SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97099; File No. SR–CboeBZX–2023–013]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt Listing Rules To Require Companies Listed on the Exchange To Develop, Implement, and Disclose a Written Compensation Recovery Policy To Comply With Rule 10D–1 Under the Exchange Act and Make Other Related Changes

March 9, 2023.

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 February 24, 2023, Cboe BZX Exchange, Inc. (the ''Exchange'' or ''BZX'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change. On March 3, 2023, the Exchange filed Amendment No. 1 to the proposed rule change, which superseded and replaced the proposed rule change in its entirety. The proposed rule change, as modified by Amendment No. 1, is described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, 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 as modified by Amendment No. 1 to adopt listing rules to require Companies listed on the Exchange to develop, implement, and disclose a written compensation recovery policy to comply with Rule 10D–1 under the Exchange Act and make other related changes.[3] The text of the proposed rule change is provided in Exhibit 5.

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

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

[2] 17 CFR 240.19b–4.

[3] This Amendment No. 1 to the rule filing SR–CboeBZX–2023–013 replaces SR–CboeBZX–2023–013 as originally filed on February 24, 2023 and supersedes that filing in its entirety.

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

This Amendment No. 1 to SR–CboeBZX–2023–013 amends and replaces in its entirety the proposal as originally submitted on February 24, 2023. The Exchange submits this Amendment No. 1 in order to clarify certain points and add additional details to the proposal.

Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the ''Dodd-Frank Act'')[4] added 15 U.S.C. 78j–4 (''Section 10D'') to the Exchange Act. Title 15 Section 78j–4 (a) of the U.S. Code (''Section 10D(a)'') required the Commission to direct the national securities exchanges, including the Exchange, and national securities associations to prohibit the listing of any equity security of an issuer that is not in compliance with the requirements of 15 U.S.C. 78j–4(b) (''Section 10D(b)'') relating to a Company's[5] policy to recover Incentive-based Compensation to executive officers that was erroneously awarded on the basis of materially misreported financial information that requires an accounting restatement. To effect this requirement, the Commission has adopted Rule 10D–1 under the Exchange Act, which was published in the **Federal Register** on November 28, 2022. Rule 10D–1 requires each national securities exchange and national securities association to propose rule amendments that comply with Rule 10D–1 to the Commission, no later than February 27, 2023, which must be effective no later than November 28, 2023.[6]

Rule 10D–1 directs the listing exchanges to establish listing standards that require Companies to:

- Adopt and comply with written policies for recovery of Incentive-based Compensation based on financial information required to be reported under the securities laws, applicable to the Company's executive officers, during the three completed fiscal years immediately preceding the date that the issuer is required to prepare an accounting restatement; and
- Disclose those compensation recovery policies in accordance with Commission rules, including providing the information in tagged data format. Accordingly, in order to carry out the requirements of Rule 10D–1 the Exchange proposes to make several amendments to Exchange Rules 14.1, 14.10, and 14.12.

(1) Definitions

First, the Exchange proposes to adopt several definitions that are applicable to either the entirety of Chapter 14 or exclusively to Rule 14.10(k) that are consistent with defined terms provided in Rule 10D–1(d). Specifically, the Exchange proposes to adopt the term ''Financial Reporting Measures'' under Rule 14.1(a), which would mean measures that are determined and presented in accordance with the accounting principles used in preparing the Company's financial statements, and any measures that are derived wholly or in part from such measures. Stock price and total shareholder return are also financial reporting measures. A financial reporting measure need not be presented within the financial statements or included in a filing with the Commission. The Exchange also proposes to adopt the term ''Incentive-based Compensation'' under Rule 14.1(a), which would mean any compensation that is granted, earned, or vested based wholly or in part upon the attainment of a financial reporting measure. Based on these proposed definitions, the Exchange also proposes to modify the numbering of the definitions provided under Rule 14.1(a).

The Exchange proposes to adopt new a definition of ''Executive Officer'' applicable only to Rule 14.10(k). The term Executive Officer is already defined under Rule 14.1(a); therefore, the Exchange proposes to adopt a separate definition under proposed Interpretation and Policy .21 of Rule 14.10. As proposed, the term Executive Officer would mean, for purposes of the

[4] Public Law 111–203, 124 Stat. 1376 (2010).

