

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-93963; File Nos. SR-CboeBYX-2021-027; SR-CboeBZX-2021-076; SR-CboeEDGA-2021-024; SR-CboeEDGX-2021-048)

January 12, 2022

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Cboe BZX Exchange, Inc.; Cboe EDGA Exchange, Inc.; Cboe EDGX Exchange, Inc.; Order Granting Approval of Proposed Rule Changes to Amend Each Exchange’s Rules in Connection with a Risk Setting that Users May Elect to Apply to their Orders in Hard to Borrow Securities

I. Introduction

On November 8, 2021, Cboe BYX Exchange, Inc. (“CboeBYX”) and Cboe BZX Exchange, Inc. (“CboeBZX”), and on November 18, 2021, Cboe EDGA Exchange, Inc. (“CboeEDGA”) and Cboe EDGX Exchange, Inc. (“CboeEDGX,” and collectively, the “Exchanges”), each filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to allow each Exchange to offer its Users<sup>3</sup> a hard to borrow risk setting (“Hard to Borrow List”) that Users may elect to apply to their short sale orders in U.S. equity securities. The proposed rule changes were published for comment in the Federal Register on November 29, 2021.<sup>4</sup>

---

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

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

<sup>3</sup> A User is any Member or Sponsored Participant who is authorized to obtain access to the System. See Cboe BYX Rule 1.5(cc); Cboe BZX Rule 1.5(cc); Cboe EDGA Rule 1.5(ee); and Cboe EDGX Rule 1.5(ee).

<sup>4</sup> See Securities Exchange Act Release Nos. 93638 (November 22, 2021), 86 FR 67767 (SR-CboeBYX-2021-027) (“BYX Notice”); 93641 (November 22, 2021), 86 FR 67763 (SR-CboeBZX-2021-076) (“BZX Notice”); 93642 (November 22, 2021), 86 FR 67765 (SR-CboeEDGA-2021-024) (“EDGA Notice”); and 93643 (November 22, 2021), 86 FR 67774 (SR-CboeEDGX-2021-048) (“EDGX Notice”). The proposed rule changes are nearly identical.

The Commission has received no comments on the proposed rule changes. This order approves the proposed rule changes.

II. Description of the Proposed Rule Changes

The Exchanges propose to include a Hard to Borrow List within their risk settings. The Exchanges currently offer certain optional risk settings applicable to a User's activities on the Exchange.<sup>5</sup> These risk settings currently provide Users with controls to restrict the types of securities transacted, including restricted securities and easy to borrow securities, as well as restricting activity to test symbols only.<sup>6</sup>

According to the Exchanges, when utilized, these optional risk tools act as a risk filter by evaluating a User's orders to determine whether the orders comply with certain criteria established by the User.<sup>7</sup> The proposal will offer Users an optional tool to evaluate whether their orders comply with User established criteria.<sup>8</sup> Specifically, orders submitted in securities included on a User's Hard to Borrow List will be rejected back to the User.<sup>9</sup> The Hard to Borrow List resides at a User's port level, a User-specific logical session used to access the Exchange.<sup>10</sup> Users may upload a Hard to Borrow List to their preferred port(s) via a web-based application programming interface.<sup>11</sup> When uploaded to the port, Users may apply the setting to

---

<sup>5</sup> See Interpretation and Policy .01 to CboeBYX Rule 11.13; Interpretation and Policy .01 to CboeBZX Rule 11.13; Interpretation and Policy .01 to CboeEDGA Rule 11.10; and Interpretation and Policy .01 to CboeEDGX Rule 11.10.

<sup>6</sup> See BYX Notice at 67767; BZX Notice at 67764; EDGA Notice at 67765; and EDGX Notice at 67775.

