

comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-MEMX-2022-10 and should be submitted on or before September 2, 2022.

VI. Accelerated Approval of Proposed Rule Change

The Commission finds good cause to approve the proposed rule change prior to the 30th day after the date of publication of Amendment No. 1 in the **Federal Register**. Amendment No.1 does not include any material changes to the proposed rules for MEMX Options or the descriptions of those rules in the original filing. In Amendment No. 1, the Exchange, among other items, provides additional detail about how some of the proposed MEMX Options rules will function, revises other existing MEMX rules to reference and accommodate MEMX Options, provides representations about how MEMX will inform Users about certain parameters or variables set forth in the MEMX Options Rules, requests exemptive relief under Section 36 of the Act from Section 19 of the Act for rules incorporated by reference, and makes other minor technical changes to the filing.

The Commission finds that Amendment No.1 raises no novel regulatory issues and is reasonably 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 impose an unnecessary or inappropriate burden on competition. The Amendment makes minor and non-material clarifying and conforming changes and makes additional representations that each provide more clarity on the application of the MEMX Options rules and the commencement of operation of MEMX Options. Accordingly, pursuant to Section 19(b)(2) of the Act,¹⁶¹ the Commission finds good cause to approve the proposed rule change on an accelerated basis.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁶² that the proposed rule change (SR-MEMX-2022-10), as modified by Amendment No. 1, be, and it hereby is, approved on an accelerated basis.

Although the Commission's approval of the proposed rule change is final, and the proposed rules are therefore

effective, it is further ordered that the operation of MEMX Options is conditioned on the satisfaction of the requirements below:

A. *Participation in Plans Relating to Options Trading.* MEMX must join: (i) the OPRA Plan; (ii) the OLPP; (iii) the Linkage Plan; and (iv) the Plan of the Options Regulatory Surveillance Authority.

B. *RSA and Rule 17d-2 Agreements.* MEMX must ensure that all necessary changes are made to its Regulatory Services Agreement and bilateral Rule 17d-2 agreement with FINRA, and it must be a party to the multiparty Rule 17d-2 agreements concerning options-related sales practice matters and options-related market surveillance.

C. *Participation in the Options Clearing Corporation.* MEMX must join the Options Clearing Corporation.

D. *Participation in the Intermarket Surveillance Group.* MEMX must be a member of the Intermarket Surveillance Group.

It is further ordered, pursuant to Section 36 of the Act,¹⁶³ that MEMX shall be exempted from the rule filing requirements of Section 19(b) of the Act¹⁶⁴ with respect to the Cboe, FINRA, and NYSE rules that MEMX proposes to incorporate by reference in MEMX Rules 26.16, 28.3, 29.5, and 29.7, subject to the conditions specified in this Order.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶⁵

J. Matthew DeLesDernier,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-95444; File No. SR-CboeBYX-2022-018]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fee Schedule

August 8, 2022.

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 August 1, 2022 Cboe BYX Exchange, Inc. (the "Exchange" or "BYX") filed with the

¹⁶³ See 15 U.S.C. 78mm.

¹⁶⁴ 15 U.S.C. 78s(b).

¹⁶⁵ 17 CFR 200.30-3(a)(12) and 17 CFR 200.30-3(a)(76).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 its fee schedule. 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 its Fee Schedule by (i) introducing a Non-Displayed Add Volume Tier under Footnote 1 (Add/Remove Volume Tiers) and (ii) amending the criteria of the Step-Up Tier under Footnote 2. The Exchange proposes to implement these changes effective August 1, 2022.

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 registered equities exchanges, as well as a number of alternative trading systems and other off-exchange venues that do not have similar self-regulatory responsibilities under the Securities

¹⁶¹ 15 U.S.C. 78s(b)(2).

