

September 6, 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: SR-CboeBZX-2024-072;¹
SR-CboeBZX-2024-073;²
SR-CboeBYX-2024-027;³
SR-CboeEDGA-2024-030;⁴
SR-CboeEDGX-2024-048;⁵
SR-CboeEDGX-2024-049;⁶

Dear Ms. Countryman:

The Healthy Markets Association⁷ writes to urge the Commission to suspend the above-referenced Cboe Sales Value Fee Filings and initiate proceedings to disapprove them.

The Cboe Sales Value Fee Filings fail to generally provide representations that they have reasonable policies and procedures in place to ensure that the monies collected by the exchanges pursuant to the fees are truly pass through of the Section 31 fees it is

¹ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Replace the Regulatory Transaction Fee with a Sales Value Fee*, SEC, Exch. Act Rel. No. 100716, Aug. 13, 2024, available at <https://www.sec.gov/files/rules/sro/cboebzx/2024/34-100716.pdf> (totaling 10 pages).

² *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Concerning the Sales Value Fee*, SEC, Exch. Act Rel. No. 100695, Aug. 12, 2024, available at <https://www.sec.gov/files/rules/sro/cboebzx/2024/34-100695.pdf> (totaling 8 pages).

³ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Replace the Regulatory Transaction Fee with a Sales Value Fee*, SEC, Exch. Act Rel. No. 100715, Aug. 13, 2024, available at <https://www.sec.gov/files/rules/sro/cboebyx/2024/34-100715.pdf> (totaling 10 pages).

⁴ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Replace the Regulatory Transaction Fee with a Sales Value Fee*, SEC, Exch. Act Rel. No. 100717, Aug. 13, 2024, available at <https://www.sec.gov/files/rules/sro/cboeedga/2024/34-100717.pdf> (totaling 10 pages).

⁵ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Replace the Regulatory Transaction Fee with a Sales Value Fee*, SEC, Exch. Act Rel. No. 100714, Aug. 13, 2024, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2024/34-100714.pdf> (totaling 10 pages).

⁶ *Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule Concerning the Sales Value Fee*, SEC, Exch. Act Rel. No. 100694, Aug. 12, 2024, available at <https://www.sec.gov/files/rules/sro/cboeedgx/2024/34-100694.pdf> (totaling 8 pages).

⁷The 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>.

charged by the Commission, and that any overages are *de minimis* in nature and not intended to generate additional revenue to the exchanges.

All exchange fees should be fully, consistently, and accurately disclosed on the exchanges' fee schedules, and we appreciate the effort to finally ensure that these fees are reflected on the exchanges' fee schedules.

However, because the exchanges' short filings fail to limit the scope of potential "excess" collections and otherwise provide the Commission with sufficient information with which it could conclude the fees are consistent with the law, the filings must be suspended, and proceedings instituted to disapprove them.

Background

Section 31 of the Securities Exchange Act of 1934 directs the Commission to "collect transaction fees and assessments that are designed to recover the costs to the Government of the annual appropriation to the Commission by Congress."⁸ These fees are commonly referred to as "Section 31" fees. In 2004, the Commission adopted a final rule outlining how the fees are calculated, assessed, and collected.⁹ The exchanges generally pay their assessed Section 31 fees in two annual billing periods.¹⁰

Cboe BZX, Cboe BYX, Cboe EDGA, and Cboe EDGX have long collected fees from customers to reimburse themselves for fees assessed and collected pursuant to Section 31.¹¹

Unfortunately, the exchanges have not consistently disclosed – much less detailed – these fees on the exchanges' fee schedules.¹² For example, according to the exchange, EDGA "currently assesses a fee on its Members for covered sales on the Exchange to recoup these amounts [incurred per Section 31]," but that fee "is not currently described on the Exchange's Fee Schedule."¹³

The Cboe Sales Value Fee Filings seek to:

1. consistently disclose the fees used to "recoup" Section 31 fees in each of the respective exchange fee schedules, and
2. obtain passive permission from the Commission to use "excess monies collected ... to fund its general operating expenses."¹⁴

⁸ 15 U.S.C. 78ee.

