

OMB APPROVAL

OMB Number: 3235-0045
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Required fields are shown with yellow backgrounds and asterisks.

Page 1 of * 28

SECURITIES AND EXCHANGE COMMISSION
 WASHINGTON, D.C. 20549
 Form 19b-4

File No.* SR - 2017 - * 003

Amendment No. (req. for Amendments *)

Filing by Cboe BYX Exchange, Inc.

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input type="checkbox"/>	Section 19(b)(3)(A) * <input checked="" type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>
			Rule		
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	<input type="checkbox"/> 19b-4(f)(1)	<input type="checkbox"/> 19b-4(f)(4)	
			<input checked="" type="checkbox"/> 19b-4(f)(2)	<input type="checkbox"/> 19b-4(f)(5)	
			<input type="checkbox"/> 19b-4(f)(3)	<input type="checkbox"/> 19b-4(f)(6)	

Notice of proposed change pursuant to the Payment, Clearing, and Settlement Act of 2010

Security-Based Swap Submission pursuant
 to the Securities Exchange Act of 1934

Section 806(e)(1) *

☐

Section 806(e)(2) *

☐

Section 3C(b)(2) *

☐

Exhibit 2 Sent As Paper Document



Exhibit 3 Sent As Paper Document



Description

Provide a brief description of the action (limit 250 characters, required when Initial is checked *).

The Exchange proposes to amend the Market Data section of its fee schedule to introduce new fees for Non-Display Usage of BYX Depth.

Contact Information

Provide the name, telephone number, and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the action.

First Name * Chris Last Name * Solgam
 Title * Assistant General Counsel
 E-mail * csolgan@cboe.com
 Telephone * (646) 856-8723 Fax

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized.

(Title *)

Date 12/27/2017

By Chris Solgan

(Name *)

Assistant General Counsel

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

csolgan@cboe.com

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFT website.

Form 19b-4 Information *

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change *

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 1A- Notice of Proposed Rule Change, Security-Based Swap Submission, or Advance Notice by Clearing Agencies *

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The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change, security-based swap submission, or advance notice being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document

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Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document

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Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² BYX Exchange, Inc. (the “Exchange” or “BYX”) proposes to amend the Market Data section of its fee schedule to introduce new fees for Non-Display Usage of BYX Depth.

The proposed changes to the fee schedule are attached as Exhibit 5 and are available on the Exchange’s website at www.markets.cboe.com, at the Exchange’s principal office and at the Public Reference Room of the Commission.

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

The Exchange submits the proposed rule change pursuant to authority delegated by the Board of Directors of the Exchange on February 11, 2014. Exchange staff will advise the Exchange’s Board of Directors of any action taken pursuant to delegated authority. No other action is necessary for the filing of the rule change and, therefore, the Exchange’s internal procedures with respect to the proposed change are complete.

The persons on the Exchange staff prepared to respond to questions and comments on the proposed rule change are:

Joanne Moffic-Silver
Executive Vice President, General
Counsel, and Corporate Secretary
(312) 786-7462

Chris Solgan
Assistant General Counsel
(646) 856-8723

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

for, the Proposed Rule Change

(a) Purpose

The Exchange proposes to amend the Market Data section of its fee schedule to introduce new fees for Non-Display Usage³ of BYX Depth. BYX Depth is an uncompressed market data feed that provides depth-of-book quotations and execution information based on equity orders entered into the System.⁴ The Exchange currently charges subscribers to BYX Depth a fee of \$2,000 per month for Non-Display Usage of BYX Depth by its Trading Platforms.⁵ Non-Display Usage is defined as “any method of accessing a Market Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.”⁶ Trading Platforms include registered National Securities Exchanges, Alternative Trading Systems (“ATs”), and Electronic Communications Networks (“ECNs”) as those terms are defined in the Exchange Act and regulations and rules thereunder. Previously, subscribers of BYX Depth that used the feed for Non-Display purposes but did not utilize the feed within a Trading Platform were charged the existing Distributors fees.

Forms of Non-Display Use include, but are not limited to, algorithmic or

³ See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

⁴ See Exchange Rule 13.8(a).

⁵ A Trading Platform is defined as “any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).” See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

⁶ See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

automated trading, order routing, surveillance, order management, risk management, clearance and settlement activities, and account maintenance.⁷ Non-Display Usage does not include any use of BYX Depth that relates solely to transportation, dissemination, and redistribution of BYX Depth, or that results in the output of BYX Depth solely for display. Non-display uses of data for non-trading purposes benefits data recipients by allowing users to automate functions, to achieve greater speed and accuracy, and to reduce costs of labor. While some non-trading uses do not directly generate revenues, they can substantially reduce a data recipient's costs by automating many functions. Those functions can be carried out in a more efficient and accurate manner, with reduced errors and labor costs.

