

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-100040; File No. SR-CboeBYX-2024-003)

April 26, 2024

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Change to Amend Rule 11.9(c)(6) and Rule 11.13(a)(4)(D) to Permit the Use of BYX Post Only Orders at Prices Below \$1.00

I. Introduction

On January 8, 2024, Cboe BYX Exchange, Inc. (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to permit the use of BYX Post Only Orders at prices below \$1.00. The proposed rule change was published for comment in the Federal Register on January 29, 2024.³ On March 8, 2024, pursuant to Section 19(b)(2) of the Act,⁴ 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 disapprove the proposed rule change.⁵ The Commission did not receive any comments. The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 99413 (January 23, 2024), 89 FR 5582 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 99697, 89 FR 18699 (March 14, 2024) (designating April 26, 2024, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove the proposed rule change).

⁶ 15 U.S.C. 78s(b)(2)(B).

II. Description of the Proposed Rule Change⁷

The Exchange proposes to amend Rule 11.9(c)(6) and Rule 11.13(a)(4)(D) to modify the treatment of BYX Post Only Orders priced below a dollar on the Exchange. BYX Post Only Orders priced at or above \$1.00 will only remove liquidity if the value of the execution when removing liquidity equals or exceeds the value of such execution if the order instead posted to the BYX Book and subsequently provided liquidity, including the applicable fees charged or rebates provided. Currently, all BYX Post Only Orders priced below \$1.00 are automatically treated as orders that remove liquidity. Under the proposed rule change, BYX Post Only Orders priced below \$1.00 will be treated in the same manner as BYX Post Only Orders priced at or above \$1.00 in that BYX Post Only Orders priced below \$1.00 will only remove liquidity if the value of the overall execution (taking into account all applicable fees and rebates) make it economically beneficial for the order to remove liquidity.

The Exchange also proposes to amend Rule 11.13(a)(4)(D) to permit Non-Displayed Orders⁸ and orders subject to display-price sliding (collectively, “Resting Orders”) which are not executable at their most aggressive price due to the presence of a contra-side BYX Post Only Order to be executed at one minimum price variation less aggressive than the order’s most aggressive price.⁹ Currently, Rule 11.13(a)(4)(D) states that, for securities priced above \$1.00, incoming

⁷ For a more detailed description of the proposed rule change, including examples, refer to the Notice, supra note 3.

⁸ See Rule 11.9(c)(11). A “Non-Displayed Order” is a market or limit order that is not displayed on the Exchange.

⁹ See Securities Exchange Act Release No. 64753 (June 27, 2011), 76 FR 38714 (July 1, 2011), SR-BYX-2011-009 (“Resting Order Execution Filing”). The Resting Order Execution Filing introduced an order handling change for certain Non-Displayed Orders and orders subject to display-price sliding that are not executable at prices equal to displayed orders on the opposite side of the market (the “locking price”). The Resting Order Execution Filing permits Resting Orders priced at or above \$1.00 to be executed at one-half minimum price variation less aggressive than the locking price (for bids) and

orders that are market orders or limit orders priced more aggressively than a displayed order on the same side of the market, the Exchange will execute the incoming order at, in the case of an incoming sell order, one-half minimum price variation less than the price of the displayed order, and, in the case of an incoming buy order, at one-half minimum price variation more than the price of the displayed order. The Exchange proposes that for securities priced below \$1.00, incoming orders that are market orders or limit orders priced more aggressively than a displayed order on the same side of the market, the Exchange will execute the incoming order at, in the case of an incoming sell order, one minimum price variation less than the price of the displayed order, and, in the case of an incoming buy order, at one minimum price variation more than the price of the displayed order.

III. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBYX-2024-003, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁰ to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

one-half minimum price variation more aggressive than the locking price (for offers), under certain circumstances.

¹⁰ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,¹¹ the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange proposes to permit the use of BYX Post Only Orders at prices below \$1.00. In addition, as described above, for securities priced below \$1.00, incoming orders that are market orders or limit orders priced more aggressively than a displayed order on the same side of the market, the Exchange will execute the incoming order at one minimum price variation less (more) than the price of the displayed order for sell (buy) orders.¹² In contrast, under the current rule for securities priced above \$1.00, the incoming order would execute at one-half minimum price variation less (more) than the price of the displayed order for sell (buy) orders.¹³ The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule change's consistency with the Act, and in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.¹⁴ In addition, Sections 6(b)(5) and 6(b)(8) of the Act, respectively, prohibit the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers¹⁵ or

¹¹ Id.

¹² According to the Exchange, executing an incoming order at the same price as the price as that of a displayed order on the same side of the market would violate the time priority of the displayed order. See Notice supra note 3, 89 FR at 5585; see also Exchange Rules 11.12(a) and 11.13(a)(4).

¹³ See Exchange Rule 11.13(a)(4)(D).

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ 15 U.S.C. 78f(b)(5).

imposing any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁶

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.”¹⁷ The description of a 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 specific to support an affirmative Commission finding,¹⁸ and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.¹⁹

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change, is consistent with Sections 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider,

¹⁶ 15 U.S.C. 78f(b)(8).

¹⁷ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

¹⁸ See id.

¹⁹ See id.

pursuant to Rule 19b-4 under the Act,²⁰ any request for an opportunity to make an oral presentation.²¹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBYX-2024-003 on the subject line.

²⁰ 17 CFR 240.19b-4.

²¹ Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94-29 (Jun. 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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-2024-003. 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 (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-CboeBYX-2024-003 and should be submitted by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Sherry R. Haywood,

Assistant Secretary.

²² 17 CFR 200.30-3(a)(57).