⁹ *Collection Practices Under Section 31 of the Exchange Act*, SEC, 69 Fed. Reg. 41060 (July 7, 2004), available at <https://www.govinfo.gov/content/pkg/FR-2004-07-07/pdf/04-15081.pdf>.

¹⁰ See, e.g., SR-CboeEDGA-2024-030, at 4 (citing 17 CFR 240.31(a)(2)).

¹¹ 15 U.S.C. 78ee.

¹² SR-CboeEDGA-2024-030, at 2-3 (EDGA "currently assesses a fee on its Members for covered sales on the Exchange to recoup these amounts [incurred per Section 31]," but that fee "is not currently described on the Exchange's Fee Schedule.").

¹³ SR-CboeEDGA-2024-030, at 2-3; see also, SR-CboeEDGX-2024-049.

¹⁴ See, e.g., SR-CboeEDGA-2024-030, at 3.

The Cboe-affiliated exchanges' agent (DTCC) has historically collected the now-disclosed-on-the-fee-schedules Sales Value Fees directly from clearing brokers.¹⁵ Oddly, the form used by Cboe to assess the Sales Value Fee Filings does not refer to a "Sales Value Fee," but instead refers solely to "Section 31 Fees (mandatory direct debit) and Transaction Fees (optional direct debit)."¹⁶ The exchanges may also invoice customers for the now-disclosed-on-the-fee-schedules Sales Value Fees on a monthly basis.

Legal Requirements for Exchange Fee Filings

The 1975 Act Amendments to the Securities Exchange Act of 1934 expressly directed the Commission to create an integrated national market system. While the 1975 Act Amendments generally pre-date the proliferation of for-profit securities exchanges, they nevertheless impose meaningful restraints on those exchanges' rules and operations, including that exchanges' rules must:

- "provide for the equitable allocation of reasonable dues, fees, and other charges;"¹⁷
- not be "designed to permit unfair discrimination";¹⁸
- "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of" the Act;¹⁹ and
- be designed "to protect investors and the public interest."²⁰

Further, the Commission Staff has adopted guidance for exchanges seeking to meet their burdens under the Exchange Act that outlines how the Commission staff considers:

- the "reasonableness" of a proposed fee;
- whether a fee is an "equitable allocation of reasonable dues, fees, and other charges;"
- whether a fee is "unfairly discriminatory;" and
- whether a fee is a "burden on competition that is not necessary or appropriate."²¹

¹⁵ See, Direct Debit Opt-In Form, Cboe, available at https://cdn.cboe.com/resources/membership/Direct_Debit_Opt-In_Form.pdf (dated Dec. 23, 2020).

¹⁶ *Id.* Nevertheless, we note that the Commission's website makes it clear that these types of "labels are not accurate" because "Section 31 fee obligations apply to SROs only, and thus the provisions do not involve SEC assessments of, or charges to, other parties." *Section 31 Fees — Basic Information for Firms*, SEC, available at <https://www.sec.gov/divisions/marketreg/sec31feesbasicinfo.htm> (last visited Sept. 4, 2024).

¹⁷ 15 U.S.C. § 78f(b)(4).

¹⁸ 15 U.S.C. § 78f(b)(5).

¹⁹ 15 U.S.C. § 78f(b)(8).

²⁰ 15 U.S.C. § 78f(b)(5).

²¹ *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> ("Guidance").

Discussion

Exchanges' Retention of "Excess" Fees May be Inconsistent with the Exchange Act and Commission Rules

HMA does not have a position on whether exchanges should be permitted to expressly pass through to their customers the costs of Section 31 fees. However, if there are such fees, they must comply with the requirements of the Exchange Act and Commission Rules, including that they be "reasonable" and not materially misleading.²²

The express purpose of the Sales Value Fees is to "recoup" the costs incurred by the exchanges pursuant to the imposition of Section 31 fees. The Cboe Sales Fee Filings do not suggest that customers receive any specific products or services as a result of the imposition of the fees. While not referenced in the Cboe Sales Value Fee Filings, the fees may be essentially compulsory, as the fees may be the result of order routing and executions resulting from best execution obligations and the Order Protection Rule.

The Sales Value Fees of the exchanges raise some unique questions under the Exchange Act.

