

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁶

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Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93997; File No. SR-CboeEDGX-2022-002]

Self-Regulatory Organizations; Cboe EDGX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Fees Applicable to Various Market Data Products

January 18, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 4, 2022, Cboe EDGX Exchange, Inc. (“Exchange” or “EDGX”) 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 EDGX Exchange, Inc. (“EDGX” or the “Exchange”) is filing with the Securities and Exchange Commission (the “Commission”) a proposed rule change to amend the fees applicable to various market data products. 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/options/regulation/rule_filings/edgx/), 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 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 the Market Data section applicable to its equities trading platform (“EDGX Equities”). Particularly, the Exchange proposes to (i) increase the External Distribution fee applicable to EDGX Top, (ii) modify the External Subscriber fees applicable to EDGX Top Derived Data API Service, (iii) adopt a New External Distributor Credit applicable to Cboe One Premium, (iv) extend the New External Distributor Credit applicable to EDGX Summary Depth Feed from one (1) month to three (3) months, and (v) eliminate the waiver of EDGX Top and EDGX Last Sale External Distribution fees for External Distributors of EDGX Depth.

Market Background

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. 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.”³ As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”⁴

Equity trading is currently dispersed across sixteen exchanges, more than 50 alternative trading systems,⁵ and numerous broker-dealer internalizers and wholesalers, all competing fiercely for order flow. Based on publicly-available information, no single U.S. equities exchange has more than 17%

market share.⁶ In turn, the market for top-of-book quotation and transaction data is highly competitive as national securities exchanges compete vigorously with each other to provide efficient, reliable, and low-cost data to a wide range of investors and market participants. In fact, there are twelve competing products offered by other national securities exchanges today,⁷ not counting products offered by the Exchange’s affiliates, and each of the Exchange’s affiliated U.S. equities exchanges also offers similar top-of-book data. Each of those exchanges offer top-of-book quotation and last sale information based on their own quotation and trading activity that is substantially similar to the information provided by the Exchange through the EDGX Top Feed.⁸ Exchange top-of-book data is therefore widely available today from a number of different sources.

Fees for External Distribution of EDGX Top

The Exchange first proposes to increase the external distribution fee applicable to EDGX Top,⁹ which is an uncompressed data feed that offers top-of-book quotations and execution information based on equity orders entered into the System.¹⁰ Currently, the Exchange charges an external distribution fee (*i.e.*, distribution outside the distributor’s own firm) of \$1,500 per month to External Distributors¹¹ of EDGX Top. The

⁶ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (December 10, 2021) available at http://markets.cboe.com/us/equities/market_share/.

⁷ Competing top-of-book products include, Nasdaq Basic, BX Basic, PSX Basic, NYSE BQT, NYSE BBO/Trades, NYSE Arca BQT, NYSE Arca BBO/Trades, NYSE American BBO/Trades, NYSE Chicago BBO/Trades, IEX TOPS, MIAX PEARL Equities Top of Market Feed, and MEMX MEMOIR Top.

⁸ For example, The Nasdaq Stock Market LLC (“Nasdaq”) offers “Nasdaq Basic” which is a real-time market data product that offers best bid and offer and last sale information for all U.S. exchange-listed securities based on liquidity within the Nasdaq market center and trades reported to the FINRA/Nasdaq Trade Reporting Facility (“Nasdaq TRF”). See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(a). The type of information contained on the EDGX Top Feed is substantially similar to that offered through Nasdaq Basic, except that the Exchange disseminates information about quotes and trades on EDGX, whereas Nasdaq Basic provides information about quotes and trades on Nasdaq and the Nasdaq TRF. Other national securities with competing top-of-book products also offer substantially similar types of information through those top-of-book products.

⁹ See Exchange Rule 13.8(c).

¹⁰ See Exchange Rule 1.5(cc).

¹¹ 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.

³⁶ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37495, 37499 (June 29, 2005) (S7-10-04) (Final Rule) (“Regulation NMS Adopting Release”).

⁴ See Securities Exchange Act Release No. 84875, 84 FR 5202, 5253 (February 20, 2019) (File No. S7-05-18) (Transaction Fee Pilot for NMS Stocks Final Rule) (“Transaction Fee Pilot”).

⁵ See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsData>. A list of alternative trading systems registered with the Commission is available at <https://www.sec.gov/foia/docs/atstlist.htm>.

