

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁴

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91523; File No. SR-IEX-2021-06]

Self-Regulatory Organizations; Investors Exchange LLC; Notice of Filing of Proposed Rule Change To Enhance the IEX Retail Price Improvement Program for the Benefit of Retail Investors

April 9, 2021.

Pursuant to Section 19(b)(1) ¹ of the Securities Exchange Act of 1934 (the “Act”) ² and Rule 19b-4 thereunder,³ notice is hereby given that, on April 1, 2021, the Investors Exchange LLC (“IEX” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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

Pursuant to the provisions of Section 19(b)(1) under the Act,⁴ and Rule 19b-4 thereunder,⁵ IEX is filing with the Commission a proposed rule change to enhance its Retail Price Improvement Program for the benefit of retail investors.

The text of the proposed rule change is available at the Exchange’s website at www.iextrading.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization 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 self-regulatory organization 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 purpose of the proposed rule change is to enhance the Exchange’s Retail Price Improvement Program for the benefit of retail investors. Specifically, the Exchange proposes to make the following four changes: (i) Revise the definition of Retail order ⁶ in IEX Rule 11.190(b)(15) to apply only to the trading interest of a natural person that does not place more than 390 equity orders per day on average during a calendar month for its own beneficial account(s);⁷ (ii) provide Order Book ⁸ priority to Retail Liquidity Provider (“RLP”) orders ⁹ at the Midpoint Price ¹⁰ ahead of other non-displayed orders priced to execute at the Midpoint Price; (iii) disseminate a “Retail Liquidity Identifier” through the Exchange’s proprietary market data feeds and the appropriate securities information processor (“SIP”) when RLP order interest aggregated to form at least one round lot for a particular security is available in the System,¹¹ provided that the RLP order interest is resting at the Midpoint Price and is priced at least \$0.001 better than the NBB ¹² or NBO;¹³ and (iv) amend the definition of RLP orders so such orders can only be midpoint peg orders,¹⁴ cannot be Discretionary Peg orders,¹⁵ and cannot include a minimum quantity restriction.¹⁶ The proposed changes are designed to further support and enhance

the ability of non-professional retail investors to obtain meaningful price improvement by incentivizing market participants to compete to provide such price improvement.

Background

In 2019 the Commission approved IEX’s Retail Price Improvement Program (“Retail Program”),¹⁷ which is designed to provide retail investors with meaningful price improvement opportunities through trading at the Midpoint Price or better.¹⁸ As currently structured, Members ¹⁹ that qualify as Retail Member Organizations (“RMOs”) ²⁰ are eligible to submit Retail orders to the Exchange. Any Member is able to provide price improvement to Retail orders through orders priced to execute at the Midpoint Price or better, including RLP orders that are only eligible to execute against a Retail order at the Midpoint Price and execute in price-time priority after other orders resting on the Order Book priced to trade at the Midpoint Price.

As IEX noted in its Retail Program rule filing,²¹ the Commission has consistently emphasized the importance of continued broad, long-term retail participation in our capital markets. In its Strategic Plan for fiscal years 2018–2022, the Commission highlighted its vision to “promote capital markets that inspire public confidence and provide a diverse array of financial opportunities to retail and institutional investors, entrepreneurs, public companies, and other market participants”, with its first goal to focus on the long-term interests of Main Street (*i.e.*, retail) investors.²² Against this backdrop, the Retail Program is designed to provide retail

¹⁷ See Securities Exchange Act Release No. 86619 (August 9, 2019), 84 FR 41769 (August 15, 2019) (SR-IEX-2019-05) (SEC order approving IEX’s Retail Program).

¹⁸ On March 1, 2021, IEX filed an immediately effective rule change proposal to provide that, in addition to executing at the Midpoint Price, a Retail order can execute against a displayed unprotected odd lot order that is resting on the Order Book at a price more aggressive than the Midpoint Price (*i.e.*, above the Midpoint Price in the case of an odd lot buy order and below the Midpoint Price in the case of an odd lot sell order). Executing against such an odd lot order thus provides more price improvement to the Retail order than executing at the Midpoint Price. See Securities Exchange Act Release No. 91324 (March 15, 2021), 86 FR 15015 (March 19, 2021) (SR-IEX-2021-03).

