

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99488; File No. SR-CboeBZX-2024-007)

February 7, 2024

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend the Definition of Retail Order, and Codify Interpretations and Policies Regarding Permissible Uses of Algorithms by RMOs

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 25, 2024, Cboe BZX Exchange, Inc. (the “Exchange” or “BZX”) filed with the Securities and Exchange Commission (the “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 BZX Exchange, Inc. (the “Exchange” or “BZX”) is filing with the Securities and Exchange Commission (the “Commission”) a proposal to (i) amend the definition of “Retail Order” as defined by Exchange Rule 11.25(a)(2); (ii) codify proposed Interpretation and Policy .01, which describes the meaning of the term, “retail investor,” as referenced in proposed Rule 11.25(a)(2); (iii) codify proposed Interpretation and Policy .02, which describes the meaning of the term, “natural person,” as referenced in proposed Rule 11.25(a)(2); (iv) codify proposed Interpretation and Policy .03, which describes acceptable uses of algorithms or other computerized methodology by Retail Member Organizations; and (v) codify proposed Interpretation and Policy .04 which explains that Rule 11.25(a)(2)’s provision preventing the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

terms of an order with respect to price is not intended to prevent a Retail Member Organization from changing the terms of the order to ensure a better execution experience for a retail investor. 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/bzx/), 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 rule filing is to (i) amend the definition of "Retail Order" as defined by Exchange Rule 11.25(a)(2); (ii) codify proposed Interpretation and Policy .01, which describes the meaning of the term, "retail investor," as referenced in proposed Rule 11.25(a)(2); (iii) codify proposed Interpretation and Policy .02, which describes the meaning of the term, "natural person," as referenced in proposed Rule 11.25(a)(2); (iv) codify proposed Interpretation and Policy .03, which describes acceptable uses of algorithms or other computerized methodology by Retail Member Organizations; and (v) codify proposed Interpretation and Policy .04 which explains that Rule 11.25(a)(2)'s provision preventing the terms of an order with

respect to price is not intended to prevent a Retail Member Organization from changing the terms of the order to ensure a better execution experience for a retail investor.

The Exchange, along with its affiliate exchanges Cboe BYX Exchange, Inc. (“BYX”), Cboe EDGA Exchange, Inc. (“EDGA”), and Cboe EDGX Exchange, Inc. (“EDGX”), believes that retail investors are a key part of the trading ecosystem, and as such, has designed products and programs to execute retail orders quickly, with high execution quality and at a low-cost, with added pricing incentives. For instance, targeted retail order types on EDGX³ and BYX,⁴ execute both marketable and non-marketable retail orders with price improvement, and enhanced speed and fill rates. Additionally, both EDGX and BYX offer retail-only pricing incentives for low cost remove and premium rebates. EDGX also offers Retail Member Organizations (“RMO”)⁵ discounts on port fees and market data, and retail tiers give growing retail firms additional rebates.

Retail Order Definition

³ EDGX’s Retail Priority program seeks to enhanced execution quality for individual investors who trade U.S. equities on EDGX. Retail Priority offers a distinct allocation model, which differs from the traditional time-based allocation model used by most U.S. equities market centers that allocate trades to orders that arrive first in time at each price point. Retail Priority focuses on improving execution quality and trading outcomes for individual investors, and the firms facilitating their orders, by reducing their time to execution. Under Retail Priority, individual investors’ displayed limit orders will post at the front of the order queue for same-priced orders submitted on EDGX.

⁴ Orders designated by a Retail Member Organization as “Retail Orders” (defined *infra*) are eligible for participation in BYX’s Retail Price Improvement Program. Through the Retail Price Improvement Program, any BYX Member may input Retail Price Improving (RPI) orders on the BYX order book that will offer price improvement on \$.001 increments to RMOs that enter a Retail Order. In addition to the price improvement opportunities, Retail Orders that interact with price improving orders receive an enhanced rebate on BYX. See generally “Cboe Retail Price Improvement” available at: https://www.cboe.com/us/equities/trading/offerings/retail_price_improvement/ See generally, “BYX Retail Price Improvement (RPI) Program” available at: https://cdn.cboe.com/resources/release_notes/2012/BATS-Introduces-Retail-Price-Improvement-Program.pdf.

⁵ The term, Retail Member Organization or RMO, means “a Member (or a division thereof) that has been approved by the Exchange under this Rule to submit Retail Orders.” See Rule 11.2525(a)(1), definition of, “Retail Member Organization”.

As currently defined in Rule 11.25(a)(2), a “Retail Order” is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03⁶ that originates from a natural person and is submitted to the Exchange by a RMO, provided that no change is made to the terms of the order with respect to price or side of the order and the order does not originate from a trading algorithm or any other computerized methodology.

The Exchange has received Member feedback,⁷ however, that it is unclear whether Rule 11.25 permits the use of algorithms or other computerized methodologies (hereinafter, collectively referred to as “algorithms”) when submitting individual retail investors’ orders to the Exchange.⁸ The impact of the rule’s ambiguity is twofold: first, while Members may route orders entered by retail investors to the Exchange for execution, they are doing so as non-RMOs and without designating such orders as Retail Orders; second, potential new Members considering registering as RMOs may be discouraged doing from so. In both cases, the ambiguity of the Exchange’s current definition is discouraging the routing of retail order flow to the Exchange and preventing individual investors from receiving the benefits provided to Retail Orders executed on the Exchange.

⁶ FINRA Rule 5320.03 provides for a Riskless Principal Exception. See FINRA Rule 5320, Prohibition Against Trading Ahead of Customer Orders, available at: <https://www.finra.org/rules-guidance/rulebooks/finra-rules/5320>.