The Exchange now proposes to adopt a separate fee of \$1,000 per month to cover other forms of Non-Display Usage other than through a Trading Platform.⁸ The proposed fee would be assessed in addition to existing Distributor⁹ fees and would supplement the existing Non-Display Usage fee for Trading Platforms. Specifically, subscribers who are subject to the Non-Display Usage by Trading Platform fee but also utilize BYX Depth for other Non-Display purposes would be subject to both fees. However, subscribers who

⁷ See e.g., Nasdaq Rule IM-7023-1(c), U.S. Non-Display Information.

⁸ The Exchange also proposes a non-substantive change to the description of the BYX Depth Enterprise Fee to remove the word "External" before "Distributor" in the first and second sentences. This amendment does not change the application of the Enterprise Fee as the Exchange previously filed a proposed rule change to offer the Enterprise fee to both Internal and External Distributors. See Securities Exchange Act Release No. 79623 (December 20, 2016), 81 FR 95226 (December 27, 2016) (SR-BatsBYX-2016-39).

⁹ A "Distributor" is defined as "any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party." See the Exchange's fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

utilize BYX Depth for other Non-Display purposes and not within a Trading Platform would be subject only to the proposed fee for Non-Display Use.

Certain subscribers that use an Exchange approved Managed Non-Display Service Provider would be exempt from proposed Non-Display Usage Fee. To be approved as Managed Non-Display Service Provider, the Distributor must host subscriber's applications that utilize BYX Depth must within the Managed Non-Display Service Provider's space/cage; fully manage and control access to BYX Depth, and not permit further redistribution of the Exchange Data internally or externally.¹⁰ In order to qualify for the exemption, the subscriber must meet the following requirements:

- any subscriber applications that utilize BYX Depth must be hosted within the Managed Non-Display Service Provider's space/cage;
- the subscriber's access to BYX Depth is fully managed and controlled by the Managed Non-Display Service Provider, and no further redistribution of the Exchange Data internally or externally is permitted; and
- the subscriber is supported solely by one Managed Non-Display Service Provider, is not hosted by multiple Managed Non-Display Service Providers, and does not have their own data center-hosted environment that also receives BYX Depth.

The Exchange intends to implement the proposed fee changes on January 2, 2018.

(b) Statutory Basis

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

¹⁰ See e.g., Securities Exchange Act Release No. 76900 at fn. 8 (January 14, 2016), 81 FR 3506 (January 21, 2016) (SR-NYSE-2016-02). In this filing, the NYSE discontinued fees related to managed non-display for NYSE OpenBook. Id.

objectives of Section 6 of the Act,¹¹ in general, and furthers the objectives of Section 6(b)(4),¹² 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 Act¹³ 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,¹⁴ 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.

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(4).

¹³ 15 U.S.C. 78k-1.

¹⁴ See 17 CFR 242.603.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange's subscribers will be subject to the proposed fees on an equivalent basis. BYX Depth 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. Accordingly, Distributors and Users 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 make any proprietary data products available or to offer any specific pricing alternatives to any customers.

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 BYX Depth 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 to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute BYX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, BYX Depth.

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.¹⁵

The proposed Non-Display fee for usage other than through a Trading Platform for BYX Depth is equitable and reasonable as the Exchange believes the proposed fee represents the value of the data provided by the feed and its use by market participants. The proposed fee changes reflects changing trends in the ways in which the industry uses market data. The proposed fee comport with the proliferation of the use of data for various non-display purposes and by non-display trading applications. It recognizes industry changes that have evolved as a result of numerous technological advances, the advent of trading algorithms and automated trading, different investment patterns, a plethora of new securities products, unprecedented levels of trading, decimalization, internationalization and developments in portfolio analysis and securities research. The

¹⁵ 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).

Exchange believes the proposed fee reflects the value of the data provided.

The Exchange notes that fees for non-display use have become commonplace in the industry. Several exchanges impose them as does the UTP, CTA/CQ, and OPRA Plans. In addition, the fee proposed is less than similar fees currently charged by other exchanges for their depth-of-book data products. For example, NYSE Arca, Inc. (“NYSE Arca”) and the New York Stock Exchange, Inc. (“NYSE”) charge \$5,000 and \$6,000 per month, respectively, for its depth-of-book data used for non-display purposes.¹⁶

The proposed fee is also equitable and reasonable in that it ensures that heavy users of the BYX Depth pay an equitable share of the total fees. Currently, External Distributors pay higher fees than Internal Distributors based upon their assumed higher usage levels. The Exchange believes that non-display users are generally high users of the data, using it to power a trading algorithms and other trading relates systems for millions or even billions of trading messages per day.