¹⁹ See IEX Rule 1.160(s).

²⁰ See IEX Rule 11.232(a)(1).

²¹ See *supra* note 17. See also Securities Exchange Act Release No. 86241 (June 28, 2019), 84 FR 32238 (July 5, 2019) (SR-IEX-2019-05) (IEX rule filing proposing Retail Program).

²² See U.S. Securities and Exchange Commission, Strategic Plan, Fiscal Years 2018–2022, available at https://www.sec.gov/files/SEC_Strategic_Plan_FY18-FY22_FINAL_0.pdf (“Commission Strategic Plan”).

²⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

⁴ 15 U.S.C. 78s(b)(1).

⁵ 17 CFR 240.19b-4.

⁶ See IEX Rules 11.190(b)(15) and 11.232(a)(2).

⁷ The existing restrictions applicable to a Retail order, that it must reflect trading interest of a natural person with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market and that does not originate from a trading algorithm or any other computerized methodology, will continue to apply.

⁸ See IEX Rule 1.160(p).

⁹ See IEX Rules 11.190(b)(14) and 11.232(a)(3).

¹⁰ The term “Midpoint Price” means the midpoint of the NBBO. See IEX Rule 1.160(t). The term “NBBO” means the national best bid or offer, as set forth in Rule 600(b) of Regulation NMS under the Act, determined as set forth in IEX Rule 11.410(b).

¹¹ See IEX Rule 1.160(nn).

¹² See IEX Rule 1.160(u).

¹³ See IEX Rule 1.160(u).

¹⁴ See IEX Rule 11.190(b)(9).

¹⁵ See IEX Rule 11.190(b)(10).

¹⁶ See IEX Rule 11.190(b)(11).

investors with access to the Exchange's deep pool of midpoint liquidity, including RLP orders, thereby providing enhanced opportunities for meaningful price improvement at the Midpoint Price. The Exchange believes the Retail Program has provided retail investors with better execution quality than they are currently able to obtain through existing exchange and over-the-counter ("OTC") order retail programs, by attracting counterparty liquidity to the Exchange from Members and their clients seeking to interact with retail liquidity.²³ The Retail Program is therefore consistent with the goals of the Commission to encourage markets that are structured to benefit ordinary investors.²⁴

Under the current Retail Program, the term "Retail order" is defined as an agency or riskless principal order that satisfies the criteria of Financial Industry Regulatory Authority, Inc. ("FINRA") Rule 5320.03, which is submitted by a RMO, designated with a "Retail order" modifier, and reflects trading interest of a natural person, with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market, and that does not originate from a trading algorithm or any other computerized methodology.²⁵ Retail orders may either be Discretionary Peg or midpoint peg orders with a Time-in-Force of IOC or FOK, and are only eligible to trade at the Midpoint Price or better.²⁶

An RMO is an IEX Member (or division thereof) that has been approved by the Exchange to submit Retail orders.²⁷ Pursuant to IEX Rules 11.232(a)(1) and (b), which describe the qualification and application process for becoming an RMO, any Member may qualify as an RMO if it conducts a retail business or routes Retail orders on behalf of another broker-dealer.

An RLP order is currently a Discretionary Peg order that is only eligible to execute against Retail orders

through the execution process described in IEX Rule 11.232(e).²⁸ Any Member can submit RLP orders.

As discussed in the Retail Program rule filing,²⁹ IEX's Retail Program is a simple approach designed to provide retail investors with the opportunity for meaningful price improvement (by executing at the Midpoint Price or better), by attracting counterparty liquidity to the Exchange from Members and their clients seeking to interact with retail liquidity.

IEX's Retail Program leverages IEX's market structure to provide enhanced price improvement opportunities for retail customers by incentivizing Members and their clients to provide liquidity to the orders of retail investors, while enabling such investors to obtain materially better price improvement than may otherwise be available, in a way that is mutually beneficial for retail investors and Members providing liquidity. Based on experience with the Retail Program, IEX believes that the four proposed changes, noted above and described in detail below, would further enhance the Retail Program.