Exchange also charges a professional user fee of \$4.00 per month, a non-professional user fee of \$0.10 per month, an enterprise fee of \$15,000 per month, and a digital media enterprise fee of \$2,500 per month that is applicable to External Distributors. The external distribution fees have been in place, without change, since June 1, 2016.¹² In the time since, the Exchange has made a number of significant enhancements to its platform, including, among other things, trading hours beginning at 4 a.m. Eastern time (which has required additional operational support) and the introduction of Retail Priority Orders.¹³ These enhancements have resulted in improved trading opportunities for investors and, consequently, more valuable market data. As such, the Exchange proposes to increase the monthly charge for external distribution of EDGX Top from \$1,500 to \$2,250 per month (*i.e.*, an increase of \$750 per month),¹⁴ which would continue to be cheaper than similar products offered by the certain of the Exchange's competitors.¹⁵ The Exchange proposes no changes to the professional, non-professional, enterprise and digital media enterprise fees associated with external distribution. Further, various incentive programs that the Exchange has adopted to facilitate the provision of lower-cost market data to retail and other investors would continue to apply.¹⁶ As a result, the Exchange believes that the proposed fee changes would allow it to be appropriately compensated for the value of its market data, particularly from professional financial services firms that use that data for external distribution, while simultaneously ensuring that its data would continue to be available to a wide range of investors and market

participants at a cost that facilitates widespread availability of such data.

EDGX Top Derived Data API Service External Subscriber Fees

The Exchange next proposes to modify fees charged to Distributors that distribute EDGX Top Derived Data through an Application Programming Interface ("API")—*i.e.*, the Derived Data API Service.¹⁷ By way of background, "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 Derived Data API Service program offers discounted fees for Distributors that make Derived Data available through an API, thereby allowing Distributors to benefit from reduced fees when distributing Derived Data to subscribers that establish their own platforms (rather than relying on a hosted display solution).

As discussed above, the Exchange currently charges a fee of \$1,500 per month for external distribution of EDGX Top (which is proposed to be increased to \$2,250). Instead of being assessed the flat regular fee for external distribution, Distributors that distribute Derived Data through an API are charged a tiered External Subscriber Fee based on the number of API Service Platforms (*i.e.*, "External Subscribers") that receive Derived Data from the Distributor through a Derived Data API Service. Currently, Distributors under this program continue to be charged a fee of \$1,500 per month (the fee normally assessed to External Distributors for EDGX Top) for each External Subscriber if the Distributor makes Derived Data available to 1–5 External Subscribers. Distributors that make Derived Data available to additional External Subscribers however benefit from discounted pricing based on the number of subscribers. Specifically, the external distribution fee is lowered to \$1,250 per month for each External Subscriber if the Distributor makes Derived Data available to 6–20 External Subscribers, and further lowered to \$1,000 per month for each External Subscriber if

the Distributor makes Derived Data available to 21 or more External Subscribers. In light of the proposed increase of the EDGX Top external distribution fee to \$2,250, the Exchange proposes to make corresponding changes to the distribution fees for Distributors of Derived Data through a Derived API Service. Particularly, the Exchange proposes to modify the External Subscriber fees as follows:

| Number of external subscribers | Current fee | Proposed fee |
|--------------------------------|-------------|--------------|
| 1–5 | \$1,500 | \$2,250 |
| 6–20 | 1,250 | 1,800 |
| 21 and above | 1,000 | 1,500 |

The Exchange notes that the External Subscriber Fee is non-progressive and based on the number of External Subscribers that receive Derived Data from the Distributor. To illustrate how the discount is applied, the Exchange has codified an example in the Fees Schedule under the notes section of the Derived Data Platform Service section, which it now proposes to update in connection with the proposed changes to the External Subscriber fees. Currently, the example provides that a Distributor providing Derived Data based on EDGX Top to six (6) External Subscribers that are API Service Platforms would be charged a monthly fee of \$7,500 (*i.e.*, 6 External Subscribers × \$1,250 each). The Exchange proposes to update the example to provide that Distributor providing Derived Data based on EDGX Top to six (6) External Subscribers that are API Service Platforms would be charged a monthly fee of \$10,800 (*i.e.*, 6 External Subscribers × \$1,800 each).

Cboe One Premium and EDGX Top Depth New External Distributor Credit

The Exchange next proposes to adopt a New External Distributor Credit applicable to Cboe One Premium and extend the New External Distributor Credit applicable to EDGX Summary Depth Feed from one (1) month to three (3) months. By way of background, Cboe One Premium is a data feed that disseminates, on a real-time basis, the aggregate best bid and offer ("BBO") of all displayed orders for securities traded on EDGX and its affiliated exchanges (*i.e.*, BYX, Cboe EDGA Exchange, Inc. ("EDGA"), and Cboe BZX Exchange, Inc. ("EDGX")) and contains optional functionality which enables recipients to receive aggregated two-sided quotations from EDGX and its affiliated equities exchanges for up to five (5)

¹² See Securities Exchange Act Release No. 77888 (May 24, 2016) 81 FR 34384 (May 31, 2016) (SR-BatsEDGX-2016-18).

