

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96916; File No. SR-CboeBYX-2023-001)

February 14, 2023

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Modify Rule 11.25 to Permit Mid-Point Peg Orders Entered as Periodic Auction Eligible Orders to Contain an Instruction to not Execute in a Locked Market

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 February 2, 2023, Cboe BYX Exchange, Inc. (“Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ 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. (the “Exchange” or “BYX”) is filing with the Securities and Exchange Commission (“Commission”) a proposal to modify Rule 11.25 to permit Mid-Point Peg Orders entered as Periodic Auction Eligible Orders to contain an instruction to not execute in a locked market. The text of the proposed rule change is provided in Exhibit 5.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

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.

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 proposed rule change is to amend Rule 11.25(b)(2)(B)⁵ in order to permit Mid-Point Peg Orders⁶ entered as Periodic Auction Eligible Orders (“Mid-Point PAE

⁵ Rule 11.25 governs Periodic Auctions on the Exchange. The Commission approved the Exchange’s proposal to introduce Periodic Auctions for the trading of U.S. equity securities on March 26, 2021. Periodic Auctions are price forming auctions that are executed at the price level which maximizes the total number of shares in both the auction book and the continuous market that are executed in the auction and do not interrupt trading on the continuous market. See Securities Exchange Act Release No. 91423 (March 26, 2021), 86 FR 17230 (April 1, 2021) (SR-CboeBYX-2020-021) (Notice of Filing of Amendments No. 3 and No. 4, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 3 and No. 4, to Introduce Periodic Auctions for the Trading of U.S. Equity Securities). See also Securities Exchange Act Release No. 94012 (January 20, 2022), 87 FR 4060 (January 26, 2022) (SR-CboeBYX-2021-024) (Notice of Filing of Amendment No. 2 and Order Approving on an Accelerated Basis a Proposed Rule Change, as Modified by Amendment No. 2, To Make Clarifying Changes Regarding Its Periodic Auctions) (together, the “Original Proposal”).

⁶ See Rule 11.9(c)(9). A “Mid-Point Peg Order” is a limit order whose price is automatically adjusted by the System in response to changes in the NBBO to be pegged

Order”)⁷ to be designated as ineligible to trade on the Continuous Book⁸ when the national best bid or offer (“NBBO”) is locked and to provide that such instruction will not apply during a Periodic Auction.⁹ Rule 11.25(b)(2)(B) currently prohibits the entry of such orders. The proposed change would not apply to Mid-Point Peg Orders designated as Periodic Auction Only Orders, as Periodic Auction Only Orders are not eligible for execution on the Continuous Book.¹⁰ The System¹¹ currently rejects Mid-Point PAE Orders containing an instruction to not execute during a locked market because the System would not be able to prevent such orders from participating in a Periodic Auction where there is a locked market at the time that the Periodic Auction occurs.¹²

However, User¹³ feedback has indicated a desire to enter Mid-Point PAE Orders that are eligible to participate in Periodic Auctions, while simultaneously prohibiting these orders from

to the mid-point of the NBBO, or, alternatively, pegged to the less aggressive of the midpoint of the NBBO or one minimum price variation inside the same side of the NBBO as the order.

⁷ See Rule 11.25(b). A “Periodic Auction Eligible Order” is a non-displayed limit order eligible to trade on the Continuous Book that is entered with an instruction to also initiate a Periodic Auction, if possible, pursuant to Rule 11.25. Periodic Auction Eligible Orders will not trade on the Continuous Book during a Periodic Auction Period in the security.

⁸ See Rule 11.25(a)(2). The term “Continuous Book” shall mean the System’s electronic file of Continuous Book Orders. A Continuous Book Order shall mean an order on the BYX Book that is not a Periodic Auction Only Order or a Periodic Auction Eligible Order.

⁹ Supra note 5.

¹⁰ See Rule 11.25(b)(1). A “Periodic Auction Only Order” is a non-displayed limit order entered with an instruction to participate solely in Periodic Auctions pursuant to Rule 11.25.

¹¹ See Rule 1.5(aa). The term “System” shall mean the electronic communications and trading facility designated by the Board through which securities orders of Users are consolidated for ranking, execution and, when applicable, routing away.