Proposal

IEX proposes four enhancements to the Retail Program, as described below.

Retail Order Definition

IEX proposes to revise the definition of Retail order in IEX Rule 11.190(b)(15) so that it is limited to retail investors who do not appear to be engaged in trading activity akin to that of a professional. Specifically, the definition of Retail order would be amended to apply only to the trading interest of a natural person that does not place more than 390 equity orders per day on average during a calendar month for its own beneficial account(s). All other existing criteria specified in IEX Rule 11.190(b)(15) would continue to apply.

IEX Rule 11.190(b)(15) currently provides that a Retail order means an order submitted by a Retail Member Organization (as defined in IEX Rule 11.232) and designated with a "Retail order" modifier. A Retail order must be an agency order, or riskless principal order that satisfies the criteria of FINRA Rule 5320.03. A Retail order must reflect trading interest of a natural person with no change made to the terms of the underlying order of the natural person with respect to price (except in the case of a market order that is changed to a marketable limit order) or side of market and that does not originate from a trading algorithm or

any other computerized methodology, which will now be defined as a "retail customer" for clarity. An order from a retail customer can include orders submitted on behalf of accounts that are held in a corporate legal form—such as an Individual Retirement Account, Corporation, or a Limited Liability Company—that have been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual. IEX proposes to add new language to IEX Rule 11.190(b)(15) to specify that a Retail order may only be submitted on behalf of a retail customer that does not place more than 390 equity orders per day on average during a calendar month for its own beneficial account(s).

In addition, IEX proposes to add Supplementary Material .01 to IEX Rule 11.190(b) specifying how to determine whether the 390 equity orders per day on average threshold has been reached. Specifically, the Supplementary Material would provide that a "parent" order that is broken into multiple "child" orders by a broker or dealer, or by an algorithm housed at a broker or dealer or by an algorithm licensed from a broker or dealer, but which is housed with the customer, counts as one order even if the "child" orders are routed across multiple exchanges. In addition, any order that cancels and replaces an existing order would count as a separate order; except that an order that cancels and replaces any "child" order resulting from a "parent" order that is broken into multiple "child" orders, does not count as a new order.

IEX also proposes to add Supplementary Material .02 to IEX Rule 11.190(b) to address the reasonable policies and procedures that an RMO must have in place to ensure that Retail orders are appropriately represented on the Exchange. Specifically, such policies and procedures should provide for a review of retail customers' activity on at least a quarterly basis. Further, Retail orders for any retail customer that had an average of more than 390 equity orders per day during any month of a calendar quarter are not eligible to be entered as Retail orders for the next calendar quarter. Retail Member Organizations must conduct a quarterly review and make any appropriate changes to the way in which they are representing orders within five business days after the end of each calendar quarter. In addition, if during a quarter the Exchange identifies a retail customer for which orders are being represented as Retail orders but that has averaged more than 390 equity orders per day during a month, the Exchange will

²³ See discussion *infra* on the desirability of interacting with retail liquidity.

²⁴ See *supra* note 22.

²⁵ See *supra* note 6. An order from a natural person can include orders submitted on behalf of accounts that are held in a corporate legal form—such as an Individual Retirement Account, Corporation, or a Limited Liability Company—that have been established for the benefit of an individual or group of related family members, provided that the order is submitted by an individual.

²⁶ See IEX Rule 11.232(a)(2). As with all pegged orders, Retail orders may only trade during the Regular Market Session. See IEX Rule 11.190(a)(3)(E).

²⁷ See IEX Rule 11.232(a)(1).

²⁸ See IEX Rule 11.232(e).

²⁹ See *supra* note 21.

notify the RMO, and the RMO will be required to change the manner in which it is representing the retail customer's orders within five business days.