¹³ See Exchange Rule 11.9.01.

¹⁴ The Exchange notes that the fee for Cboe One Summary is equivalent to the aggregate EDGX Top, BZX, Top, BYX Top, and EDGA Top fees. The Exchange is not proposing to change the current Cboe One Summary external distribution fee. Instead, the Cboe BYX Exchange, Inc. ("BYX") has simultaneously with this proposal proposed to decrease its fee for BYX Top by \$750 in order to ensure the proposed fee will continue to not cause the combined cost of subscribing to EDGX, EDGA, BYX, and BZX individual Top and Last Sale feeds to be greater than those currently charged to subscribe to the Cboe One Summary fee.

¹⁵ See *infra* notes 38, 39, 41, and 42.

¹⁶ See *e.g.*, EDGX Fees Schedule, Small Retail Broker Distribution Program, which provides for a reduced EDGX Top Distribution Fee for small broker-dealers that operate a retail business and Retail Membership Program, which provides for discounted membership fees, logical and physical port fees, and market data fees and provides for an opportunity for Members to receive an enhanced rebate for retail volume.

¹⁷ An "API Service" is a type of data feed distribution in which a Distributor delivers an API or similar distribution mechanism to a third-party entity for use within one or more platforms. The service allows Distributors to provide Derived Data to a third-party entity for use within one or more downstream platforms that are operated and maintained by the third-party entity. The Distributor maintains control of the entitlements, but does not maintain technical control of the usage or the display.

price levels.¹⁸ Currently, the Exchange charges an external distribution fee of \$12,500 per month to External Distributors¹⁹ of Cboe One Premium. The Exchange now proposes to adopt a New External Distributor Credit which provide that new External Distributors of the Cboe One Premium Feed will not be charged an External Distributor Fee for their first three (3) months in order to allow them to enlist new Users to receive the Cboe One Summary[sic] Feed. The Exchange believes the proposal will incentivize External Distributors to enlist new users to receive Cboe One Premium. To ensure consistency across the Cboe Equity Exchanges, BZX, BYX, and EDGA will be filing companion proposals to reflect this proposal in their respective fee schedules.

The Exchange notes that it offers similar credits for other market data products. For example, the Exchange currently offers a one (1) month New External Distributor Credit applicable to Cboe One Summary,²⁰ which is a data feed that disseminates, on a real-time basis, the aggregate BBO of all displayed orders for securities traded on EDGX and its affiliated equities exchanges and also contains individual last sale information for the EDGX and its affiliated equities exchanges.²¹ It also offers a New External Distributor Credit of one (1) month for subscribers of EDGX Summary Depth, which is a data feed that offers aggregated two-sided quotations for all displayed orders entered into the System for up to five (5) price levels. EDGX Summary Depth also contains the individual last sale information, Market Status, Trading

¹⁸ The Cboe Aggregated Market (“Cboe One”) Feed is a data feed that contains the aggregate best bid and offer of all displayed orders for securities traded on the Exchange and its affiliated exchanges (i.e., BYX, Cboe EDGA Exchange, Inc. (“EDGA”), and Cboe BZX Exchange, Inc. (“EDGX”)[sic]). See Exchange Rule 13.8(b). The Cboe One Feed contains optional functionality which enables recipients to receive aggregated two-sided quotations from the Cboe Equities Exchanges for up to five (5) price levels (“Cboe One Premium Feed”). See Exchange Rule 13.8(b)(i). The Cboe One Premium external distribution fee is equal to the aggregate EDGX Summary Depth, BYX Summary Depth, EDGA Summary Depth, and BZX Summary Depth external distribution fees.

¹⁹ 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.

²⁰ See Exchange Rule 13.8(b).

²¹ The Exchange notes that when it first adopted the New External Distributor Credit for Cboe One Summary, it similarly applied for a new External Distributor’s first three (3) months. See Securities Exchange Act Release No. 74282 (February 17, 2015), 80 FR 9487 (February 23, 2015) (SR–EDGX–2015–09).

