

May 10, 2024

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees for File No. SR-CboeBYX-2024-012¹; File No. SR-CboeBZX-2024-027²; File No. SR-CboeBZX-2024-030³; File No. SR-CboeEDGA-2024-013⁴; File No. SR-CboeEDGX-2024-020⁵; File No. SR-CboeEDGX-2024-021⁶; File No. SR-C2-2023-005⁷

Dear Ms. Countryman:

The Healthy Markets Association⁸ writes to object – again – to the above-referenced filings by the Cboe family of exchanges (Collectively, “Fifth Set of Cboe Port Fee Filings”), which are substantively identical to filings that were previously withdrawn and

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-100004, April 22, 2024, available at <https://www.sec.gov/files/rules/sro/cboebyx/2024/100004.pdf>.

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-100005, April 22, 2024, available at <https://www.sec.gov/files/rules/sro/cboebzx/2024/100005.pdf>.

³ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-100013, April 23, 2024, available at <https://www.sec.gov/files/rules/sro/cboebzx/2024/34-100013.pdf>.

⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-100002, April 22, 2024, available at <https://www.sec.gov/files/rules/sro/cboeedga/34-100002.pdf>.

⁵ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-100001, April 22, 2024, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2024/34-100001.pdf>.

⁶ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-100011, April 23, 2024, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2024/34-100011.pdf>.

⁷ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-100012, April 23, 2024, available at <https://www.sec.gov/files/rules/sro/c2/2024/34-100012.pdf>.

⁸ The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

suspended by the Commission.⁹ The Fifth Set of Cboe Port Fee Filings is not new despite what is indicated in the regulatorily-mandated classification of the filings, but rather a resuscitation of several prior filings to implement the same fees.

In fact, a prior iteration of this filing was previously suspended by the Commission staff. Nevertheless, the Cboe family of exchanges has simply continued to withdraw and refile so as to continue collecting the referenced fees.

HMA objected several filings ago. Unfortunately, HMA and other market participants, much like the Commission, have neither the time nor capabilities to continue this game of whack-a-mole. Conveniently, because this filing is not materially any different from the prior filings, we believe that our comment letter submitted in connection with the 3rd set of CBOE filings should sufficiently identify why these filings should be suspended and disapproved on the merits (in addition to the clear abuse of the Commission's procedures). Please find our prior objection attached as Exhibit 1.

The Commission has the full power to stop duplicative filings like the Fifth Set of Cboe Port Fee Filings, that were previously substantively suspended by the Commission. We request that the Commission use its authority to stop Cboe and other exchanges from withdrawing and refile duplicative, immediately effective filings as materially misleading.

The Commission must stop the abuse of its procedures that results in exchanges applying fees that were never found to be consistent with the law, much less those that have been affirmatively suspended.

⁹ See, *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98647, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebyx/2023/34-98647.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98646, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98646.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98650, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98650.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98652, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedga/2023/34-98652.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98653, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98651, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98651.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98649, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/c2/2023/34-98649.pdf> (collectively, "Cboe Port Fee Filing Suspensions").

Conclusion

The Commission's determination to ignore the requirements of the law and its own Rules with respect to these filings would not withstand legal challenge. Accordingly, the Commission must suspend the facially deficient Fifth Set of Cboe Port Fee Filings and initiate proceedings to disapprove them. The Commission also must use its authority to prevent these duplicative filings from occurring.

Further, the Commission should consider suspending any subsequent filings that are substantively similar to the instant filings or alternatively consider them as amendments to these filings. The exchanges should not be permitted to circumvent the law or Commission Rules by continuing to extract fees based upon filings that are inconsistent with the law and Commission Rules, much less already suspended.

Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "Chris Nagy".