As noted above, the Exchange believes that the price improvement benefits that accrue to Retail orders on IEX should be limited to retail customers who do not appear to be engaged in trading activity akin to that of a professional. IEX notes that the 390-order limitation is a threshold used by various options exchanges to distinguish professional customers from retail customers, so that a customer that is not a broker-dealer but enters more than 390 options orders per day (on average during a calendar month) is classified as a Professional Customer and does not receive customer execution priority.³⁰ The 390-order threshold is also used by Cboe EDGX Exchange, Inc. ("EDGX") with respect to its equity market to delineate Retail Priority Orders, which receive execution priority, from other retail customers. EDGX Retail Priority Orders may only be entered on behalf of a person that does not place more than 390 equity orders per day on average during a calendar month for its own beneficial account(s).³¹

EDGX and the options exchanges apply a comparable methodology and supervisory requirements to determine whether the 390-order threshold has been reached as is proposed by IEX in this proposal.³² IEX understands that the impetus for EDGX's and options exchanges' use of the 390-order threshold is to limit priority benefits and assist in ensuring that these benefits flow only to retail investors that are not engaged in a significant amount of trading activity akin to that of a professional.³³

IEX believes that similarly restricting Retail orders to non-professional customers will expand the pool of market participants willing to provide contra-side liquidity to trade with Retail orders because the limitations will narrow the pool of Retail orders to those from customers who are less likely to be

professional market participants. By expanding the pool of market participants willing to compete for providing price improvement to Retail orders, IEX believes that more Retail orders will be able to obtain meaningful price improvement for their orders. IEX also notes that 390 orders per day represents an order entered each minute during regular trading hours—from 9:30 a.m. eastern time to 4:00 p.m. eastern time—which IEX believes is a reasonable and not overly restrictive limitation in that it contemplates active trading but not at the level of a professional trader.³⁴ IEX believes that limiting the pool of customers eligible to enter Retail orders, as proposed, will incentivize additional resting liquidity seeking to trade against such Retail orders (and provide price improvement) because of their non-professional characteristics.³⁵ Thus, to the extent the proposed change is successful in increasing the pool of RLP and other contra-side liquidity it will benefit Retail orders by increasing execution opportunities and price improvement.

RLP Order Book Priority

IEX proposes to provide Order Book priority to RLP orders ahead of other non-displayed orders priced to execute at the Midpoint Price. Currently, IEX Rule 11.232(e)(3)(A)(iv) provides that RLP orders are prioritized after all other non-displayed orders priced to trade at the Midpoint Price. This approach was adopted by IEX originally because RLP orders were a new order type and are only eligible to trade against Retail orders. However, IEX now believes that RLP orders should have higher priority than other non-displayed orders priced to trade at the Midpoint Price in order to provide additional incentives for the entry of RLP orders and concomitant provision of price improvement to

³⁴ For example, an analysis of orders sent to IEX by Members and customers conducting a proprietary trading business indicates that many of such Members and customers typically send millions of orders per day and even the less active send thousands of orders per day.

³⁵ This approach was supported by Citadel Securities in a comment letter on EDGX's retail priority proposal. Citadel Securities notes that "[t]he market's experience with [retail programs] evidences the failure of an overly broad definition of 'Retail Order'. [Retail programs] have not gained traction in the market, precisely because the [retail programs'] definition of 'Retail Order' includes orders from both retail investors as well as active professional traders. To the extent that the 'Retail Order' flow routed to [retail programs] includes orders from active professional traders and is thus not as attractive to other market participants, those market participants will simply elect not to post [retail] liquidity and fill-rates for [retail] routes will be low." See Letter dated April 26, 2019 from Stephen John Berger, Citadel, to Eduardo A. Aleman, Commission.

Retail orders. The Exchange notes that other exchanges that offer retail programs enable retail liquidity providing orders that provide immaterial sub-penny price improvement to achieve queue priority by providing a retail order type that trades first with retail liquidity providing orders before trading with other similarly priced orders.³⁶

Thus, as proposed, IEX Rule 11.232(e)(3)(A) would be amended to provide that a Retail order to buy (sell) shall execute upon entry against sell (buy) orders resting on the Order Book in the following order:

- (i) Displayed sell (buy) orders at the NBO (NBB) during a locked or crossed market;
- (ii) displayed sell (buy) odd lot orders priced to trade between the NBB (NBO) and the Midpoint Price;
- (iii) Retail Liquidity Provider orders priced to trade at the Midpoint Price; and
- (iv) nondisplayed orders priced to trade at the Midpoint Price.