⁷ The Exchange has spoken with various current and prospective Members, ranging from smaller, regional broker-dealers to larger, bulge bracket broker-dealers, that are responsible for handling and routing retail orders for execution.

⁸ The Exchange notes that this is not a novel question and that this issue was initially raised by SIFMA in its comment letter to the New York Stock Exchange’s Retail Liquidity Program rule filing, in which SIFMA noted that a broad prohibition on algorithmic and computerized methodologies could be read to mean only orders submitted via phone may be considered Retail Orders, or that even orders entered through an online broker by an actual retail customer would not qualify. See SIFMA Comment Letter (March 23, 2012), to Securities Exchange Act Release No. 34-66346 (File No. SR-NYSE-2011-55 and File No. SR-NYSEAmex-2011-84) (“Retail Liquidity Program”).

The Exchange now seeks to amend the definition of Retail Order to clarify for Members, including potential new Members, that the use of an algorithm to submit orders to the Exchange on behalf of a retail investor, does not automatically preclude an RMO from designating such orders as, “Retail Orders.” Specifically, use of an algorithm to submit a Retail Order to the Exchange is permissible provided that the order, or investment criteria for the order (discussed *infra*) originates from a natural person, such as the investor him/herself, or a natural person on behalf of a retail investor (e.g., a Financial Advisor (“FA”), or trader), and such order is submitted to the Exchange by an RMO. Additionally, except as described in proposed Interpretation and Policy .03 (discussed *infra*), no change to the terms of the order with respect to price or side, may be made.

By amending the Retail Order definition, more RMOs may choose to avail themselves of the benefits offered by the Exchange’s Retail Attribution Program, which allows RMOs to designate a Retail Order to be identified as a Retail Order on the Exchange’s proprietary feeds offered by the Exchange, either on an order-by-order basis or on a port-by-port basis. In turn, the enhanced opportunity interact with retail flow is likely to incentivize more retail liquidity provision, as it is generally considered preferable to trade with retail orders than with orders of professional investors that are typically more informed regarding short-term price movements.⁹ Enhanced RMO participation and retail liquidity provision will ultimately foster transparency

⁹ Indeed, even the Commission noted “the markets generally distinguish between individual retail investors, whose orders are considered desirable by liquidity providers because such retail investors are presumed on average to be less informed about short-term price movements, and professional traders, whose orders are presumed on average to be more informed.” See Securities Exchange Act Release No. 34-68303 (November 27, 2012), 77 FR 71652 (December 3, 2012) (SR-BYX-2012-019) (“Order Granting Approval to Proposed Rule Change, as Modified by Amendment No. 2, to Adopt a Retail Price Improvement Program”).

and price discovery, and provide Retail Orders with additional price improvement opportunities as liquidity providers compete to interact with retail flow on BZX.

The Exchange believes that the proposed amendments are merely a codification of how retail trading occurs in today's markets and helps to ensure that retail customers are not inadvertently excluded from enhanced execution quality simply because they utilize automated trading solutions widely utilized by other market participants that have been developed since the current definition was added to the BZX rulebook. As noted in the Staff Report on Algorithmic Trading in U.S. Capital Markets, the current markets for secondary trading in NMS stocks is predominantly electronic, with most of the trading lifecycle, including order generation, routing, and execution, being fully automated.¹⁰ Indeed, both retail and institutional investors utilize algorithms to actively make investment and trading decisions.¹¹ Additionally, some specialized brokers provide individual retail investors with sophisticated broker algorithms, or allow them to create their own algorithms,¹² as well as utilize auto-investing technology that trades for retail customers based on how much money a retail customer wishes to invest, and their preferred investment horizon.¹³ Given the prevalent use of trading algorithms in the securities markets, the Exchange believes it necessary to modify the definition of Retail Order to align Exchange rules

¹⁰ See "Staff Report on Algorithmic Trading in U.S. Capital Markets" (August 5, 2020), available at https://www.sec.gov/tm/reports-and-publications/special-studies/algo_trading_report_2020.

¹¹ Id.

¹² Id.

¹³ See generally Betterment[®], Automated Investing, available at: <https://www.betterment.com/investing> (Betterment[®] provides retail customers access to technology that automatically invests in the market based on the retail customer's available funds and stated investment period) ("Automated Technology is how we make investing easier, better, and more accessible"); see also DriveWealth[®], LLC, Robo, available at: <https://www.drivewealth.com/solutions/robo> ("DriveWealth's[®] technology enables our partners to design cutting-edge robo-investing experiences for your customers...or you can empower people to make their own investment decisions with robo-advisory capability.")

with current market practice, and to provide clarity to Members and potential new Members regarding the definition of Retail Order.

Proposed Interpretation and Policy .01

The Exchange also seeks to adopt proposed Interpretation and Policy .01, which seeks to describe the meaning of the term, “retail investor,” which is referenced in proposed Rule 11.25(a)(2). To ensure that orders from only bona fide retail investors may qualify as Retail Orders, the Exchange believes it important to first specify what type of investor is considered a retail investor for the purposes of Rule 11.25. Specifically, a retail investor is intended to refer to a non-professional, individual investor that invests money in their own account, held at a brokerage firm. A retail investor may also refer to an account held in corporate form (e.g., corporation, or limited liability company) that has been established for the benefit of an individual or group of related family members (e.g., the legal representative for a family office).¹⁴ Furthermore, the investment goals of a retail investor are mainly saving for retirement and/or education, generating income, or growing wealth over the long-term. A retail investor may trade directly on his or her own behalf (e.g., self-directed online brokerage account), utilize online investing platforms that employ software algorithms to create and enters orders, and manage investment portfolios based on an investor’s investment criteria (e.g., “robo-advisors”), or utilize a FA who makes investment decisions and enters orders on the retail investor’s behalf.

