

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93638; File No. SR-CboeBYX-2021-027)

November 22, 2021

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend Interpretation and Policy .01 to Rule 11.13 in Connection with a Risk Setting that Users may Elect to Apply to their Orders in Hard to Borrow Securities

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on November 8, 2021, Cboe BYX Exchange, Inc. filed with the Securities and Exchange 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 proposal to amend Interpretation and Policy .01 to Rule 11.13 in connection with a risk setting that Users³ may elect to apply to their orders in hard to borrow securities. 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/), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ A User is any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.13. See Rule 1.5(cc).

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 purpose of this proposal is to amend Interpretation and Policy .01 to Rule 11.13 to allow the Exchange to offer its Users 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. Pursuant to Interpretation and Policy .01 to Rule 11.13, the Exchange currently offers certain optional risk settings applicable to a User’s activities on the Exchange. Specifically, Interpretation and Policy .01(d) currently provides 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. 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.⁴

The Exchange now proposes to amend Interpretation and Policy .01(d) to Exchange Rule 11.13, to also include a Hard to Borrow List. Like the existing risk settings, the proposed rule

⁴ See Securities Exchange Act Release No. 60236 (July 2, 2009) 74 FR 34068 (July 14, 2009) (SR-BATS-2009-019) (notice of filing and immediate effectiveness of proposed rule change to establish a Sponsored Access Risk Management Tool). See also Securities Exchange Act Release No. 34-68330 (November 30, 2012) 77 FR 72894 (December 6, 2012) (SR-BATS-2012-045).

change offers Users an optional tool to evaluate whether their orders comply with User established criteria. Specifically, orders submitted in securities included on a User's Hard to Borrow List will be rejected back to the User.

The Hard to Borrow List resides at a User's port level, a User-specific logical session used to access the Exchange. Users may upload a Hard to Borrow List to their preferred port(s) via a web-based application programming interface. When uploaded to the port, Users may apply the setting to some or all of the market-participant identifiers (MPID) that they use to access the Exchange via the specified port. As is the case with the Exchange's 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.⁵ Furthermore, use of the Hard to Borrow List does not automatically constitute compliance with Exchange Rules. As is the case with the Exchange's existing risk settings, the Exchange does not believe that the use of the Hard to Borrow List can replace User-managed risk management solutions.

The Exchange proposes to make the risk setting available to its Users upon request and will not require Users to utilize the Hard to Borrow List. The Exchange will not provide preferential treatment to Users using the Hard to Borrow List. However, the Exchange believes the Hard to Borrow List will offer Exchange Users another option in efficient risk management of its access to the Exchange. For instance, the Hard to Borrow List may assist some Users in managing borrowing costs for their short sale transactions. Generally, day over day borrowing

⁵ *See* Securities and Exchange Commission Release No. 34-50103 (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).

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 the Exchange, borrowing costs may make such transactions less desirable. By utilizing the Hard to Borrow List, Users have a tool that enables them to manage their costs by rejecting orders in such securities.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the requirements of Section 6(b) of the Act,⁶ in general, and Section 6(b)(5) of the Act,⁷ in particular, in that it is 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.

Specifically, the Exchange believes that the proposed rule change is consistent with these principles because, like the current risk settings, the Hard to Borrow List fosters competition by providing another option in the efficient risk management of trading on the Exchange. Users are free to use the Exchange's Hard to Borrow List, or other risk management offerings.

Moreover, as noted by the Commission, even when shares can be borrowed short sellers may find it costly to borrow stock to enter or maintain a short position.⁸ In this regard, the Hard

⁶ 15 U.S.C. § 78f(b).

⁷ 15 U.S.C. § 78f(b)(5).

⁸ *See* Staff of the U.S. Securities and Exchange Commission, *Staff Report on Equity And Options Market Structure Conditions in Early 2021*, (October 14, 2021) at 30, footnote 84

to Borrow List provides Users with a tool to help manage such costs by rejecting orders in hard to borrow securities and thus providing a mechanism of financial protection to Exchange Users.

The proposed rule change also is designed to support the principles of Section 11A(a)(1)⁹ in that it seeks to assure economically efficient execution of securities transactions, makes it practicable for brokers to execute investors' orders in the best market, and provides an opportunity for investors' orders to be executed without the participation of a dealer. Additionally, the rule proposal is consistent with Section 11(a)(1)¹⁰ in that makes the Hard to Borrow List available to all Users, regardless of their size.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Rather, the proposed rule change is not designed to address any competitive issues and does not pose an undue burden on Users, as the Hard to Borrow List is an optional risk setting offered to all Users.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has not solicited, and does not intend to solicit, comments on this proposal. No written comments were solicited or received on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

⁹ 15 U.S.C. § 78k-1(a)(1)

¹⁰ *Id.*

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be 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 e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBYX-2021-027 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-2021-027. This file number should be included on the subject line if e-mail 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 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-2021-027 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹¹

J. Matthew DeLesDernier
Assistant Secretary

¹¹ 17 CFR 200.30-3(a)(12).