¹⁶² *Id.*

Exchange Act of 1934 (the “Act”), to which market participants may direct their order flow. Based on publicly available information, no single registered equities exchange has more than 16% of the market share.³ Thus, in such a low-concentrated and highly competitive market, no single equities exchange possesses significant pricing power in the execution of order flow. The Exchange in particular operates a “Taker-Maker” model whereby it pays credits to members that remove liquidity and assesses fees to those that add liquidity. The Exchange’s Fee Schedule sets forth the standard rebates and rates applied per share for orders that remove and provide liquidity, respectively. Particularly, for securities at or above \$1.00, the Exchange provides a standard rebate of \$0.00020 per share for orders that remove liquidity and assesses a fee of \$0.00200 per share for orders that add liquidity. For orders priced below \$1.00, the Exchange does not assess a fee or provide a rebate for orders that add liquidity and assesses a fee of 0.10% of total dollar value for orders that remove liquidity. Additionally, in response to the competitive environment, the Exchange also offers tiered pricing, which provides Members with opportunities to qualify for higher rebates or lower fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for Members to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying more stringent criteria.

Add/Remove Volume Tiers

Currently, the Exchange offers various Add/Remove Volume Tiers under footnote 1 of the Fee Schedule, which offer various enhanced rebates and reduced fees for reaching certain, incrementally more challenging volume-based thresholds. These tiers are available to Members whose orders yield fee codes B,⁴ V,⁵ and Y,⁶ [sic] where a Member meets certain required volume-based criteria. The Exchange now proposes to adopt a Non-Displayed Add Volume Tier under Footnote 1, which will provide a

³ See Cboe Global Markets, U.S. Equities Market Volume Summary, Month-to-Date (July 26, 2022), available at https://markets.cboe.com/us/equities/market_statistics/.

⁴ Orders yielding Fee Code B are displayed orders that add liquidity to BYX (Tape B) and are assessed a standard fee of \$0.00200.

⁵ Orders yielding Fee Code V are displayed orders that add liquidity to BYX (Tape A) and are assessed a standard fee of \$0.00200.

⁶ Orders yielding Fee Code Y are displayed orders that add liquidity to BYX (Tape C) and are assessed a standard fee of \$0.00200.

reduced fee of \$0.00050 for orders yielding fee codes MM⁷ or AH⁸. Currently, orders yielding fee codes MM or AH pay a fee of \$0.00100 for orders in securities priced at or above \$1.00. Under the proposed Non-Displayed Add Volume Tier, Members with an eligible order type (e.g., orders yielding fee codes MM or AH) that have a combined Auction ADV⁹ and ADAV¹⁰ greater than or equal to 5,000,000 would be eligible for the reduced fee.

The proposed Non-Displayed Add Volume Tier is designed to incentivize overall order flow, particularly by offering a reduced fee for non-displayed orders that achieve the volume-based criteria. The Exchange also believes that the proposed fee associated with the proposed Non-Displayed Add Volume Tier is commensurate with the tier’s criteria. Further, the proposed Non-Displayed Add Volume Tier will provide non-displayed liquidity providing Members on the Exchange incentives to contribute to a deeper, more liquid market, which in turn, provides additional execution opportunities for all Members. The Exchange believes that this benefits all Members by enhancing overall market quality and contributing towards a robust and well-balanced market ecosystem. The Exchange notes that the proposed Non-Displayed Add Volume Tier will be available to all Members.

Step-Up Tier

The Exchange also proposes to revise the criteria of the Step-Up Tier under Footnote 2 of the Fee Schedule. Currently, the Step-Up Tier offers a reduced fee of \$0.0014 to Members whose orders yield fee codes, B,¹¹ V,¹² Y,¹³ and AD¹⁴ and increase their

⁷ Orders yielding Fee Code MM are non-displayed orders that add liquidity using Mid-Point Peg. Mid-Point Peg is an order type defined in Exchange Rule 11.9(c)(9) as “[a] limit order that after entry into the System, the price of the order is automatically adjusted by the System in response to changes in the NBBO to be pegged to the mid-point of the NBBO, or, alternatively, pegged to the less aggressive of the midpoint of the NBBO or one minimum price variation inside the same side of the NBBO as the order.”

⁸ Orders yielding Fee Code AH are non-displayed orders that execute in a Periodic Auction.

⁹ “Auction ADV” means average daily auction volume calculated as the number of shares executed in an auction per day. ADV means average daily volume calculated as the number of shares added or removed, combined, per day, and is calculated on a monthly basis.

¹⁰ “ADAV” means average daily volume calculated as the number of shares added per day and is calculated on a monthly basis.

¹¹ *Supra* note 4.

¹² *Supra* note 5.

¹³ *Supra* note 6.