The Exchange believes that this description will help to make clear to investors whether their trading practices and investment goals are consistent with the Exchange’s view of what constitutes retail trading activity. Additionally, this description should help to make clear that

¹⁴ Family offices are “entities established by wealthy families to manage their wealth and provide other services to family members, such as tax and estate planning services. See generally Small Entity Compliance Guide, “Family Office”, available at: <https://www.sec.gov/rules/final/2011/ia-3220-secg.htm>.

Retail Orders can also include orders entered on behalf of entities organized for the benefit of retail investors, and are not strictly limited to humans – e.g., orders entered by a legal representative for a family office may be considered Retail Orders as they ultimately benefit a retail investor.

Conversely, the term retail investor is *not* intended to include individual investors that engage in more professional trading strategies designed to profit from bid-ask spreads, short-term price movements, and arbitrage, or in trading behavior where multiple buy and sell orders are entered over a short period of time based on market conditions.¹⁵ While the Exchange acknowledges that certain industry offerings may provide individual investors the tools to trade in such a manner, such trading strategies are not considered those of a retail investor for the purposes of Rule 11.25.

Proposed Interpretation and Policy .02

The Exchange also seeks to adopt proposed Interpretation and Policy .02, which seeks to describe the meaning of the term, “natural person,” which is referenced in proposed Rule 11.25(a)(2). Specifically, for the purposes of Rule 11.25, the Exchange intends for the term “natural person” to refer to a human who enters an order or investment criteria for an order (discussed *infra*). This individual may be the retail investor him/herself, or a natural person entering the order on behalf of a retail investor (e.g., an FA or trader).

The Exchange believes that this clarification will help to ensure that only bona fide retail orders are submitted to the Exchange as Retail Orders by making clear that orders generated

¹⁵ The Exchange notes that the items noted herein are not intended to be an exhaustive list of restricted trading strategies. Indeed, what is noteworthy is that such trading activity is not representative of the type of activity an “ordinary” investor would engage in. Accordingly, while certain trading strategies may not be explicitly noted, trading representative of more sophisticated investors would similarly be prohibited for the purposes of Rule 11.25.

automatically by an algorithm, without human intervention, shall not be considered Retail Orders. For the sake of clarity, while the proposed definition of Retail Order requires an order to be entered by a human, a retail investor may utilize an online brokerage platform that employs algorithms to create and manage orders based on investment criteria (discussed *infra*) entered by a natural person. The Exchange believes that such orders still require *human intervention*, and the initial impetus to trade was not generated by an algorithm. In other words, the use of an algorithm comes only after investment criteria is entered by a human.

Additionally, the Exchange believes that proposed Interpretation and Policy .02 will place professional investors and trading firms on notice that orders generated from algorithms, without human intervention, that are entered and routed to the Exchange for professional trading purposes such as market making, high-frequency trading, and proprietary trading, etc., shall not satisfy the definition of Retail Order.¹⁶ While certain industry offerings may provide individual investors sophisticated tools enabling them to trade in a more automated fashion, the Exchange does not believe that such trading strategies and corresponding orders should be considered Retail Orders for the purposes of Rule 11.25.

Proposed Interpretation and Policy .03

Importantly, the Exchange seeks to ensure that only bona fide retail flow is designated as a Retail Order and does not intend for professional investors and professional trading firms to avail themselves of the benefits provided to RMOs by the Exchange. Therefore, the Exchange also seeks adopt Interpretation and Policy .03 to describe how an RMO can permissibly utilize an algorithm when entering Retail Orders onto the Exchange.

The Exchange believes that an RMO can utilize an algorithm to enter individual

¹⁶ Id.

investors' orders onto the Exchange, and permissibly designate such orders as Retail Orders, provided the order or investment criteria used to generate an order, originates from a natural person, such as the retail investor him/herself, or a natural person on behalf of a retail investor (e.g., an FA or trader), and is submitted to the Exchange for execution by an RMO. Examples of acceptable uses of algorithms by an RMO include, but are not limited to: a smart order router to route the Retail Order to the Exchange for execution; a smart order router to assess trading venues for the best priced quotation and liquidity prior to routing the Retail Order to the Exchange; an order management system, smart order router, or other functionality to change the terms an order to seek a better execution price; use of an order management system to assist with portfolio rebalancing and asset reallocation for the accounts of retail investors; and a retail investor's use of automated investment management tools offered by RMOs to manage their assets based on their goals and risk tolerance (i.e. robo-advisory solutions).

One example of an acceptable use of an algorithm by an RMO includes the use of a smart order router to route a Retail Order to the Exchange for execution. Here, an RMO may permissibly use a smart order router to send an order to the Exchange that: (i) an employee of the RMO (e.g., an FA or trader) entered into their trading system on behalf of a retail investor, (ii) was entered by the retail investor him/herself and is being managed by the RMO algorithmically (e.g., an order entered by an individual investor via a self-directed brokerage account), (iii) was created by the RMO's automated investment algorithm that creates orders based on investment criteria entered into a brokerage platform by a retail investor (i.e., robo-advisory solutions), or (iv) the RMO is managing on behalf of their broker-dealer customer that manages retail flow through the same channels described in (i)-(iii). In each use case, such algorithmic usage is permissible because the orders or investment criteria were not generated without intervention by

a natural person and the algorithms are only used after the orders or investment criteria have been entered.