¹² See Rule 11.25(a)(8). The term “Periodic Auction Period” shall mean the fixed time period of 100 milliseconds for conducting a Periodic Auction.

¹³ See Rule 1.5(cc). The term “User” shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.

trading on the Continuous Book during a locked market.¹⁴ Accordingly, the Exchange now seeks to permit the System to accept Mid-Point PAE Orders containing an instruction prohibiting trading on the Continuous Book during a locked market.¹⁵

As noted above, the System currently rejects Mid-Point PAE Orders that are designated as ineligible to execute during a locked market.¹⁶ However, the System does permit Non-PAE Mid-Point Orders (i.e. Mid-Point Peg Orders that do not also contain a Periodic Auction Eligible Order instruction) to be designated as ineligible to execute during a locked market.¹⁷ Based on the feedback from Users described above, the Exchange is proposing that Mid-Point PAE Orders be handled by the System in the same manner as Non-PAE Mid-Point Orders. As noted above, Periodic Auction Eligible Orders are eligible to trade on either the Continuous Book or initiate a Periodic Auction, if possible. Mid-Point PAE Orders trade on the Continuous Book until such orders match with contra-side Periodic Auction Orders¹⁸ and initiate a Periodic Auction Period. Once a Periodic Auction Period has been initiated, Periodic Auction Eligible Orders, including Mid-

¹⁴ Mid-Point Peg Orders are often used by Members seeking price improvement over displayed liquidity. When Mid-Point Peg Orders execute during a locked market, the Member does not receive any price improvement.

¹⁵ The proposed rule change will not prevent Mid-Point PAE Orders from initiating and completing a Periodic Auction, as the instruction to not execute in a locked market will be ignored when a Periodic Auction Period begins and will only apply when a Mid-Point PAE Order is trading on the Continuous Book.

¹⁶ See Rule 11.25(b)(2)(B).

¹⁷ See Securities Exchange Act Release No. 91423 (March 26, 2021), 86 FR 17230 (April 1, 2021) (SR-CboeBYX-2020-021) (Notice of Filing of Amendments No. 3 and No. 4, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 3 and No. 4, to Introduce Periodic Auctions for the Trading of U.S. Equity Securities) at footnote 27.

¹⁸ See Rule 11.25(a)(6). The term “Periodic Auction Order” shall mean a “Periodic Auction Only Order” or “Periodic Auction Eligible Order” as those terms are defined in Rules 11.25(b)(1)-(2).

Point PAE Orders, are ineligible for trading on the Continuous Book until the Periodic Auction Period is completed. Outside of the ability to initiate a Periodic Auction Period, Mid-Point PAE Orders behave just as a Non-PAE Mid-Point Orders. Accordingly, Users should be able to designate their Mid-Point PAE Orders as ineligible to execute during a locked market while trading on the Continuous Book.¹⁹

The Exchange plans to implement the proposed rule change during the first quarter of 2023 and will announce the implementation date via Trade Desk Notice.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.²⁰ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²¹ requirements that the rules of an exchange 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 regulating, clearing, settling, processing information with respect to, and 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. Additionally, the Exchange believes the proposed rule change

¹⁹ The Exchange is not proposing to broadly change Mid-Point Peg Order functionality. Rather, the proposal seeks only to modify Mid-Point Peg Orders entered as PAE.

²⁰ 15 U.S.C. 78f(b).

²¹ 15 U.S.C. 78f(b)(5).

is consistent with the Section 6(b)(5)²² requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed rule change is consistent with just and equitable principles of trade as the Exchange will allow the System to accept Mid-Point PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market, which is consistent with how the System accepts Non-PAE Mid-Point Orders containing the same instruction pursuant to Rule 11.9(c)(9). Further, the proposed change will provide Users with enhanced control over their Mid-Point PAE Orders as the System will be permitted to accept Mid-Point Peg PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market, and these orders will continue to have the benefit of initiating a Periodic Auction should the order match with a contra-side Periodic Auction Order. The Exchange believes that by accepting Mid-Point PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market, additional Users would begin using the Periodic Auction Eligible Order type, which would in turn may create additional liquidity in Periodic Auctions.

