

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-101092; File No. SR-CBOE-2024-039)

September 18, 2024

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule

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 September 3, 2024, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) 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

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to amend its Fees 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://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Fees Schedule, effective September 3, 2024.

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 17 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 15% of the market share.³ Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to competitive pricing, the Exchange, like other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange.

The Exchange currently offers a variety of auction mechanisms, which provide price improvement opportunities for eligible orders, whereby the eligible orders are electronically

³ See Cboe Global Markets U.S. Options Monthly Market Volume Summary (August 29, 2024), available at https://markets.cboe.com/us/options/market_statistics/.

exposed for an Exchange-determined period in accordance with the applicable Exchange Rule, during which time Users may submit responses (collectively referred to herein as “auction responses” or “auction response messages”) to an auction message.

For example, the Exchange offers Automated Improvement Mechanism (“AIM”), which includes functionality in which a Trading Permit Holder (“TPH”) (an “Initiating TPH”) may electronically submit for execution an order it represents as agent on behalf of a customer, broker dealer, or any other person or entity (“Agency Order”) against any other order it represents as agent, as well as against principal interest in AIM only, (an “Initiating Order”) provided it submits the Agency Order for electronic execution into the AIM Auctions.⁴ Upon commencement of an auction, market participants may submit responses (“Responder”) to trade against the Agency Order. At the conclusion of an auction, depending on the contra-side interest available, the Initiating Order may be allocated a certain percentage of the Agency Order. Other examples of auction mechanisms offered by the Exchange include Solicitation Auction Mechanism (“SAM”), FLEX AIM⁵ and FLEX SAM⁶ auctions.

Additionally, the Exchange offers an electronic FLEX Auction Process, described in Rule 5.72(c). A TPH may electronically submit a FLEX Order (simple or complex) into an electronic FLEX Auction for execution. Upon receipt of a FLEX Order that meets the conditions in Rule 5.72(c)(1), the FLEX Auction commences, and the System initiates a FLEX Auction by sending a FLEX Auction notification message to FLEX Traders detailing the FLEX Order and any FLEX Trader may submit responses to the FLEX Auction. The FLEX Auction concludes at the end of

⁴ See Rule 5.37 (AIM); Rule 5.39 (SAM); Rule 5.38 (Complex AIM); Rule 5.40 (Complex SAM); Rule 5.73 (FLEX AIM); and Rule 5.74 (FLEX SAM).

⁵ See Rule 5.73.

⁶ See Rule 5.74.

the determined exposure interval, and the System executes the FLEX Order against the FLEX responses at the best price(s), to the price at which the balance of the FLEX Order or the FLEX responses can be fully executed.⁷

The Fees Schedule contains specific transaction fees for orders executed using AIM. For example, the Exchange assesses a fee of \$0.07 per contract for certain AIM Contra orders in index products, yielding fee code YB. The Exchange also assesses a fee of \$0.07 per contract for certain AIM Contra orders in equity, Exchange Traded Funds (“ETF”) and ETN options, yielding fee code YC. Additionally, the Exchange assesses no charge for Customer AIM Agency/Primary and Contra orders in equity, ETF and ETN options, yielding fee code CK. The Exchange notes that under the Fees Schedule, fees for AIM Agency/Primary and Contra orders apply uniformly to qualifying orders in SAM, FLEX AIM and FLEX SAM.⁸ Currently, orders in an electronic FLEX Auction are assessed under the standard transaction fees for electronic orders.

Clarifying Changes

The Exchange notes that currently, within the Rates Table for All Products Excluding Underlying Symbol List A⁹ (the “Rates Table”), fees for “Equity, ETF, and ETN Options” for Clearing TPH (“F” Capacity Code); non-TPH Affiliate (“L” Capacity Code); Market-Maker (“M” capacity code); Broker-Dealer (“B” Capacity Code); Non-TPH Market-Maker (“N” Capacity Code); Joint Back-Office (“J” Capacity Code); and Professional (“U” Capacity Code) capacities are grouped with index products for purposes of transaction fees. As part of the proposed changes, for the aforementioned capacities, the Exchange proposes to separate out fees

⁷ See Rule 5.72(c)(3).

⁸ See Fees Schedule Footnotes 18 and 19.

⁹ See Fees Schedule Footnote 34.

for equity, ETF, and ETN options as a separate line item within the table. Except as otherwise noted within this filing, the fees for equity, ETF and ETN options remain unchanged.