Another permissible use of an algorithm by an RMO includes the use of a smart order router to assess trading venues for the best priced quotation and liquidity prior to routing the Retail Order entered through the channels described in (i)-(iv) above. Here, there is no automated generation of an order by an algorithm without intervention by a natural person – whether by order entry or entry of investment criteria (i.e., the robo-advisory scenario noted above, and discussed further *infra*). Rather, the RMO is using algorithmic technology post-order entry to assess the best market for the retail investor’s orders, which is consistent with an RMO’s duty to provide best execution¹⁷ and integral to providing optimal execution quality.

An RMO’s use of an order management system, smart order router, or other functionality to change the terms an order to seek a better execution price, may also be a permissible use of an algorithm. As discussed further below, an RMO may utilize such technology to monitor and manage orders previously routed to the Exchange on behalf of a retail investor to help work the order towards execution, by amending an order’s limit price, or changing the size of an order. Here, an order is not being automatically generated by an algorithm without intervention by a natural person. Rather, the RMO is utilizing trading technology post-order entry by a natural person to help achieve best execution for the retail investors’ orders, and to help achieve optimal execution quality.

Moreover, use of an order management system to assist with portfolio rebalancing and

¹⁷ See. FINRA Rule 5310, Best Execution and Interpositioning, available at: <https://www.finra.org/rules-guidance/guidance/reports/2021-finras-examination-and-risk-monitoring-program/best-execution>. FINRA Rule 5310 requires, amongst other things, that in any transaction for or with a customer or a customer of another broker-dealer, a FINRA member and persons associated with a FINRA member shall use reasonable diligence to ascertain the best market for the subject security and buy or sell in such market so that the resultant price to the customer is favorable as possible under prevailing market conditions.

asset reallocation for the accounts of retail investors may be a permissible use of an algorithm by an RMO. Here, a natural person employed by an RMO, such as an FA, often manages the accounts of multiple retail investors. In managing the assets of these accounts, FAs may often utilize order management systems, or other software that automatically rebalances their customers' equity security allocations, and simultaneously generates a pro-rata buy or sell order to execute the change in position for these accounts in order to eliminate the need to manually enter multiple buy and/or sell orders across multiple accounts. Here, an FA is utilizing an order management system to help manage orders they are entering on behalf of retail investors. While the generation of the order may be based on automated actions from the order management system, the creation of the order is originating from the intervention of a natural person, the FA, in a manner consistent with the FA's understanding of her/his clients' investment criteria.

Finally, the use of robo-advisory solutions offered by RMOs to retail investors to help them manage their personal assets based on their investment criteria (discussed *infra*) may also be an acceptable use of algorithms. As discussed below, robo-advisory solutions involve the algorithmic creation and management of orders based on investment criteria entered into the trading tool by a natural person. Despite the automated creation of an order by the RMO's algorithm, the Exchange believes that the algorithms offered by robo-advisory solutions are only utilized after a natural person enters his/her investment criteria and provides certain guidelines for his/her account. While robo-advisory solutions represent a relatively new type of trading platform available to retail investors, these platforms are investing solutions widely used by retail investors and offered by numerous brokerage firms. Given the popularity of robo-advisory solutions, to exclude such automated trading technology would be ignore the reality of how many retail investors participate in today's markets.

Conversely, orders automatically generated and submitted to the Exchange by an algorithm based on factors such as market conditions and price movements, which do not originate from a manual entry of order terms or investment criteria by a natural person, shall not be considered Retail Orders. Examples of such algorithms include, but are not limited to, algorithms developed for market-making, high-frequency trading, liquidity provision, arbitrage, hedging, or proprietary trading. In addition to the fact that such orders do not typically originate from a natural person, entities engaging in such trading strategies are not typically doing so for the account of a retail investor. While retail investors may be offered certain technologies that would permit them to engage in the trading strategies mentioned above, this activity is generally outside the scope of the investment goals of a traditional retail investor (discussed *supra*) and should be excluded from the type of permissible algorithm usage for Retail Orders.

Proposed Interpretation and Policy .04

The Exchange believes that proposed Rule 11.25(a)(2)'s provisions prohibiting the changing of a Retail Order's price or side may discourage the submission of Retail Orders to the Exchange, as it may be unclear how an RMO may handle a Retail Order it submitted to the Exchange algorithmically. As such, the Exchange seeks to codify Interpretation and Policy .04 to mitigate any confusion that RMOs may have in this regard. Specifically, despite proposed Rule 11.25(a)(2)'s provision preventing the changing of the price or side of a Retail Order, Interpretation and Policy .04 would provide that post-order entry an RMO may algorithmically amend the Retail Order's price and/or size provided such amendments are made for the purposes of seeking better execution, enhance execution quality, or minimize market impact.

Accordingly, an RMO may utilize an algorithm to add a limit price to an unpriced order, amend an order's price and/or size to manage an order's marketability and/or mitigate the risk of

receiving executions at aberrant prices, or adjust the price and/or size of an order as market conditions or trading objectives may dictate. For example, an RMO that receives unpriced orders from its retail clients may choose to assign limit prices to such orders to prevent unintended market impact and to prevent such orders from executing at undesirable price levels, or to ensure an order's limit price falls within the Limit Up/Limit Down ("LULD")¹⁸ bands. In this regard, Interpretation and Policy .04 will help to ensure that an order submitted by a retail investor does not lose its standing as a Retail Order simply because the RMO that submitted the order assigned limit prices to the orders to help ensure better priced executions.

