

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98532; File No. SR-CboeBZX-2023-063)

September 26, 2023

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Adopt an Alternative to the Minimum \$4 Price Requirement for Companies Seeking to List Tier II Securities on the Exchange

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 September 19, 2023, 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. (“BZX” or the “Exchange”) is filing with the Securities and Exchange Commission (“Commission” or “SEC”) a proposed rule change to adopt an alternative to the minimum \$4 price requirement for companies seeking to list Tier II securities on the Exchange.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Exchange proposes to adopt an alternative to the minimum \$4 price requirement for companies that seek to list Tier II securities on the Exchange which meet the express exclusion from the definition of a “penny stock” contained in Exchange Act Rule 3a51-1(g) (the “Penny Stock Rules”).³ Such an amendment would allow a Company to list a Tier II security on the Exchange if it satisfies all existing and proposed listing standards except for the \$4 price requirement.⁴ As discussed below, the “net tangible assets and average revenue tests” proposed herein that satisfies the requirements of Exchange Act Rule 3a51-1(g) are substantively identical to the net tangible assets and average revenue tests proposed by Nasdaq Stock Market, LLC (“Nasdaq”) that received Commission approval.⁵

³ 17 CFR 240.3a51-1(g).

⁴ See Rule 14.9(b)(1)(A).

⁵ See Securities Exchange Act Nos. 66159 (January 13, 2012) 77 FR 3021 (January 20, 2012) (SR-NASDAQ-2012-002) (Notice of Filing of Proposed Rule Change To Adopt an Alternative to the \$4 Initial Listing Bid Price Requirement for the Nasdaq Capital Market of Either \$2 or \$3, if Certain Other Listing Requirements Are Met); 66830 (April 18, 2012) 77 FR 24549 (April 24, 2012) (Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to Proposed Rule Change, as Modified by Amendment No. 1, To Adopt an Alternative to the \$4 Per Share Initial Listing Bid Price Requirement for the Nasdaq Capital Market of Either \$2 Closing Price Per Share or \$3 Closing Price Per Share, if Certain Other Listing Requirements are Met).

The Exchange is seeking to make this change to enhance competition among exchanges for companies with securities priced between \$2 and \$4. Rule 3a51-1⁶ defines a “penny stock” as any equity security that does not satisfy one of the exceptions enumerated in subparagraphs (a) through (g) under the Rule. If a security is a penny stock, Rules 15g-1 through 15g-9 under the Act⁷ impose certain additional disclosure and other requirements on brokers and dealers when effecting transactions in such securities. Exchange-listed securities are not considered penny stocks because they comply with the requirements of Rule 3a51-1(a)(2) under the Act,⁸ which excepts from the definition of penny stock securities registered on national securities exchanges that have initial listing standards that meet certain requirements, including a \$4 bid price at the time of listing. The Exchange’s listings standards currently include all the requirements to qualify for the penny stock exception under Exchange Act Rule 3a51-1(a)(2) so that today, once a security is initially listed on the Exchange, the Exchange will not be considered a penny stock for so long as it is listed on the Exchange.

The penny stock rules also exclude from the definition of penny stock, under a “grandfather” provision, securities registered on a national securities exchange that has been continually registered as such since April 20, 1992, and has maintained quantitative listing standards that are substantially similar to or stricter than those listing standards that were in place on the exchange on January 8, 2004.⁹ NYSE American, LLC (“NYSE American”) meets this standard, but the Exchange, which was more recently registered as a national securities exchange, does not.

⁶ 17 CFR 240.3a51-1.

⁷ 17 CFR 240.15g-1.

⁸ 17 CFR 240.3a51-1(a)(2).

⁹ See 17 CFR 240.3a51-1(a)(1).

Accordingly, NYSE American’s initial listing price requirements of either \$2 or \$3 are grandfathered under this provision.

In 2012, Nasdaq received Commission approval for a proposed rule change that allowed it to adopt an alternative to the \$4 bid price requirement (the “Nasdaq proposal”).¹⁰ The Exchange is now proposing to similarly adopt an alternative to the minimum \$4 price requirement for companies seeking to list Tier II securities on the Exchange that is substantively identical to the Nasdaq proposal at the time it was adopted.¹¹

Under proposed Rule 14.9(b)(1)(A)(ii), companies that maintain a \$2 or \$3 closing price for at least five consecutive business days prior to approval would qualify for listing, if among other things, they meet the net tangible assets or average revenue tests of the alternative penny stock exclusion set forth in Exchange Act Rule 3a51-1(g)¹² and meet all existing listing standards except for the \$4 price requirement. Such a company must instead have a minimum \$3 price if it qualifies

¹⁰ Supra note 5.