Retail Liquidity Identifier

IEX proposes to disseminate a Retail Liquidity Identifier through the Exchange's proprietary market data feeds, TOPS³⁷ and DEEP,³⁸ and the appropriate SIP when RLP order interest aggregated to form at least one round lot for a particular security is available in the System, provided that the RLP order interest is resting at the Midpoint Price and is priced at least \$0.001 better than the NBB or NBO ("RLP Interest"). The purpose of the Retail Liquidity Identifier is to provide relevant market information to RMOs that there is RLP Interest on IEX, thereby incentivizing them to send Retail orders to IEX. The Exchange does not believe that such market information constitutes a "quote" within the meaning of Regulation NMS because it would not include a specific price or size of the interest.³⁹ The Retail Liquidity Identifier will reflect the symbol and the side (buy or sell) of the RLP Interest but will not include the price or size. While an explicit price will not be disseminated, because RLP orders are only eligible to trade at the Midpoint Price, dissemination will thus reflect the

³⁶ See, e.g., Arca Rule 7.44-E(k) (Retail orders trade first with retail price improvement orders (akin to IEX's RLP orders), and then with all other orders to sell (buy) with a working price below (above) the NBO (NBB)); See also BYX Rule 11.24(f); and Nasdaq BX, Inc. ("Nasdaq BX") Rule 4702(b)(6)(A).

³⁷ See IEX Rule 11.330(a)(1).

³⁸ See IEX Rule 11.330(a)(3).

³⁹ The Exchange plans to submit a letter requesting that the staff of the Division of Trading and Markets not recommend any enforcement action under Rule 602 of Regulation NMS ("Quote Rule") based on the Exchange's and its Members' participation in the Retail Program.

³⁰ See, e.g., Nasdaq Stock Market LLC Options 1, Section 1(a)(47); NYSE Arca, Inc. ("Arca") Rule 6.1A-O(a)(4A).

³¹ See EDGX Rule 11.9 Interpretations and Policies .01.

³² See EDGX Rule 11.9 Interpretations and Policies .02.

³³ See Securities Exchange Act Release No. 87200 (October 2, 2019), 84 FR 53788, 53791 (October 8, 2019) (SR-CboeEDGX-2019-012) (order approving EDGX Retail Priority Orders); see also Securities Exchange Act Release No. 89991 (September 24, 2020), 85 FR 61782, 61783 (September 30, 2020) (SR-MIAX-2020-31) (giving priority to orders submitted on behalf of non-professional customers who submit less than 390 orders per day).

availability of price improvement at the Midpoint Price. A number of other exchanges that offer retail programs also disseminate a Retail Liquidity Identifier on their proprietary market data feeds and the appropriate SIP if such interest would provide at least \$0.001 of price improvement.⁴⁰ IEX's proposal is comparable, but (as discussed below) because the RLP orders will be resting at the Midpoint Price, IEX's Retail Liquidity Indicator will reflect at least \$0.005 of price improvement for any orders priced at or above \$1.00 per share unless the NBB is locked or crossed. The Exchange believes that it is appropriate to limit dissemination of the Retail Liquidity Identifier to those cases when at least one round lot of RLP order interest is available in order to limit dissemination to cases in which there is a material amount of RLP trading interest available on the IEX Order Book.

As proposed, IEX would only disseminate the Retail Liquidity Identifier when the RLP order interest is resting at the Midpoint Price and is priced at least \$0.001 better than the NBB or NBO, consistent with the rules of the other exchanges that disseminate Retail Liquidity Identifiers⁴¹ as well as the SIP Plans' requirements.⁴² Because RLP orders are proposed to be only midpoint peg orders, they will always represent at least \$0.001 price improvement over the NBB or NBO, with two exceptions: (i) Locked or crossed markets and (ii) sub-dollar quotes when the security's spread is less than \$0.002.⁴³ When the market is locked, under IEX Rule 11.190(h)(3)(C) the Exchange considers the Midpoint Price to be equal to the locking price and when the market is crossed, under IEX Rule 11.190(h)(3)(D) the Exchange considers the Midpoint Price to be indeterminable. In these situations, RLP orders are repriced as specified in the applicable rule provision and would not provide any price improvement to an incoming Retail order, and therefore will not comprise RLP Interest for purposes of the Retail Liquidity Indicator. Similarly, when a particular security is priced less than \$1.00 per