Importantly, such order amendments may be made manually by a natural person who entered the order on behalf of the retail investor (e.g., an RMO's trader, an FA, or a retail investor via their online brokerage account), by the smart order router used by the RMO to route the order to the Exchange, and/or by the algorithm utilized by the RMO to manage the order's execution. While the changing of an order's price or size by an algorithm or smart order router may be automated, the Exchange believes such behavior is permissible provided the RMO is making such amendments are made to satisfy their best execution obligations, prevent outsized market impact due to an order's super-marketable limit price, or to ensure an order's marketable limit price falls within the Limit Up/Limit Down bands.

Retail Segments that Will Benefit from the Proposed Amendments

¹⁸ The Limit Up/Limit Down Plan is designed to prevent trades in NMS Stocks from occurring outside specified price bands, which are set at a percentage level above and below the average reference price of a security over the preceding five-minute period. The percentage level is determined by a security's designation as a Tier 1 or Tier 2 security. Tier 1 comprises all securities in the S&P 500, the Russell 1000 and select Exchange Traded Products (ETPs). Tier 2 comprises all other NMS securities, except for rights and warrants, which are specifically excluded from coverage. The Plan applies during regular trading hours of 9:30 am ET - 4:00 pm ET.

The Exchange believes that the proposed definition may encourage financial advisors from wealth management firms that are RMOs to send their Retail Orders to the Exchange, as these RMOs will have additional certainty as to how algorithms may be used in the submission of Retail Orders. When managing their retail customers' portfolios, even financial advisors rely on automated technologies such as trading algorithms and automated smart order routing solutions to assist them with efficiently managing and entering orders for their various customer accounts.¹⁹ Yet, in speaking with some of the Exchange's Members, they are hesitant to allow send their FAs retail order flow to the Exchange given the ambiguity of the current definition of Retail Order. In this regard, the Exchange believes that the proposed rule change will provide further guidance to these Members and encourage them to route their Retail Orders to the Exchange where they can benefit from retail-only pricing incentives. Certainly, orders originating from FAs who are responsible for managing individuals' securities accounts are quintessentially retail, and the qualification of such orders as Retail Orders should not be in doubt simply because FAs may elect to utilize automated trading technologies currently utilized by a broad array of other market participants.

Additionally, the proposed rule may also make clear to specialized brokers and traditional brokerage firms²⁰ that provide retail investors with automated trading solutions, that orders from

¹⁹ For instance, many brokerage firms offer investment advisory programs where FAs manage their clients' portfolios based on their clients' investment criteria and risk profiles. In managing these accounts, FAs may determine that a certain equity security has reached a price point triggering the buying (selling) of such security across multiple client accounts. Rather than individually buying (selling) the security multiple times for each client account, an FA may instead choose to manage the accounts through automated technology, such as an order management system, trading algorithm, and smart order router. The Exchange believes that the Retail Order definition should include such activity, as the order activity is being entered by a natural person (i.e., the FA), on behalf of natural persons (i.e., retail investors).

²⁰ For example, Merrill Guided Investing offers retail investors an automated investing tool. See Merrill Guided Investing, available at: <https://merrilledge.com/investing/merrill-guided-investing>; see also Fidelity Go[®], which provides retail investors with technology to help automate investing based on information retail investors provide about themselves and their financial institution, available at: <https://www.fidelity.com/managed-accounts/fidelity-go/overview>; see also Schwab Intelligent Portfolios[®],

retail investors may qualify as Retail Orders. By way of background, automated trading solutions generally begin by providing retail investors with a questionnaire that asks them for investment criteria, such as personal information regarding their age, investing time horizon, investing goals, and a target dollar amount to guide asset allocation. From there, a retail investor's investments are initially allocated and subsequently re-allocated according to pre-determined models developed by the brokerage firm. Typically, automated rebalancing may also occur when a retail investor adds or withdraws money from the account, or an allocation percentage drifts from the retail investor's desired range. Retail investors utilizing such services typically complete a periodic review to confirm that their portfolio is still aligned with their investment goals, and when their portfolios are reallocated, they must accept the changes before an allocation is executed. In this use case, natural persons (i.e., retail customers) are directly entering their investment criteria into a brokerage firm's platform, and algorithms and trading models automatically generate orders based on such data after the retail customer provides the criteria from which an order can be generated. If such orders do not qualify as Retail Orders, it would be hard to contemplate what types of orders do satisfy such a definition.

Existing Framework Ensuring Only Bona Fide Retail Orders Satisfy Rule 11.25.

The Exchange notes that it already has in place robust protections designed to ensure only bona fide retail orders are designated as Retail Orders. The proposed amendments will not eliminate or diminish the strength of the existing protections. Rather, the proposed amendments will augment the Exchange's existing RMO framework.

which offers retail investors automated investing through a robo-advisor that helps build and manage retail investors' portfolios, available at: <https://intelligent.schwab.com/>.

