

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴¹

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–92984; File No. SR–CboeBYX–2021–020]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 11.22 To Introduce a Product To Be Known as Cboe Premium Exchange Tools and To Amend Its Fee Schedule To Establish a Fee for a User Login That Elects To Subscribe to the Cboe Premium Exchange Tools

September 14, 2021.

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 8, 2021, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act ³ and Rule 19b–4(f)(6) thereunder.⁴ The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) proposes to amend Rule 11.22 to introduce a new product to be known as Cboe Premium Exchange Tools and to amend its Fee Schedule to establish a fee for a user login that elects to subscribe to the Cboe Premium Exchange Tools. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (http://markets.cboe.com/us/equities/regulation/rule_filings/byx/), at

the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 11.22(b) to introduce a new product to be known as Cboe Premium Exchange Tools, as further described below, and to amend its Fee Schedule to adopt a monthly fee assessed to users that elect to subscribe to such Cboe Premium Exchange Tools, effective August 31, 2021.⁵

Cboe Premium Exchange Tools

Currently, Members,⁶ Sponsored Participants,⁷ and service bureaus are leveraging certain value-added tools (*i.e.*, Cboe Premium Exchange Tools) on the Exchange to obtain certain information free of charge. Particularly, Cboe Premium Exchange Tools offers an easily accessible internet-based tool that allows users access to certain execution information for their firm through a single interface. Now, the Exchange proposes to amend Rule 11.22(b) to describe the Cboe Premium Exchange Tools in its Rules. Specifically, proposed Rule 11.22(b) provides that the Cboe Premium Exchange Tools is a web-based tool designed to give a subscribing user the ability to track latency statics of the user’s logical order entry ports or execution information of the Member or a Sponsored Participant of the Member. The proposed rule also provides that a user may obtain historical reports of such execution information, as further described

below.⁸ Cboe Premium Exchange Tools is currently comprised of the following three reports: (i) Trade data report,⁹ (ii) latency statistics report,¹⁰ and (iii) volume history report.¹¹

Trade Data Report

The trade data report offers the ability for a user to view and/or export its Member’s and, if applicable, a Sponsored Participant of the Member, granular execution detail.¹² Specifically, the report currently includes the following information: Date, time, Member identifier, clearing member identifier, session, order identification, symbol, side (*i.e.*, buy, sell, sell short), price, quantity, capacity (*e.g.*, agent, principal), liquidity indicator (*i.e.*, adder or remover of liquidity), order type,¹³ indicator as to whether order set or joined the national best bid or offer (“NBBO”),¹⁴ and associated fee code(s). The information is provided in order to aid Members in conducting their own reconciliations and assist in report generation, and, unlike the Volume History Report, is available on an execution-by-execution basis.

Latency Statistics Report

The latency statistics report offers functionality to view latency statistics relating to logical order entry ports, including a Member’s orders, acknowledgements, and cancels, including roundtrip data from into the edge network device and back, which accounts for latency within the Exchange order gateways and matching engines. Specifically, the latency statistics report includes the following information: (i) The roundtrip time between the order entering the Exchange’s network and the time the order acknowledgement leaves the Exchange’s network, (ii) the roundtrip time between an order cancellation request and the time the order cancellation request acknowledgement leaves the Exchange’s network, (iii) the

⁸ All information available to Members as described herein is historical information.

⁹ Trade Data Reports may be obtained by a Member, or if authorized to do so a Sponsored Participant.

¹⁰ Latency Statistics Reports may be obtained by a Member, Sponsored Participant or service bureaus as it relates to their respective logical order entry ports.

¹¹ Volume History Reports may be obtained by a Member.

¹² Sponsored Participants may also subscribe to the Trade Data Report, provided that its Sponsoring Member provides the Exchange authorization to do so. Trade Data Reports provided to Sponsored Participants only include execution detail related to the Sponsored Participant.

¹³ See Exchange Rule 11.9.

¹⁴ Hidden orders that neither set or join the NBBO are identified as such within the report.

⁴¹ 17 CFR 200.30–3(a)(12).

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).