¹¹ The Exchange notes that since Nasdaq adopted the alternative minimum price requirement in 2012, it has adopted certain other initial listing requirements that differ from the Exchange’s current initial listing requirements. The Exchange is not proposing to amend its initial listing requirements except for the proposed alternative minimum price requirement at this time. Instead, the Exchange is proposing to adopt the proposed alternative minimum price requirement while its other initial listing standards are substantively identical to Nasdaq’s initial listing standards at the time the minimum price requirement was approved by the Commission in 2012.

¹² See 17 CFR 240.3a51-1(g). A company seeking to qualify under only the Market Value of Listed Securities Standard would, among other things, also be required to maintain for 90 consecutive trading days the market value of their listed securities at \$50 million and the \$2 price requirement prior to applying to list under the alternative standard. See Exchange Rule 14.9(b)(2)(B). Under the Market Value of Listed Securities Standard, an issuer would need to meet, among other things: (A) Market value of listed securities of at least \$50 million (current publicly traded issuers must meet this requirement and the price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the market value of listed securities standard); (B) stockholders' equity of at least \$4 million; and (C) market value of publicly held shares of at least \$15 million. The Exchange proposes to revise Rule 14.9(b)(2)(B) in order to make it consistent with the proposal. In particular, Rule 14.9(b)(2)(B)(i) would be revised to delete the specific reference to \$4 bid price requirement, since an issuer seeking to initially list its securities under the Market Value of Listed Securities Standard using the proposed alternative price requirement would have to maintain a closing price of at least \$2 per share for 90 consecutive trading days.

under the \$5 million equity¹³ or \$750,000 net income alternatives¹⁴ or a minimum \$2 price if it qualifies under the \$50 million market value of listed securities alternative.¹⁵ In addition, a company qualifying under the proposed standard must have either: (a) net tangible assets in excess of \$2 million, if the issuer has been in continuous operation for at least three years; or (b) net tangible assets in excess of \$5 million, if the issuer has been in continuous operation for less than three years; or (c) average revenue of at least \$6 million for the last three years. For this purpose, net tangible assets or revenue must be demonstrated on the Company's most recently filed audited financial statements, satisfying the requirements of the Commission, and which are dated less than 15 months prior to the date of listing.¹⁶

As proposed under new interpretation and policy .01(a) to Rule 14.9, an Exchange-listed security could become subject to the penny stock rules following initial listing if it no longer meets the tangible assets or average revenue tests of the alternative exclusion, and does not qualify for another exclusion under the penny stock rules. Further, unlike securities listed under the Exchange's existing standards, which have a blanket exclusion from the penny stock rules, broker-dealers that effect recommended transactions in securities that originally qualified for listing under the Exchange's alternative price standard would, among other things, under Exchange Act Rule 3a51-1(g), need to review current financial statements of the issuer to verify that it meets the applicable net tangible assets or average revenue test, have a reasonable basis for believing they remain accurate, and preserve copies of those financial statements as part of its records. As provided in proposed Interpretation and Policy .01 to Rule 14.9, in order to assist brokers' and dealers'

¹³ See Exchange Rule 14.9(b)(2)(A).

¹⁴ See Exchange Rule 14.9(b)(2)(C).

¹⁵ See Exchange Rule 14.9(b)(2)(B).

¹⁶ The proposed rule adopts the 15-month requirement to assure consistency with the timing requirements contained in Exchange Act Rule 3a51-1(g).

compliance with the requirements of the Penny Stock Rules, the Exchange will monitor companies listed under the proposed alternative and publish a list of any company that initially listed under that requirement, which does not then meet the requirements of Exchange Act Rule 3a51-1(g), described above, or any of the other exclusions from being a penny stock contained in Rule 3a51-1.¹⁷ Such list will be updated on a daily basis.

If a company initially lists with a bid price below \$4 under the alternative requirement contained in Rule 14.9(b)(1)(A)(ii), but subsequently achieves a \$4 closing price for at least five consecutive business days and, at the same time, satisfies all other initial listing criteria, it will no longer be considered as having listed under the alternative requirement and the Exchange will notify the Company that it has qualified for listing under the price requirement contained in Rule 14.9(b)(1)(A)(i).¹⁸ If a security obtains a \$4 closing price, the Exchange will determine whether it meets all other initial listing requirements for the Tier II securities, including both the quantitative and qualitative requirements.¹⁹ If the security meets all initial listing requirements, it will satisfy the requirements for the exclusion contained in Rule 3a51- 1(a)(2) and no longer be monitored for compliance with the other exclusions from the definition of a penny stock. Brokers and dealers are reminded that the list published by the Exchange is only an aid and that the Penny Stock Rules impose specific obligations on brokers and dealers with respect to transactions in penny stocks.