[5] ''Company'' means the issuer of a security listed or applying to list on the Exchange. For purposes of Chapter XIV, the term ''Company'' includes an issuer that is not incorporated, such as, for example, a limited partnership. *See* Exchange Rule 14.1 (a)(3).

[6] *See* 17 CFR 240.10D–1(a)(2).

compensation recovery policy, a Company's president, principal financial officer, principal accounting officer (or if there is no such accounting officer, the controller), any vice-president of the Company in charge of a principal business unit, division, or function (such as sales, administration, or finance), any other officer who performs a policy-making function, or any other person who performs similar policy-making functions for the Company. Executive Officers of the Company's parent(s) or subsidiaries are deemed Executive Officers of the Company if they perform such policy making functions for the Company. In addition, when the Company is a limited partnership, officers or employees of the general partner(s) who perform policy-making functions for the limited partnership are deemed officers of the limited partnership. When the Company is a trust, officers, or employees of the trustee(s) who perform policy-making functions for the trust are deemed officers of the trust. Policy-making function is not intended to include policy-making functions that are not significant. Identification of an Executive Officer for purposes of this Rule would include at a minimum executive officers identified pursuant to 17 CFR 229.401(b). The Exchange also proposes to provide under new interpretation and policy .21 of Rule 14.10 that Incentive-based Compensation is deemed received in the Company's fiscal period during which the financial reporting measure specified in the Incentive-based Compensation award is attained, even if the payment or grant of the Incentive-based Compensation occurs after the end of that period.

As noted above, the definition of Financial Reporting Measures, Incentive-based Compensation, Executive Officer, and the application of ''received'' as it relates to Incentive-based Compensation is substantively identical to the definitions provided Rule 10–D–1(d).

(2) Compensation Recovery Policy

Next, the Exchange proposes to adopt a new corporate governance requirement under Rule 14.10 related to the compensation recovery policy. Accordingly, the Exchange proposes to modify Rule 14.10(a) to include the compensation recovery policy in the list of rules covered under Rule 14.10. The Exchange proposes to adopt the compensation recovery policy requirement under proposed Rule 14.10(k). Proposed Rule 14.10(k) first provides a summary of the timing requirements for compliance under the proposed Rule in accordance with Rule 10D–1. Specifically, the Rule would state that in accordance with Rule 10D–1 under the Act, each Company shall: (i) adopt the compensation recovery policy required by this Rule no later than 60 days following {insert date of Commission approval of File No. SR–CboeBZX–2023–013} (the ''effective date''), to which the Company is subject; (ii) comply with that recovery policy for all Incentive-based Compensation received by Executive Officers on or after the effective date of the applicable listing standard; and (iii) provide the disclosures required by this Rule and in the applicable Commission filings required on or after the effective date of the listing standard to which the Company is subject.

Proposed Rule 14.10(k) would then set forth the requirements related to the compensation recovery policy. First, proposed Rule 14.10(k)(1) requires that each Company adopt a written compensation recovery policy providing that the Company will recover reasonably promptly the amount of erroneously awarded Incentive-based Compensation in the event that the Company is required to prepare an accounting restatement due to the material noncompliance of the Company with any financial reporting requirement under the securities laws, including any required accounting restatement to correct an error in previously issued financial statements that is material to the previously issued financial statements, or that would result in a material misstatement if the error were corrected in the current period or left uncorrected in the current period, as required by Section 10D–1 under the Act.

Proposed Rule 14.10(k)(1)(A) sets forth the circumstances under which the Company's Incentive-based Compensation recovery policy must apply. Specifically, the Company's recovery policy must apply to a person (i) after beginning service as an Executive Officer; (ii) who served as an Executive Officer at any time during the performance period for that Incentive-based Compensation; (iii) while the Company has a class of securities listed on a national securities exchange or a national securities association; and (iv) during the three completed fiscal years immediately preceding the date that the Company is required to prepare an accounting restatement as described in proposed paragraph (k)(1) of this Rule. In addition to these last three completed fiscal years, the recovery policy must apply to any transition period (that results from a change in the Company's fiscal year) within or immediately following those three completed fiscal years. However, a transition period between the last day of the Company's previous fiscal year end and the first day of its new fiscal year that comprises a period of nine to 12 months would be deemed a completed fiscal year. A Company's obligation to recover erroneously awarded compensation is not dependent on if or when the restated financial statements are filed.

