

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-94373; File No. SR-CboeBYX-2021-028)

March 7, 2022

Self-Regulatory Organizations; Cboe BYX Exchange, Inc; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Introduce a New Data Product to be Known as the Short Volume Report

I. Introduction

On November 22, 2021, Cboe BYX Exchange, Inc. (“BYX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Exchange Rule 11.22(f) to introduce a new data product to be known as the Short Volume Report. The proposed rule change was published for comment in the Federal Register on December 7, 2021.<sup>3</sup> On January 20, 2022, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove

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<sup>1</sup> 15 U.S.C.78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 93689 (December 1, 2021), 86 FR 69335 (“Notice”). The comment letters received on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-cboebyx-2021-028/srcboebyx2021028.htm>.

<sup>4</sup> 15 U.S.C. 78s(b)(2).

the proposed rule change.<sup>5</sup> This order institutes proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

## II. Description of and Comments on the Proposed Rule Change

### A. Description of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 11.22(f) to provide for a new data product to be known as the Short Volume Report, which will be available for purchase to Members and non-Members.<sup>7</sup> Specifically, the Exchange proposes to describe the Short Volume Report as “an end-of-day report that summarizes equity trading activity on the Exchange, including trade count and volume by symbol for buy, sell, sell short, and sell short exempt trades.”<sup>8</sup> The Exchange proposes that the end-of-day report will include the following information: trade date, symbol, total volume, buy volume, buy trade count, sell volume, sell trade count, sell short volume, sell short trade count, sell short exempt volume, and sell short exempt trade count.<sup>9</sup> The Exchange proposes that the Short Volume Report will be available on a monthly subscription basis.<sup>10</sup> The Exchange states subscribers will receive a daily end-of-day file that will be delivered after the conclusion of the After Hours Trading Session.<sup>11</sup>

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<sup>5</sup> See Securities Exchange Act Release No. 94009, 87 FR 4098 (January 26, 2022). The Commission designated March 7, 2022 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Notice, supra note 3, at 69335. The Exchange states that it intends to submit a separate rule filing to adopt fees for the Short Volume Report product. See Notice, supra note 3, at 69336.

<sup>8</sup> See proposed Rule 11.22(f).

<sup>9</sup> See Notice, supra note 3, at 69336.

<sup>10</sup> See id.

<sup>11</sup> Additionally, the Exchange proposes to make historical Short Volume Reports dating as

In support of the proposal, the Exchange states that the proposed product includes substantially similar information as that included in comparable products offered on the Nasdaq Stock Market LLC (“Nasdaq”) and the New York Stock Exchange (“NYSE”) except that the Exchange proposes to also include buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.<sup>12</sup> The Exchange states that while the proposed product offers volume and trade counts which are not offered in the comparable NYSE and Nasdaq short sale volume reports, similar data is otherwise available or determinable in other NYSE data product offerings.<sup>13</sup> Specifically, the Exchange states that the NYSE Trade and Quote (“TAQ”) product provides trade and quote information for orders entered on the NYSE affiliated equity exchanges, which include buy, sell, and sell short volume.<sup>14</sup> Thus, according to the Exchange, subscribers to NYSE TAQ could determine volume and trade counts from such data.<sup>15</sup> Additionally, the Exchange states that the NYSE Monthly Short Sales report provides a record of every short sale transaction on NYSE during the month, which includes a size and short sale

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far back as January 2, 2015 available for purchase on an ad hoc basis in monthly increments. According to the Exchange, the subscription files and historical files will include the same data points. See id.

<sup>12</sup> Specifically, the Exchange states that the Nasdaq daily short sale volume file reflects the aggregate number of shares executed on Nasdaq, Nasdaq BX, Inc. and Nasdaq PHLX LLC. According to the Exchange, the Nasdaq daily short volume report provides the following information: trade date, symbol, volume during regular trading hours, and CTA market identifier. Additionally, the Exchange states that the NYSE Group Short Volume daily file reflects a summary of short sale volume for securities traded on NYSE, NYSE American LLC, NYSE Arca, Inc., NYSE National, Inc., and NYSE Chicago, Inc. According to the Exchange, the NYSE Group Short Volume product provides the following information: trade date, symbol, short exempt volume, short volume, total volume all transactions, and market identifier. See id.

<sup>13</sup> See id.

<sup>14</sup> See id.

