

should be submitted on or before April 21, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>49</sup>

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94520; File No. SR-CboeBYX-2022-009]

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

March 25, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 23, 2022, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) 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

Cboe BYX Exchange, Inc. (“BYX” 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/equities/regulation/rule\\_filings/byx/](http://markets.cboe.com/us/equities/regulation/rule_filings/byx/)), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for

the proposed rule change and discussed any comments it received on the 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 (“BYX Equities”). Particularly, the Exchange proposes to (i) decrease the External Distribution fee applicable to BYX Top, (ii) adopt a New External Distributor Credit applicable to Cboe One Premium, and (iii) extend the New External Distributor Credit applicable to BYX Summary Depth Feed from one (1) month to three (3) months.<sup>3</sup>

###### 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.”<sup>4</sup> As the Commission itself recognized, the market for trading services in NMS stocks has become “more fragmented and competitive.”<sup>5</sup>

Equity trading is currently dispersed across sixteen exchanges, more than 50 alternative trading systems,<sup>6</sup> 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.<sup>7</sup> 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,<sup>8</sup> 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 BYX Top Feed.<sup>9</sup> Exchange top-of-book data is therefore widely available today from a number of different sources.

###### Fees for External Distribution of BYX Top

The Exchange first proposes to decrease the external distribution fee applicable to BYX Top,<sup>10</sup> which is an uncompressed data feed that offers top-of-book quotations and execution information based on equity orders entered into the System.<sup>11</sup> Currently, the Exchange charges an external distribution fee (*i.e.*, distribution outside the distributor's own firm) of

registered with the Commission is available at <https://www.sec.gov/foia/docs/atlist.htm>.

<sup>7</sup> 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/](http://markets.cboe.com/us/equities/market_share/).

<sup>8</sup> 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.

<sup>9</sup> 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 BYX Top Feed is substantially similar to that offered through Nasdaq Basic, except that the Exchange disseminates information about quotes and trades on BYX, 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.

<sup>10</sup> See Exchange Rule 11.22(d).

<sup>11</sup> See Exchange Rule 1.5(aa).

<sup>49</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The Exchange initially filed the proposed fee changes on January 3, 2022 (SR-CboeBYX-2022-001). On March 2, 2022 the Exchange withdrew that filing and refiled (SR-Cboe-BYX-2022-003). On March 15, 2022, the Exchange withdrew that filing and refiled (SR-Cboe-BYX-2022-005). On March 16, 2022 the Exchange withdrew that and refiled (SR-BYX-2022-007). On March 23, 2022, the Exchange withdrew that filing and submitted this filing.

<sup>4</sup> 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”).

<sup>5</sup> 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”).

<sup>6</sup> See FINRA ATS Transparency Data, available at <https://otctransparency.finra.org/otctransparency/AtsData>. A list of alternative trading systems

\$1,000 per month to External Distributors<sup>12</sup> of BYX Top. The Exchange also charges a professional user fee of \$1.00 per month, a non-professional user fee of \$0.025 per month, an enterprise fee of \$10,000 per month,<sup>13</sup> and a digital media enterprise fee<sup>14</sup> 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.<sup>15</sup> Nonetheless, the Exchange proposes to decrease the monthly charge for external distribution of BYX Top from \$1,000 to \$250 per month (*i.e.*, a decrease of \$750 per month),<sup>16</sup> which would continue to be cheaper than similar products offered by certain of the Exchange's competitors.<sup>17</sup> The Exchange proposes no changes to the professional, non-professional, enterprise and digital media enterprise fees associated with external distribution.

#### Cboe One Premium and BYX 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 BYX 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 BYX and its affiliated exchanges (*i.e.*, EDGX, Cboe EDGA Exchange, Inc. ("EDGA"), and Cboe BZX Exchange, Inc. ("BZX")) and contains optional functionality which enables recipients to receive aggregated two-sided quotations from BYX and its affiliated equities exchanges for up to five (5) price levels.<sup>18</sup> Currently, the Exchange charges an external distribution fee of \$12,500 per month to External Distributors 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 Premium 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, EDGX, 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,<sup>19</sup> which is a data feed that disseminates, on a real-time basis, the aggregate BBO of all displayed orders for securities traded on BYX and its affiliated equities exchanges and also contains individual last sale information for the BYX and its affiliated equities exchanges.<sup>20</sup> It also offers a New External Distributor Credit of one (1) month for subscribers of BYX 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. BYX Summary Depth also contains the individual last sale information, Market

Status, Trading Status, and Trade Break messages.<sup>21</sup> The External Distribution fees for Cboe One Premium is equivalent to the aggregate BYX Summary Depth, BZX Summary Depth, EDGX 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 BYX Summary Depth from one (1) month to three (3) months and the Exchange's affiliates EDGX, 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 BYX, EDGA, EDGX, and BZX Summary Depth feeds for new External Distributors to be greater than those currently charged to subscribe to the Cboe One Premium feed.