Proposed Rule 14.10(k)(1)(B) provides that for purposes of determining the relevant recovery period, the date that a Company is required to prepare an accounting restatement as described in paragraph (k)(1) of this Rule is the earlier to occur of: (i) the date the Company's board of directors, a committee of the board of directors, or the officer or officers of the Company authorized to take such action if board action is not required, concludes, or reasonably should have concluded, that the Company is required to prepare an accounting restatement as described in paragraph (k)(1) of this Rule; or (ii) the date a court, regulator, or other legally authorized body directs the Company to prepare an accounting restatement as described in paragraph (k)(1) of this Rule.

Proposed Rule 14.10(k)(1)(C) provides that the amount of Incentive-based Compensation that must be subject to the Company's compensation recovery policy (''erroneously awarded compensation'') is the amount of Incentive-based Compensation received that exceeds the amount of Incentive-based Compensation that otherwise would have been received had it been determined based on the restated amounts, and must be computed without regard to any taxes paid. For Incentive-based Compensation based on stock price or total shareholder return, where the amount of erroneously awarded compensation is not subject to mathematical recalculation directly from the information in an accounting restatement, proposed Rule 14.10(k)(1)(C)(i)–(iii) sets forth additional requirements. Specifically, the amount must be based on a reasonable estimate of the effect of the accounting restatement on the stock price or total shareholder return upon which the Incentive-based Compensation was received, and the Company must maintain documentation of the determination of that reasonable estimate and provide such documentation to the exchange or association. The Company must recover erroneously awarded compensation in compliance with its compensation recovery policy except to the extent that the below three conditions are met and

the Company's committee of Independent Directors responsible for executive compensation decisions, or in the absence of such a committee, a majority of the independent directors serving on the board, has made a determination that recovery would be impracticable. The three conditions are as follows:

- The direct expense paid to a third party to assist in enforcing the policy would exceed the amount to be recovered. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on expense of enforcement, the Company must make a reasonable attempt to recover such erroneously awarded compensation, document such reasonable attempt(s) to recover, and provide that documentation to the exchange or association.
- Recovery would violate home country law where that law was adopted prior to November 28, 2022. Before concluding that it would be impracticable to recover any amount of erroneously awarded compensation based on violation of home country law, the Company must obtain an opinion of home country counsel, acceptable to the applicable national securities exchange or association, that recovery would result in such a violation, and must provide such opinion to the exchange or association.
- Recovery would likely cause an otherwise tax-qualified retirement plan, under which benefits are broadly available to employees of the registrant, to fail to meet the requirements of 26 U.S.C. 401(a)(13) or 26 U.S.C. 411(a) and regulations thereunder.

Finally, under proposed Rule 14.10(k)(1)(D) a Company's written compensation recovery policy must provide that the Company is prohibited from indemnifying any Executive Officer or former Executive Officer against the loss of erroneously awarded compensation.

The second requirement under proposed Rule 14.10(k)(2) provides that each Company must file all disclosures with respect to the recovery policy in accordance with the requirements of Federal securities laws, including the disclosure required by the applicable Commission filings.

(3) Exemptions to Compensation Recovery Policy Requirement

The Exchange also proposes to amend Rule 14.10(e) (exemptions the Corporate Governance Requirements) to provide for limited exemptions to the compensation recovery policy requirement in accordance with Rule 10D–1. First, the Exchange proposes to exempt asset-backed issuers and other passive issuers from the compensation recovery policy requirement. Specifically, proposed Rule 14.10(e)(1)(A)(iii) exempts any security issued by a unit investment trust (''UIT''), as defined in 15 U.S.C. 80a–4(2), from the compensation recovery policy requirements under proposed Rule 14.10(k). As discussed in the Final Rule,[7] unlike listed funds, UITs are pooled investment entities without a board of directors, corporate officers, or an investment adviser to render investment advice during the life of the UIT, and they do not file a certified shareholder report. In addition, because the investment portfolio of a UIT is generally fixed, UITs are not actively managed. Accordingly, the Commission exempted the listing of any security issued by a UIT from the requirements of Rule 10D–1 under the Exchange Act. As such, the Exchange proposes to similarly exempt such UITs from the requirements of Rule 14.10(k).