Chris Nagy
Research Director

Cc: Hon. Gary Gensler, Chair

EXHIBIT 1

IMA HEALTHY
MARKETS
ASSOCIATION
A MEMBER ORGANIZATION

November 10, 2023

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman, Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees for File No. SR-CboeBYX-2023-015¹; File No. SR-CboeBZX-2023-083²; File No. SR-CboeBZX-2023-084³; File No. SR-CboeEDGA-2023-017⁴; File No. SR-CboeEDGX-2023-064⁵; File No. SR-CboeEDGX-2023-065⁶; File No. SR-C2-2023-022⁷

Dear Ms. Countryman:

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98793, Oct. 24, 2023, available at <https://www.sec.gov/files/rules/sro/cboebyx/2023/34-98793.pdf> (“Cboe BYX Exchange Port Fee Filing III”).

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98785, Oct. 23, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98785.pdf> (“Cboe BZX Exchange Port Fee Filing V”).

³ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98794, Oct. 24, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98794.pdf> (“Cboe BZX Exchange Port Fee Filing VI”).

⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98783, Oct. 23, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedga/2023/34-98783.pdf> (“Cboe EDGA Exchange Port Fee Filing III”).

⁵ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98787, Oct. 23, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98787.pdf> (“Cboe EDGX Exchange Port Fee Filing V”).

⁶ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98782, Oct. 23, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98782.pdf> (“Cboe EDGX Exchange Port Fee Filing VI”).

⁷ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98784, Oct. 23, 2023, available at <https://www.sec.gov/files/rules/sro/c2/2023/34-98784.pdf> (“Cboe C2 Exchange Port Fee Filing III”).

The Healthy Markets Association⁸ writes to object – again – to the above-referenced filings by the Cboe family of exchanges (Collectively, “Third Set of Cboe Port Fee Filings”), which are substantively identical to filings that were previously withdrawn and suspended by the Commission.⁹

This Third Set of Cboe Port Fee Filings fails for the same reasons as the prior filings: they do not provide sufficient information to support a finding by the Commission that the exchanges have met their obligations under the Exchange Act and Commission Rules. Accordingly, the Commission must suspend and initiate proceedings to disapprove them.¹⁰

Background on SEC Review of Exchange Rule Proposals

The Commission is obligated to review exchange filings and determine that those filings are consistent with the Exchange Act,¹¹ including that an exchange’s rules:

⁸The Healthy Markets Association is a not-for-profit member organization focused on improving the transparency, efficiency, and fairness of the capital markets. Healthy Markets promotes these goals through education and advocacy to reduce conflicts of interest, improve timely access to market information, modernize the regulation of trading venues and funding markets, and promote robust public markets. Its members include public pension funds, investment advisers, broker-dealers, exchanges, and data firms. To learn about HMA or our members, please see our website at <http://healthymarkets.org>.

⁹ See, *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98647, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebyx/2023/34-98647.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98646, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98646.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98650, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboebzx/2023/34-98650.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98652, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedga/2023/34-98652.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98653, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98651, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98651.pdf>; *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98649, Sep. 29, 2023, available at <https://www.sec.gov/files/rules/sro/c2/2023/34-98649.pdf> (collectively, Cboe Port Fee Filing Suspensions”).

¹⁰ We note that, unfortunately, due to the sheer number of exchange filings, we were only alerted to the first set of Cboe Port Fee Filings – from July 2023 – recently.

¹¹ See *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442 (D.C. Cir. 2017)(“The SEC “shall approve” a self regulatory organization’s proposed rule change only “if it finds that such proposed rule change is

- “provide for the equitable allocation of reasonable dues, fees, and other charges;”¹²
- not be “designed to permit unfair discrimination”;¹³
- “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of” the Act;¹⁴ and
- be designed “to protect investors and the public interest.”¹⁵

Rule 700(b)(3) of the Commission's Rules of Practice clearly establishes that:

The burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization is on the self-regulatory organization that proposed the rule change. As reflected in the General Instructions to Form 19b-4, the Form is designed to elicit information necessary for the public to provide meaningful comment on the proposed rule change and for the Commission to determine whether the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. The self-regulatory organization must provide all information elicited by the Form, including the exhibits, and must present the information in a clear and comprehensible manner. In particular, the self-regulatory organization must explain why the proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the self-regulatory organization. ***A mere assertion that the proposed rule change is consistent with those requirements, or that another self-regulatory organization has a similar rule in place, is not sufficient. Instead, the description of the proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and***

consistent with” provisions of the Exchange Act.”). *Accord*, Remarks of Brett Redfearn, SEC, before the SEC Roundtable and Market Access and Market Data, Oct. 26, 2018, *available at* <https://www.sec.gov/news/public-statement/statement-redfearn-102518> (declaring that in order for the Commission to “meet our obligations under the Exchange Act, we also need to ensure that the fees that are being charged for such important market services are fair and reasonable, not unreasonably discriminatory, and do not impose an undue or inappropriate burden on competition.”).

¹² 15 U.S.C. § 78f(b)(4).

¹³ 15 U.S.C. § 78f(b)(5).

¹⁴ 15 U.S.C. § 78f(b)(8).

¹⁵ 15 U.S.C. § 78f(b)(5).

specific to support an affirmative Commission finding. Any failure of the self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization.¹⁶

In 2017, the Court of Appeals for the District of Columbia Circuit remanded the Commission's approval of another self-regulatory organization's rule change, explaining that the Administrative Procedure Act

requires us to hold unlawful agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or that is "unsupported by substantial evidence." To satisfy the "arbitrary and capricious" standard, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"¹⁷

Put simply, the exchange must provide sufficient details, and the Commission must examine those details and independently determine that the exchange's rule meets the requirements of the Exchange Act. While we understand that this may be difficult, given the often dozens of exchange filings per month, the Commission is nevertheless still obligated to "find" or "determine" that the rule meets the requirements of the Exchange Act.¹⁸

¹⁶ 17 C.F.R. §201.700(b)(3)(emphasis added); accord, *Order Disapproving Proposed Rule Change To Introduce a Liquidity Provider Protection Delay Mechanism on EDGA*, SEC, Exch. Act Rel. No. 34-88261, Feb. 21, 2020, available at <https://www.sec.gov/files/rules/sro/cboeedga/2020/34-88261.pdf>.

¹⁷ *Susquehanna*, at 445 (internal citations omitted).

¹⁸ *Susquehanna*, at 446. However, at least when it comes to exchange port fee filings, the Commission has rarely made any such determinations, and yet has simultaneously not frequently disapproved filings for failing to meet the requirements of the Exchange Act and Commission Rules. In fact, almost exactly five years ago, then-Commissioner Robert J. Jackson, Jr. declared that his staff had reviewed all 95 exchange connectivity filings from 2016 through September 2018, and found that not a single one had been rejected by the Commission or staff. Hon. Robert J. Jackson, Jr., *Unfair Exchange: The State of America's Stock Markets*, Sept. 19, 2018, at n.33, available at https://www.sec.gov/news/speech/jackson-unfair-exchange-state-americas-stock-markets#_ftn33.

Background on The Cboe Port Fee Filings

The exchanges now comprising the Cboe family of exchanges have different origins, but yet the history of their associated connectivity fees is a breathtaking display of a monopolist exploiting its market power without any meaningful resistance from regulators.

For example, in 2010, the predecessor exchange to CboeEDGX filed to impose a new connectivity fee for a 10Gb connection of \$10,000 per year. In a terse, four-page order, the Commission staff (via delegated authority) approved that new fee.¹⁹ The entire discussion and analysis of the implications of the fee spanned a whopping two paragraphs. Despite the paucity of analysis by the Commission staff, however, a significant new revenue stream was born for the exchange.

Just months after receiving permission to adopt the new physical port fees, the exchange filed to adopt monthly physical port fees of \$1000 per month for a 10Gb connection.²⁰ Unlike the initial port fees, however, these new monthly rates became effective without Commission action.²¹

In April 2013, the exchange filed to double the cost for a 10Gb connection to \$2000 per month.²² Again, these new monthly rates were immediately effective.