#### 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act,<sup>22</sup> in general, and furthers the objectives of Section 6(b)(4),<sup>23</sup> 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.<sup>24</sup> Finally, the proposed rule change is also consistent with Rule 603 of Regulation NMS,<sup>25</sup> 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

<sup>12</sup> 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.

<sup>13</sup> As an alternative to User fees, a recipient firm may purchase a monthly Enterprise license to receive BYX Top from an External Distributor for distribution to an unlimited number of Professional and Non-Professional Users. A recipient firm must pay a separate Enterprise Fee for each External Distributor that controls the display of BYX Top if it wishes such User to be covered by the Enterprise Fee.

<sup>14</sup> As an alternative to User fees, a recipient firm may purchase a monthly Digital Media Enterprise license to receive BYX Top from an External Distributor for distribution to an unlimited number of Users for viewing via television, websites, and mobile devices for informational and non-trading purposes only.

<sup>15</sup> See Securities Exchange Act Release No. 77886 (May 23, 2016) 81 FR 33722 (May 27, 2016) (SR-BatsBYX-2016-08).

<sup>16</sup> The Exchange notes that the fee for Cboe One Summary is equivalent to the aggregate BYX Top, BZX, Top, EDGX Top, and EDGA Top fees. The Exchange is not proposing to change the current Cboe One Summary external distribution fee. Instead, the Cboe EDGX Exchange, Inc. ("EDGX") has simultaneously with this proposal proposed to increase its fee for EDGX Top by \$750 in order to ensure the proposed fee will continue to not cause the combined cost of subscribing to BYX, EDGA, EDGX, and BZX individual Top and Last Sale feeds to be greater than those currently charged to subscribe to the Cboe One Summary fee.

<sup>17</sup> See *infra* notes 32, 33, 34, and 35.

<sup>18</sup> 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.*, EDGX, EDGA, and BZX). See Exchange Rule 11.22(i). 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"). The Cboe One Premium external distribution fee is equal to the aggregate BYX Summary Depth, BYX Summary Depth, EDGA Summary Depth, and BZX Summary Depth external distribution fees.

<sup>19</sup> See Exchange Rule 11.22(i).

<sup>20</sup> 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. 74284 (February 18, 2015), 80 FR 9792 (February 24, 2015) (SR-BYX-2015-09).

<sup>21</sup> See Exchange Rule 11.22(k).

<sup>22</sup> 15 U.S.C. 78f.

<sup>23</sup> 15 U.S.C. 78f(b)(4).

<sup>24</sup> 15 U.S.C. 78k-1.

<sup>25</sup> See 17 CFR 242.603.

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 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.'"<sup>26</sup> 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.'"<sup>27</sup> As discussed in this filing, significant competitive forces constrain the ability of the Exchange to charge supra-competitive fees.

#### BYX Top

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

Subscribing to BYX Top is entirely optional. The Exchange is not required to make BYX Top available to any customers, nor is any customer required to purchase BYX Top.<sup>28</sup> A customer's

decision as to whether to purchase BYX Top is therefore entirely discretionary and is based on that firms' individual business needs. Generally, firms that choose to subscribe to BYX 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 BYX 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 BYX 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 BYX Top. And, as discussed later in this filing, any External Distributor of top-of-book data that does not wish to purchase BYX 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 BYX 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 BYX 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. BYX 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.<sup>29</sup> 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, BYX 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. Other exchanges have similarly filed to reduce the prices of their top-of-book data in order to compete with products offered by the Exchange and other competing exchanges.<sup>30</sup> In fact, the impact of competition on the market in which BYX Top is offered to market participants and investors is showcased by the Exchange's other recent fee changes related to this product, which involved the reduction of fees to facilitate the Exchange's ability to compete for customers.<sup>31</sup>

Distributors can discontinue use of BYX 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 BYX Top. The Exchange offers all of its proprietary market data products pursuant to a month-to-month contract that allows

<sup>26</sup> *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).

<sup>27</sup> *Id.* at 535.

<sup>28</sup> The Exchange notes that broker-dealers are not required to purchase proprietary market data to comply with their best execution obligations. See In 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.

<sup>29</sup> Although the Exchange does not have access to the customer lists for other competing products, it understands based on conversations with subscribers to BYX 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.

<sup>30</sup> See e.g., Securities Exchange Act Release No. 90616 (December 9, 2020), 85 FR 81237 (December 15, 2020) (SR-NASDAQ-2020-086).

<sup>31</sup> See e.g., Securities Exchange Act Release No. 88221 (February 14, 2020), 85 FR 9904 (February 20, 2020) (SR-CboeBYX-2020-007).