Second, proposed Rule 14.10(e)(1)(E)(iv) exempts any security issued by a management company, as defined in 15 U.S.C. 80a–4(3), that is registered under section 8 of the Investment Company Act of 1940 (15 U.S.C. 80a–8), if such management company has not awarded Incentive-based Compensation to any Executive Officer of the company in any of the last three fiscal years, or in the case of a company that has been listed for less than three fiscal years, since the listing of the company. Excluding listed funds that do not pay Incentive-based Compensation would allow such funds to avoid the burden of developing recovery policies they may never use. Listed funds that have paid Incentive-based Compensation in that time period, however, would be subject to the rule and rule amendments and be required to implement a compensation recovery policy like other listed issuers.

(4) Failure To Meet Listing Standard

Last, the Exchange proposes to amend Rule 14.12 (Failure to Meet Listing Standards) to provide for a Company's failure to meet the requirements of proposed Rule 14.10(k). Amended Rule 14.12(f)(2)(A)(iii) would provide when a Company is deficient with respect to Rule 14.10(k), it may submit a plan to regain compliance to the Listing Qualifications Department. In this regard, the Exchange proposes to allow Companies 45 calendar days to submit such a plan, which is consistent with the deficiencies from most other rules that allow Companies to submit a plan to regain compliance.[8] If Exchange staff does not accept the plan, a Staff Delisting Determination will be issued, which could be appealed to a Hearings Panel pursuant to Rule 14.12(h). The administrative process for such deficiencies will follow the established pattern used for similar corporate governance deficiencies, and would allow Exchange staff to provide the issuer up to 180 days to cure the deficiency. Thereafter, Exchange staff would be required to issue a delisting letter,[9] which the issuer could appeal to the Hearings Panel, as provided in Exchange Rule 14.12(h). The Hearings Panel could allow the issuer up to an additional 180 days to cure the deficiency.

Exchange Rule 14.12 currently provides that violations of Exchange corporate governance or notification listing standards may result in a Public Reprimand Letter if the Staff of Adjudicatory Body determines that delisting is an inappropriate sanction, with one exception. Specifically, the Exchange will not issue a Public Reprimand Letter if the violation involved the violation of a corporate governance or notification listing standard required by Rule 10A–3 under the Act. The Exchange proposes to similarly prohibit the issuance of a Public Reprimand Letter for violations of a corporate governance or notification listing standard that is required by Rule 10D–1. Accordingly, the Exchange proposes to amend Rule 14.12(b)(9), (f)(4), (h)(3)(iii), (i)(4)(A), and (j)(4). Additionally, the Exchange proposes to modify the aforementioned Rules to provide that Rules 10A–3 and 10D–1 are ''under'' the Act.

[7] *See* Securities Exchange Act No. 11126 (October 26, 2022) 87 FR 73076 (November 28, 2022) (Listing Standards for Recovery of Erroneously Awarded Compensation) (the ''Final Rule'').

[8] The Exchange notes that the following deficiencies are allowed 45 calendar days to submit a plan to regain compliance: deficiencies from the standards of Rules 14.10(f)(3) (Quorum), 14.10(h) (Review of Related Party Transactions), 14.10(i) (Shareholder Approval), 14.6(c)(3) (Auditor Registration), 14.7 (Direct Registration Program), 14.10(d) (Code of Conduct), 14.10(e)(1)(D)(v) (Quorum of Limited Partnerships), 14.10(e)(1)(D)(vii) (Related Party Transactions of Limited Partnerships), or 14.10(j) (Voting Rights).

[9] Rule 14.12 provides that notifications of deficiencies that allow for submission of a compliance plan may result, after review of the compliance plan, in issuance of a Staff Delisting Determination or a Public Reprimand Letter. However, the Exchange believes that issuance of a Public Reprimand Letter is inconsistent with the provisions of Rule 10D–1 and, therefore, proposes to amend its applicable listing rules to provide that a Public Reprimand Letter may not be issued for violations of a listing standard required by Rule 10D–1.

While Rule 10D–1 requires a listed Company recover the amount of erroneously awarded Incentive-based Compensation reasonably promptly, it does not specify the time by which the Company must complete the recovery of excess Incentive-based Compensation. The Exchange would determine whether the steps a Company is taking constitute compliance with its compensation recovery policy. The Company's obligation to recover erroneously awarded Incentive-based Compensation reasonably promptly will be assessed on a holistic basis with respect to each accounting restatement prepared by the Company. In evaluating whether a Company is recovering erroneously awarded Incentive-based Compensation reasonably promptly, the Exchange will consider whether the Company is pursuing an appropriate balance of cost and speed in determining the appropriate means to seek recovery and whether the Company is securing recovery through means that are appropriate based on the particular facts and circumstances of each Executive Officer that owes a recoverable amount.

