SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-97639; File No. SR-CboeBYX-2023-008)

June 1, 2023

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 11.24(e) to Modify When the Exchange Will Disseminate the Retail Liquidity Identifier

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on May 19, 2023, Cboe BYX Exchange, Inc. filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a "non-controversial" rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b-4(f)(6) thereunder,[4] which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe BYX Exchange, Inc. (the "Exchange" or "BYX") is filing with the Securities and Exchange Commission ("Commission") a proposal to modify Rule 11.24(e). The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website (http://markets.cboe.com/us/equities/regulation/rule_filings/byx/), at the Exchange's Office of the Secretary, and at the Commission's Public Reference Room.

1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 15 U.S.C. 78s(b)(3)(A)(iii).

4 17 CFR 240.19b-4(f)(6).

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 currently operates a Retail Price Improvement Program ("RPI Program")[5] that permits Retail Member Organizations ("RMOs")[6] to submit Retail Orders[7] to the Exchange. Exchange Users[8] are permitted to provide potential price improvement for Retail Orders through the use of Retail Price Improvement Orders ("RPI Orders").[9] When there is an RPI Order in a particular

5 See Securities Exchange Act Release No. 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").

6 See Rule 11.24(a)(1). An RMO is a Member (or a division thereof) that has been approved by the Exchange under Rule 11.24 to submit Retail Orders.

7 See Rule 11.24(a)(2). A Retail Order is an agency or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by an RMO, provided that no change is made to the terms of an order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. A Retail Order is an Immediate or Cancel ("IOC") Order and shall operate in accordance with Rule 11.24(f). A Retail Order can be an odd lot, round lot, or mixed lot.

8 See Rule 1.5. The term "User" shall mean any Member or Sponsored Participant who is authorized to obtain access to the System pursuant to Rule 11.3.

9 See Rule 11.24(a)(3). An RPI Order consists of non-displayed interest on the Exchange that is priced better than the Protected NBB or Protected NBO by at least $0.001 and that is identified as such. The System will monitor whether RPI buy or sell interest, adjusted

security that meets certain requirements (further described below), the Exchange disseminates an indicator, known as the Retail Liquidity Identifier (the "Identifier").[10] The Exchange now proposes to amend Rule 11.24(e), which describes when the Exchange will disseminate the Identifier.

Currently, Rule 11.24(e) states that the Exchange may disseminate the Identifier "when RPI interest priced at least $0.001 better than the Exchange's Protected Bid or Protected Offer for a particular security is available in the System." Exchange Rule 1.5(t) defines Protected Bid and Protected Offer as a bid or offer in a stock that is (i) displayed by an automated trading center; (ii) disseminated pursuant to an effective national market system plan; and (iii) an automated quotation that is the best bid or best offer of a national securities exchange or association.[11] In other words, the Protected Bid or Protected Offer referenced in Rule 11.24(e) is the Protected Bid or Protected Offer on the Exchange and does not contemplate the Protected Bid or Protected Offer on any other exchanges.

The Exchange now proposes to amend Rule 11.24(e) so that the Identifier will be disseminated when there is RPI interest priced at least $0.001 better than the Protected NBB ("PBB") or Protected NBO ("PBO")[12] available in the System. The Exchange notes that its

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by any offset and subject to the ceiling or floor price, is eligible to interact with incoming Retail Orders. An RPI Order remains non-displayed in its entirety (the buy or sell interest, the offset, and the ceiling or floor). An RPI Order may also be entered in a sub-penny increment with an explicit limit price. Any User is permitted, but not required, to submit RPI Orders. An RPI Order may be an odd lot, round lot or mixed lot.

10 See Rule 11.24(e). The Retail Liquidity Identifier shall be disseminated through proprietary data feeds or as appropriate through the Consolidated Quotation System when RPI interest priced at least $0.001 better than the Exchange's Protected Bid or Protected Offer for a security is available in the System. The Retail Liquidity Identifier shall reflect the symbol for the particular security and the side (buy or sell) of the RPI interest, but shall not include the price or size of the RPI interest.

11 See Rule 1.5(t).

12 See Rule 1.5(s). "Protected NBB" shall mean the national best bid that is a Protected Quotation and the term "Protected NBO" shall mean the national best offer that is a

proposed functionality is substantively identical to NYSE Rule 7.44(j), NYSE Arca Rule 7.44-E(j), and Nasdaq BX Rule 4780(e).[13] The Exchange believes that removing the reference to the "Exchange's Protected Bid or Protected Offer" and providing for the dissemination of the Identifier to occur when there is RPI interest priced at least $0.001 better than PBB or PBO may decrease the amount of false signals provided by the Identifier,[14] as the Identifier would no longer be disseminated only when there is an RPI Order priced $0.001 better than the *Exchange's* (emphasis added) Protected Bid[15] or Protected Offer[16]. The Exchange further believes that permitting the Identifier to display when there is RPI interest priced at least $0.001 better than the PBB or PBO may attract additional retail order flow and create greater retail order flow competition, which helps ensure that retail investors benefit from competitive price improvement that liquidity providers provide.

