

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-84600; File No. SR-CboeBYX-2018-014)

November 15, 2018

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Make Permanent Exchange Rule 11.24, Which Sets Forth the Exchange’s Pilot Retail Price Improvement Program

I. Introduction

On July 30, 2018, Cboe BYX Exchange, Inc. (“BYX” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to make permanent Exchange Rule 11.24, which sets forth the Exchange’s pilot Retail Price Improvement Program. The proposed rule change was published for comment in the Federal Register on August 17, 2018.³ On September 27, 2018, the Commission extended to November 15, 2018, the time period in which to approve, disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.⁴ The Commission received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act⁵ to determine whether to approve or disapprove the proposed rule change.

II. Summary of the Proposed Rule Change

The Exchange proposes to amend Exchange Rule 11.24 to make permanent the Retail Price Improvement Program (the “Program”), which sets forth the rules and procedures

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 83831 (August 13, 2018), 83 FR 41128 (“Notice”).

⁴ See Securities Exchange Act Release No. 84297, 83 FR 49959 (October 3, 2018).

⁵ 15 U.S.C. 78(s)(b)(2)(B).

governing the program and is currently offered on a pilot basis.⁶ The pilot is scheduled to expire upon the earlier of the approval of this proposed rule change or December 31, 2018.⁷ According to the Exchange, the Program is designed to attract retail order flow and allow such order flow to receive potential price improvement.⁸

Under the Program, a class of market participant called a Retail Member Organization (“RMO”) is eligible to submit certain retail order flow (“Retail Orders”) to the Exchange. A User⁹ is permitted to provide potential price improvement for Retail Orders¹⁰ by submitting Retail Price Improvement (“RPI”) Orders, which are non-displayed orders that are priced at least \$0.001 better than the best protected bid (“PBB”) or best protected offer (“PBO”) (“PBBO”), as such terms are defined in Regulation NMS, and that is identified as such.¹¹ After an RPI Order is

⁶ In November 2012, the Commission approved the Program on a pilot basis. See Securities Exchange Act Release No. 68303 (November 27, 2012), 77 FR 71652 (December 3, 2012) (“RPI Approval Order”) (SR-BYX-2012-019).

⁷ The Exchange implemented the Program on January 11, 2013, and has extended the pilot period five times. See Securities Exchange Act Release Nos. 71249 (January 7, 2014), 79 FR 2229 (January 13, 2014) (SR-BYX-2014-001); 74111 (January 22, 2015), 80 FR 4598 (January 28, 2015) (SR-BYX-2015-05); 76965 (January 22, 2016), 81 FR 4682 (January 27, 2016) (SR-BYX-2016-01); 78180 (June 28, 2016), 81 FR 43306 (July 1, 2016) (SR-BYX-2016-15); and 81368 (August 10, 2017), 82 FR 38960 (August 16, 2017) (SR-BYX-2017-18).

⁸ See Notice, supra note 3 at 41128.

⁹ A “User” is defined in Exchange Rule 1.5(cc) as any member or sponsored participant of the Exchange who is authorized to obtain access to the System.

¹⁰ A “Retail Order” is defined in Exchange Rule 11.24(a)(2) as an agency order or riskless principal that meets the criteria of FINRA Rule 53250.03 that originates from a natural person and is submitted to the Exchange by a RMO, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any computerized methodology. See Exchange Rule 11.24(a)(2).

¹¹ See Notice, supra note 3 at 41128. As more fully set forth in the Notice, RPI Orders may be submitted with an explicit limit price, or an offset. RPI Orders submitted with an offset are similar to other pegged orders in that the order is tied or “pegged” to a certain

submitted, the Exchange disseminates an indicator through its proprietary data feeds or through the Consolidated Tape Association/Consolidated Quotation Plan for Tape A and Tape B securities and the Nasdaq UTP Plan for Tape C securities, known as the Retail Liquidity Identifier, indicating that such interest exists.¹² The Retail Liquidity Identifier reflects the symbol for the particular security and the side (buy or sell) of the RPI interest, but does not include the price or size of the RPI interest.¹³

To qualify as an RMO, a member organization must conduct a retail business or route retail orders on behalf of another broker-dealer.¹⁴ A member organization must submit the following to the Exchange for approval: (i) an application form, (ii) supporting documentation, and (iii) an attestation that substantially all orders submitted as retail orders will qualify as such. The Program provides for an appeal process for a disapproved applicant, and a withdraw process for RMOs. RMOs must have written policies and procedures reasonably designed to assure that they will only designate orders as Retail Orders if all requirements of a Retail Order are met. RMOs could be disqualified if they submit Retail Orders that do not meet the requirements of Retail Orders. If disqualified, RMOs may appeal and reapply.

Under the Program, there are two types of Retail Orders. A Type 1 Retail Order will interact with only available contra-side RPI Orders and other price improving contra-side

price, and would have its price automatically set and adjusted upon changes to the Protected NBBO. The offset is a predetermined amount by which the User is willing to improve the Protected NBBO, subject to a ceiling or floor price. The ceiling or floor price is the amount above or below which the User does not wish to trade. RPI Orders in their entirety (the buy or sell interest, the offset, and the ceiling or floor) will remain non-displayed.

¹² See Notice, supra note 3 at 41130.

¹³ See id.