¹⁷ The Exchange believes that the other exclusion most likely to be implicated would be Rule 3a51-1(d), 17 CFR 240.3a51-1(d), which provides an exclusion from the definition of a penny stock for a security with a minimum bid price of \$5. Note, however, that if a Company obtains a \$4 minimum bid price at a time when it meets all other initial listing requirements, the Exchange would no longer consider the company as having listed under the proposed alternative standard.

¹⁸ See proposed Interpretation and Policy .01(a) to Rule 14.9.

¹⁹ The security will have to meet the \$4 bid price requirement contained in Rule 14.9(b)(1)(A)(i). In addition, Rule 14.9(b)(2)(B) requires a company qualifying only under the Market Value of Listed Securities requirement to satisfy that requirement and the price requirement for 90 consecutive trading days prior to applying for listing. Such a company will have to achieve a \$4 bid price for 90 consecutive trading days and a \$4 closing price for five days, although these periods may overlap.

Proposed Interpretation and Policy .01(b) to Rule 14.9 provides that the proposed alternative price test will be based on the BZX Official Closing Price²⁰ in the security.²¹

The Exchange also proposes that the required closing price must be achieved for at least five consecutive business days before approval of the listing application.²² The Exchange may extend the minimum five-day compliance period required to satisfy these tests based on any fact or circumstance, including the margin of compliance, the trading volume, the trend of the security's price, or information or concerns raised by other regulators concerning the trading of the security. The Exchange believes that requiring the minimum \$2 or \$3 closing price to be maintained for a period of five days (as opposed to one day) should reduce the risk that some might attempt to manipulate or otherwise artificially inflate the closing price in order to allow a security to qualify for listing. In addition, the Exchange will exercise its discretionary authority to deny initial listing if there are particular concerns about an issuer, such as its ability to

²⁰ See BZX Rule 11.23(a)(3). As provided in Exchange Rule 11.23(c)(2)(B), “[f]or a BZX-listed corporate security, the Closing Auction price will be the BZX Official Closing Price. In the event that there is no Closing Auction for a BZX-listed corporate security, the BZX Official Closing Price will be the price of the Final Last Sale Eligible Trade. See Exchange Rule 11.23(a)(9) for the definition of “Final Last Sale Eligible Trade”.

²¹ The Exchange notes that the process for determining the BZX Official Closing Price is similar to the process on Nasdaq for determining the Nasdaq Official Closing Price. See Nasdaq Rule 4754. The Exchange notes that pursuant to Nasdaq Rule 4754(b)(5), Nasdaq may apply auxiliary procedures for the Closing Cross to ensure a fair and orderly market, where no such provision is available on BZX.

²² The Exchange, working with FINRA, will also adopt surveillance procedures to monitor securities listed under the proposed alternative as they approach \$4. These procedures will be designed to identify anomalous trading that could be indicative of potential manipulation of the price.

maintain compliance with continued listing standards or if there are other public interest concerns.²³

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.²⁴ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²⁵ 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.

The proposed rule change would adopt a \$2 and \$3 initial listing price alternative for Tier II securities listed on the Exchange that is substantially similar to the requirements of NYSE American and Nasdaq. Particularly, the proposed rule change would require companies to satisfy an additional net tangible asset or revenue test, which is consistent with the requirements for a security to avoid being a penny stock as set forth in Exchange Act Rule 3a51-1(g).²⁶ The proposed additional net tangible asset or revenue test is also identical to the existing test on Nasdaq.²⁷

²³ See Exchange Rule 14.2.

²⁴ 15 U.S.C. 78f(b).

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ 17 CFR 240.3a51-1(g).

²⁷ See Nasdaq Rule 5505(a)(1).

As discussed above, broker-dealers that effect recommended transactions in securities that originally qualified for listing under the Exchange's alternative standard would among other things, under Exchange Act Rule 3a51-1(g), need to review current financial statements of the issuer to verify that it meets the applicable net tangible assets or average revenue test, have a reasonable basis for believing they remain accurate, and preserve copies of those financial statements as part of its records. To facilitate compliance by broker-dealers, the Exchange has committed to monitor the companies listed under the alternative price standard and to publish on its website, and update daily, a list of any such company that no longer meets the net tangible assets or average revenue tests of the penny stock exclusion, and which does not satisfy any other penny stock exclusion. The Exchange also specifically reminds broker-dealers of their obligations under the penny stock rules. The Exchange believes that, although the listing of securities that do not have a blanket exclusion from the penny stock rules and require ongoing monitoring may increase compliance burdens on broker-dealers, the additional steps proposed by the Exchange to facilitate compliance should reduce those burdens and that, on balance, the Exchange's proposal is consistent with the requirement of Section 6(b)(5) of the Act that the rules of an exchange, among other things, be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