share, its MPV is \$0.0001, so the Midpoint Price will not always represent at least \$0.001 in price improvement.⁴⁴ Therefore, IEX will only disseminate RLP Interest for sub-dollar securities if the spread in the security is greater than or equal to \$0.002, meaning the Midpoint Price represents at least \$0.001 price improvement over the NBB or NBO. With respect to the requirement that an RLP order must be resting at the Midpoint Price in order to be included in the RLP Interest to be disseminated, the Exchange notes that an RLP order could have a limit price less aggressive than the Midpoint Price in which case it would not be eligible to trade with an incoming Retail order and therefore should not be included in the Retail Liquidity Identifier dissemination since it would not reflect interest available to trade with Retail orders.

RLP Order Type Definition

IEX proposes to amend the definition of RLP orders so such orders can only be midpoint peg orders, instead of Discretionary Peg orders, and cannot include a minimum quantity condition. Currently an RLP order is a Discretionary Peg order that is only eligible to execute against Retail orders through the execution process described in IEX Rule 11.232(e).

In connection with the proposed changes, described above, to disseminate a Retail Liquidity Identifier and provide enhanced priority to RLP orders, IEX believes that it is appropriate that RLP orders be midpoint peg orders. Specifically, IEX notes that midpoint peg orders post on the Order Book at the Midpoint Price while Discretionary Peg orders post on the Order Book at the less aggressive of the order's limit price or a price one minimum price variation less aggressive than the NBB or NBO (as applicable) and exercise price discretion to the Midpoint Price except during periods of quote instability when Discretionary Peg orders are not permitted to trade at a price more aggressive than their resting price.⁴⁵ Thus, disseminating a Retail Liquidity Identifier of RLP Interest at the Midpoint Price would be unnecessarily complicated if RLP orders were to continue to be Discretionary Peg orders since they do not explicitly post to the Order Book at the Midpoint Price.

Additionally, IEX's rules provide that Discretionary Peg orders are prioritized behind any non-displayed interest at the discretionary price (in this case the Midpoint Price),⁴⁶ so it would be inconsistent with the priority rules for RLP Discretionary Peg orders to have priority over non-RLP midpoint peg orders that do rest at the Midpoint Price.

Similarly, permitting an RLP order to include a minimum quantity condition would reduce the determinism of the order's availability to trade at the Midpoint Price. IEX also believes that the protections that Discretionary Peg orders receive because they do not exercise price discretion to the Midpoint Price during periods of quote instability, or by utilizing a minimum quantity condition to avoid potential information leakage, are less necessary when trading against Retail orders. Moreover, IEX believes that the proposed changes will increase execution rates for Retail orders because RLP orders will not be subject to contingencies based on quote instability or minimum quantity requirements.

Implementation

If the Commission approves this proposed rule change, the Exchange will implement it within 90 days of approval and provide at least ten (10) days' notice to Members and market participants of the implementation timeline.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,⁴⁷ in general, and furthers the objectives of Section 6(b)(5),⁴⁸ in particular, in that it is 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 facilitating transactions in securities, and 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.

The Commission has consistently emphasized that the U.S. capital markets should be structured with the interests of retail investors in mind⁴⁹ and the enhancements to the Retail Program proposed in this rule change proposal are explicitly designed with that goal in mind. The four proposed enhancements to the Retail Program are individually and collectively designed

⁴⁰ See, e.g., BYX Rule 11.24(e); Nasdaq BX Rule 4780(e).

⁴¹ See *supra* note 40.