Currently, Rule 11.25(b)(1)-(6) sets forth an objective process by which a Member organization applies to become a RMO. First, to qualify as a Retail Member Organization, a Member must conduct a retail routing business or route retail orders on behalf of another broker-dealer.²¹ To become an RMO, a Member is required to submit an application form,²² supporting documentation (e.g., marketing literature, website screenshots, and other publicly disclosed materials) confirming that the applicant’s order flow would meet the requirements of the Retail Order definition,²³ and an attestation²⁴ in a form prescribed by the Exchange, that substantially all orders submitted as Retail Orders will qualify as such under the Rule.²⁵ After submission of these materials, various Exchange functions, including legal and operations, review the application to assess whether the applicant’s order flow complies with Exchange rules.²⁶ Applicants are then notified, in writing, of the Exchange’s decision.²⁷

Furthermore, all RMOs must have in place policies and procedures reasonably designed to ensure that it will only designate orders as Retail Orders if all requirements of a Retail Order are met.²⁸ These policies and procedures must require the Member to (i) exercise due diligence before entering a Retail Order to assure that entry as a Retail Order is in compliance with the requirements of the Rule, and (ii) monitor whether orders entered as Retail Orders meet the

²¹ See Rule 11.25(b)(1).

²² See Rule 11.25(b)(2)(A).

²³ See Rule 11.25(b)(2)(B).

²⁴ See section, “Retail Member Organization - Broker-Dealer Customer Agreement”, and “Broker-Dealer Customer Annual Attestation” of “Cboe BYX Exchange, Inc., Retail Member Organization Application”, available at: https://cdn.cboe.com/resources/membership/BYX_Retail_Member_Organization_Application.pdf.

²⁵ See Rule 11.25(b)(2)(C)

²⁶ See Rule 11.25(b)(3)

²⁷ Id.

²⁸ See Rule 11.(b)(6)

applicable requirements.²⁹ If a RMO does not itself conduct a retail business but routes Retail Orders on behalf of another broker-dealer, the RMO's supervisory procedures must be reasonably designed to assure that the orders it receives from the other broker-dealer that are designated as Retail Orders meets the definition of a Retail Order.³⁰ In these cases, the RMO must (i) obtain an annual written representation, in a form acceptable to the Exchange, from each other broker-dealer that sends the RMO orders to be designated as Retail Orders that the entry of such orders as Retail Orders will be in compliance with the requirements of this Rule; and (ii) monitor whether Retail Order flow routed on behalf of other such broker-dealers meets the applicable requirements.³¹ Importantly, the Exchange's regulatory and surveillance functions provide appropriate oversight by the Exchange by monitoring for continued compliance with the terms of these provisions. If a RMO fails to abide by the Retail Order requirements, the Exchange in its sole discretion may disqualify a Member from its status as a RMO.³²

Overall, the Exchange believes it has in place an effective framework for ensuring that only bona fide retail orders are designated as Retail Orders by RMOs, and notes that the proposed amendments will only seek to enhance Members' understanding of Exchange rules regarding Retail Orders, as well as augment the Exchange's ability to enforce its rules related to Retail Orders. Therefore, while the proposed amendments may broaden the spectrum of retail investors whose orders are eligible to be routed to the Exchange by RMOs, the enhanced clarity of these rules will help to enable Members to make routing decisions in compliance with applicable Exchange rules. In this regard, the Exchange believes it important to note that as

²⁹ Id.

³⁰ Id.

³¹ Id.

³² See Rule 1121(b)(d)(1). [*sic*]

Members of the Exchange, RMOs must be registered brokers or dealers. As registered brokers or dealers, RMOs are subject to a panoply of rules, such as FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), BZX Rule 2.2. (Obligation of Members and the Exchange), and BZX Rule 3.1 (Business Conduct of Members). These rules require, amongst other things, that as brokers or dealers, Members are required to conduct business with the highest standards of commercial honor, and obligate Members to comply with all Exchange rules, by-laws, and regulations.³³ While the Exchange has an obligation to maintain fair and orderly markets and carry out its duties as a self-regulatory organization, RMOs are also obligated to ensure that only orders that comply with Exchange rules are routed to the Exchange and designated as Retail Orders.

The Exchange also believes that the proposed amendments will provide the Exchange's regulatory and surveillance functions with a rule set that is more aligned with today's retail order routing practices. With the prevalent use of algorithms in today's equity markets, more descriptive rule text will aid the Exchange's business associates in properly guiding its Members through the RMO process, as well as further strengthen the regulatory and surveillance function's ability to enforce Exchange rules.

2. Statutory Basis

The Exchange believes the proposed rule changes are 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.³⁴ Specifically, the

³³ While the RMO application process discussed above does rely on information provided by the applicant, the Exchange believes that ultimately it must be allowed to rely on representations made by registered brokers or dealers that are obligated to conduct their securities business consistent with the highest standards of commercial honor, and in submitting their application, have attested to the accuracy of the information provided to the Exchange.

³⁴ 15 U.S.C. 78f(b).

Exchange believes the proposed rule change is consistent with the Section 6(b)(5)³⁵ 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)³⁶ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Retail Order Definition

The Exchange believes that the proposed rule change is consistent with these principles because it would increase competition among execution venues, encourage additional on-exchange retail liquidity, and offer retail investors the opportunity to receive order book priority [*sic*] ahead of all other interest on the BZX Book. The Exchange notes that a significant percentage of the orders of individual investors are executed over the counter,³⁷ and that by amending the definition of Retail Order more retail flow may be directed to the Exchange and have the opportunity to execute on a regulated, transparent market. Indeed, even the Commission has noted that “a very large percentage of marketable (immediately executable) order flow of individual investors is ‘executed’ or ‘internalized’ by broker-dealers in the [over-

³⁵ 15 U.S.C. 78f(b)(5).

³⁶ Id.

