on the included data points on any one exchange. As such, if a market participant views another exchange’s potential report as more attractive, then such market participant can merely choose not to purchase the Exchange’s Short Volume Report and instead purchase another exchange’s similar data product, which offers similar data points, albeit based on that other market’s trading activity.

In addition, the Exchange believes that the proposed fees are equitable and not unfairly discriminatory because they will apply to all Members and non-Members that choose to subscribe to the Short Volume Report equally. As stated, the Short Volume Report is completely optional and not necessary for trading. Rather, the Exchange voluntarily makes the Short

Volume Report available, and Users may choose to subscribe (and pay for) the report based on their own individual business needs. Potential subscribers may subscribe to the Short Volume Report at any time if they believe it to be valuable or may decline to purchase it.

The Exchange also believes it is reasonable, equitable and not unfairly discriminatory to charge an External Distributor of the Short Volume Report a higher fee than an Internal Distributor as an External Distributor will ordinarily charge a fee to its downstream customers for this service, and, even if the vendor is not charging a specific fee for this particular service, the Exchange expects products from the Short Volume Report to be part of a suite of offerings from distributors that generally promote sales. External distribution is also fundamentally different than internal use, in that the former generates revenue from external sales while the latter does not. Therefore, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to charge a higher fee for a product that generates downstream revenue. Further, the proposed fee will apply equally to Internal and External Distributors, respectively, that choose to distribute data from the Short Volume Report. Moreover, as described above, another Exchange similarly charges External Distributors higher fees as compared to Internal Distributors for a similar data product.¹⁶

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 because the Short Volume Report will be available equally to all Members and non-Members that choose to subscribe to the report. As stated, the Short Volume Report is optional and Members and non-Members may choose to subscribe to such report, or not, based on their view of the additional

¹⁶ See Nasdaq Rule 7 Section 152.

benefits and added value provided by utilizing the Short Volume Report. As such, the Exchange believes the proposed rule change imposes no burden on intramarket competition.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, similar products offered by Nasdaq and the NYSE Group are priced higher than the Short Volume Report. 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.” 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’”. Accordingly, the Exchange does not believe its proposal 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.

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-4¹⁸ thereunder. 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. If the Commission takes such action, the Commission will institute proceedings 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-2022-021 on the subject line.

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-2022-021. This file number should be included on the subject line if e-mail is used. To help the Commission process and review

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

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-2022-021, 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

J. Matthew DeLesDernier,
Deputy Secretary.

¹⁹ 17 CFR 200.30-3(a)(12).