⁴² See January 26, 2021 CQS Participant Input Binary Specification Version 2.6a, available at https://www.ctaplan.com/publicdocs/ctaplan/CQS_Pillar_Input_Specification.pdf and May 2020 UTP Data Feed Services Specification Version 1.5, available at <https://www.utpplan.com/DOC/UtpBinaryOutputSpec.pdf>.

⁴³ The minimum price variant ("MPV") for bids, offers, or indications of interest priced less than \$1.00 per share is \$0.0001. See IEX Rule 11.210(a)(2).

⁴⁴ For example, if a security's NBB is \$0.505 and NBO is \$0.506, the Midpoint Price would be \$0.5055, which is \$0.0005 more than the NBB and less than NBO, so it would not represent at least \$0.001 price improvement over the NBB or NBO, and therefore will not comprise RLP Interest for purposes of the Retail Liquidity Indicator.

⁴⁵ See IEX Rule 11.190(g).

⁴⁶ See IEX Rule 11.220(a)(1)(C)(vii).

⁴⁷ 15 U.S.C. 78f(b).

⁴⁸ 15 U.S.C. 78f(b)(5).

⁴⁹ See *supra* note 22.

to benefit retail investors by providing enhanced opportunities for such investors to obtain meaningful price improvement. The four enhancements are designed to work in tandem to narrow the pool of market participants eligible to enter Retail orders to those who are less likely to be professional traders and thereby attract increased contra-side liquidity seeking to trade against and provide meaningful price improvement to such Retail orders, as well as to publicize when there is non-trivial contra-side price improving interest available, and fine tune the requirements applicable to such interest so that it is more deterministic.

The Exchange also believes that the proposed rule change is consistent with the protection of investors because it is designed to increase competition among execution venues by enhancing IEX's Retail Program which offers the potential for meaningful price improvement to orders of retail investors, including through incentivizing market participants to provide additional liquidity to execute against the orders of retail investors.

Specifically, the Exchange believes that limiting the use of Retail orders to only those retail investors who do not appear to be engaged in trading activity akin to that of a professional is consistent with the protection of investors and the public interest because it is designed to enable the benefits of the Retail Program to accrue to less sophisticated market participants that may be underserved by existing trading alternatives. Moreover, as discussed in the Purpose section and above, limiting the use of Retail orders in this manner is designed to incentivize additional resting liquidity seeking to trade against and provide price improvement to Retail orders.

Further, the Exchange believes that using a threshold of 390 orders per day on average during a calendar month (which is equivalent to one order per minute during the trading day) is a reasonable way to differentiate between less active retail investors and those that are more akin to market professionals. IEX believes that it is consistent with the protection of investors and the public interest to treat an investor that enters more than one order per minute as a professional trader, and notes that this threshold is used to differentiate between priority and professional customers in the options industry and by EDGX for its retail priority program. Thus, identifying Retail orders based on the average number of orders entered for a beneficial account is a familiar and objective approach to distinguish

ordinary retail investors from active traders akin to professionals.⁵⁰

The Exchange also believes that the counting methodology and additional policies and procedures that RMOs must comply with to reasonably ensure that Retail orders are appropriately represented on the Exchange are consistent with the Act. In this regard IEX notes that such methodology and policies and procedures are substantially identical to those in place at EDGX. The Exchange has a robust regulatory program, including an exam process implemented by FINRA, in place to monitor for compliance with existing RMO requirements, which will be enhanced for this proposal.

The Exchange believes that its proposal to narrow the definition of Retail order is not unfairly discriminatory but rather is designed to promote a competitive process for retail executions while providing retail investors with the potential to receive meaningful price improvement. All retail programs, including IEX's, provide for differentiation of retail orders from other orders. The proposed changes are merely incremental, designed to enhance IEX's ability to compete for retail order flow and retail liquidity and thereby provide benefits to retail investors from the better price that liquidity providers are willing to give their orders.

