



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-99247; File No. SR-CboeBZX-2023-063]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt an Alternative to the Minimum \$4 Price Requirement for Companies Seeking to List Tier II Securities on the Exchange

December 27, 2023.

On September 19, 2023, Cboe BZX Exchange, Inc. (“BZX” or the “Exchange”) filed with the Securities and Exchange Commission (“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 adopt an alternative to the minimum \$4 price requirement for companies seeking to list Tier II securities on the Exchange. The proposed rule change was published for comment in the Federal Register on October 2, 2023.³ On November 6, 2023, pursuant to Section 19(b)(2) of the 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 The Commission received two comments letters on the proposed rule change.⁶ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 98532 (Sept. 26, 2023) 88 FR 67852.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 98860, 88 FR 77647 (Nov. 13, 2023). The Commission designated December 31, 2023 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

⁶ Comments received on the proposed rule change are available at: <https://www.sec.gov/comments/sr-cboebzx-2023-063/srcboebzx2023063.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

I. Summary of the Proposed Rule Change⁸

The Exchange proposes to adopt an alternative to the current minimum \$4 price requirement for companies seeking to list securities on Tier II of the Exchange that are excluded from the definition of a “penny stock” under Exchange Act Rule 3a51-1(g) (the “Penny Stock Rule”).⁹ Specifically, under proposed Exchange Rule 14.9(b)(1)(A)(ii), a company whose security maintains a \$2 or \$3 closing price for at least five consecutive business days prior to approval would qualify for listing as a Tier II security, if among other things, it meets the net tangible assets or average revenue tests of the alternative penny stock exclusion set forth in Exchange Act Rule 3a51-1(g)¹⁰ and meets all existing listing standards except for the \$4 price requirement. Such a company must instead have a minimum \$3 price if it qualifies under the \$5 million equity¹¹ or \$750,000 net income alternatives¹² or a minimum \$2 price if it qualifies under the \$50 million market value of listed securities alternative.¹³ In addition, a company qualifying under the proposed standard must have either: (a) net tangible assets in excess of \$2 million, if the company has been in continuous operation for at least three years; or (b) net tangible assets in excess of \$5 million, if the company has been in continuous operation for less than three years; or (c) average revenue of at least \$6 million for the last three years. For this purpose, net tangible assets or revenue must be

⁸ For a full description of all aspects of the proposed rule change, please see the Notice, supra note 3.

⁹ 17 CFR 240.3a51-1(g).

¹⁰ See 17 CFR 240.3a51-1(g). A company seeking to qualify under only the Market Value of Listed Securities Standard would, among other things, also be required to maintain for 90 consecutive trading days the market value of its listed securities at \$50 million and the \$2 price requirement prior to applying to list under the alternative standard. See proposed Exchange Rule 14.9(b)(2)(B). Under the Market Value of Listed Securities Standard, a company would need to achieve, among other things: (A) market value of listed securities of at least \$50 million (current publicly traded issuers must meet this requirement and the price requirement for 90 consecutive trading days prior to applying for listing if qualifying to list only under the market value of listed securities standard); (B) stockholders' equity of at least \$4 million; and (C) market value of publicly held shares of at least \$15 million. The Exchange proposes to revise Rule 14.9(b)(2)(B) in order to make it consistent with the proposal. In particular, Rule 14.9(b)(2)(B)(i) would be revised to delete the specific reference to \$4 bid price requirement, since an issuer seeking to initially list its securities under the Market Value of Listed Securities Standard using the proposed alternative price requirement would have to maintain a closing price of at least \$2 per share for 90 consecutive trading days.

¹¹ See Exchange Rule 14.9(b)(2)(A).

¹² See Exchange Rule 14.9(b)(2)(C).

¹³ See proposed Exchange Rule 14.9(b)(2)(B).

demonstrated on the company's most recently filed audited financial statements, satisfying the requirements of the Commission, and which are dated less than 15 months prior to the date of listing.¹⁴