Status, and Trade Break messages.²² The External Distribution fees for Cboe One Premium is equivalent to the aggregate EDGX Summary Depth, BZX Summary Depth, BYX Summary Depth, and EDGA Summary Depth External Distribution fees. In order to alleviate any competitive issues that may arise with a vendor seeking to offer a product similar to the Cboe One Premium Feed based on the underlying data feeds, the Exchange proposes to also extend the current New External Distributor Credit for EDGX Summary Depth from one (1) month to three (3) months and the Exchange’s affiliates BYX, BZX and EDGA are also submitting similar proposals to increase the length of their respective Summary Depth New External Distributor Credits from one (1) month to three (3) months. The respective proposals to extend these credits to three months ensures the proposed New External Distributor Credit for Cboe One Premium will continue to not cause the combined cost of subscribing to EDGX, EDGA, BYX, and BZX Summary Depth feeds for new External Distributors to be greater than those currently charged to subscribe to the Cboe One Premium feed.

Waiver of External Distribution Fees for EDGX Top and EDGX Last Sale

The Exchange currently provides External Distributors of EDGX Depth,²³ upon request and at no additional External Distribution Fee, access to the EDGX Top or EDGX Last Sale²⁴ feeds for External Distribution. This waiver was intended to encourage the distribution of the EDGX Top and Last Sale data products. The waiver has been in place, without change, since June 1, 2016.²⁵ The Exchange believes such waiver has been in place for ample time to allow External Distributors to grow their respective subscriber bases and no longer wishes to provide this waiver of the External Distribution fees for EDGX Top and EDGX Last Sale feeds. Accordingly, the Exchange proposes to strike this language from the fees schedule.

²² See Exchange Rule 13.8(f).

²³ EDGX Depth is a data feed that contains all displayed orders for listed securities trading on the Exchange, order executions, order cancellations, order modifications, order identification numbers, and administrative messages. See Exchange Rule 13.8(a).

²⁴ EDGX Last Sale is an uncompressed data feed that offers only execution information based on orders entered into the System. See Exchange Rule 13.8(d).

²⁵ See Securities Exchange Act Release No. 77888 (May 24, 2016) 81 FR 34384 (May 31, 2016) (SR–BatsEDGX–2016–18).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,²⁶ in general, and furthers the objectives of Section 6(b)(4),²⁷ 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. In addition, the Exchange believes that the proposed rule change is consistent with Section 11(A) of the Act as 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.²⁸ Finally, the proposed rule change is also consistent with Rule 603 of Regulation NMS,²⁹ 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.

The Exchange operates in a highly competitive environment. Indeed, there are now sixteen registered U.S. equities exchanges, and with the exception of Long-Term Stock Exchange, Inc. (“LTSE”), which has determined to not offer any proprietary market data feeds, each of these exchanges offer associated market data products to their customers, either with or without a fee. It is in this robust and competitive market in which the Exchange is proposing to increase its fees, while still providing its data at a significantly lower price than competing products offered by other national securities exchanges with similar data quality.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Further, with respect to market data, the decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC* upheld the Commission’s reliance on the existence of competitive market mechanisms to evaluate the reasonableness and fairness of fees for proprietary market data: “In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and

²⁶ 15 U.S.C. 78f.

²⁷ 15 U.S.C. 78f(b)(4).

²⁸ 15 U.S.C. 78k–1.

²⁹ See 17 CFR 242.603.

that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’”³⁰ The court agreed with the Commission’s conclusion that “Congress intended that ‘competitive forces should dictate the services and practices that constitute the U.S. national market system for trading equity securities.’”³¹ As discussed in this filing, significant competitive forces constrain the ability of the Exchange to charge supra-competitive fees.

EDGX Top and EDGX Top Derived Data API Service

i. The EDGX Top Feed Is an Optional Market Data Product, and the Exchange Is Constrained in Its Pricing by Significant Competitive Forces

Subscribing to EDGX Top is entirely optional. The Exchange is not required to make EDGX Top available to any customers, nor is any customer required to purchase EDGX Top.³² A customer’s decision as to whether to purchase EDGX Top is therefore entirely discretionary and is based on that firm’s individual business needs. Generally, firms that choose to subscribe to EDGX Top do so because they believe that it is a cost-effective source for top-of-book data that provides valuable information about the market for national market system (“NMS”) stocks traded on the Exchange, where a consolidated display covering all U.S. equities exchanges is not required. Such firms are able to determine for themselves whether EDGX Top helps them to achieve their business goals, and if so, whether or not it is attractively priced compared to other similar top-of-book products offered by competing exchanges. Indeed, if EDGX Top does not provide sufficient value to firms based on the uses those firms may have for it, such firms may simply choose to conduct their business operations in ways that do not use EDGX Top. In fact, comparing the number of External Distributors that currently subscribe to