⁵ The Exchange initially filed the proposal August 31, 2021 [sic] (SR–CboeBYX–2021–015). On September 8, 2021, the Exchange withdrew that filing and submitted this proposal.

⁶ See Exchange Rule 1.5(n).

⁷ See Exchange Rule 1.5(x).

roundtrip time between an order entering the Exchange's network and the time that the order appears on the Multicast PITCH feed, (iv) the roundtrip time for a Transmission Control Protocol ("TCP")¹⁵ message sent by the Exchange to be acknowledged by the Member, and (v) averages a Member can expect for items (i) through (iii) across their own ports and across the entire system (*i.e.*, across all Members). A Member, service bureau, or Sponsored Participant may view the latency statistics for orders that they send to the Exchange through their own respective logical order entry ports. The information included in the latency statistics report is designed to give users insight into the performance characteristics of their logical order entry ports.

Volume History Report

The volume history report provides users the functionality to view the Member's, high level volume history on the Exchange, as well as more granular added, removed, and routed orders at a per Tape and MPID level or a per security level for the purpose of tracking and measuring outcomes.¹⁶ The tools offer functionality to allow a user to view aggregated volume history reports on behalf of the Member or a Sponsored Participant of the Member for the purpose of firm or client-level reporting, administration, and risk management.

Cboe Premium Exchange Tools Fee

The Exchange also proposes to adopt a fee applicable to users that subscribe to the proposed Cboe Premium Exchange Tools. Specifically, as proposed, the Exchange would assess a monthly fee of \$40 for each user login that subscribes to any of the reports and services that comprise the Cboe Premium Exchange Tools. As discussed above, Premium Exchange Tools provides users with an easily accessible tool that allows them to access certain execution and latency information from a single interface and provides such information in a convenient, user-friendly format. Further, a number of enhancements have recently been made to the various reports and services included in the Cboe Premium Exchange Tools. For example, the trade data report has recently been enhanced to provide timestamps with

microsecond granularity for added detail on a per trade basis. Therefore, the Exchange believes the assessment of such a fee aligns with the additional value and benefits provided to users that choose to subscribe to the Cboe Premium Exchange Tools. The Exchange also believes that the proposal is appropriate to balance the Exchange resource requirements in creating, managing, and supporting the services and reports provided by the Cboe Premium Exchange Tools.

The Cboe Premium Exchange Tools fee will be assessed to a user for the entire month regardless of when the user receives access to the Premium Exchange Tools. If a user obtains or cancels a subscription to the Cboe Premium Exchange Tools on or after the first business day of the month, the user will be required to pay the entire Cboe Premium Exchange Tools fee for that month.

The Exchange anticipates a number of users will subscribe to the Cboe Premium Exchange Tools. It is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make the reports or services available and that potential subscribers may purchase it only if they voluntarily choose to do so. Further, the Exchange notes that other exchanges offer similar products.¹⁷

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.¹⁸ Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁹ which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Members and other persons using its facilities. The Exchange also believes the proposed rule change is consistent with the Section 6(b)(5)²⁰ 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)²¹ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposal to amend Rule 11.22(b) to provide for the Cboe Premium Exchange Tools is reasonable for several reasons. First, certain of the underlying information available via the Cboe Premium Exchange Tools is otherwise generally available to users. While the proposal provides a value-added service by setting forth such information in a user-friendly format, the underlying data included in the trade data report and volume history report contains general Member-specific execution information to which a Member would have access to without subscribing to Premium Exchange Tools, (*e.g.*, via their own order entry ports which include Member-provided order instructions, exchange-sent acknowledgement messages, and drop copies). Moreover, the data included in the trade data report and volume history report is substantially similar to data offered in the Nasdaq TradeInfo tool, which provides detailed data on the status of orders executions, cancels and breaks, and generates reports for download, and allows the member to cancel or correct open orders.²²

While certain underlying data included in the latency statistics report such as latency averages across the System is not otherwise available to Members, or where applicable, Sponsored Participants, or service bureaus, the Exchange notes such users can obtain similar information on their own latency statistics relating to their orders, acknowledgements, TCP messages, and cancels, including roundtrip data from out of their edge network device and back without subscribing to Premium Exchange Tools. Particularly, users are able to calculate these latencies on their own servers as the underlying transaction information is timestamped, which would similarly account for the latency

¹⁵ TCP is a communications standard that enables application programs and computing devices to exchange messages over a network.