As proposed under new Interpretation and Policies .01(a) to Exchange Rule 14.9, an Exchange-listed security could become subject to the Penny Stock Rule following initial listing if it no longer meets the tangible assets or average revenue tests of the alternative exclusion and does not qualify for another exclusion under the penny stock rules. Further, unlike securities listed under the Exchange's existing initial standards, which have a blanket exclusion from the Penny Stock Rule, broker-dealers that effect recommended transactions in securities that originally qualified for listing under the Exchange's alternative price standard would, among other things, under Exchange Act Rule 3a51-1(g), need to review current financial statements of the issuer to verify that it meets the applicable net tangible assets or average revenue test, have a reasonable basis for believing they remain accurate, and preserve copies of those financial statements as part of its records. As provided in proposed Interpretation and Policies .01 to Rule 14.9, in order to assist brokers' and dealers' compliance with the requirements of the Penny Stock Rule, the Exchange would monitor companies listed under the proposed alternative and publish a list of any company that initially listed under that requirement, which does not then meet the requirements of Exchange Act Rule 3a51-1(g), described above, or any of the other exclusions from being a penny stock contained in Rule 3a51-1.¹⁵ Such list would be updated on a daily basis.¹⁶

If a company initially lists its security with a bid price below \$4 under the alternative requirement contained in Rule 14.9(b)(1)(A)(ii), but subsequently achieves a \$4 closing price for at

¹⁴ The Exchange states that the proposed rule adopts the 15-month requirement to assure consistency with the timing requirements contained in Exchange Act Rule 3a51-1(g).

¹⁵ The Exchange believes that the other exclusion most likely to be implicated would be Rule 3a51-1(d), 17 CFR 240.3a51-1(d), which provides an exclusion from the definition of a penny stock for a security with a minimum bid price of \$5. However, the Exchange states that if a Company obtains a \$4 minimum bid price at a time when it meets all other initial listing requirements, the Exchange would no longer consider the company as having listed under the proposed alternative standard.

¹⁶ See proposed Interpretations and Policies .01(a) to Exchange Rule 14.9.

least five consecutive business days and, at the same time, satisfies all other initial listing criteria, it would no longer be considered as having listed under the alternative requirement and the Exchange would notify the Company that it has qualified for listing under the price requirement contained in Rule 14.9(b)(1)(A)(i).¹⁷ If a security obtains a \$4 closing price, the Exchange would determine whether the security meets all other initial listing requirements for Tier II securities, including both the quantitative and qualitative requirements.¹⁸ If the security meets all initial Tier II listing requirements, it would satisfy the requirements for the exclusion contained in Rule 3a51- 1(a)(2) and would no longer be monitored by the Exchange for compliance with the other exclusions from the definition of a penny stock. Proposed Interpretations and Policies .01(a) to Exchange Rule 14.9 would remind brokers and dealers that the list published by the Exchange is only an aid and that the Penny Stock Rule imposes specific obligations on brokers and dealers with respect to transactions in penny stocks. Proposed Interpretation and Policy .01(b) to Exchange Rule 14.9 provides that the proposed alternative price test will be based on the BZX Official Closing Price¹⁹ in the security.

The Exchange also proposes that the required closing price must be achieved for at least five consecutive business days before approval of the listing application.²⁰ The Exchange may extend the minimum five-day compliance period required to satisfy these tests based on any fact or circumstance, including the margin of compliance, the trading volume, the trend of the

¹⁷ See id.

¹⁸ The security would have to meet the \$4 bid price requirement contained in proposed Exchange Rule 14.9(b)(1)(A)(i). In addition, proposed Rule 14.9(b)(2)(B) requires a company qualifying only under the Market Value of Listed Securities requirement to satisfy that requirement and the price requirement for 90 consecutive trading days prior to applying for listing. Such a company would have to achieve a \$4 bid price for 90 consecutive trading days and a \$4 closing price for five days, although these periods may overlap.

¹⁹ See Exchange Rule 11.23(a)(3). As provided in Exchange Rule 11.23(c)(2)(B), “[f]or a BZX-listed corporate security, the Closing Auction price will be the BZX Official Closing Price. In the event that there is no Closing Auction for a BZX-listed corporate security, the BZX Official Closing Price will be the price of the Final Last Sale Eligible Trade. See Exchange Rule 11.23(a)(9) for the definition of “Final Last Sale Eligible Trade.”