³⁷ Ninety-plus percent (90%) of retail marketable orders are routed to wholesalers and executed off-exchange. See Chair Gensler’s remarks, “Market Structure and the Retail Investors: Remarks Before the Piper Sandler Global Exchange Conference”, (June 2, 2022), available at: <https://www.sec.gov/news/speech/gensler-remarks-piper-sandler-global-exchange-conference-060822>.

the-counter-markets].”³⁸ The Commission has also noted that a review of the order flow of eight retail brokers revealed that nearly 100% of their customer market orders were routed to over-the-counter market makers, often pursuant to payment for order flow arrangements.³⁹ By helping to incentivize RMOs to send Retail Orders to the Exchange, RMOs will have another alternative to over-the-counter market makers. In turn, an increase in the number of Retail Orders submitted onto the Exchange will encourage more retail liquidity provision, thereby deepening BZX’s retail liquidity pool, fostering enhanced price discovery, and offering Retail Orders more price improvement opportunities as liquidity providers compete to trade with Retail Orders increases.

The Exchange also believes that the proposed amendment to the definition of “Retail Order” promotes just and equitable principles of trade and is not unfairly discriminatory. While the proposed amendment treats Retail Orders differently than non-retail orders, the Exchange believes that such a distinction does not constitute *unfair* discrimination, and in fact benefits both liquidity providers and retail investors alike. As noted by the Commission in its order approving the BYX RPI program,⁴⁰ the markets already distinguish between retail investors, whose orders are considered desirable by liquidity providers because retail investors are presumed to be, on average, less informed about short-term price movements, and professional traders, whose orders are presumed, on average, to be more informed about short-term price movements.⁴¹ Because of this distinction, the Commission noted that liquidity providers prefer to provide price improvement opportunities to less informed retail orders than to informed professional orders, and that absent price improvement opportunities, retail investors are likely to encounter wider

³⁸ See Securities Exchange Act Release No. 61358 (January 14, 2010), 75 FR 3594, 3600 (January 21, 2010) (“Concept Release on Equity Market Structure”).

³⁹ Id.

⁴⁰ Supra note 9.

⁴¹ Id.

spreads which are a consequence of their interaction with more informed order flow.⁴² The Exchange believes that in clarifying the definition of Retail Order, RMOs will be more encouraged to enter orders onto the Exchange, where they will receive beneficial retail-only Exchange pricing. Moreover, increased RMO participation may in turn attract additional retail liquidity, benefitting both the retail investing community and professional traders.

The proposed amendment to the definition of Retail Order is also designed to protect investors and the public interest. In conjunction with proposed Interpretations and Policies .01 - .04, the Exchange seeks to clarify precisely how Retail Orders may be entered onto the Exchange by RMOs through the use of algorithms. This clarity is designed to not only encourage Members to submit Retail Orders onto the Exchange, but to ensure that only bona fide retail orders are able to take advantage of the benefits provided to Retail Orders by the Exchange.

Proposed Interpretation and Policy .01

Proposed Interpretation and Policy .01 is designed 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. By providing additional guidance to market participants about what is meant by the term “retail investor”, the Exchange is helping to ensure that only bona fide retail activity is entered onto the Exchange, and that professional investors cannot somehow avail themselves of the benefits offered to Retail Orders by the Exchange.

The proposed clarification may also provide Members, and potential new Members, with the necessary assurances that they are in fact managing retail order flow, encouraging them to enter their Retail Orders onto the Exchange as RMOs. Increased RMO participation may in turn foster more retail liquidity provision as more sophisticated order flow seeks to trade with retail

⁴² Id.

flow. The increase in liquidity provision and RMO provision will likely lead to deeper liquidity on the Exchange that will help to enhance price discovery and increased price improvement opportunities for not only retail investors, but all investors submitting order flow to the Exchange. Additionally, by routing Retail Orders to the Exchange, RMOs and their retail investors will benefit from the Exchange's retail-only pricing incentives.

Proposed Interpretation and Policy .02

Proposed Interpretation and Policy .02 is designed 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. By providing additional guidance around the term “natural person”, it will be clearer to Members that an order, or investment criteria for an order, must be entered by a human and cannot originate from an algorithm without human intervention. This will help to ensure that only bona fide retail orders are designated as “Retail Orders” and mitigate the likelihood that professional investors that utilize fully automated trading technology designed to participate in certain trading strategies inappropriately seek to designate their orders as Retail Orders.

Furthermore, by clarifying that orders created through broker-dealers' robo-advisory programs can qualify as Retail Orders if the investment criteria are entered by a natural person, additional order flow from robo-advisory program may be directed to the Exchange for execution. Similarly, by making clear that a “natural person” may also be an account held in corporate form, such as an individual retirement account or limited liability corporation (e.g., family office), more retail flow may be directed to the Exchange. By executing on the Exchange RMOs will be able to avail themselves of retail-specific pricing, which they can pass onto their retail clients in the form of reduced commissions and transaction costs. Additionally, these

orders will have the opportunity to participate in the Exchange's Retail Priority program [*sic*], which focuses on improving execution quality and trading outcomes for individual investors, and the firms facilitating their orders, by reducing their time to execution.

Finally, as noted throughout, increased retail flow will augment the Exchange's liquidity pools, thereby fostering price discovery, and creating more opportunities for price improvement. With improved on-execution experiences more investors may be incentivized to route their retail orders on-exchange (i.e., BZX) exposing retail flow to on-exchange price competition.

Proposed Interpretation and Policy. 03

Proposed Interpretation and Policy .03 is designed to protect investors and the markets by making clear to RMOs using algorithms to enter Retail Orders onto the Exchange that orders must be entered by a retail investor or a natural person on behalf of a retail investor, and that in the case of robo-advisory solutions, the retail investor must enter the investment criteria that the brokerage firm's algorithm uses to generate orders. By providing examples of both acceptable and unacceptable uses of algorithms, market participants will be clearer as to whether the orders they route to the Exchange for execution are indeed "Retail Orders". In doing so, the Exchange is helping to ensure that only bona fide retail orders qualify as Retail Orders, and that professional investors are not inappropriately receiving benefits specifically reserved for retail investors.