4. 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 BYX Depth 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.

¹⁶ See the non-display fees for NYSE OpenBook and NYSE ArcaBook in the NYSE and NYSE Arca fee schedules available at <http://www.nyxdata.com/nyse/nyse/default.aspx?tabid=518&folder=207656>

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.

In addition, BYX Depth competes with a number of alternative products. For instance, BYX Depth does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce depth-of-book information products, and many currently do, including Nasdaq, NYSE, and NYSE Arca.

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 Users. The existence of alternatives to BYX Depth, 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.

The Exchange believes the adoption of the fee for Non-Display Usage for BYX Depth would increase competition amongst the exchanges that offer depth-of-book products. In addition, the proposed Non-Display Usage fee is less than similar fees currently charged by the NYSE and NYSE Arca for their depth-of-book data.¹⁷

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

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

6. Extension of Time Period for Commission Action

Not applicable.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

(a) This proposed rule change is filed pursuant to paragraph (A) of Section 19(b)(3) of the Act.

(b) This proposed rule change establishes dues, fees or other charges among its

¹⁷ See supra note 15.

members and, as such, may take effect upon filing with the Commission pursuant to Section 19(b)(3)(A)(ii) of the Act¹⁸ and paragraph (f)(2) of Rule 19b-4 thereunder.¹⁹

(c) Inapplicable.

(d) Inapplicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Security Based-Swap Submissions Filed Pursuant to Section 3C of the Act

Not applicable.

10. Advance Notices Filed Pursuant to Section 806(e) of the Payment, Clearing and Settlement Supervision Act

Not applicable.

11. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Federal Register.

Exhibit 5 – Text of the Proposed Rule Change.

¹⁸ 15 U.S.C. 78s(b)(3)(A)(ii).

¹⁹ 17 CFR 240.19b-4(f)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-_____; File No. SR-CboeBYX-2017-003)

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for the BYX Depth Market Data Product

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 _____, Cboe BYX Exchange, Inc. (the “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 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 Market Data section of its fee schedule to introduce new fees for Non-Display Usage of BYX Depth.

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

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).

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 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Market Data section of its fee schedule to introduce new fees for Non-Display Usage⁵ of BYX Depth. BYX Depth is an uncompressed market data feed that provides depth-of-book quotations and execution information based on equity orders entered into the System.⁶ The Exchange currently charges subscribers to BYX Depth a fee of \$2,000 per month for Non-Display Usage of BYX Depth by its Trading Platforms.⁷ Non-Display Usage is defined as “any method of accessing a Market Data product that involves access or use by a machine or automated

⁵ See the Exchange's fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

⁶ See Exchange Rule 13.8(a).

⁷ A Trading Platform is defined as “any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).” See the Exchange's fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

device without access or use of a display by a natural person or persons.”⁸ Trading Platforms include registered National Securities Exchanges, Alternative Trading Systems (“ATs”), and Electronic Communications Networks (“ECNs”) as those terms are defined in the Exchange Act and regulations and rules thereunder. Previously, subscribers of BYX Depth that used the feed for Non-Display purposes but did not utilize the feed within a Trading Platform were charged the existing Distributors fees.

Forms of Non-Display Use include, but are not limited to, algorithmic or automated trading, order routing, surveillance, order management, risk management, clearance and settlement activities, and account maintenance.⁹ Non-Display Usage does not include any use of BYX Depth that relates solely to transportation, dissemination, and redistribution of BYX Depth, or that results in the output of BYX Depth solely for display. Non-display uses of data for non-trading purposes benefits data recipients by allowing users to automate functions, to achieve greater speed and accuracy, and to reduce costs of labor. While some non-trading uses do not directly generate revenues, they can substantially reduce a data recipient’s costs by automating many functions. Those functions can be carried out in a more efficient and accurate manner, with reduced errors and labor costs.

The Exchange now proposes to adopt a separate fee of \$1,000 per month to cover other forms of Non-Display Usage other than through a Trading Platform.¹⁰ The

⁸ See the Exchange’s fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

⁹ See e.g., Nasdaq Rule IM-7023-1(c), U.S. Non-Display Information.