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, including BYX Top. In addition, the Exchange notes that a majority of External Distributors of BYX 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.<sup>32</sup>

In setting the proposed fees for BYX 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 BYX 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.

#### 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 they would represent a decreased fee for top-of-book data that has proven valuable for investors. BYX 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, BYX 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 BYX Top is competitive on both of these factors.

First, BYX Top would remain competitively priced compared to similar products offered by other comparable U.S. equities exchanges. Although BYX 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, BYX Top would remain significantly cheaper than similar products offered by New York Stock Exchange LLC ("NYSE"), NYSE Arca, Inc. ("Arca") 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,<sup>33</sup> and an additional \$1,500 per month for transaction information,<sup>34</sup> both of which are included in BYX Top for a single fee. In addition, a \$1,000 per month redistribution fee is applied by NYSE. 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.<sup>35</sup> 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.<sup>36</sup> The external distribution charges associated with obtaining comparable U.S. equities

market data from NYSE, Arca and Nasdaq runs significantly 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.

#### 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 BYX 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 BYX Top and distribute that data to external subscribers. As proposed, all External Distributors of BYX 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 BYX Top on the same equitable and non-discriminatory terms.

The Exchange believes that it is also fair and equitable, and not unfairly discriminatory to charge different fees for internal and external distribution of the BYX Top. Although the proposed distribution fee charged to External Distributors will be lower than the existing distribution fee charged to Internal Distributors,<sup>37</sup> External Distributors are subject to professional user fees, non-professional user fees, an enterprise fee, and a digital media enterprise fee to which Internal Distributors are not subject. Furthermore, the proposal is designed to incentivize External Distributors to subscribe to BYX Top.

#### 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

<sup>32</sup> Market data vendors typically establish connectivity to a number of national securities exchanges to be able to offer their market data to customers.

<sup>33</sup> See NYSE PDP Market Data Pricing, Section 1.3, NYSE BBO.

<sup>34</sup> See NYSE PDP Market Data Pricing, Section 1.4, NYSE Trades.

<sup>35</sup> See NYSE PDP Market Data Pricing, Section 3.3, NYSE Arca BBO; NYSE PDP Market Data Pricing, Section 3.4, NYSE Arca Trades.

<sup>36</sup> 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.

<sup>37</sup> An Internal Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity.

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. Furthermore, External Distributors are subject to higher risks of launch as the data is provided outside their own firm. For these reasons, the Exchange believes it is appropriate to provide this incentive so that External Distributors have sufficient time to test the data within their own systems prior to going live externally. The Exchange believes extending the New External Distributor Credit for BYX 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 BYX, EDGA, EDGX, and BZX Summary Depth feeds for new External Distributors to be greater than those currently charged to subscribe to the Cboe One Premium feed.

#### *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 top-of-book data products is constrained by competition among exchanges that offer similar data products to their customers. Top-of-book 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. Further, the Exchange's proposal to extend the New External Distributor Credit applicable to BYX Summary Depth from one (1) month to three (3) months and to adopt a new External Distributor credit for Cboe One Premium involves no change to the existing fees, but simply extends or offers a waiver. Other exchanges are free to adopt a similar waiver if they choose. 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 other market participants. As discussed, the proposed fees and credit would apply to all External Distributors of BYX Top and Cboe One Premium, respectively, on an equal and non-discriminatory basis. The difference in fees for internal and external distribution of BYX Top are reasonably designed to incentivize External Distributors to subscribe to BYX Top. Further, 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 and because External Distributors are subject to additional fees (e.g., user fees greater than \$0 or enterprise and digital media enterprise fees). 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 for BYX Top, 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 Act<sup>38</sup> and paragraph (f) of Rule 19b-4<sup>39</sup> 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](mailto:rule-comments@sec.gov). Please include File Number SR-CboeBYX-2022-009 on the subject line.

#### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeBYX-2022-009. 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

<sup>38</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>39</sup> 17 CFR 240.19b-4(f).

Reference Room, 100 F Street NE Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–CboeBYX–2022–009 and should be submitted on or before April 21, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>40</sup>

**J. Matthew DeLesDernier,**  
Assistant Secretary.

[FR Doc. 2022–06754 Filed 3–30–22; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–94518; File No. SR–NYSEArca–2021–65]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To List and Trade Shares of the Sprott ESG Gold ETF Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares)

March 25, 2022.