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

some or all of the market-participant identifiers (MPID) that they use to access the Exchange via the specified port.<sup>12</sup>

The Exchanges state that, as is the case with the Exchanges' existing risk settings, the User, and not the Exchange, will have the full responsibility for ensuring that their orders comply with applicable securities rules, laws, and regulations, and may not rely on the Hard to Borrow List for any such purpose.<sup>13</sup> Furthermore, use of the Hard to Borrow List does not automatically constitute compliance with Exchange Rules.<sup>14</sup> The Exchanges state that they do not believe that the use of the Hard to Borrow List can replace User-managed risk management solutions.<sup>15</sup>

The Exchanges propose to make the risk setting available to their Users upon request and will not require Users to utilize the Hard to Borrow List.<sup>16</sup> The Exchanges also state that they will not provide preferential treatment to Users using the Hard to Borrow List.<sup>17</sup>

In support of the proposal, the Exchanges assert the Hard to Borrow List will offer Users another option in efficient risk management of their access to the Exchange.<sup>18</sup> For example, the Exchanges state the Hard to Borrow List may assist some Users in managing borrowing costs for

---

<sup>12</sup> Id.

<sup>13</sup> See BYX Notice at 67767; BZX Notice at 67764; EDGA Notice at 67765; and EDGX Notice at 67775 (citing Securities and Exchange Act Release No. 50103 (July 28 2004), 69 FR 48007 (August 6, 2004) (Final Rule: Short Sales) at 48014, regarding hard to borrow lists and the locate requirements under 17 CFR 242.203 (Regulation SHO Rule 203 – Borrowing and delivery requirements)).

<sup>14</sup> See BYX Notice at 67767; BZX Notice at 67764; EDGA Notice at 67766; and EDGX Notice at 67775.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

<sup>18</sup> Id.

their short sale transactions.<sup>19</sup> According to the Exchanges, day over day borrowing costs in hard to borrow securities may be costly, and while a locate may be secured by a User prior to routing their short sale transactions to one of the Exchanges, borrowing costs may make such transactions less desirable.<sup>20</sup> The Exchanges state by utilizing the Hard to Borrow List, Users have a tool that enables them to manage their costs by rejecting orders in such securities.<sup>21</sup>

### III. Discussion and Commission Findings

After careful review of the proposals, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>22</sup> In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act,<sup>23</sup> which requires, among other things, that the Exchanges' rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, 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.

The Commission believes that the proposed rule changes are reasonably designed to provide a useful risk management tool to Users on the Exchanges. Adding a Hard to Borrow

---

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> In approving the proposed rule changes, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

List could allow Users on the Exchanges to better manage borrowing costs for such securities. The Exchanges currently provide risk controls restricting certain transactions by symbol,<sup>24</sup> and the Commission believes that the proposed rule change would provide an additional option for Users seeking to further tailor their risk management capability while transacting on the Exchanges.

The Commission notes that the proposed Hard to Borrow List is an optional functionality. The Commission reminds Users electing to use the proposed risk control to be mindful of their obligations under all applicable securities laws, rules, and regulations and emphasizes that the proposed risk control is not a substitute for a Users' own systems, processes, and procedures for compliance with such laws, rules, and regulations. The Commission expects the Exchanges to periodically assess whether its risk control settings are operating in a manner that is consistent with the promotion of fair and orderly markets.

For the foregoing reasons, the Commission finds that the proposal is consistent with the requirements of the Act.

---

<sup>24</sup> See, e.g., Interpretation and Policy .01 to CboeBYX Rule 11.13(d); Interpretation and Policy .01 to CboeBZX Rule 11.13(d); Interpretation and Policy .01 to CboeEDGA Rule 11.10(d); and Interpretation and Policy .01 to CboeEDGX Rule 11.10(d).

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act<sup>25</sup> that the proposed rule changes (SR-CboeBYX-2021-027, SR-CboeBZX-2021-076, SR-CboeEDGA-2021-024, SR-CboeEDGX-2021-048), be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

J. Matthew DeLesDernier  
Assistant Secretary

---

<sup>25</sup> 15 U.S.C. 78f(b)(5).

<sup>26</sup> 17 CFR 200.30-3(a)(12).