Protected Quotation. The term "Protected Quotation" is defined in Rule 1.5(t) and means a quotation that is a Protected Bid or a Protected Offer.

13 See e.g., NYSE Rule 7.44(j) and NYSE Arca Rule 7.44-E(j). A Retail Liquidity Identifier will be disseminated through proprietary data feeds and through the Consolidated Quotation System or the UTP Quote Data Feed when RPI interest priced at least $0.001 better than the PBB or PBO for a particular security is available in the applicable exchange systems. See also Nasdaq BX Rule 4780(e), which states that an identifier shall be disseminated through proprietary data feeds and through the Securities Information Processor when RPI interest priced at least $0.001 better than the NBBO for a particular security is available in the Nasdaq BX system.

14 The Exchange has been made aware of instances where the Identifier is disseminated because of an RPI Order priced better than the Exchange's Protected Bid or Protected Offer, but because the RPI Order is not priced at least $0.001 better than the PBB or PBO, it is ineligible to execute. When this occurs, Retail Orders submitted to the Exchange to execute against the RPI interest identified by the Identifier are rejected. The Exchange believes that by amending Rule 11.24(e), fewer false signals will occur because the Identifier will only display when there is RPI interest priced at least $0.001 better than the PBB or PBO.

15 Supra note 11.

16 Id.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.[17] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[18] 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)[19] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the proposed change promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market and a national market system because the proposed change is reasonably designed to attract retail order flow to the Exchange, which in turn may allow retail investors to benefit from the better price that liquidity providers are willing to give their orders. The Exchange believes its proposed amendment to Rule 11.24(e) will provide fewer false signals, as the RPI interest signaled by the Identifier would no longer be based on the *Exchange's* Protected Bid or Protected Offer, but

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17 15 U.S.C. 78f(b).

18 15 U.S.C. 78f(b)(5).

19 Id.

rather will be based on the PBB or PBO. By displaying the Identifier based on the PBB or PBO, the Exchange expects fewer instances in which Retail Orders submitted to execute against RPI Orders based on the Identifier would be rejected due to the RPI Order being inexecutable.[20] This may help attract additional retail order flow to the Exchange, which will create greater retail order flow competition amongst exchanges and provide more opportunities for competitive price improvement for retail orders, benefitting market participants as a whole.

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 that the proposal does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposal will apply equally to all RPI interest on the Exchange that is priced at least $0.001 better than the PBB or PBO. Furthermore, the Exchange believes its proposal will promote intramarket competition as additional retail order flow may be submitted to the Exchange with the potential to interact with other price improving liquidity or resting orders, subject to RMO order designation.

The Exchange also believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the Act. As discussed above, NYSE, NYSE Arca, and Nasdaq BX each disseminate similar indicators of RPI interest under their respective retail price improvement programs and the Exchange believes that its proposed rule change will allow it to compete for additional retail order flow with the

[20] Supra note 14.

aforementioned exchanges.[21] Given that the Exchange's Identifier is proposed to be displayed in an almost identical manner to the competitor exchanges mentioned above rather than its current state of being displayed only when there is RPI interest priced $0.001 better than the *Exchange's* (emphasis added) Protected Best Bid or Protected Best Offer, the Exchange believes its proposal to permit the Identifier to display when there is RPI interest priced at least $0.001 better than the PBB or PBO will promote competition between the exchanges, hence fostering innovation within the market, and increasing the quality of the national market system by allowing national securities exchanges to compete both with each other and with off-exchange venues for order flow.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act[22] and Rule 19b-4(f)(6)[23] thereunder.

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21 Supra note 13.

22 15 U.S.C. 78s(b)(3)(A).

23 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

A proposed rule change filed under Rule 19b-4(f)(6)[24] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),[25] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the proposed rule change may become operative upon filing. The Exchange states that waiver of the operative delay does not present market participants with any new or novel issues, as other exchanges already utilize the PBB, PBO, or NBBO to determine when to disseminate their retail liquidity identifiers, and that accordingly, the proposed rule change does not significantly affect the protection of investors or the public interest.[26] The Exchange also states that the proposed amendment to its Rule 11.24(e) will result in fewer instances in which Retail Orders submitted to execute against RPI Orders based on the Identifier would be rejected due to the RPI Order being inexecutable. For these reasons, the Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the operative delay and designates the proposal operative upon filing.[27]

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such

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[24] 17 CFR 240.19b-4(f)(6).

[25] 17 CFR 240.19b-4(f)(6)(iii).

[26] The Exchange also states that NYSE, NYSE Arca, and Nasdaq BX each disseminate similar indicators of RPI interest under their respective retail price improvement programs, and the Exchange believes that its proposed rule change will allow it to compete for additional retail order flow with the aforementioned exchanges. <u>See</u> <u>supra</u> note 21 and accompanying text.

[27] For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. <u>See</u> 15 U.S.C. 78c(f).

action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (http://www.sec.gov/rules/sro.shtml); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CboeBYX-2023-008 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-CboeBYX-2023-008. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (http://www.sec.gov/rules/sro.shtml). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to File Number SR-CboeBYX-2023-008 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[28]

Sherry R. Haywood

Assistant Secretary

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[28] 17 CFR 200.30-3(a)(12).