#### I. Introduction

On July 19, 2021, NYSE Arca, Inc. (“NYSE Arca” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) and Rule 19b–4 thereunder,<sup>2</sup> a proposed rule change to list and trade shares (“Shares”) of the Sprott ESG Gold ETF (“Trust”) under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares). The proposed rule change was published for comment in the *Federal Register* on July 30, 2021.<sup>3</sup> On September 2, 2021, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the

proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.<sup>5</sup> On October 27, 2021, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.<sup>7</sup> On January 19, 2022, pursuant to Section 19(b)(2) of the Act,<sup>8</sup> the Commission designated a longer period within which to issue an order approving or disapproving the proposed rule change.<sup>9</sup> On February 25, 2022, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>10</sup> This Amendment No. 1, set forth in Item II below, replaces SR–NYSE Arca–2021–65 as originally filed and supersedes such filing in its entirety. The Commission has received no comment letters on the proposal. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

#### 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 self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to list and trade shares (“Shares”) of the Sprott ESG Gold ETF (the “Trust”), under NYSE Arca Rule 8.201–E.<sup>11</sup> Under NYSE Arca Rule 8.201–E, the Exchange may propose to list and/or trade Commodity-Based Trust Shares pursuant to unlisted trading privileges (“UTP”).<sup>12</sup>

The Trust will not be registered as an investment company under the Investment Company Act of 1940, as amended,<sup>13</sup> and is not required to register under such act. The Trust is not a commodity pool for purposes of the Commodity Exchange Act, as amended.<sup>14</sup>

The Sponsor of the Trust is Sprott Asset Management LP, a Canadian limited partnership. The Bank of New York Mellon serves as the Trust’s administrator (the “Administrator”) and

<sup>5</sup> See Securities Exchange Act Release No. 92867, 86 FR 50568 (September 9, 2021).

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Securities Exchange Act Release No. 93434, 86 FR 60516 (November 2, 2021).

<sup>8</sup> 15 U.S.C. 78s(b)(2).

<sup>9</sup> See Securities Exchange Act Release No. 94003, 87 FR 3865 (January 25, 2022). The Commission designated March 27, 2022, as the date by which the Commission shall either approve or disapprove the proposed rule change.

<sup>10</sup> Amendment No. 1 is available on the Commission’s website at <https://www.sec.gov/comments/sr-nysearca-2021-65/srnysearca202165-20117903-270825.pdf>. Among other things, Amendment No. 1 to the proposed rule change provided greater detail with respect to characteristics of unallocated gold, Sprott ESG Approved Gold (as defined herein), and ESG Criteria (as defined herein), as well as valuation of the Trust’s (as defined herein) gold. Amendment No. 1 explained how Sprott ESG Approved Gold will be created for the Trust, as well as the process of the exchange or conversion of the types of gold held by the Trust, and how this occurs during creations and redemptions. Amendment No. 1 also represented that there is no separate market for Sprott ESG Approved Gold, there is no industry standard for ESG factors that apply to gold production, and the value of the gold held by the Trust, whether allocated Sprott ESG Approved Gold or unallocated gold, will be determined by the LBMA Gold Price PM (as defined herein). Amendment No. 1 made additional representations, including regarding the Information Bulletin. Finally, Amendment No. 1 provided clarifications and technical edits to the proposed rule change.

<sup>11</sup> On February 11, 2021, the Trust submitted to the Commission its draft registration statement on Form S–1 under the Securities Act of 1933 (15 U.S.C. 77a) (“Securities Act”) and on July 1, 2021, the Trust submitted to the Commission the most recent amendment to its draft registration statement (collectively, the “Registration Statement”). The Jumpstart Our Business Startups Act, enacted on April 5, 2012, added Section 6(e) to the Securities Act. Section 6(e) of the Securities Act provides that an “emerging growth company” may confidentially submit to the Commission a draft registration statement for confidential, non-public review by the Commission staff prior to public filing, provided that the initial confidential submission and all amendments thereto shall be publicly filed not later than 21 days before the date on which the issuer conducts a road show, as such term is defined in Securities Act Rule 433(h)(4). An emerging growth company is defined in Section 2(a)(19) of the Securities Act as an issuer with less than \$1,070,000,000 total annual gross revenues during its most recently completed fiscal year. The Trust meets the definition of an emerging growth company and consequently has submitted its Form S–1 Registration Statement on a confidential basis with the Commission. The Registration Statement is not yet effective and the Shares will not trade on the Exchange until such time that the Registration Statement is effective.

<sup>12</sup> Commodity-Based Trust Shares are securities issued by a trust that represent investors’ discrete identifiable and undivided beneficial ownership interest in the commodities deposited into the Trust.

<sup>13</sup> 15 U.S.C. 80a–1.

<sup>14</sup> 17 U.S.C. 1.

<sup>40</sup> 17 CFR 200.30–3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> See Securities Exchange Act Release No. 92506 (July 26, 2021), 86 FR 41109.

<sup>4</sup> 15 U.S.C. 78s(b)(2).