Proposed Interpretation and Policy .03 will also help to remove impediments to and perfect the mechanism of a free and open market and a national market system. By providing additional guidance on how RMOs may use algorithms when submitting Retail Orders to the Exchange, Members will be more certain as to whether their orders in fact qualify as Retail Orders. In doing so, RMOs may route more Retail Orders to the Exchange and in turn, may

encourage more market participants to provide additional retail liquidity thereby deepening the liquidity pool, and enhancing price discovery and transparency. As more investors are incentivized to execute their retail flow on the Exchange an increasing number of individual investors' orders will be exposed to on-exchange price competition, increasing their opportunity to receive price improvement and improved execution quality.

Interpretation and Policy .04

Interpretation and Policy .04 helps to remove impediments to and perfect the mechanism of a free and open market and a national market system. The provision preventing the changing of the price or side of an order in both the current and proposed definition of Retail Order was designed to ensure that orders entered onto the Exchange by RMOs were submitted on behalf of retail investors, and not institutional orders which typically have the terms of price and size amended, canceled, or replaced frequently throughout the day. However, the Exchange recognizes that RMOs may sometimes receive unpriced orders from their retail customers or may deem a certain limit price to be appropriate for the purposes of seeking a better execution and/or preventing an order from executing at undesirable price levels. As such, by clarifying that Retail Orders may in fact be amended provided it is to affect a better execution experience for the retail investor, or to manage market impact, RMOs may be more encouraged to send more Retail Orders to the Exchange. As noted throughout, increased RMO activity and retail liquidity provision will only serve to deepen liquidity for Retail Orders, which in turn will lead to price competition and increased price improvement opportunities for individual investors' orders.

The Exchange also believes that proposed Interpretations and Policies .01-.04 promote just and equitable principles of trade and are not unfairly discriminatory because they are

intended to provide guidance to all Members, in particular RMOs, as to what constitutes a Retail Order.

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

The Exchange does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes its proposed amendment to the definition of Retail Order and codification of Interpretation and Policies .01 – .04 will benefit intramarket competition rather than burden competition. The proposed changes serve to provide additional clarity to Members and RMOs as to the types of persons or accounts eligible to submit Retail Orders and describe the permissible and impermissible uses of algorithms available to Members and RMOs when submitting Retail Orders. The Exchange believes this additional information will lead to additional retail order flow being submitted to the Exchange by RMOs, which all contra-side orders are eligible to interact with. Greater overall order flow and trading opportunities benefits all market participants on the Exchange. An increase in RMO activity and liquidity providing orders will serve to enhance the Exchange's available liquidity. Deeper liquidity pools will, in turn, enhance price discovery, as well as price improvement opportunities for retail investors as liquidity providers compete for retail executions. Liquidity providers also benefit by being able to interact with retail order flow that is often executed off-exchange, and therefore generally inaccessible to those trading in the lit markets.

While the proposed definition will help to ensure that only bona fide retail investors receive the benefits of afforded to Retail Orders, prioritization of retail investors is not a novel concept in the securities market. In this regard, the proposed amendments should not result in any new or novel issues to be considered by the Commission, or that have not already been contemplated by today's market participants. Indeed, as noted in the Amendment 1 of the

EDGX's Retail Priority filing,⁴³ customer priority has a long tradition in the options market where orders entered on behalf of non-broker dealer public customers have historically been afforded priority over orders submitted by registered broker dealers. In fact, most options exchanges, including the Exchange's equity options platform,⁴⁴ employ a customer priority execution algorithm where orders submitted by a subset of public customer with more limited trading activity are provided order book priority ahead of orders submitted by broker-dealers or other market professionals at the same price.

The Exchange further believes that the proposed rule change will increase intermarket competition by enabling the Exchange to better compete with other exchanges and off-exchange trading venues for retail order flow. The Commission has spoken about "increasing competition and enhancing the direct exposure of individual investor orders to a broader spectrum of market participants"⁴⁵ and the Exchange believes its proposed amendments to the definition of Retail Order and introduction of Interpretations and Policies .01 – .04 provide sufficient guidance to RMOs to encourage additional retail order flow be sent to the Exchange. In turn, retail investors will have additional opportunities to receive executions on a transparent, regulated, national securities exchange in addition to the currently available off-exchange trading venues. Additionally, a revised definition of Retail Order may encourage additional competition for retail order flow on-exchange that would be eligible to avail themselves of retail specific benefits and order types offered by the Exchange, such as Retail Attribution. This, in turn, could create additional incentives for regulated exchanges to develop additional liquidity programs designed

⁴³ See Securities Exchange Act Release No. 86280 (July 2, 2019), 84 FR 32808 (July 9, 2019) ("Notice of Amendment No. 1").

⁴⁴ See BZX Rule 21.8(d)(1). [*sic*]

⁴⁵ See Securities Exchange Act Release No. 96495 (December 14, 2022), 88 FR 128 (January 3, 2023) ("Order Competition Rule") at 178.

at providing additional benefits to retail investors, thus promoting additional intermarket competition.

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

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:

- 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2024-007 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-CboeBZX-2024-007. 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-CboeBZX-2024-007 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.⁴⁶

Sherry R. Haywood,
Assistant Secretary.

⁴⁶ 17 CFR 200.30-3(a)(12).