Next, the Exchange proposes to amend the Rates Table to include fee code YC. Currently, fee code YC is appended to AIM Contra orders in equity and ETF options for the following capacities: Clearing TPH (“F” Capacity Code); non-TPH Affiliate (“L” Capacity Code); Broker-Dealer (“B” Capacity Code); Non-TPH Market-Maker (“N” Capacity Code); Joint Back-Office (“J” Capacity Code); and Professional (“U” Capacity Code). The Exchange inadvertently omitted the fee code (and corresponding fee) from the Rates Table and now proposes to add references to the fee code and its rate, within the Rates Table, as applicable. The Exchange also proposes to amend the Rates Table to clarify that fee code MA is appended to Market-Maker (“M” Capacity Code) AIM Contra orders in equity, ETF, and ETN options.

Fee Code Related Changes

The Exchange proposes to amend fee code YC to also apply to orders in equity, ETF, and ETN options responding to an electronic FLEX Auction (“FLEX Auction Responder”) (in addition to AIM Contra orders), for the following capacities: Clearing TPH (“F” Capacity Code); non-TPH Affiliate (“L” Capacity Code); Broker-Dealer (“B” Capacity Code); Non-TPH Market-Maker (“N” Capacity Code); Joint Back-Office (“J” Capacity Code); and Professional (“U” Capacity Code).¹⁰ The charge assessed per contract for fee code YC remains the same under the proposed rule change. Further, the Exchange proposes to append fee code CK to Customer (Capacity Code “C”) orders in equity, ETF and ETN options initiating (“FLEX Auction Initiator”) and responding (“FLEX Auction Responder”) to an electronic FLEX Auction.

¹⁰ The proposed changes are added to the column in the Rates Table which sets forth standard transaction fees for electronic orders in Penny and Non-Penny classes; as part of the proposed changes, for F/L and B/N/U/J capacities, the Exchange restated fee codes FB/FC and BB/BC within the column, as appropriate; there are no changes to these fee codes as part of the proposal.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the “Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹¹ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹² 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)¹³ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁴ which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities.

The Exchange believes its proposal to amend the Rates Table to separate “Equity, ETF, and ETN Options” fees for Clearing TPH; non-TPH Affiliate; Broker-Dealer; Non-TPH Market-Maker; Joint Back-Office; Professional; and Market-Maker capacities from fees for index products for the aforementioned capacities and to update the Rates Table to correct inadvertent

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

¹³ Id.

¹⁴ 15 U.S.C. 78f(b)(4).

omission to fee codes MA and YC, as applicable, is reasonable, equitable and consistent with the Act. The changes are designed to provide additional clarity to TPHs with respect to the Exchange's pricing, in particular in regard to AIM pricing. Further, the Exchange's proposal to add reference to fee codes MA and YC, as applicable, is intended to correct inadvertent errors where the fee codes should have been placed within the Rates Table. Additionally, the proposed changes promote just and equitable principles of trade and are designed to removed impediments to and perfect the mechanism of a free and open market and a national market system as they provide transparency to TPHs regarding the applicability of fee codes within the Rates Table and eliminate potential for confusion.

Additionally, the Exchange believes the proposed rule change to amend fee code YC to apply to applicable AIM Contra and FLEX Auction Responder orders in equity, ETF and ETN options and to append fee code CK to Customer FLEX Auction Initiator or Responder orders in equity, ETF and ETN options is reasonable, equitable, and not unfairly discriminatory. As stated above, the Exchange 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. The proposed fee changes reflect a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange's FLEX Auctions, which the Exchange believes would enhance market quality to the benefit of all TPHs.

The Exchange notes that the proposed fees in connection with certain FLEX Auction orders do not represent a significant departure from the fees currently offered under the Fees Schedule for market participants for similar offerings. As noted above, the Exchange offers several electronic auction mechanisms, including AIM, SAM, FLEX AIM, FLEX SAM, and the

FLEX Auction Process. Under the Fees Schedule, fees for AIM Agency/Primary and Contra orders apply uniformly to qualifying orders in AIM, SAM, FLEX AIM and FLEX SAM.¹⁵ The Exchange believes it is reasonable to generally align the fees for FLEX Auction initiating and response orders in equity, ETF and ETN options, with other auctions designed to promote price improvement.