Further, to address concerns about the potential manipulation of lower priced stocks to meet the initial listing requirements, the Exchange has proposed to require a company to maintain a \$2 or \$3 closing price for five consecutive business days prior to approval for listing, rather than on a single day. The Exchange believes that requiring the minimum \$2 or \$3 closing price to be maintained for a longer period should reduce the risk that some might attempt to

manipulate or otherwise artificially inflate the closing price in order to allow a security to qualify for listing. In addition, the Exchange notes that it will exercise its discretionary authority to deny initial listing if there are particular concerns about an issuer, such as its ability to maintain compliance with continued listing standards or if there were other public interest concerns. The Exchange believes these additional measures, in conjunction with Exchange's surveillance procedures and pre-listing qualification review, should help reduce the potential for price manipulation to meet the new initial listing standards, and in this respect are designed to prevent fraudulent and manipulative acts and practices consistent with Section 6(b)(5) of the Act.

As proposed, if securities listed under the alternative price listing standard subsequently achieve a \$4 closing price over at least five consecutive business days, and the issuer and the securities satisfy all other relevant initial listing criteria, then such securities would no longer be considered as having listed under the alternative price requirement. The Exchange notes that it has taken several steps to address whether this provision could provide an incentive for market participants to manipulate the price of the security in order to achieve the \$4 closing price and no longer be considered as having listed under the alternative requirement. First, the Exchange represents that it will conduct a robust, wholesale review of the issuer's compliance with all applicable initial listing criteria, including qualitative and quantitative standards, at the time the \$4 closing price is achieved, and will have a reasonable basis to believe that that price was legitimately, and not manipulatively, achieved. Secondly, the Exchange represents that it is developing enhanced surveillance procedures to monitor securities listed under the alternative price requirement as they approach \$4 to identify anomalous trading that would be indicative of potential price manipulation. Finally, the proposal requires the \$4 closing price to be met over at least a five consecutive business day period in order to reduce the potential for price

manipulation. The Exchange believes that these measures should help reduce the potential for price manipulation to achieve the \$4 closing price, and in this respect are designed to prevent fraudulent and manipulative acts and practices consistent with Section 6(b)(5) of the Act.

Section 6(b)(8) of the Act requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In addition, Section 11A of the Act²⁸ requires that there be fair competition among exchange markets to further the public interest and protection of investors. Currently, both Nasdaq and NYSE American rules allow for companies to list within a minimum price requirement of \$2 or \$3. The Exchange's initial listing requirements are substantively identical to Nasdaq's initial listing requirements at the time the Nasdaq proposal was approved by the Commission.²⁹ Further, the net tangible assets and average revenue tests proposed herein are identical to those on Nasdaq. Moreover, the proposed net tangible assets and average revenue tests satisfy the requirements of Exchange Act Rule 3a51-1(g). The proposed rule change would enhance the competition between exchanges, and benefit companies and their investors, by providing companies with another listing venue. As such, the proposed rule change is consistent with Sections 6(b)(8) and 11A.

Finally, as noted above, the proposed rule change would adopt the identical initial listing price requirement contained in the NYSE American Company Guide as well as Nasdaq Listing Rules. While the Exchange acknowledges that Nasdaq has amended its initial listing requirements as it pertains to unrestricted publicly held shares since the Commission approved the alternative minimum price requirement, the Exchange notes that its initial listing standards

²⁸ 15 U.S.C. 78k-1.

²⁹ Supra note 5.

are substantively identical to the Nasdaq Capital Market initial listing standards at the time the alternative minimum price requirement was approved by the Commission.³⁰ As such, the Exchange believes that its listing requirements would remain substantially similar to those of “Designated Markets”,³¹ as required for covered securities under Section 18 of the Securities Act.³²

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 Exchange believes the proposed rule change will not impose any unnecessary burden on intramarket competition as all companies seeking to list Tier II securities on the Exchange would be affected in the same manner by the proposed change.

The proposed rule change will expand the competition for the listing of equity securities as they will enable the Exchange to compete for the listing of companies that are currently not qualified for listing on the Exchange but are qualified to list on other national securities exchanges. To the extent that companies prefer listing on a market with these proposed listing standards, other exchanges can choose to adopt similar enhancements to their requirements. As such, these changes are neither intended to, nor expected to, impose any burden on competition between exchanges.

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.

³⁰ Id.

³¹ Designated Markets refers to the national securities exchanges designated by the Commission to have substantially similar listing standards to those of the “named markets” (i.e., NYSE American and Nasdaq).

³² 15 U.S.C. 77f.

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-2023-063 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-2023-063. 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-2023-063 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.³³

Sherry R. Haywood,

Assistant Secretary.

³³ 17 CFR 200.30-3(a)(12).