EDGX Top, based on data compiled by the Exchange as of November 2021, to the total number of External Distributors that subscribe to core data offered by the CTA and UTP SIPs, as published on plan websites for Q1 2021,³³ less than 7.37% of External Distributors that purchase U.S. equities data choose to subscribe to EDGX Top.³⁴ The EDGX Top Feed therefore represents an insignificant proportion of the market for such market data, and significantly more External Distributors choose not to purchase this product than those that do. Given the insignificant percentage of External Distributors that consume EDGX Top, it is clear that such firms can and do exercise their right to choose to purchase, or not purchase, this particular market data product. And, as discussed later in this filing, any External Distributor of top-of-book data that does not wish to purchase EDGX Top, due to the price of that data or for any other reason, can choose to substitute similar information from other exchanges. Although the Exchange is not required to make any data, including top-of-book data, available through its proprietary market data platform, the Exchange believes that making such data available increases investor choice, and contributes to a fair and competitive market. Specifically, making such data publicly available through proprietary data feeds allows investors to choose alternative, potentially less costly, market data based on their business needs. For example, a broker or fintech firm may choose to purchase EDGX Top, or a similar product from another exchange, in order to perform investment analysis, or to provide general information about the market for U.S. equity securities, respectively. In either case the choice to purchase EDGX Top would be based on the firm’s determination of the value of the data offered by their chosen product compared to the cost of acquiring this data instead of receiving similar data from other sources. EDGX Top serves as a valuable reference for investors that do

not require a consolidated display. Making alternative products available to market participants ultimately ensures competition in the marketplace, and constrains the ability of exchanges to charge supra-competitive fees. Further, in the event that a market data customer views one exchange’s top-of-book data product and/or fees as more or less attractive than a competitor’s offerings they can and often do switch between competing products. As discussed, similar top-of-book information is available from a number of competing U.S. equities exchanges.³⁵ This includes a number of large established exchanges that charge for access to such top-of-book data, as well as certain smaller or new exchange entrants that provide similar data without charge, in many cases as a way of attracting customers to their exchange while they seek to grow market share. In this way, EDGX Top and other top-of-book products offered by a number of U.S. equities exchanges, are all substitutes. The availability of these substitute products constrains the Exchange’s ability to charge supra-competitive prices as market participants can easily obtain similar data from one of the Exchange’s many competitors. In fact, the impact of competition on the market in which EDGX Top is offered to market participants and investors is showcased by Exchange affiliates’ other recent fee changes related to this product, which involved the reduction of fees to facilitate the Exchange affiliates’ ability to compete for customers.

Distributors can discontinue use of EDGX Top at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Other External Distributors are free to similarly cancel their subscriptions in favor of a competitor offering, or cheaper or free data offered by the Exchange’s affiliated U.S. equities exchanges, if they believe that the fees are too high given their particular use case for obtaining the data that the Exchange provides over EDGX Top. The Exchange offers all of its proprietary market data products pursuant to a month-to-month contract that allows subscribers to choose to terminate their subscription at any time. As a result, there are no contractual or other legal impediments for firms that wish to cancel their subscription to the Exchange’s market data products,

³⁵ Although the Exchange does not have access to the customer lists for other competing products, it understands based on conversations with subscribers to EDGX Top that they typically view exchange top-of-book products as substitutes and do not generally look to purchase such data from more than one national securities exchange.

³⁰ *NetCoalition v. SEC*, 615 F.3d 525, 535 (D.C. Cir. 2010) (“*NetCoalition I*”) (quoting H.R. Rep. No. 94–229 at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 323).

³¹ *Id.* at 535.

³² The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. See *The Matter of the Application of Securities Industry and Financial Markets Association for Review of Actions Taken by Self-Regulatory Organizations*, Release Nos. 34–72182; AP–3–15350; AP–3–15351 (May 16, 2014). Similarly, there is no requirement in Regulation NMS or any other rule that proprietary data be utilized for order routing decisions, and some broker-dealers and ATSs have chosen not to do so.

³³ See CTA Quarterly Population Metrics (Q1 2021), available at https://www.ctaplan.com/publicdocs/ctaplan/CTAPLAN_Population_Metrics_3Q2021.pdf; UTP Quarterly Population Metrics (Q1 2021), available at https://www.utpplan.com/DOC/UTP_2021_Q1_Stats_with_Processor_Stats.pdf.