The Exchange believes the proposed Rule change removes impediments to and perfects the mechanism of a free and open market and a national market system by permitting the System to accept Mid-Point PAE Orders containing an instruction to prohibit trading on the Continuous Book during a locked market without concern that the order could initiate a Periodic Auction and would be unable to execute at the conclusion of the Periodic Auction Period due to the presence of a locked market. The Exchange introduced Periodic Auctions with the intent of providing a competitive mechanism for the execution of orders in thinly-traded securities. The System's

²²

Id.

current practice of rejecting Mid-Point PAE Orders containing an instruction to prohibit trading during a locked market limits Users' desire to utilize the Mid-Point PAE Order instruction, which in turn may limit the liquidity in Periodic Auctions. Some Users have indicated to the Exchange that they prefer the use of Non-PAE Mid-Point Orders that are ineligible to execute during a locked market over use of Mid-Point PAE Orders because Non-PAE Mid-Point Orders that are ineligible to execute during a locked market provide Users an opportunity to receive midpoint price improvement. Mid-Point PAE Orders, however, may execute during a locked market while trading on the Continuous Book and therefore may not receive midpoint price improvement. The proposed rule change will encourage the use of Mid-Point PAE Orders while removing the possibility of an execution during a locked market while these orders are trading on the Continuous Book.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change would not impose any intramarket burden on competition for Users currently using Periodic Auction Orders as there will be no change as to how Mid-Point PAE Orders interact with Periodic Auction Orders. Mid-Point PAE Orders will continue to remain eligible to initiate a Periodic Auction if matched with contra-side Periodic Auction Orders. The proposed rule change will only affect how Mid-Point PAE Orders behave during a locked market when these orders are trading on the Continuous Book. The Exchange also believes that the proposed rule change will encourage Users to submit this particular order type, thereby increasing Users' participation in Periodic Auctions. The Exchange notes that the ability to restrict Mid-Point PAE Orders from executing during a locked market will be available to all

Users of the Mid-Point PAE Order type and will be available on an optional basis. While the proposal directly benefits Users of Mid-Point PAE Orders, all Exchange market participants may benefit from the potential increased utilization of Periodic Auctions that may occur if Mid-Point PAE Orders are able to initiate additional Periodic Auctions.

While Periodic Auctions are a unique feature to the Exchange, the proposed rule change will not burden intermarket competition as the ability to restrict Mid-Point Peg Orders from executing during a locked market on the Continuous Book already exists on other markets.²³ Users are free to determine whether to utilize the Mid-Point PAE Order functionality offered by the Exchange when making order routing determinations. The Exchange notes that it operates in a highly competitive market in which market participants can readily choose between competing venues if they deem participation in the Exchange's market is no longer desirable. The Exchange believes its proposed change will promote competition among trading venues by making the Exchange a more attractive trading venue for participants and investors.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the

²³ See NYSE Rule 7.31(d)(3)(B); MIAX Pearl Equities Rule 2614(a)(3)(B).

Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁴ and Rule 19b-4(f)(6) thereunder.²⁵

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),²⁶ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay. The Exchange states that it is seeking to offer the same functionality to Mid-Point PAE Orders that it already provides for Non-PAE Mid-Point Orders under Rule 11.9(c)(9). The System accepts Non-PAE Mid-Point Orders with an instruction to not execute in a locked market when trading on the Continuous Book, and the only proposed change is to allow Mid-Point PAE Orders to similarly be ineligible from trading during a locked market while trading on the Continuous Book. The proposed order instruction is also voluntary, and Users may continue to designate Mid-Point PAE Orders to execute in a locked market. For these reasons, the Commission finds that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the operative delay and designates the proposed rule change operative upon filing.²⁷

²⁴ 15 U.S.C. 78s(b)(3)(A).

²⁵ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

²⁶ 17 CFR 240.19b-4(f)(6)(iii).

²⁷ For purposes only of accelerating the operative date of this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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 e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBYX-2023-001.

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-2023-001. 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-2023-001, 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.²⁸

Sherry R. Haywood,
Assistant Secretary.

²⁸ 17 CFR 200.30-3(a)(12), (59).