The Exchange also believes that providing Order Book priority to RLP orders ahead of other non-displayed orders priced to execute at the Midpoint Price is consistent with the protection of investors and the public interest because it is designed to provide additional incentives for the entry of RLP orders and concomitant provision of price improvement to Retail orders, as discussed in the Purpose section. The Exchange also notes that Retail orders will still be able to execute against other orders priced to execute at the Midpoint Price so the proposed changes is not creating a segmented liquidity pool. Additionally, the Exchange believes that providing Order Book priority to RLP

⁵⁰ This approach was suggested by Citadel Securities in a comment letter on the EDGX retail priority proposal which did not initially include the 390 orders per day on average limitation. In its comment letter, Citadel Securities noted that the definition of "Retail Order" used by various equities exchanges does not adequately distinguish retail investors' orders from those of active professional traders. Citadel went on to suggest that EDGX leverage the definition of "professional customer" used by various options exchanges that is defined as a trader who places more than 390 orders in listed options per day on average during a calendar month for their own beneficial account. See Letter dated April 26, 2019 from Stephen John Berger, Citadel, to Eduardo A. Aleman, Commission.

orders is not unfairly discriminatory since any Member can enter an RLP order. Further, as discussed in the Purpose section, this proposed change is consistent with the approach of several other exchanges that provide immaterial sub-penny price improvement to achieve queue priority by providing a retail order type that trades first with retail liquidity providing orders before trading with other similarly priced orders.⁵¹

Additionally, the Exchange believes that it is consistent with the Act to disseminate a Retail Liquidity Identifier, as described in the Purpose section. The purpose of the Retail Liquidity Identifier is to provide relevant market information to RMOs that there is RLP Interest on IEX. The dissemination is thus designed to augment the total mix of information available to RMOs that may benefit Retail orders they represent. The Exchange notes that other exchanges disseminate comparable information regarding available contra-side liquidity available to execute against retail orders, as noted in the Purpose section.

Further, the Exchange believes it is consistent with the Act to amend the definition of RLP orders to make them midpoint peg orders instead of Discretionary Peg orders, so that the availability of such orders to trade at the Midpoint Price is more deterministic, as described in the Purpose section. IEX also believes that the proposed changes will benefit Retail orders to the extent that their execution rates, and resulting price improvement, increase.

The Commission consistently highlights the need to ensure that the U.S. capital markets are structured with the interests of retail investors in mind, and recently highlighted its focus on the "long-term interest of Main Street Investors" as its number one strategic goal for fiscal years 2018 to 2022.⁵² The Exchange believes the proposed enhancements to its Retail Program will better serve the retail investing public by providing them with expanded opportunities for meaningful price improvement on eligible trades.

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. To the contrary, IEX believes that the proposed enhancements to our Retail Program would continue to enhance competition

⁵¹ See *supra* note 36.

⁵² See *supra* note 22.

and execution quality for retail customers.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition since competing venues have and can continue to adopt similar retail programs, subject to the SEC rule change process. The Exchange operates in a highly competitive market in which market participants can easily direct their orders to competing venues, including off-exchange venues.

The Exchange also does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. While orders submitted by some Members will be treated differently, as described in the Purpose section, those differences are not based on the type of Member entering orders but on whether the order is for a retail customer, and there is no restriction on whether a Member can handle retail customer orders. Further, any Member can enter an RLP order.

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

Written comments were neither solicited nor received.

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 within such longer period 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 Exchange consents, the Commission will: (a) By order approve or disapprove such 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 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-IEX-2021-06 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-IEX-2021-06. 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-IEX-2021-06 and should be submitted on or before May 6, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵³

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-91521; File No. SR-CboeBZX-2021-024]

Self-Regulatory Organizations; Cboe BZX Exchange, Inc.; Notice of Filing of 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

April 9, 2021.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 26, 2021, Cboe BZX Exchange, Inc. (the "Exchange" or "BZX") filed with the 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

The Exchange rule change to list and trade shares of the WisdomTree Bitcoin Trust (the "Trust"),³ under BZX Rule 14.11(e)(4), Commodity-Based Trust Shares. The shares of the Trust are referred to herein as the "Shares."

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.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The Trust was formed as a Delaware statutory trust on March 8, 2021 and is operated as a grantor trust for U.S. federal tax purposes. The Trust has no fixed termination date.

⁵³ 17 CFR 200.30-3(a)(12).