¹⁶ Information included in the Volume History Report includes all activity, including that executed on behalf of Sponsored Participants. Execution volume made on behalf of a Sponsored Participant is not delineated within the Volume History Report.

¹⁷ See the "TradeInfo Fees" offered on the Nasdaq Stock Exchange ("Nasdaq"), Nasdaq BX, Inc. ("Nasdaq BX"), and the Nasdaq PHLX LLC ("Phlx"), each of which assess a fee of \$95 per user per month.

¹⁸ 15 U.S.C. 78f(b).

¹⁹ 15 U.S.C. 78f(b)(4).

²⁰ 15 U.S.C. 78f(b)(5).

²¹ *Id.*

²² See Securities and Exchange Act No. 90772 (December 22, 2020) 85 FR 86632 (December 30, 2020) (SR-NASDAQ-2020-088) (Proposed rule change describing the withdrawal of Nasdaq's QView product from sale and that the information included therein will continue to be available via TradeInfo).

throughout the Exchange side of the network (*i.e.*, the Exchange does not believe latency statistics calculated by users themselves would be materially different from the Exchange's calculations). The Exchange notes that although latency information related to averages across the system would not otherwise be available to Members, Sponsored Participants or service bureaus absent subscribing to Premium Exchange Tools, providing users such information is not novel as similar information was historically made available in an offering by Nasdaq. Specifically, prior to its decommission in December of 2020, Nasdaq provided summary latency statistics via its QView tool which provided members that subscribed to QView Latency Optics add-on service the ability to monitor three types of latency for order messages and compare that latency to the average on the Nasdaq System.²³ The specific latency statistics included: (i) The roundtrip time between order entry and receipt of acknowledgement; (ii) roundtrip time between order entry and the time that the order appears on the TotalView ITCH multicast feed; and (iii) the roundtrip time between the entry of an order cancellation request and the time that the message in reply is received by the client device.²⁴ Similarly as noted above, the Exchange's proposed latency statistics report provides users averages across the entire System for three types of latency: (i) The roundtrip time between the order entering the Exchange's network and the time the order acknowledgement leaves the Exchange's network, (ii) the roundtrip time between an order cancellation request and the time the order cancellation request acknowledgement leaves the Exchange's network, (iii) the roundtrip time between an order entering the Exchange's network and the time that the order appears on the Multicast PITCH feed. Even after QView was decommissioned, the underlying data needed to generate the latency statistics (other than for averages across the Nasdaq system) for each member was

and continues to be available via the Nasdaq TradeInfo tool.²⁵

The Exchange believes that the proposed fee for the Cboe Premium Exchange Tools is consistent with the Act in that it is reasonable, equitable, and not unfairly discriminatory. In particular, the Exchange believes that the proposed fee is reasonable because it is reasonably aligned with the value and benefits provided to users that choose to subscribe to the Cboe Premium Exchange Tools on the Exchange. As discussed above, Premium Exchange Tools provides users with an easily accessible tool that allows them to access certain execution and latency information from a single interface and provides such information in a convenient, user-friendly format. Also as described above, information provided by Premium Exchange Tools relates to the subscribing user's activity on the Exchange, and users may generally access and aggregate this information by other means, including its own internal systems, without a subscription to Premium Exchange Tools. As such, the Exchange believes that if a user determines that the fee is not cost-efficient for its needs, it may decline to subscribe to Premium Exchange Tools and access such information from other sources. Indeed, the Cboe Premium Tools is a completely voluntary product, and the Exchange is not required by any rule or regulation to offer the reports or services provided under the Cboe Premium Exchange Tools. Nonetheless, such tools may be beneficial to Members and non-Members as they provide various value-added Exchange reports and services. Providing the Cboe Premium Exchange Tools to users requires the Exchange to allocate additional resources to create, manage, and support the services and reports. Therefore, the Exchange believes that it is reasonable to assess a modest fee to users that subscribe to the Cboe Premium Exchange Tools.