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.[10] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[11] 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. Section 6(b)(5) also requires that a national securities exchange's rules not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Exchange is proposing to adopt Rule 14.10(k) to comply with the requirements of Section 954 of the Dodd-Frank Act and Rule 10D–1 under the Act, and therefore believes the proposed rule change to be consistent with the Act, particularly with respect to the protection of investors and the public interest. The Exchange also believes that the proposal will contribute to investor protection and the public interest by incentivizing executive officers to take steps to reduce the likelihood of inadvertent misreporting and will reduce the financial benefits to executive officers who choose to pursue impermissible accounting methods, which the Exchange expects will further discourage such behavior. These increased incentives may improve the overall quality and reliability of financial reporting, which further benefits investors.

The Exchange believes it is not unfairly discriminatory to exempt UITs and management investment companies that do not pay Incentive-based Compensation from the requirements of proposed Rule 14.10(k). Specifically, excluding management investment companies that do not pay Incentive-based Compensation would allow such companies to avoid the burden of developing recovery policies they may never use. Management investment companies that have paid Incentive-based Compensation in that time period, however, would be subject to the rule and rule amendments and be required to implement a compensation recovery policy like other listed issuers. Further, unlike management investment companies, UITs are pooled investment entities without a board of directors, corporate officers, or an investment adviser to render investment advice during the life of the UIT, and they do not file a certified shareholder report. In addition, because the investment portfolio of a UIT is generally fixed, UITs are not actively managed. Accordingly, the Exchange believes that it is necessary or appropriate in the public interest, and consistent with the protection of investors, to exempt the listing of any security issued by a UIT from the requirements of proposed Rule 14.10(k).

The Exchange believes that allowing a Company to regain compliance with Rule 14.10(k) by submitting a plan of compliance to the Listing Qualifications within 45 calendar days is consistent with the deficiencies from most other rules that allow Companies to submit a plan to regain compliance.[12] Therefore, the Exchange believes the proposal to permit a Company to submit such a plan for a deficiency related to Rule 14.10(k) provides continuity in the Exchange's rulebook, to the benefit of investors.

Finally, the Exchange believes the proposal to prohibit the issuance of a Public Reprimand Letter for violations of a corporate governance or notification listing standard that is required Rule 14.10(k) is consistent with the requirements of Rule 10D–1, which provide that a Company would be subject to delisting if it does not adopt and comply with its compensation recovery policy. The Exchange notes that existing Exchange Rules similarly prohibit violations of a corporate governance or notification listing standard that is required by 10A–3 from issuing a Public Reprimand Letter.

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

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes that the proposed rules are designed to allow investors to properly assess the value of the Companies whose financial reporting is based on erroneous information. Without such a rule, such erroneous information could result in an inefficient allocation of capital, inhibiting capital formation and competition. The Exchange does not believe the proposal will have any impact on intramarket competition as all listing exchanges are required to adopt similar listing standards pursuant to Rule 10D–1.

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

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

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

Within 45 days of the date of publication of this notice in the **Federal Register** or 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 self-regulatory organization consents, the Commission will:

(A) by order approve or disapprove the 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, as modified by Amendment No.

[10] 15 U.S.C. 78f(b).

[11] 15 U.S.C. 78f(b)(5).

[12] *Supra* note 6.

1, 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 Number SR–CboeBZX–2023–013 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–2023–013. 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 Number SR–CboeBZX–2023–013 and should be submitted on or before April 5, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[13]

J. Matthew DeLesDernier,

Deputy Secretary.

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[13] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–97102; File No. SR–CboeBZX–2022–035]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares

March 10, 2023.