³⁴ This statistic reflects the number of External Distributors that purchase EDGX Top divided by the number of External Distributors that purchase consolidated market data from the SIPs, as reflected in publicly available information. *Id.* The Exchange does not have similar information about the number of External Distributors that purchase top-of-book data from other exchanges as competing exchanges do not typically make this information publicly available due to the commercially sensitive nature of such information.

including EDGX Top. In addition, the Exchange notes that a majority of External Distributors of EDGX Top either receive this data through a market data vendor, as opposed to directly from the Exchange, or is a market data vendor itself. Thus, firms can seamlessly switch to any other competitor product offered by their chosen vendor without incurring additional switching costs, such as the cost of establishing connectivity to another exchange to receive its market data.³⁶

In setting the proposed fees for EDGX Top, the Exchange considered the competitiveness of the market for proprietary data and all of the implications of that competition. Indeed, the Exchange is not in a position to charge unreasonable fees for its top-of-book data as there are a number of competing products in the market, including products that are currently offered free of charge by certain other exchanges that have determined not to charge for their market data. The existence of alternatives to EDGX Top ensures that the Exchange cannot set unreasonable fees when vendors and subscribers can freely elect these alternatives or choose not to purchase a specific proprietary data product if the attendant fees are not justified by the returns that any particular vendor or data recipient would achieve through the purchase.

Similarly, in an effort to widen distribution to market participants that use equities market data to compute pricing for certain derivatives instruments, national securities exchanges, including for example the Exchange and The Nasdaq Stock Market LLC (“Nasdaq”),³⁷ offer discounted pricing for Derived Data that is created using their top of book products. Derived Data is largely used to create derivative instruments, such as contracts for difference, rather than to trade equity securities, and is often purchased by market data customers outside of the U.S. where such derivative instruments are more commonly offered. As a result, customers that purchase top of book data to create Derived Data do not need a consolidated quotation, and typically only purchase top of book data to create Derived Data from one source. If a competing exchange were to charge less

for a similar product than the Exchange proposes to charge under the EDGX Top Derived Data API Service fee structure, prospective subscribers may choose not to subscribe to, or cease subscribing to, the EDGX Top Derived Data API Service. The existence of alternatives ensures that the Exchange cannot set unreasonable or unfairly discriminatory fees, as subscribers are free to elect such alternatives.

ii. The Proposed Fees Are Reasonable Given the Value of the Data Provided to Customers, and When Compared to Competing Market Data Products

The proposed fees are also reasonable as even with the proposed fee increase they would continue to represent a relatively modest fee for top-of-book data that has proven valuable for investors. EDGX Top is a competitively-priced alternative to top-of-book data disseminated by other national securities exchanges. It is purchased by a wide variety of market participants and vendors, including data platforms, websites, fintech firms, buy-side investors, retail brokers, regional banks, and securities firms inside and outside of the U.S. that desire low cost, high quality, real-time U.S. equity market data. By providing lower cost access to U.S. equity market data, EDGX Top benefits a wide range of investors that participate in the national market system. As discussed, the decision to purchase a particular market data product from a particular exchange is largely based on two factors: (1) The quality of the data, and (2) the price charged for access to that data. The Exchange believes that EDGX Top is competitive on both of these factors.

First, EDGX Top would remain competitively priced compared to similar products offered by other comparable U.S. equities exchanges. Although EDGX Top is not offered free of charge like certain other competitor offerings, particularly those offered by newer U.S. equities exchanges that are seeking to grow market share, it is made available at a price that is less than the prices charged by the Exchange’s main competitors—*i.e.*, those with comparable market shares and data quality. Notably, even with the proposed fee increase, EDGX Top would remain significantly cheaper than similar products offered by New York Stock Exchange LLC (“NYSE”) and Nasdaq in terms of the fees charged for external distribution. For example, NYSE charges a total of \$4,000 per month for access and redistribution of their equivalent products, *i.e.*, \$1,500 per month for applicable top-of-book

quotation information,³⁸ and an additional \$1,500 per month for transaction information,³⁹ both of which are included in EDGX Top for a single fee.⁴⁰ In addition, a \$1,000 per month redistribution fee is applied. NYSE Arca, Inc. (“Arca”), which has a similar pricing model to NYSE, charges a rate of \$2,250 per month for access and redistribution of its equivalent products, separated into a \$750 per month charge for top-of-book quotation information, an additional \$750 per month charge for transaction information, and \$750 per month for redistribution.⁴¹ Therefore, while Arca’s fees are slightly less than the proposal, the proposed fees are in-line with those charged by Arca. Finally, Nasdaq charges its External Distributors a fee of \$2,000 per month for Nasdaq Basic, which includes both top-of-book quotation information and transaction information for the same fee, a \$350 per month Data Consolidation fee, and a \$100 per month Monthly Administrative Fee.⁴² The external distribution charges associated with obtaining comparable U.S. equities market data from NYSE and Nasdaq runs more than the proposed fee to be charged by the Exchange, meaning that the Exchange would continue to be offering its data at a price that is attractive compared to the prices charged by its competitors. The fee for EDGX Top Derived Data API Service would remain competitively priced compared to Nasdaq which also offers pricing discounts for Derived Data.⁴³

Second, the proposed fees are reasonable given the value of the data provided in EDGX and used by data recipients in their profit-generating activities. EDGX Top provides top-of-book quotations and transactions executed on the Exchange, and provides a valuable window into the market for securities traded on a market that accounts for about 5% of U.S. equity market volume today.⁴⁴ As discussed, the Exchange offers EDGX Top in a competitive environment where firms may freely choose which market data

³⁸ See NYSE PDP Market Data Pricing, Section 1.3, NYSE BBO.