In June 2015, the exchange filed to double the cost for a 10Gb connection again, to \$4000 per month.²³ Again, these new monthly rates were immediately effective.

In January 2017, the exchange filed to raise the cost for a 10Gb connection again, to \$6000 per month.²⁴ Again, these new monthly rates were immediately effective.

¹⁹ *Order Approving Proposed Rule Change to Amend the EDGX Fee Schedule to Impose Fees for Physical Ports Used to Connect to EDGX Exchange*, SEC, Exch. Act Rel. No. 34-62680, Aug. 10, 2010, available at <https://www.sec.gov/files/litigation/litreleases/2010/34-62680.pdf>.

²⁰ *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule*, SEC, SR-EDGX2010-21, Dec. 10, 2010, available at <https://www.sec.gov/files/litigation/litreleases/2010/34-63520.pdf>.

²¹ The exchange discontinued the annual payment option in early 2013, leaving monthly payments as the only way to pay for connectivity. *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule*, SEC, Sec. Exch. Act Rel. No. 34-68831, Feb. 5, 2013, available at <https://www.sec.gov/files/litigation/litreleases/2013/34-68831.pdf>.

²² *Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to the EDGX Exchange, Inc. Fee Schedule*, SEC, Exch. Act Rel. No. 34-69482, Apr. 30, 2013, available at <https://www.sec.gov/files/litigation/litreleases/2013/34-69482.pdf>.

²³ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Fees for Use of EDGX Exchange, Inc.*, SEC, Exch. Act Rel. No. 34-75393, July 8, 2015, available at <https://www.sec.gov/files/litigation/litreleases/2015/34-75393.pdf>.

²⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Fees for Connectivity and its Communication and Routing Service Known as Bats Connect*, SEC, Exch. Act Rel. No. 34-79774, Jan. 11, 2017, available at <https://www.sec.gov/files/rules/sro/batsedgx/2017/34-79774.pdf>.

In November 2017, the exchange filed to raise the cost for a 10Gb connection again, to \$7000 per month.²⁵ Again, these new monthly rates were immediately effective.

In June 2018, the exchange filed to raise the cost for a 10Gb connection again, to \$7500 per month.²⁶ Again, these new monthly rates were immediately effective.

In July 2023, the exchange filed to raise the cost for a 10Gb connection again, to \$8500 per month.²⁷ Again, these new monthly rates were immediately effective.

In August 2023, the exchange submitted a comment to the Commission indicating that it intended to withdraw the filing.²⁸ While the actual withdrawal had not been posted on the Commission's website as of October 31st, we understand that the withdrawal was submitted on September 1st, and another "new" filing was submitted in its place that same day.²⁹

On September 1, 2023, the exchange filed again to raise the cost for a 10Gb connection to \$8500 per month.³⁰ The exchange – consistent with past practices permitted by the Commission, but inconsistently with the law or common sense – treated the September filing as entirely "new," even though it was nearly identical to the filing it replaced. While the monthly rates were immediately effective, the entire Second Set of Cboe Port Fee Filings were suspended by the Commission staff before the end of the month.³¹

However, the exchange was not content to simply lose the additional revenues pending the Commission's consideration of its compliance with the law and Commission Rules.

Instead, on October 13, 2023, the exchange filed for the third time to raise the cost for a 10Gb connection to \$8500 per month. The duplicative filings to raise the monthly rates across the Cboe family of exchanges to \$8500 were immediately effective, and have not

²⁵ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify its Fees for Physical Ports*, SEC, Exch. Act Rel. No. 34-82060, Nov. 13, 2017, available at <https://www.sec.gov/files/rules/sro/batsedgx/2017/34-82060.pdf>.

