

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99508; File No. SR-CboeBYX-2024-005)

February 9, 2024

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fee Schedule Regarding Periodic Auctions

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 1, 2024, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (“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. (the “Exchange” or “BYX”) proposes to amend its Fee Schedule. 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.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 its Fee Schedule applicable to its equities trading platform (“BYX Equities”) by modifying the rate associated with fee code AU in securities priced at or above \$1.00. The Exchange proposes to implement these changes effective February 1, 2024.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities Exchange Act of 1934 (the “Act”), to which market participants may direct their order flow. Based on publicly available information,³ no single registered equities exchange has more than 13% of the market share. Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a “Taker-Maker” model whereby it pays credits to members that remove liquidity and assesses fees to those that add liquidity. The Exchange’s Fee Schedule sets forth the standard rebates and rates applied per share for orders that remove and provide liquidity, respectively. Currently, for orders in securities priced at or above \$1.00, the

³ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (January 26, 2024), available at https://www.cboe.com/us/equities/market_statistics/.

Exchange provides a standard rebate of \$0.00200 per share for orders that remove liquidity and assesses a fee of \$0.00200 per share for orders that add liquidity.⁴ For orders in securities priced below \$1.00, the Exchange does not assess any fees for orders that add liquidity, and provides a rebate in the amount of 0.10% of the total dollar value for orders that remove liquidity.⁵

Additionally, in response to the competitive environment, the Exchange also offers tiered pricing which provides Members opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

Fee Code AU

The Exchange currently offers fee code AU, which is appended to Periodic Auction Only⁶ or Periodic Auction Eligible⁷ orders that are executed in a Periodic Auction.⁸ Currently, the Exchange does not assess a fee or provide a rebate for any orders appended with fee code AU. Now, the Exchange proposes to modify the rate associated with fee code AU in securities priced at or above \$1.00. The Exchange proposes to assess a fee of \$0.00040 per share in securities priced at or above \$1.00 for orders appended with fee code AU. The Exchange does

⁴ See BYX Equities Fee Schedule, Standard Rates.

⁵ Id.

⁶ 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. Periodic Auction Only Orders are not eligible for execution on the Continuous Book.

⁷ See Rule 11.25(b)(2). 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.

⁸ A Periodic Auction is a price forming auction that is 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 does 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) (“Periodic Auction Filing”). See also Securities Exchange Act Release No. 94012 (January 20, 2022), 87 FR 4060 (January 26, 2022) (SR-CboeBYX-2021-024) (“Periodic Auction Amendment”).

not propose to implement a fee for securities appended with fee code AU in securities priced below \$1.00. The purpose of introducing a fee associated with fee code AU in securities priced at or above \$1.00 is for business and competitive reasons, as the Exchange has seen increased participation in Periodic Auctions and now seeks to implement a fee for Members⁹ who choose to add liquidity designed to participate in a Periodic Auction. The Exchange notes that while it is adding a modest fee for securities priced at or above \$1.00 appended with fee code AU, the fee remains lower than many of the fees assessed to liquidity-adding orders on the Exchange.¹⁰

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹¹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹² 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 is consistent with the Section 6(b)(5)¹³ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers,

⁹ See Rule 1.5(n). The term “Member” shall mean any registered broker or dealer that has been admitted to membership in the Exchange.

¹⁰ See BYX Equities Fee Schedule, Standard Rates. See also BYX Equities Fee Schedule, Fee Codes and Associated Fees.

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

¹³ Id.

issuers, brokers, or dealers as well as Section 6(b)(4)¹⁴ as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities.

As described above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange believes the proposed amendment to the fee associated with fee code AU is reasonable as it does not represent a significant departure from the Exchange's general pricing structure. The Exchange notes that the proposed amendment to the fee associated with fee code AU represents a modest increase over existing prices and yet the proposed fee is lower than other similar fees assessed to orders that add liquidity to the BYX Book.¹⁵ In addition, the Exchange believes the proposed amendment represents an equitable allocation of fees and rebates and is not unfairly discriminatory because the fees will apply to all Members who add liquidity by submitting Periodic Auction Only or Periodic Auction Eligible orders, equally.

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. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes

¹⁴ 15 U.S.C. 78f(b)(4)

¹⁵ See, e.g. EDGA Equity Fee Schedule, Fee Codes B, V, and Y.

further the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."

The Exchange believes the proposed rule changes do not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed fees associated with fee code AU would apply to all Members equally in that all Members would be subject to the same fee for the execution of a Periodic Auction Only or Periodic Auction Eligible order during a Periodic Auction on the Exchange. Each of the Periodic Auction Only and Periodic Auction Eligible order types are available to all Members on an equal and non-discriminatory basis. As a result, any Member can decide to use (or not use) the Periodic Auction Only or Periodic Auction Eligible order type based on the benefits provided by such order types in potentially avoiding unfavorable executions, and the associated charge that the Exchange proposes to amend.

Next, the Exchange believes the proposed rule changes does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 13% of the market share.¹⁶ Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-

¹⁶ Supra note 1.

exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, 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.”¹⁷ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ ... As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ ...”.¹⁸ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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.

¹⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁸ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

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 Act¹⁹ and paragraph (f) of Rule 19b-4²⁰ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBYX-2024-005 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.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f).

All submissions should refer to file number SR-CboeBYX-2024-005. 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-2024-005 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Sherry R. Haywood,

Assistant Secretary.

²¹ 17 CFR 200.30-3(a)(12).