¹⁴ Orders yielding Fee Code AD are displayed orders that execute in a Periodic Auction.

relative add-volume order flow each month over a predetermined baseline as well as add liquidity over an established threshold. Specifically, the current Step-Up Tier provides a reduced fee for eligible orders (e.g., those orders yielding fee codes B, V, Y, and AD) where a Member (i) has a combined Step-Up Auction ADV¹⁵ and Step-Up ADAV¹⁶ from June 2021 greater than or equal to 0.05% of TCV¹⁷ or Member has a combined Step-Up Auction ADV and Step-Up ADAV from June 2021 greater than or equal to 2,000,000; and (ii) Member has a combined Auction ADV and ADAV greater than or equal to 0.25% of TCV. The Exchange now proposes to lower the reduced fee to \$0.0012 (instead of \$0.0014) and amend the criteria to read as follows:

- Member has a combined Step-Up Auction ADV and Step-Up ADAV from April 2022 (as compared to June 2021) greater than or equal to 3,000,000 (as compared to 2,000,000); and Member has a combined Auction ADV and ADAV greater than or equal to 0.25% of TCV.

The Exchange believes the proposed change continues to incentivize increased overall order flow to the Exchange, albeit with slightly modified criteria, which may contribute to a deeper, more liquid market to the benefit of all market participants by creating a more robust and well-balanced market ecosystem.

Additionally, the Exchange believes the proposed lower reduced fee of \$0.0012 is commensurate with the revised criteria as Members are still required to increase the amount of liquidity they provide on the Exchange, thereby contributing to a deeper and more liquid market, which benefits all market participants. Furthermore, the proposed Step-Up Tier continues to be available to all Members and provide Members an opportunity to receive a reduced fee, albeit using a slightly modified criteria.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 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

¹⁵ “Step-Up Auction ADV” means Auction ADV in the relevant baseline month subtracted from current Auction ADV.

¹⁶ “Step-Up ADAV” means ADAV in the relevant baseline month subtracted from current ADAV.

¹⁷ “TCV” means total consolidated volume calculated as the volume reported by all exchange and trade reporting facilities to a consolidated transaction reporting plan for the month for which the fees apply.

¹⁸ 15 U.S.C. 78f(b).

Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁹ 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)²⁰ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposed Non-Displayed Add Volume Tier and the proposed changes to the Step-Up Tier are reasonable, equitable and not unfairly discriminatory because each tier, as proposed, will be available to all Members and provide Members an opportunity to receive a reduced fee. As noted above, the Exchange operates in a highly competitive market. The Exchange is only one of 16 equity venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. It is also only one of several taker-maker exchanges. Competing equity exchanges offer similar rates and tiered pricing structures to that of the Exchange, including schedules of rebates and fees that apply based upon members achieving certain volume thresholds. Specifically, the Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges,²¹ including the Exchange,²² and are reasonable, equitable and non-discriminatory because they are open to all members on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels or liquidity provision and/or growth patterns.

In particular, the Exchange believes the proposed Non-Displayed Add Volume Tier is reasonable because it provides an additional opportunity for

Members to receive a discounted rate by reaching the proposed threshold by means of liquidity adding non-displayed orders. The Exchange believes that adopting a Non-Displayed Add Volume Tier based on a Member's non-displayed liquidity adding orders will encourage non-displayed liquidity providing Members to provide for a deeper, more liquid market, and, as a result, increased execution opportunities at improved price levels and, thus, overall order flow. The Exchange similarly believes that the proposed revised Step-Up Tier is reasonable because it continues to provide a discounted rate (albeit at a lower amount), which is commensurate with the revised criteria. The Exchange believes that removing the first requirement from the first prong of criteria while simultaneously updating the baseline month from June 2021 to April 2022 and increasing the growth amount continues to provide a reasonable means to achieve a reduced fee while contributing towards a deeper and more liquid market. The Exchange believes that the proposed Non-Displayed Add Volume Tier and proposed revised Step-Up Tier continue to benefit all Members by contributing towards a robust and well-balanced market ecosystem. Increased overall order flow benefits all investors by deepening the Exchange's liquidity pool, providing greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection.