²⁶ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Related to Physical Port Fees for EDGX*, SEC, Exch. Act Rel. No. 34-83450, June 15, 2018, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2018/34-83450.pdf>.

²⁷ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-97929, July 17, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-97929.pdf>.

²⁸ Letter from Corinne Klott, Cboe, to Vanessa Countryman, SEC, Aug. 23, 2023, available at <https://www.sec.gov/comments/sr-cboeedgx-2023-045/srcboeedgx2023045-249899-570542.pdf>.

²⁹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98390, at 2 n.3, Sept. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98390.pdf>.

³⁰ Id.

³¹ See, e.g., *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98651, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98651.pdf>.

been suspended – despite the fact that the filings are substantively identical to the filings previously withdrawn and the filings that had been suspended by the Commission staff just weeks earlier. Interestingly, the Third Set of Cboe Port Fee Filings only buried in a footnote that they were replacing substantively identical filings that had already been suspended, which themselves had replaced filings that had been withdrawn. These were hardly entirely “new” filings.³²

Days after the new Cboe EDGX Exchange Port Fee Filing was released for public comment by the Commission without being immediately suspended, the exchange filed to withdraw the previously suspended filing that it had already replaced.³³ That withdrawal, unlike the one from September, has been posted on the Commission’s website.³⁴

The net result is that market participants are likely expected to pay the previously withdrawn and suspended monthly fees of \$8500 for October 2023 and beyond.

Commission Suspension Order and Initiation of Proceedings

The Cboe Port Fee Filing Suspension Orders generally repeated the conclusory, generalized, and vague assertions by the various exchanges, and then ask the public:

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(4) of the Act, which requires that the rules of a national securities exchange “provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities”;³⁵
- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules

³² Cboe EDGX Port Fee Filing V, at 2, n.3.

³³ *Notice of Withdrawal of Proposed Rule Change to Amend Its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98807, Oct. 27, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98807.pdf>; and *Notice of Withdrawal of Proposed Rule Change to Amend Its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98811, Oct. 27, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98811.pdf>.

³⁴ *Id.*

³⁵ See, e.g., *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98653, at 8-9, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf> (regarding Cboe EDGX Exchange).

of a national securities exchange not be “designed to permit unfair discrimination between customers, issuers, brokers, or dealers”;³⁶ and

- Whether the Exchange has demonstrated how the proposed fees are consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange “not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act].”³⁷

The answer to each of these questions is no.

To be clear, the cost of transmitting data quickly is materially lower than it was in 2010. The previously withdrawn and suspended Cboe Port Fee Filings did not address this reality, however. Rather, each exchange simply asserted:

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018.¹⁰ Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified. Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.³⁸

The revised, Third Set of Cboe Port Fee Filings appears to have added one sentence to its claims:

The Exchange believes the proposed fee change is reasonable as it reflects a moderate increase in physical

³⁶ See, e.g., *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98653, at 9, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf> (regarding Cboe EDGX Exchange).

³⁷ See, e.g., *Suspension of and Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend its Fee Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98653, at 9, Sept. 29, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98653.pdf> (regarding Cboe EDGX Exchange).

³⁸ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Related to Physical Port Fees*, SEC, Exch. Act Rel. No. 34-98390, at 4, Sept. 14, 2023, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2023/34-98390.pdf>; see also,

connectivity fees for 10 Gb physical ports. Further, the current 10 Gb physical port fee has remained unchanged since June 2018. Since its last increase 5 years ago however, there has been notable inflation. Particularly, the dollar has had an average inflation rate of 3.9% per year between 2018 and today, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified. **Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation.** Accordingly, the Exchange believes the proposed fee is reasonable as it represents only an approximate 13% increase from the rates adopted five years ago, notwithstanding the cumulative rate of 21.1%.³⁹

The attempt to tie exchange connectivity pricing to macroeconomic inflation levels was laughable the first two times it was made. And the sentence added by the exchange since its Second Set of Cboe Port Fee Filings does not provide any new information.