²⁰ See proposed Interpretations and Policies .01(b) to Exchange Rule 14.9. The Exchange states that it will work with FINRA to adopt surveillance procedures to monitor securities listed under the proposed alternative as they approach \$4. See Notice, supra note 3, at 67853. According to the Exchange, these procedures will be designed to identify anomalous trading that could be indicative of potential manipulation of the price. See id.

security's price, or information or concerns raised by other regulators concerning the trading of the security.²¹ The Exchange states that requiring the minimum \$2 or \$3 closing price to be maintained for a period of five days (as opposed to one day) should reduce the risk that some might attempt to manipulate or otherwise artificially inflate the closing price in order to allow a security to qualify for listing. In addition, the Exchange represents that it will exercise its discretionary authority to deny initial listing if there are particular concerns about a company, such as its ability to maintain compliance with continued listing standards or if there are other public interest concerns.²²

II. Proceedings to Determine Whether to Approve or Disapprove SR-CboeBZX-2023-063 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²³ to determine whether the proposed rule change 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 proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,²⁴ the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the consistency of the proposal with Sections 6(b)(5)²⁵ and 6(b)(8)²⁶ of the Act. Section 6(b)(5) of the Act requires that the rules of a national securities exchange be designed, among other things, to promote just and

²¹ See proposed Interpretations and Policies .01(b) to Exchange Rule 14.9.

²² See Exchange Rule 14.2. See also Notice, supra note 3, at 67854.

²³ 15 U.S.C. 78s(b)(2)(B).

²⁴ Id.

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ 15 U.S.C. 78f(b)(8).

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 not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

The Commission has consistently recognized the importance of exchange listing standards. Among other things, such listing standards help ensure that exchange-listed companies will have sufficient public float, investor base, and trading interest to provide the depth and liquidity necessary to promote fair and orderly markets.²⁷ Under the proposed rule change, shares subject to resale restrictions (“Restricted Securities”) are counted in the calculations of the company’s publicly held shares, market value of publicly held shares, and round lot holder. The Commission believes that a company’s publicly held shares, market value of publicly held shares, and the number of round lot holders are indicators of the liquidity of its shares. To the extent Restricted Securities are counted when calculating a company’s publicly held shares, market value of publicly held shares, and round lot holders, the company’s shares could be less liquid, potentially making them more susceptible to price manipulation.

²⁷ The Commission has stated in approving exchange listing requirements that the development and enforcement of adequate standards governing the listing of securities on an exchange is an activity of critical importance to the financial markets and the investing public. In addition, once a security has been approved for initial listing, maintenance criteria allow an exchange to monitor the status and trading characteristics of that issue to ensure that it continues to meet the exchange’s standards for market depth and liquidity so that fair and orderly markets can be maintained. *See, e.g.*, Securities Exchange Act Release No. 91947 (May 19, 2021), 86 FR 28169 (May 25, 2021) (SR-NASDAQ-2020-057); Securities Exchange Act Release Nos. 90768 (Dec. 22, 2020), 85 FR 85807, 85811 n.55 (Dec. 29, 2020) (SR-NYSE-2019-67) (“NYSE 2020 Order”); 82627 (Feb. 2, 2018), 83 FR 5650, 5653 n.53 (Feb. 8, 2018) (SR-NYSE-2017-30) (“NYSE 2018 Order”); 81856 (Oct. 11, 2017), 82 FR 48296, 48298 (Oct. 17, 2017) (SR-NYSE-2017-31); 81079 (July 5, 2017), 82 FR 32022, 32023 (July 11, 2017) (SR-NYSE-2017-11). The Commission has stated that adequate listing standards, by promoting fair and orderly markets, are consistent with Section 6(b)(5) of the Exchange Act, in that they are, among other things, designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest. *See, e.g.*, NYSE 2020 Order, 85 FR at 85811 n.55; NYSE 2018 Order, 83 FR at 5653 n.53; Securities Exchange Act Release Nos. 87648 (Dec. 3, 2019), 84 FR 67308, 67314 n.42 (Dec. 9, 2019) (SR-NASDAQ-2019-059); 88716 (Apr. 21, 2020), 85 FR 23393, 23395 n.22 (Apr. 27, 2020) (SR-NASDAQ-2020-001).

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Exchange Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”²⁸ 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,²⁹ 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 Exchange Act and the applicable rules and regulations.³⁰ The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein.

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, 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 proposed rule change is consistent with the Exchange Act and the rules and regulations thereunder.

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,³¹ any request for an opportunity to make an oral presentation.³²

²⁸ 17 CFR 201.700(b)(3).

²⁹ See id.

³⁰ See id.

³¹ 17 CFR 240.19b-4.

³² Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (Jun. 4, 1975), grants to 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 Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [INSERT DATE 21 DAYS AFTER DATE OF 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 AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CboeBZX-2023-063 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-2023-063. 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 (<https://www.sec.gov/rules/sro.shtml>).

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should

submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-063 and should be submitted by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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

Christina Z. Milnor,

Assistant Secretary.

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