The Exchange further believes the proposed fee is reasonable because the amount assessed is less than the analogous fees charged by Nasdaq, Nasdaq BX, and PHLX. The TradeInfo product offered by the aforementioned exchanges provides users the status of orders, executions, cancels and breaks, and provides the ability to cancel orders. Further, to view a variety of trading data, users can generate several

different types of reports such as execution reports.²⁶ As described above, the Cboe Premium Exchange Tools will offer similar data to that provided by Nasdaq, Nasdaq BX, and PHLX while, the Exchange's proposed fee for the Cboe Premium Tools at \$40 per month per user, is lower than each of the Nasdaq, Nasdaq BX, and PHLX fees for similar information which charge \$95 per user.

The Exchange believes that the proposed fee is equitable and not unfairly discriminatory because it will apply to all Members and non-Members that choose to subscribe to the Cboe Premium Exchange Tools equally. As stated, the services and reports provided by the Cboe Premium Exchange Tools are completely optional and not necessary for trading. Rather, the Exchange voluntarily makes the Cboe Premium Exchange Tools available and users may choose to subscribe (and pay for) the Cboe Premium Exchange Tools based on their own individual business needs. Potential subscribers may subscribe to Cboe Premium Exchange Tools at any time if they believe it to be valuable or may decline to purchase such services and reports.

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 because the proposed Cboe Premium Exchange Tools will be available equally to all Members and non-Members that choose to subscribe to such tools. As stated, the Cboe Premium Exchange Tools are optional and Members and non-Members may choose to subscribe to such tools, or not, based on their view of the additional benefits and added value provided by utilizing the reports or services offered by the Cboe Premium Exchange Tools.

Next, the Exchange believes the proposed rule change does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As previously discussed, Nasdaq currently offers products that include similar information to that proposed under the Cboe Premium Exchange Tools. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation

²³ See Securities Exchange Act Release No. 68617 (January 10, 2013), 78 FR 3480 (January 16, 2013) (SR-Nasdaq-2013-005) (introducing the Latency Optics add-on). See also Securities Exchange Act Release No. 82003 (November 2, 2017), 82 FR 51894 (November 8, 2017) (SR-Nasdaq-2017-113) (proposed rule change that also describes the Latency Optics add-on service, which provided, among other things, subscribing members the ability to compare their latency to the average of the Nasdaq system).

²⁴ *Id.*

²⁵ Nasdaq similarly noted that users of TradeInfo are able to calculate latencies included in the Latency Optics add-on service as the underlying transaction information is timestamped. See Securities and Exchange Act No. 90772 (December 22, 2020) 85 FR 86632 (December 30, 2020) (SR-NASDAQ-2020-088).

²⁶ See <https://www.nasdaqtrader.com/Trader.aspx?id=tradeinfo>.

NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.” The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’”. Accordingly, the Exchange does not believe its proposal imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

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

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 from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act²⁷ and Rule 19b-4(f)(6) thereunder.²⁸

A proposed rule change filed under Rule 19b-4(f)(6)²⁹ normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)³⁰ permits the Commission to designate a shorter time if such action is consistent with the

protection of investors and the public interest. The Exchange has proposed to implement this proposed rule change on August 31, 2021 and has asked the Commission to waive the 30-day operative delay for this filing. The Exchange states that the proposed data to be included in the proposed Cboe Premium Exchange Tools is already generally available to all users without a subscription to Cboe Premium Exchange Tools and/or is substantially similar to information that was historically, or currently is, included in similar products offered on Nasdaq.³¹ The Commission believes waiver of the operative delay will allow a description of Cboe Premium Exchange Tools product to be immediately reflected in the Exchange’s rules and is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative from August 31, 2021.³²

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission’s internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File No. SR-CboeBYX-2021-020 on the subject line.

³⁰ 17 CFR 240.19b-4(f)(6)(iii).

³¹ See *supra* notes 21–24.

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-2021-020. 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 (<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-2021-020, and should be submitted on or before October 12, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³³

J. Matthew DeLesDernier,

Assistant Secretary.

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³³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 77724

³² For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).