<sup>15</sup> See id.

indicator.<sup>16</sup> Thus, according to the Exchange, subscribers to the NYSE Monthly Short Sales report could determine the sell short and sell short exempt volume and trade count, albeit on a monthly basis rather than a daily basis.<sup>17</sup>

The Exchange states that the additional data points will benefit market participants because they will allow market participants to better understand the changing risk environment on a daily basis.<sup>18</sup> The Exchange states that the proposed Short Volume Report would further broaden the availability of U.S. equity market data to investors, promoting increased transparency and better informed trading, specifically by allowing market participants to identify the source of selling pressure and whether it is long or short.<sup>19</sup>

B. Comments on the Proposed Rule Change

One commenter states that the proposed rule text and the Exchange’s description of the content of the proposed Short Volume Report are unclear.<sup>20</sup> Specifically, the commenter states that the difference between “total volume” and “buy volume” is difficult to understand, “since every trade always includes a buyer.”<sup>21</sup> The commenter also states that the phrase “buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume” is confusing, and questions how, for example, buy volume for sell short exempt trades and sell

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<sup>16</sup> See id.

<sup>17</sup> See id.

<sup>18</sup> See id.

<sup>19</sup> See id.

<sup>20</sup> Letter from R. T. Leuchtkafer to Vanessa Countryman, Secretary, Commission, dated December 27, 2021, at 2-3.

<sup>21</sup> Id. at 2.

volume for short exempt trades would be any different.<sup>22</sup> The commenter states that in order to be sensible “buy and sell volume” must either mean simply “trade volume” or else it describes splitting out buyer and seller-initiated trade volume or total buy and sell order volume.<sup>23</sup> The commenter states that “the public deserves to be told” with greater clarity what data the proposed Short Volume Report contains and “deserves a chance to comment before approval.”<sup>24</sup> In addition, the commenter states that the proposal could involve the provision and sale of “sensitive” or “regulatory” data and could reveal “quite a bit about who is doing what in the markets.”<sup>25</sup>

This commenter also states that the data contained in the proposed Short Volume Report is substantially different from the data contained in products offered by other national securities exchanges, despite the Exchange’s assertion that the proposed Short Volume Report is similar to those products.<sup>26</sup> Specifically, the commenter states that the Exchange’s description of the NYSE TAQ data that it points to as precedent is inaccurate.<sup>27</sup> According to the commenter, contrary to the Exchange’s statements in the proposal, the TAQ data does not contain

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<sup>22</sup> Id.

<sup>23</sup> Id. Specifically, the commenter states that “the phrase ‘buy and sell volume as well as trade counts for buy, sell, sell short, and sell short exempt volume’ makes more sense if understood as (a) ‘buy[er-initiated] and sell[er-initiated] volume as well as trade counts for buy, sell, sell short, and sell short exempt volume’ or (b) ‘buy [order] and sell [order] volume as well as trade counts for buy, sell, sell short, and sell short exempt volume.’”  
Id.

<sup>24</sup> Id. at 2-3. For example, the commenter states that listed companies and investors may want to comment to the extent that the proposed Short Volume Report is intended to convey to high frequency trading firms, on a daily basis for every stock, the level of aggressive short selling or short sale order volume. Id.

<sup>25</sup> Id. at 1, 5-6.

<sup>26</sup> Id. at 2-4.

<sup>27</sup> Id. at 3-4.

information that would enable subscribers to determine short sale volume or trade counts.<sup>28</sup>

III. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBYX-2021-028 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>29</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>30</sup> the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange has proposed to amend its rules to provide for a new data product to be known as the Short Volume Report. The Commission has received comment letters that express concerns regarding the content of the proposed Short Volume Report, including the clarity of the Exchange's description of the proposed product.

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<sup>28</sup> Id. This commenter also submitted a second comment letter which objects to certain redactions made to the commenter's first letter, stating that the redactions diminished the commenter's "pointed criticism[s]" of the Commission's performance in reviewing the proposal. See letter from R. T. Leuchtkafer to Vanessa Countryman, Secretary, Commission, dated January 4, 2022.

<sup>29</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>30</sup> Id.

The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with Section 6(b)(5)<sup>31</sup> of the Act. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and equitable principles of trade, 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, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder.

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>32</sup> any request for an opportunity to make an oral presentation.<sup>33</sup>

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<sup>31</sup> 15 U.S.C. 78f(b)(5).

<sup>32</sup> 17 CFR 240.19b-4.

<sup>33</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, and any other issues raised by the proposed rule change under the Act. In particular, the Commission seeks commenters' views regarding whether the Exchange has adequately described the proposed new data product for the Commission to make a determination under Section 6(b)(5) of the Act.

Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-CboeBYX-2021-028 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 No. SR-CboeBYX-2021-028. The file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the



proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File No. SR-CboeBYX-2021-028 and should be submitted by [insert date 21 days from date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>34</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>34</sup> 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(57).