¹⁴ See id.

interest.¹⁵ A Type 1 Retail Order will not interact with other available contra-side interest or route to away markets. The unexecuted portion of a Type 1 Retail Order will be immediately cancelled. A Type 2 Retail Order will interact first with available contra-side RPI Orders and price-improving liquidity, and then any remaining portion will be executed as an immediate-or-cancel order.¹⁶ A Type 2-designated Retail Order can either be submitted as a BYX Only Order or an order eligible for routing.¹⁷

The Program provides that RPI Orders will be ranked and allocated according to price-time priority. Executions occur in price time priority. Any remaining unexecuted RPI interest remains available to interact with other incoming Retail Orders if such interest is at an eligible price.

A more detailed description of how the program operates, including but not limited to how a member organization may qualify an apply to become a RMO; the different types of Retail Orders; and priority and order allocation of RPI Orders is more fully set forth in the Notice.¹⁸

As part of the RPI Approval Order, the Exchange agreed to provide the Commission with a significant amount of data to assist the Commission's evaluation of the Program.¹⁹ Specifically, the Exchange represented that it would "produce data throughout the pilot, which will include statistics about participation, the frequency and level of price improvement provided

¹⁵ See id.

¹⁶ See id. at 41130-31.

¹⁷ See id. at 41131.

¹⁸ See Notice, supra note 3.

¹⁹ See RPI Order, supra note 7, at 71657.

by the Program, and any effects on the broader market structure.”²⁰ The Commission expected the Exchange to monitor the scope and operation of the Program and study the data produced during that time with respect to such issues.²¹

In the Notice, the Exchange states that it believes that it has achieved its goal of attracting retail order flow to the Exchange.²² The Exchange further states that its analysis of the data collected demonstrates that “there has been consistent retail investor interest in the Program, which has provided tangible price improvement to those retail investors through a competitive pricing process over the course of the pilot.”²³ The Exchange also concluded that the data shows that the Program “had an overall negligible impact on broader market quality outside of the Program.”²⁴

III. Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²⁵ to determine whether the proposal 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 disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposal.

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Id.

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Id.

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See Notice, supra note 3, at 41131.

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Id.

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Id.

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

Pursuant to Section 19(b)(2)(B) of the Act,²⁶ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act,²⁷ which requires that the rules of an exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, 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 which prohibits the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers, and with Section 6(b)(8) of the Act, which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁸

The Program was intended to create additional price improvement opportunities for retail investors by segmenting retail order flow on the Exchange.²⁹ When the Commission initially approved the Program on a pilot basis, it explained that it would monitor the Program throughout the pilot period for its potential effects on public price discovery and on the broader market structure.³⁰ The Commission expressed its view that the Program should not cause a major shift in market structure, but instead, it would closely replicate the trading dynamics that exist in the over-the-counter markets to present another competitive venue for retail order flow execution.³¹

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Id.

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

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15 U.S.C. 78f(b)(8).

²⁹

See RPI Approval Order, supra note 13, at 71655

³⁰

See id.

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See id. at 71656.

As explained above, the Exchange provides an analysis of what it considers to be the economic benefits for retail investors and the marketplace flowing from operation of the Program.³² The Exchange also concludes, among other things, that the relatively modest volume in the Program limits the potential impact of the Program on the broader market quality on the Exchange, and that Program has not had any significant impact on broader market quality.³³

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”³⁴ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,³⁵ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.³⁶ Moreover, “unquestioning reliance” on an SRO’s representations in a proposed rule change would not be sufficient to justify Commission approval of a proposed rule change.³⁷

The Commission questions whether the information and analysis provided by the Exchange support the Exchange’s conclusions that the Program has achieved its goals, including

³² See supra notes 20 - 22, and Notice, supra note 3, at 41131-38.

³³ See id. at 413332; 41337.

³⁴ Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

³⁵ See id.

³⁶ See id.

³⁷ See Susquehanna Int’l Group, LLP v. Securities and Exchange Commission, 866 F.3d 442, 446-47 (D.C. Cir. 2017) (rejecting the Commission’s reliance on an SRO’s own determinations without sufficient evidence of the basis for such determinations).

whether the Program has not had a significant impact on broader market quality. The Commission seeks additional information and analysis concerning the Program's impact on the broader market; for example, additional information to support the view that the Program has not had a material adverse impact on market quality. The Commission believes it is appropriate to institute proceedings to allow for additional consideration and comment on the issues raised herein, any potential response to comments or supplemental information provided by the Exchange, and any additional independent analysis by the Commission. The Commission believes that these issues raise questions as to whether the Exchange has met its burden to demonstrate, based on the data and analysis provided, that permanent approval of the Program is consistent with the Act, and specifically, with its requirements that the Program be designed to perfect the mechanism of a free and open market and the national market system, protect investors and the public interest, and not be unfairly discriminatory; or not impose an unnecessary or inappropriate burden on competition.³⁸

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, 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 proposal is consistent with Sections 6(b)(5) and 6(b)(8), or any other provision of the Exchange Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be

³⁸ See 15 U.S.C. 78f(b)(4), (5), and (8).

facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.³⁹

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert 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].

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-2018-014 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-2018-014. 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

³⁹ Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants 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 Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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 such 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 publicly available. All submissions should refer to File Number SR-CboeBYX-2018-014 and should be submitted on or before [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.⁴⁰

Eduardo A. Aleman
Assistant Secretary

⁴⁰ 17 CFR 200.30-3(a)(57) and (58).