Some of the questions are factual. What are the relevant details of the exchanges' past experience in assessing these fees? What have the exchanges been doing with "excess" collections to date? How frequent are excess collections? How distortive are they? How much are they? What have the exchanges done with the money in the past? How would or could things change in the future?

Other questions relate to policy considerations. Is it "reasonable" to allow exchanges to use any "excess" collections "to fund [the exchanges'] general operating expenses?" If so, what amount of "excess" charges is "reasonable," given that the Sales Value Fees' purportedly sole purpose is to reimburse the exchange for its Section 31 fee obligations? How far in advance of paying an expense should a service provider be able to collect "reimbursement?"

Given the clear conflicts of interest created by the proposed use of "excess" collections, is an "excess" of one percent in just one month reasonable? What about every month? What about ten percent, or twenty? Is it "reasonable" for an exchange to collect a fee in February to reimburse it for an expense that may not be paid for a half year or more? Is that what is happening now?

Neither the exchanges nor the Commission appear to identify, much less address these basic questions. Thus, there is no way the Commission could reasonably conclude that

²² For example, we understand that Commission staff has historically been aware that exchanges may collect fees from customers to offset the exchanges' Section 31 fees assessed by the Commission, but has not permitted exchanges to call such fees "Section 31 fees" because fees assessed on exchange customers are not assessed by the government. We note that the Commission's website explains that it is "inaccurate" for firms to claim that these fees are "Section 31 fees" when their assessment and collection is not mandated by Section 31, but rather the choice of the firms seeking reimbursement. See, *Section 31 Fees — Basic Information for Firms*, SEC, available at <https://www.sec.gov/divisions/marketreg/sec31feesbasicinfo.htm> (last visited Sept. 4, 2024).

the filings comply with the law and Commission Rules, and any decision to permit the filings to remain effective would be arbitrary and capricious.

The Exchanges' Complete and Accurate Disclosures of Fees on Their Fee Schedules is Overdue

As the Cboe Stable Value Fee Filings make clear, the exchanges have long assessed these fees on their customers, but have not disclosed them in their fee schedules. That should be remedied.

Worse, the filings offer essentially no details regarding the relevant historical fee data. For example, how much have they collected per year for each of the past four years? How has any excess been used? Given the significant gap in time between when the Sales Value Fees may be collected and when the exchanges may be compelled to pay Section 31 Fees, how do the exchanges handle the funds? What control do the exchanges exercise over those revenues today? Do the exchanges generate profits from those assets? If so, how and how much?

We are not aware of the Commission ever materially assessing these potential benefits to exchanges. Further, the Cboe Sales Value Fee Filings not only fail to include any discussion of these issues, but also fail to provide the Commission with sufficient data and analysis with which the Commission could determine that the fees are consistent with the Exchange Act and Commission Rules.

Section 31 Fee Reimbursements Could Comply With the Exchange Act and Commission Rules

Exchanges should be permitted to collect fees to reimburse them for Section 31 fees. However, those fees should be transparent and very narrowly tailored to recoup Section 31 fees charged to exchanges by the Commission . Further, the Commission should insist on exchanges adopting reasonable policies, procedures, and practices designed to ensure:

1. complete and accurate disclosures about the calculations, assessments, and burdens and benefits of the fees, including any shifting of costs to or from different customers of the exchanges, and
2. the fees collected match the amount of Section 31 fees due as closely as reasonably possible and do not (intentionally or unintentionally) systemically overcollect or improperly shift costs to their customers or between different customers.

Put simply, the “excess” collections beyond the imposed Section 31 fee amounts ultimately paid should be “de minimis,” not persistent, not discriminatory, and not distortive.

Conclusion

While we are sympathetic to the purported justification for the assessment of fees to reimburse the exchanges for Section 31 fees, the Cboe Sales Value Fee Filings do not provide the Commission with sufficient information with which it could conclude that the filings comply with the law and Commission Rules. Accordingly, the Commission should suspend and initiate proceedings to disapprove them.

Lastly, the Commission must be particularly cognizant of the potential precedent that could be set by permitting exchanges to simply appropriate for general use “excess” collections of fees. At a minimum, without safeguards, this potential precedent could materially undermine any claims for “reasonableness” of fees.

Thank you for your consideration.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tyler Gellasch".

Tyler Gellasch
President and CEO