The Commission is rightly not tasked with worrying about the cost of milk, lumber, childcare, or Park City vacation rentals – as they don't have relevance to the exchanges' costs or implications for its compliance with the Exchange Act's requirements or Commission Rules. The Exchange Act and Commission Rules dictate that the Commission be provided with sufficient information to know about the exchanges' actual costs.⁴⁰

But, assuming, *arguendo* that the exchange's pricing for 10Gb connectivity was tied to inflation, then why did the exchange repeatedly hike fees by orders of magnitude greater than inflation for the years from 2010 through today (as the exchange has successively raised rates from \$0 to \$10,000 to \$24,000 to \$48,000 to \$72,000 to \$84,000 to \$90,000 to \$102,000 per year)?

If macroeconomic inflation in the United States was a relevant benchmark for exchange data pricing, then the expected current cost based on the 2010 starting point would be somewhere between \$0 and \$14,000 per year, not \$102,000.⁴¹

³⁹ Cboe EDGX Exchange Port Fee Filing III, at 4 (emphasis added).

⁴⁰ Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Oct. 25, 2023, available at <https://www.sec.gov/comments/sr-cboeedgx-2023-058/srcboeedgx2023058-280699-685482.pdf> (citing *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>).

⁴¹ The cumulative Consumer Price Index increase from 2010 through October 2023 is about 40%. See US Inflation Calculator, CoinNews Media Group, available at <https://www.usinflationcalculator.com/inflation/consumer-price-index-and-annual-percent-changes-from-1913-to-2008/> (reflecting CPI change from 217 in January 2010 to 308 in October 2023).

The Third Set of Cboe Port Fee Filings – like the first and second – didn’t provide sufficient actual information about the exchange’s costs with which the Commission could determine that the SRO has met its burden under the law and Commission Rules.

Further, the Commission needs to determine that the fees the exchanges seek to impose do “not impose any burden on competition not necessary or appropriate.”⁴² The Third Set of Cboe Port Fee Filings – like the previously withdrawn and suspended Cboe Port Fee Filings – offer no analysis whatsoever related to how the new fees impact the competition between firms who may seek 10Gb connectivity to the exchanges, other than to admit that some firms may be elect to drop their subscriptions and connect through their own competitors (at what expense and business impact, is generally unaddressed). And while the exchange makes the conclusory assertion that there is no such burden, the Commission cannot simply rely upon that unsupported assertion. Unfortunately, the exchanges have not provided the Commission with sufficient information to draw its own conclusions.

Further, the Commission needs to determine that the fees the exchanges seek to impose are designed to not “permit unfair discrimination between customers, issuers, brokers, or dealers.”⁴³ Yet, once again, the Third Set of Cboe Port Fee Filings fail to provide the information needed to make that determination. The Third Set of Cboe Port Fee Filings – like the previously withdrawn and suspended filings – do not break down the exchanges’ customers by types or sizes or analyze how they are impacted by the fees. For example, it may be that the increase causes smaller volume traders to elect to unsubscribe to the faster connections, leaving them with greater latencies and poorer execution qualities, or additional challenges and complexities because they start interpositioning other third-parties. In fact, the exchanges explicitly acknowledge these possibilities, and yet they do not offer any analysis regarding the actual impact of exercising those alternatives has on those exchange customers.

We note that the Commission has recently expressed concerns with discriminatory pricing by exchanges related to “volume-based exchange transaction pricing,” which raise “competitive concerns among exchange members as well as among exchanges.”⁴⁴ In its release to prohibit some discriminatory pricing practices, the Commission explicitly acknowledged that “lower volume members may find it difficult to compete for customer order flow because they are unable to pass through to customers the favorable exchange transaction pricing or lower commissions that are available to higher-volume members.”⁴⁵

⁴² 15 U.S.C. § 78f(b)(8).

⁴³ 15 U.S.C. § 78f(b)(5).