³⁹ See NYSE PDP Market Data Pricing, Section 1.4, NYSE Trades.

⁴⁰ *Supra* note 3.

⁴¹ See NYSE PDP Market Data Pricing, Section 3.3, NYSE Arca BBO; NYSE PDP Market Data Pricing, Section 3.4, NYSE Arca Trades.

⁴² See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(c)(1). In addition, Nasdaq also charges distributors a \$100 monthly administrative fee. See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 135.

⁴³ See generally, the Nasdaq Basic fees at <http://www.nasdaqtrader.com/TraderB.aspx?id=MDDPricingALLN>.

⁴⁴ *Supra* note 10.

³⁶ Market data vendors typically establish connectivity to a number of national securities exchanges to be able to offer their market data to customers.

³⁷ See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 147(c)(1). In addition, Nasdaq also charges distributors a \$100 monthly administrative fee. See Nasdaq Equity Rules, Equity 7, Pricing Schedule, Section 135.

products best suit their business needs. Invariably, firms that choose to purchase EDGX Top instead of receiving one of the many free products offered by other exchanges,⁴⁵ have decided that the value of EDGX Top is greater than that offered by those other products. The Exchange consistently ranks among the top U.S. equities exchanges in terms of various market quality measures, e.g., NBBO quote quality and NBBO market share.⁴⁶ In turn, investors may choose to rely on the Exchange's market data products instead of other competitor offerings based on the value they provide in relation to any additional cost associated with obtaining that market data from the Exchange. For example, investors may wish to obtain market data from an exchange that has a higher time at the inside, as data obtained from an exchange that is quoting more often at the NBBO may better reflect the applicable market for securities it trades. Similarly, an exchange with greater overall market share will produce more transaction information that may be valuable to consumers of its data. Improvements in market quality will therefore directly impact the value of the market data that an exchange is able to offer to investors.

iii. The Proposed Fees Are Equitable and Not Unfairly Discriminatory as External Distributors Will Be Subject to Uniform Pricing Based on Their Usage of the Data and Differences Between the Fees Charged for Internal and External Distribution are Appropriate

The Exchange believes the proposed fees for external distribution of EDGX Top will continue to be allocated fairly and equitably among subscribers, and are not unfairly discriminatory, as the proposed fees will apply equally to all data recipients that choose to subscribe to EDGX Top and distribute that data to external subscribers. As proposed, all External Distributors of EDGX Top will continue to be subject to the same external distribution fee, regardless of the type of business that they operate, or the use they plan to make of the data feed. Thus, all External Distributors would have access to EDGX Top on the same equitable and non-discriminatory terms.

The Exchange believes that it is also fair and equitable, and not unfairly discriminatory to continue to charge different fees for internal and external distribution of the EDGX Top. As is common practice, the Exchange charges

lower fees to distributors that use its market data products for internal distribution only than to distributors that redistribute that data externally to their customers. In the case of EDGX Top, External Distributors are subject to a higher distribution fee, and are also subject to professional user fees, non-professional user fees, an enterprise fee, and a digital media enterprise fee. The Exchange continues to believe that it is appropriate to distinguish between internal and External Distributors in setting fees for EDGX Top as External Distributors can redistribute the Exchange's market data to its clients for a fee, whereas Internal Distributors are not allowed to redistribute the data.

Finally, the Exchange believes the proposed changes to the distribution fees for Distributors of EDGX Top Derived Data through a Derived API Service is equitable and not unfairly discriminatory because the Exchange will apply the same fees to any similarly situated Distributors that elect to participate in the program based on the number of External Subscribers provided access to the Derived Data through an API Service. The Exchange believes that it is equitable and not unfairly discriminatory to continue to provide discounted rates to Distributors that provide access to at least six External Subscribers as the discounted rates are designed to incentivize firms to grow the number of External Subscribers that purchase Derived Data from the Exchange.