¹⁰ The Exchange also proposes a non-substantive change to the description of the BYX Depth Enterprise Fee to remove the word “External” before “Distributor” in

proposed fee would be assessed in addition to existing Distributor¹¹ fees and would supplement the existing Non-Display Usage fee for Trading Platforms. Specifically, subscribers who are subject to the Non-Display Usage by Trading Platform fee but also utilize BYX Depth for other Non-Display purposes would be subject to both fees. However, subscribers who utilize BYX Depth for other Non-Display purposes and not within a Trading Platform would be subject only to the proposed fee for Non-Display Use.

Certain subscribers that use an Exchange approved Managed Non-Display Service Provider would be exempt from proposed Non-Display Usage Fee. To be approved as Managed Non-Display Service Provider, the Distributor must host subscriber's applications that utilize BYX Depth must within the Managed Non-Display Service Provider's space/cage; fully manage and control access to BYX Depth, and not permit further redistribution of the Exchange Data internally or externally.¹² In order to qualify for the exemption, the subscriber must meet the following requirements:

- any subscriber applications that utilize BYX Depth must be hosted within the

the first and second sentences. This amendment does not change the application of the Enterprise Fee as the Exchange previously filed a proposed rule change to offer the Enterprise fee to both Internal and External Distributors. See Securities Exchange Act Release No. 79623 (December 20, 2016), 81 FR 95226 (December 27, 2016) (SR-BatsBYX-2016-39).

¹¹ A "Distributor" is defined as "any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party." See the Exchange's fee schedule available at http://markets.cboe.com/us/equities/membership/fee_schedule/byx/.

¹² See e.g., Securities Exchange Act Release No. 76900 at fn. 8 (January 14, 2016), 81 FR 3506 (January 21, 2016) (SR-NYSE-2016-02). In this filing, the NYSE discontinued fees related to managed non-display for NYSE OpenBook. Id.

Managed Non-Display Service Provider's space/cage;

- the subscriber's access to BYX Depth is fully managed and controlled by the Managed Non-Display Service Provider, and no further redistribution of the Exchange Data internally or externally is permitted; and
- the subscriber is supported solely by one Managed Non-Display Service Provider, is not hosted by multiple Managed Non-Display Service Providers, and does not have their own data center-hosted environment that also receives BYX Depth.

The Exchange intends to implement the proposed fee changes on January 2, 2018.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,¹³ in general, and furthers the objectives of Section 6(b)(4),¹⁴ 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 Act¹⁵ in that it supports (i) fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than

¹³ 15 U.S.C. 78f.

¹⁴ 15 U.S.C. 78f(b)(4).

¹⁵ 15 U.S.C. 78k-1.

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,¹⁶ 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.

In addition, the proposed fees would not permit unfair discrimination because all of the Exchange's subscribers will be subject to the proposed fees on an equivalent basis. BYX Depth 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. Accordingly, Distributors and Users 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 make any proprietary data products available or to offer any specific pricing alternatives to any customers.

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

¹⁶ See 17 CFR 242.603.

Competition, the existence of alternatives to BYX Depth 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 to consolidate and distribute its similar product than the Exchange charges to consolidate and distribute BYX Depth, prospective Users likely would not subscribe to, or would cease subscribing to, BYX Depth.

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.¹⁷

¹⁷ 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

The proposed Non-Display fee for usage other than through a Trading Platform for BYX Depth is equitable and reasonable as the Exchange believes the proposed fee represents the value of the data provided by the feed and its use by market participants. The proposed fee changes reflects changing trends in the ways in which the industry uses market data. The proposed fee comport with the proliferation of the use of data for various non-display purposes and by non-display trading applications. It recognizes industry changes that have evolved as a result of numerous technological advances, the advent of trading algorithms and automated trading, different investment patterns, a plethora of new securities products, unprecedented levels of trading, decimalization, internationalization and developments in portfolio analysis and securities research. The Exchange believes the proposed fee reflects the value of the data provided.

The Exchange notes that fees for non-display use have become commonplace in the industry. Several exchanges impose them as does the UTP, CTA/CQ, and OPRA Plans. In addition, the fee proposed is less than similar fees currently charged by other exchanges for their depth-of-book data products. For example, NYSE Arca, Inc. (“NYSE Arca”) and the New York Stock Exchange, Inc. (“NYSE”) charge \$5,000 and \$6,000 per month, respectively, for its depth-of-book data used for non-display purposes.¹⁸

The proposed fee is also equitable and reasonable in that it ensures that heavy users of the BYX Depth pay an equitable share of the total fees. Currently, External Distributors pay higher fees than Internal Distributors based upon their assumed higher

Best Quote and Trades Data Feed, Operative December 1, 2014).