⁴⁴ *Volume-Based Exchange Transaction Pricing for NMS Stocks*, SEC, Exch. Act Rel. No. 34-98766, at 9, Oct. 18, 2023, available at <https://www.sec.gov/files/rules/proposed/2023/34-98766.pdf>.

⁴⁵ *Id.*, at 10.

Notably, this exact same economic dynamic exists with the high (and rising) fixed costs of connectivity to exchanges. On a per-share traded basis, the fixed costs for 10Gb connectivity for high volume traders are significantly lower than for low volume traders.

Yet, while the Third Set of Cboe Port Fee Filings – like the previously withdrawn and suspended Cboe Port Fee Filings – explicitly acknowledge that some brokers may elect to route through others for connectivity, they provide no material information nor analysis to address the impact of the imposition of the higher fees on different types and sizes of customers. For example, what is the impact on smaller brokers who remain connected to the exchanges? What is the impact on those who elect to route through other brokers, who are likely their direct competitors? What is the relative cost per share traded on each of the exchanges for different types and sizes of customers? None of that information is provided.

Of course, we aren't surprised to see Cboe attempt to raise fees across its family of exchanges without providing any meaningful data. After all, it (and its predecessors) met no Commission resistance when it (and its predecessors) repeatedly ratcheted up 10Gb connectivity costs from \$0 to \$90,000 per year from 2010 to 2018 – without ever providing sufficient relevant data or meaningful economic analysis with which the Commission could make the determinations that the filings complied with the Exchange Act's requirements.⁴⁶

If anything, that experience demonstrated that demand for exchange connectivity is extremely inelastic (as the vast majority of subscribers continued to subscribe with each hike) and the Commission would be extremely unlikely to intervene to ensure compliance with the Exchange Act or its own rules.

Staff Guidance Regarding SRO Fee Filings

In 2019, amidst efforts by the Commission to finally impose structure around the then-rapidly rising market data and connectivity costs for investors, the Commission staff adopted significant guidance for exchanges seeking to meet their burdens under the Exchange Act.⁴⁷

Some exchanges have generally sought to comply with that guidance, as the details they have generally provided and (and length) of their respective filings clearly demonstrate. For example, a recent MIAX filing to impose physical port fees is 87 pages

⁴⁶ Obviously, those hikes were not in any way consistent with inflation during that period.

⁴⁷ *Staff Guidance on SRO Rule Filings Relating to Fees*, SEC, May 21, 2019, available at <https://www.sec.gov/tm/staff-guidance-sro-rule-filings-fees>.

long,⁴⁸ *roughly eight times longer than these ostensibly similarly intended Cboe Port Fee Filings*. Similarly, IEX's filing in 2019 to raise its port fees to a whopping \$100 (or 1/75th the fees then being charged by Cboe EDGX Exchange for its 10Gb connection) was far lengthier and more detailed than the instant filings.⁴⁹ While we take no position regarding the adequacy of the MIAX or IEX filings, it is indisputable that they contain significantly more relevant information for the Commission and the public to assess than either the previously suspended filings or this still-deficient Third Set of Cboe Port Fee Filings.

We are also disappointed that, rather than hold all exchanges to the standards of the Exchange Act, the Commission has incentivized and effectively encouraged exchanges to play "Whack-a-Mole" with connectivity filings. For example, over a year ago, we wrote to the Commission to object to the Seventh MEMX Connectivity filing, which had been filed after several prior versions of the same fee filing had been submitted, fees had been charged to customers, and then the filings were withdrawn (only to be immediately replaced).⁵⁰

Obviously, Cboe has learned this lesson from its competitors, as it has now withdrawn its filings twice, and most recently, only after it was confident that its subsequently filed duplicative Third Set of Cboe Port Fee Filings would be permitted by the staff to go into effect.

Put simply, the Commission has allowed the exchange to extort an additional \$1000 per 10Gb connection per month, starting in October 2023 from market participants in reliance on filings that are facially inconsistent with the law and Commission Rules.