I. Introduction

On June 24, 2022, Cboe BZX Exchange, Inc. (''BZX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to list and trade shares (''Shares'') of the VanEck Bitcoin Trust (''Trust'') under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The proposed rule change was published for comment in the **Federal Register** on July 13, 2022.[3]

On August 24, 2022, pursuant to Section 19(b)(2) of the Exchange Act,[4] 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 the proposed rule change.[5] On October 4, 2022, the Commission instituted proceedings under Section 19(b)(2)(B) of the Exchange Act[6] to determine whether to approve or disapprove the proposed rule change,[7] and on December 16, 2022, the Commission designated a longer period for Commission action on the proposed rule change.[8]

This order disapproves the proposed rule change. The Commission concludes that BZX has not met its burden under the Exchange Act and the Commission's Rules of Practice to demonstrate that its proposal is consistent with the requirements of Exchange Act Section 6(b)(5), which requires, in relevant part, that the rules of a national securities exchange be ''designed to prevent fraudulent and manipulative acts and practices'' and ''to protect investors and the public interest.''[9]

When considering whether BZX's proposal to list and trade the Shares is designed to prevent fraudulent and manipulative acts and practices, the Commission applies the same analytical framework used in its orders considering previous proposals to list bitcoin[10]-based commodity trusts and bitcoin-based trust issued receipts to assess whether a listing exchange of an exchange-traded product (''ETP'') can meet its obligations under Exchange Act Section 6(b)(5).[11]

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 95218 (July 7, 2022), 87 FR 41755 (''Notice''). BZX previously filed, and the Commission disapproved, a substantially similar proposal to list and trade the Shares of the Trust. *See* Notice of Filing of a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 91326 (Mar. 15, 2021), 86 FR 14987 (Mar. 19, 2021) (''Previous VanEck Filing''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the VanEck Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93559 (Nov. 12, 2021), 86 FR 64539 (Nov. 18, 2021) (SR–CboeBZX–2021–019) (''Previous VanEck Order'').

[4] 15 U.S.C. 78s(b)(2).

[5] *See* Securities Exchange Act Release No. 95596, 87 FR 53038 (Aug. 30, 2022).

[6] 15 U.S.C. 78s(b)(2)(B).

[7] *See* Securities Exchange Act Release No. 95978, 87 FR 61418 (Oct. 11, 2022).

[8] *See* Securities Exchange Act Release No. 96517, 87 FR 78740 (Dec. 22, 2022).

[9] 15 U.S.C. 78f(b)(5).

[10] Bitcoins are digital assets that are issued and transferred via a decentralized, open-source protocol used by a peer-to-peer computer network through which transactions are recorded on a public transaction ledger known as the ''bitcoin blockchain.'' The bitcoin protocol governs the creation of new bitcoins and the cryptographic system that secures and verifies bitcoin transactions. *See, e.g.,* Notice, 87 FR at 41757.

[11] *See* Order Setting Aside Action by Delegated Authority and Disapproving a Proposed Rule Change, as Modified by Amendments No. 1 and 2, To List and Trade Shares of the Winklevoss Bitcoin Trust, Securities Exchange Act Release No. 83723 (July 26, 2018), 83 FR 37579 (Aug. 1, 2018) (SR–BatsBZX–2016–30) (''Winklevoss Order''); Order Disapproving a Proposed Rule Change, as Modified by Amendment No. 1, To Amend NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares) and To List and Trade Shares of the United States Bitcoin and Treasury Investment Trust Under NYSE Arca Rule 8.201–E, Securities Exchange Act Release No. 88284 (Feb. 26, 2020), 85 FR 12595 (Mar. 3, 2020) (SR–NYSEArca–2019–39) (''USBT Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the WisdomTree Bitcoin Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93700 (Dec. 1, 2021), 86 FR 69322 (Dec. 7, 2021) (SR–CboeBZX–2021–024) (''WisdomTree Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Valkyrie Bitcoin Fund Under NYSE Arca Rule 8.201–E (Commodity-Based Trust Shares), Securities Exchange Act Release No. 93859 (Dec. 22, 2021), 86 FR 74156 (Dec. 29, 2021) (SR–NYSEArca–2021–31) (''Valkyrie Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the Kryptoin Bitcoin ETF Trust Under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares, Securities Exchange Act Release No. 93860 (Dec. 22, 2021), 86 FR 74166 (Dec. 29, 2021) (SR–CboeBZX–2021–029) (''Kryptoin Order''); Order Disapproving a Proposed Rule Change To List and Trade Shares of the First Trust SkyBridge Bitcoin ETF Trust Under NYSE Arca Rule 8.201–

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