New External Distributor Fee Credit

The Exchange also believes that adopting a New External Distributor Credit for Cboe One Premium is equitable and reasonable. As discussed above, a similar New External Distributor Fee Credit was initially adopted at the time the Exchange began to offer the Cboe One Summary to subscribers. It was intended to incentivize new Distributors to enlist Users to subscribe to Cboe One Summary in an effort to broaden the product's distribution. Now the Exchange proposes to adopt a similar credit for Cboe One Premium subscribers for their first three (3) months to similarly incentivize new Distributors to enlist Users to subscribe to Cboe One Premium in an effort to broaden the product's distribution. While this incentive is not available to Internal Distributors of Cboe One Premium, the Exchange believes it is appropriate as Internal Distributors have no subscribers outside of their own firm. The Exchange believes extending the New External Distributor Credit for EDGX Summary Depth from one (1)

month to three (3) months is also equitable and reasonable, as it (along with simultaneous corresponding proposals by the Exchange's affiliates) ensures the proposed New External Distributor Credit for Cboe One Premium will continue to not cause the combined cost of subscribing to EDGX, EDGA, BYX, and BZX Summary Depth feeds for new External Distributors to be greater than those currently charged to subscribe to the Cboe One Premium feed.

EDGX Top and EDGX Last Sale External Distribution Fee Waiver for Fees for External Distributors of EDGX Depth

Finally, the Exchange amending the fee waiver of EDGX Top and EDGX Last Sale feeds for External Distributors of EDGX Depth is equitable and reasonable. The Exchange believes eliminating the fee waiver is equitable and reasonable because it has been available, without change, since June 1, 2016⁴⁷ providing External Distributors with ample time to grow their subscriber bases. Moreover, the Exchange is not required to provide any such waiver to External Distributors of EDGX Depth.

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

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price these data products is constrained by competition among exchanges that offer similar data products to their customers. Top-of-book data, depth-of-book data, and derived data is broadly disseminated by competing U.S. equities exchanges. There are therefore a number of alternative products available to market participants and investors, including products offered by certain competing exchanges without charge. In this competitive environment potential subscribers are free to choose which competing product to purchase to satisfy their need for market information. Often, the choice comes down to price, as market data customers look to purchase cheaper data products, and quality, as market participants seek to purchase data that represents significant market liquidity.

Intramarket Competition. The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to

⁴⁵ See e.g., Cboe EDGA Exchange, Inc., Fee Schedule, EDGA Top.

⁴⁶ See https://www.cboe.com/us/equities/market_statistics/market_quality/.

⁴⁷ *Supra* note 16.

other market participants. As discussed, the proposed fees, credit, and eliminated waiver would apply to all External Distributors of EDGX Top, Cboe One Premium, and EDGX Depth, respectively, on an equal and non-discriminatory basis. The continued difference in fees for internal and external distribution of EDGX Top are appropriate given the ability for External Distributors to redistribute data externally to their clients. Similarly, the credit applicable to only External Distributors is appropriate as it incentivizes such External Distributors to enlist subscribers, whereas Internal Distributors have no subscribers outside their firm. The Exchange therefore believes that the proposed fees neither favor nor penalize one or more categories of market participants in a manner that would impose an undue burden on competition.

Intermarket Competition. The Exchange believes that the proposed fees do not impose a burden on competition or on other SROs that is not necessary or appropriate in furtherance of the purposes of the Act. In setting the proposed fees, the Exchange is constrained by the availability of numerous substitute products offered by other national securities exchanges. Because market data customers can find suitable substitute feeds, an exchange that overprices its market data products stands a high risk that users may substitute another product. These competitive pressures ensure that no one exchange's market data fees can impose an undue burden on competition, and the Exchange's proposed fees do not do so here.

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 Act⁴⁸ and paragraph (f) of Rule 19b-4⁴⁹ 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 email to rule-comments@sec.gov. Please include File Number SR-CboeEDGX-2022-002 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-CboeEDGX-2022-002. This file number should be included on the subject line if email 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-CboeEDGX-2022-002 and

should be submitted on or before February 14, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁰

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2022-01228 Filed 1-21-22; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93987; File No. SR-NASDAQ-2022-001]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the NOM Pricing Schedule at Options 7, Section 2

January 18, 2022.

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that, on January 3, 2022, The Nasdaq Stock Market LLC ("Nasdaq" or "Exchange") filed with the Securities and Exchange Commission (the "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

The Exchange proposes to amend the Nasdaq Options Market ("NOM") Pricing Schedule at Options 7, Section 2.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules>, at the principal office of the Exchange, 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 proposed rule change. The text of these statements may be examined at the

⁵⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴⁸ 15 U.S.C. 78s(b)(3)(A).

⁴⁹ 17 CFR 240.19b-4(f).