As we have written before, this is a breathtaking abuse of the Commission's process, and is inconsistent with both the law and the Commission's mission to protect investors and promote fair, orderly, and efficient markets.

This abuse is simply a Commission-sanctioned private tax on market participants that is being permitted without the Commission ever fulfilling its obligations to make findings

⁴⁸ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Its Fee Schedule to Modify Certain Connectivity and Port Fees*, SEC, Exch. Act Rel. No. 34-98752, Oct. 13, 2023, available at <https://www.sec.gov/files/rules/sro/miax/2023/34-98752.pdf>.

⁴⁹ *Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Modify the IEX Fee Schedule, Pursuant to IEX Rules 15.110(a) and (c), to Charge a Fee of \$100 Per Month for Each Logical Order Entry Port in Excess of Five Per User*, SEC, Exch. Act Rel. No. 34-86626, Aug. 9, 2019, available at <https://www.sec.gov/files/rules/sro/iex/2019/34-86626.pdf>.

⁵⁰ Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Sept. 20, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/09/9-20-22-MEMX-Connectivity-Filing-SR-MEMX-2022-26-1.pdf>.

that the exchange's filings comply with the law or its own rules. Worse, the process is simply overwhelming to market participants.⁵¹

Lastly, with respect to the substance of exchange filings, two years ago, we pleaded with the Commission that

to assess the filings related to market data and connectivity filings, the Commission and staff would ostensibly need to know who is using the product or service, the costs to them, and how the product or service impacts not just those firms, but those firms in relation to those that do not purchase it. It would need to have sufficient information to determine if the costs for the products or services are "reasonable" and "equitably allocated." It would need to determine if the products or services (or costs associated with them) are discriminatory or impose undue burdens on competition.

For example, a market maker could not readily compete in today's marketplace without access to the fastest connections or depth-of-book information. So while an exchange may charge for those products, the Commission should consider the competitive advantages those products convey. It hasn't. And yet, the products likely create a classic cost-based barrier to entry for not only smaller market participants but also the formation of new investment strategies that could diversify price and liquidity competition making the markets more fair, orderly, and efficient.

Further, market data and connectivity-related revenues may be used to subsidize other programs of the exchanges, including paying rebates to some traders that may even exceed transaction fees collected for those trades. ... Unfortunately, the Commission and staff have also not explored these connections when evaluating market data or connectivity-related SRO fee filings.⁵²

⁵¹ We simply cannot keep up with the gamesmanship of multiple exchanges submitting filings for new fees, withdrawing, and refiling them as if they are "new," despite no material changes in the filings. One or two sentences of conclusory statements devoid of meaningful information does not render a filing "new", nor does it render the filing substantially more likely to meet the requirements of the Exchange Act or Commission Rules.

⁵² Letter from Tyler Gellasch, HMA, to Vanessa Countryman, SEC, Oct. 29, 2021, *available at* <https://www.sec.gov/comments/sr-cboeedga-2021-017/srcboeedga2021017-9360012-261666.pdf>.

None of this information or analysis is provided in the Third Set of Cboe Port Fee Filings. If the Commission is to fulfill its obligation to ensure that exchange filings are consistent with the Exchange Act, it needs to know significantly more information than the exchanges have provided.

Conclusion

The Commission's determination to ignore the requirements of the law and its own Rules with respect to these filings would not withstand legal challenge. Accordingly, the Commission must suspend the facially deficient Third Set of Cboe Port Fee Filings and initiate proceedings to disapprove them.

Further, the Commission should consider suspending any subsequent filings that are substantively similar to the instant filings or alternatively consider them as amendments to these filings. The exchanges should not be permitted to circumvent the law or Commission Rules by continuing to extract fees based upon filings that are inconsistent with the law and Commission Rules.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Gellasch", written in a cursive style.

Tyler Gellasch
President and CEO

Cc: Hon. Gary Gensler, Chair