The Exchange believes that the proposed fees are reasonably designed to incentivize relevant capacities (i.e., Customer, Clearing TPH, non-TPH Affiliate, Broker-Dealer, Non-TPH Market-Maker, Joint Back-Office, and Professional) to continue to respond, and potentially increase their responses, to electronic FLEX Auctions. Further, the Exchange believes the proposed fees are reasonably designed to incentivize Customers to initiate electronic FLEX Auctions. An overall increase in FLEX Auctions provides additional opportunities for price discovery and execution, to the benefit of all market participants.

The Exchange further notes that excluding orders in Underlying Symbol List A from the proposed FLEX Auction fees is also consistent with the same exclusions under the structure of the Exchange's fees for AIM Agency/Primary and AIM Contra orders. These specific sets of proprietary products are also commonly excluded from a variety of fee programs, qualification calculations and transaction fees, including the Volume Incentive Program, the Marketing Fee, and the Clearing TPH Fee Cap.

The Exchange also believes that the proposed changes are equitable and not unfairly discriminatory. The charges assessed per contract for fee codes YC and CK remain the same under the proposed rule change. Further, the proposed fees for electronic FLEX Auction Initiator

¹⁵ See Fees Schedule Footnotes 18 and 19.

and Responder orders will apply equally to all applicable orders, i.e. all such TPHs will be assessed the same amount.

The Exchange also believes that continuing to assess standard transaction fees for Market-Maker orders in a FLEX Auction is equitable and not unfairly discriminatory because Market-Makers have incentive opportunities not otherwise applicable to market participants, such as the Liquidity Provider Sliding Scale program. Further, the Exchange believes the continuing to assess standard transaction fees for Clearing TPH, non-TPH Affiliate, Broker-Dealer, Non-TPH Market-Maker, Joint Back-Office, and Professional FLEX Auction Initiator orders is equitable and not unfairly discriminatory, because the options industry has a long history of providing preferential pricing to Customers, and the Exchange's current fees schedule currently does so in many places, as do the fees structures of multiple other exchanges.¹⁶

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.

As noted above, the proposal to amend the Rates Table to separate "Equity, ETF, and ETN Options" fees for Clearing TPH; non-TPH Affiliate; Broker-Dealer; Non-TPH Market-Maker; Joint Back-Office; Professional; and Market-Maker capacities from fees for index products for the aforementioned capacities and to update the Rates Table to correct inadvertent omission to fee codes MA and YC, as applicable, is designed to provide additional clarity to TPHs with respect to the Exchange's pricing, provide transparency to TPHs regarding the applicability of fee codes within the Rates Table and eliminate potential for confusion.

¹⁶ See, e.g., NYSE American Options Fee Schedule, Section I(G), "CUBE Auction Fees and Credits", which assesses a lower transaction fee for customer orders than that of other market participants for executions in CUBE Auctions.

Additionally, the Exchange does not believe the proposed rule change to amend fee code YC to apply to applicable AIM Contra and FLEX Auction Responder orders in equity, ETF and ETN options and to append fee code CK to Customer FLEX Auction Initiator or Responder orders in equity, ETF and ETN options will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. All TPH's applicable AIM Contra and FLEX Auction Responder orders in equity, ETF and ETN options will automatically yield fee code YC and uniformly be assessed the corresponding fee. Further, all TPH's applicable Customer FLEX Auction Initiator or Responder orders in equity, ETF and ETN options will yield fee code CK and uniformly be assessed the corresponding fee.

The Exchange does not believe the clarifying changes set forth within the proposal will impose any burden on inter-market competition as the changes are intended to protect investors by providing further transparency regarding the Exchange's Fees Schedule. Additionally, the Exchange does not believe the proposed fee code changes will 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 17 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 16% of the market share.¹⁷ Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange and off-exchange venues if they deem fee levels at

¹⁷ See Cboe Global Markets U.S. Options Monthly Market Volume Summary (August 29, 2024), available at https://markets.cboe.com/us/options/market_statistics/.

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.”¹⁸ 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 stated 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’”¹⁹ Accordingly, the Exchange does not believe its proposed fee change imposes any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

¹⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁹ *NetCoalition v. SEC*, 615 F.3d 525, 539 (D.C. Cir. 2010) (quoting Securities Exchange Act Release No. 59039 (December 2, 2008), 73 FR 74770, 74782-83 (December 9, 2008) (SR-NYSEArca-2006-21)).

Act²⁰ and paragraph (f) of Rule 19b-4²¹ 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CBOE-2024-039 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-CBOE-2024-039. 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

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f).

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-CBOE-2024-039 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Vanessa A. Countryman,

Secretary.

²² 17 CFR 200.30-3(a)(12).