The Exchange believes the proposed Non-Displayed Add Volume Tier and the proposed revisions to the Step-Up Tier represent an equitable allocation of fees and are not unfairly discriminatory because all Members continue to be eligible for those tiers, would have the opportunity to meet a tier's criteria, and would receive the proposed reduced fee if such criteria is met. Without having a view of activity on other market and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitely result in any Members qualifying for the proposed tiers. While the Exchange has no way of predicting with certainty how the proposed tiers will impact Member activity, the Exchange anticipates that at least one Member will be able to satisfy the criteria for the proposed Non-Displayed Add Volume Tier and ten Members will be able to satisfy the proposed criteria for the Step-Up Tier. The Exchange also notes that the

proposed changes will not adversely impact any Member's ability to qualify for other reduced fee or enhanced rebate tiers. Should a Member not meet the proposed criteria under the proposed or modified tier, the Member will merely not receive that corresponding reduced fee. The Exchange believes that the proposed addition of the Non-Displayed Add Volume Tier and the proposed changes to the Step-Up Tier will benefit all market participants by incentivizing additional hidden liquidity and, thus, deeper more liquid markets as well as increased execution opportunities. Particularly, the proposals are designed to incentivize liquidity, which further contributes to a deeper, more liquid market and provide even more execution opportunities for active market participants at improved prices. This overall increase in activity deepens the Exchange's liquidity pool, offers additional cost savings, supports the quality of price discovery, promotes market transparency and improves market quality, for all investors.

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. Rather, as discussed above, the Exchange believes that the proposed change would encourage the submission of additional order flow to a public exchange, thereby promoting market depth, execution incentives and enhanced execution opportunities, as well as price discovery and transparency for all Members. As a result, the Exchange believes that the proposed changes further the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."

The Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed tier changes will apply to all Members equally, in that all Members will be eligible for the Non-Displayed Add Volume Tier and all Members will continue to be eligible for the Step-Up Tier. In addition, all Members will have a reasonable opportunity to meet the tiers' criteria and will receive the reduced fee on their qualifying orders if such criteria are met. The Exchange does not believe the proposed changes burden competition, but rather, enhance competition as they

¹⁹ 15 U.S.C. 78f(b)(5).

²⁰ *Id.*

²¹ See Cboe BZX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

²² See Cboe BYX Equities Fee Schedule, Footnote 1, Add/Remove Volume Tiers.

are intended to increase the competitiveness of BYX by amending existing pricing incentives in order to attract order flow and incentivize participants to increase their participation on the Exchange, providing for additional execution opportunities for market participants and improved price transparency. Greater overall order flow, trading opportunities, and pricing transparency benefit all market participants on the Exchange by enhancing market quality and continuing to encourage Members to send orders, thereby contributing towards a robust and well-balanced market ecosystem.

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, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including other equities exchanges, off-exchange venues, and alternative trading systems. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single equities exchange has more than 16% of the market share.²³ Therefore, no exchange possesses significant pricing power in the execution of order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at those other venues to be more favorable. 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 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.”²⁴ 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 states 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’ . . .”²⁵

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act²⁶ and paragraph (f) of Rule 19b-4²⁷ thereunder. 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 will 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 Number SR-CboeBYX-2022-018 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-2022-018. This

²³ *NetCoalition v. SEC*, 615 F.3d 525, 539 (DC Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

²⁶ 15 U.S.C. 78s(b)(3)(A).

²⁷ 17 CFR 240.19b-4(f).

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. 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-CboeBYX-2022-018, and should be submitted on or before September 2, 2022.

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

J. Matthew DeLesDernier,
Deputy Secretary.

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SURFACE TRANSPORTATION BOARD

[Docket No. FD 36618]

KS Railroad, a Division of KINKISHARYO International, L.L.C.—Operation Exemption—in Piscataway, N.J.

KS Railroad (KS), a noncarrier and division of KINKISHARYO International, L.L.C. (KII), has filed a verified notice of exemption pursuant to 49 CFR 1150.31 to operate on 1,173 feet, three inches of railroad track inside an existing industrial facility owned by KII in Piscataway, N.J. (the Line). The Line has no mileposts.

According to the verified notice, the Line is currently operated by KII as

²⁸ 17 CFR 200.30-3(a)(12).

²³ *Supra* note 3.

²⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).