¹⁸ See the non-display fees for NYSE OpenBook and NYSE ArcaBook in the NYSE and NYSE Arca fee schedules available at <http://www.nyxdata.com/nysedata/default.aspx?tabid=518&folder=207656>

usage levels. The Exchange believes that non-display users are generally high users of the data, using it to power a trading algorithms and other trading relates systems for millions or even billions of trading messages per day.

(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 BYX Depth 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.

In addition, BYX Depth competes with a number of alternative products. For instance, BYX Depth does not provide a complete picture of all trading activity in a security. Rather, the other national securities exchanges, the several TRFs of FINRA, and ECNs that produce proprietary data all produce trades and trade reports. Each is currently permitted to produce depth-of-book information products, and many currently

do, including Nasdaq, NYSE, and NYSE Arca.

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 Users. The existence of alternatives to BYX Depth, 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.

The Exchange believes the adoption of the fee for Non-Display Usage for BYX Depth would increase competition amongst the exchanges that offer depth-of-book products. In addition, the proposed Non-Display Usage fee is less than similar fees

currently charged by the NYSE and NYSE Arca for their depth-of-book data.¹⁹

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

The Exchange has neither solicited nor received written 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 Act²⁰ and paragraph (f) of Rule 19b-4 thereunder.²¹ 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 proposal 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 No. SR-CboeBYX-2017-003 on the subject line.

Paper Comments:

¹⁹ See *supra* note 18.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f).

- 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 No. SR-CboeBYX-2017-003. 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 am and 3:00 pm. Copies of such 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 No. SR-CboeBYX-2017-003 and should be submitted on or before [_____21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to

delegated authority.²²

Robert W. Errett
Deputy Secretary

²² 17 CFR 200.30-3(a)(12).

EXHIBIT 5

Proposed new language is underlined; proposed deletions are in [brackets].

Cboe BYX U.S. Equities Exchange Fee Schedule

Effective [December 7, 2017]January 2, 2018

* * * * *

Market Data Fees:**Definitions**

- A Distributor of an Exchange Market Data product is any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.
- 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.
- 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.
- 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.
- A Non-Professional User of an Exchange Market Data product is a natural person who is not: (i) registered or qualified in any capacity with the Commission, the Commodity Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 202(a)(11) of the Investment Advisers Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt.
- A Professional User of an Exchange Market Data product is any User other than a Non-Professional User.
- Non-Display Usage means any method of accessing a Market Data product that involves access or use by a machine or automated device without access or use of a display by a natural person or persons.
- A Trading Platform is any execution platform operated as or by a registered National Securities Exchange (as defined in Section 3(a)(1) of the Exchange Act), an Alternative Trading System (as defined in Rule 300(a) of Regulation ATS), or an Electronic Communications Network (as defined in Rule 600(b)(23) of Regulation NMS).
- A Managed Non-Display Service Provider is a Distributor that host a subscriber's applications that utilizes a Market Data Product within the Managed Non-Display Service Provider's space/cage; fully manages and controls access to the Market Data Product, and

does not permit further redistribution of the Market Data Product internally or externally.

BYX Depth:

Delivery	Fee
Internal Distributor	(No change).
External Distributor	(No change).
<u>Non-Display Usage not by Trading Platforms*</u>	<u>\$1,000/month</u>
Non-Display Usage by Trading Platforms**	(No change).
Professional User Fee	(No change).
Non-Professional User Fee	(No change).
Enterprise Fee***	\$25,000/month

* Subscribers that use an Exchange approved Managed Non-Display Service Provider would be exempt from proposed Non-Display Usage Fee. In order to qualify for the exemption, the subscriber must meet the following requirements: (i) any subscriber applications that utilize BYX Depth must be hosted within the Managed Non-Display Service Provider's space/cage; (ii) the subscriber's access to BYX Depth is fully managed and controlled by the Managed Non-Display Service Provider, and no further redistribution of the Exchange Data internally or externally is permitted; and (iii) the subscriber is supported solely by one Managed Non-Display Service Provider, is not hosted by multiple Managed Non-Display Service Providers, and does not have their own data center-hosted environment that also receives BYX Depth.

** (No change).

*** As an alternative to User fees, a recipient firm may purchase a monthly Enterprise license to receive the BYX Depth Feed from a[n External] Distributor for distribution to an unlimited number of Professional and Non-Professional Users. A recipient firm must pay a separate Enterprise Fee for each [External]Distributor that controls the display of the BYX Depth Feed if it wishes such User to be covered by the Enterprise Fee. The Enterprise Fee is in addition to the Distributor Fee.

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