

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86765; File No. SR-CBOE-2019-047)

August 26, 2019

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Amending 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 August 13, 2019, 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 Fees Schedule in connection with the Volume Incentive Program (“VIP”). The Exchange intends to implement the proposed change on August 1, 2019.³

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 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 20% of the market share.⁴ The Exchange notes that a similar statistic is also true for exchange market share in connection with customer volume; no single options exchange has more than 19% of customer volume.⁵ 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

³ The Exchange initially filed the proposed fee change pursuant to SR-CBOE-2019-041 and has withdrawn that filing and submitted this filing.

⁴ See Cboe Global Markets U.S. Options Market Volume Summary (July 31, 2019), available at https://markets.cboe.com/us/options/market_statistics/.

⁵ Options Clearing Corporation (“OCC”) cleared customer volume, available at <https://www.theocc.com/market-data/volume/default.jsp>.

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 the competitive environment, the Exchange offers tiered pricing in its Fees Schedule, like that of other options exchanges fees schedules,⁶ which provides Trading Permit Holders (“TPHs”) opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for TPHs to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

For example, under VIP, the Exchange credits each TPH the per contract amount set forth in the VIP table for Public Customer (origin code “C”) orders transmitted by TPHs (with certain exceptions)⁷ and executed electronically on the Exchange, provided the TPH meets certain volume thresholds, in which volume for Professional Customers and Voluntary Professionals (“Professional Customers”) (origin code “W”), Broker-Dealers (origin code “B”), and Joint Back-Offices (“JBO”) (origin code “J”) orders are counted toward reaching such thresholds. Specifically, the percentage thresholds are calculated per month based on the percentage of national customer volume in all underlying symbols entered and executed, excluding those in Underlying Symbol List A,⁸

⁶ See e.g., NASDAQ Stock Market Rules, Options Rules, Options 7 Pricing Schedule, Sec. 2 Options Market - Fees and Rebates, Tiers 1-6; see also NYSE Arca Options, Fees and Charges, Customer Posting Credit Tiers in Non-Penny Pilot Issues.

⁷ See Cboe Options Fees Schedule, Footnote 36.

⁸ See Cboe Options Fees Schedule, Footnote 34. Underlying Symbol List A includes Underlying Symbol List A: OEX, XEO, RUT, RLG, RLV, RUI, AWDE, FTEM, FXTM, UKXM, SPX (includes SPXw), VIX, VOLATILITY INDEXES and binary options.

Sector Indexes,⁹ the MSCI EAFE Index (“MXEA”), the MSCI Emerging Market Index (“MXEF”), Mini-NDX Index (“MNX”), the NASDAQ-100 Index (“NDX”), the Dow Jones Industrial Average Index (“DJX”), Mini-SPX Index (“XSP”) and Mini-XSP Index (AM Settlement) (“XSPAM”). VIP offers rates for both Complex and Simple orders (both in AIM and Non-AIM orders, respectively). The Exchange notes that its market share in customer volume (which includes Customer, Professional Customers, Broker-Dealer, and JBO order flow)¹⁰ has historically been between 16.5% and 18.3%. In recent months, the Exchange’s percentage of such market share has hovered closer to the lower end of this scale. As stated, the Exchange operates in a highly competitive market where no single options exchange possesses significant pricing power in the execution of option order flow, and the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow. Therefore, in light of the declination of the Exchange’s market share in customer volume and competitive forces, the Exchange now proposes to amend the volume thresholds for Tiers 4 and 5. Currently, a TPH may meet the criteria under Tier 4 if its qualifying volume in the qualifying classes is above 3.00% and up to 3.75% of national customer volume, and may meet criteria under Tier 5 if their qualifying volume is above 3.75% of national customer volume. The Exchange now proposes to increase the volume threshold percentage in Tier 4 to above 3.00% and up to 4.00% and to increase the threshold percentage in Tier 5 to above 4.00%. The purpose of these changes is to adjust for current volume trends by encouraging more volume as the Exchange’s market share in customer volume has declined over recent months and the proposed increased threshold is designed to

⁹ See Cboe Options Fees Schedule, Footnote 47.

¹⁰ See supra note 5.

incentivize more volume to earn the same credits while also maintaining an incremental incentive for TPHs to strive for the highest tier level. The Exchange notes that the credits offered under VIP are not changing. The proposed change is designed to increase the amount of volume TPHs provide on the Exchange and further encourage them to contribute to a deeper, more liquid market, as well as to increase transactions and take such execution opportunities provided by such increased liquidity. The Exchange believes that this, in turn, benefits all market participants by contributing towards a robust and well-balanced market ecosystem. The Exchange notes the proposed tiers are competitively achievable for all TPHs that submit significant customer order flow, in that all firms that submit the requisite significant customer order flow could compete to meet the tiers.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the objectives of Section 6 of the Act, in general, and furthers the objectives of Section 6(b)(4), in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its Members and issuers and other persons using its facilities.

The Exchange also believes that the proposed rule change is consistent with the objectives of Section 6(b)(5) 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, and, particularly, is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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 rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all TPHs.

In particular, the Exchange believes the proposed tier is reasonable because it continues to encourage TPHs to take the opportunity to receive credits on Customer orders by reaching the proposed volume thresholds. The Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges¹¹ 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 of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates/credits and fees that apply based upon members achieving certain volume and/or growth thresholds. These competing pricing schedules,

¹¹ See supra note 6.

moreover, are presently comparable to those that the Exchange provides, including the pricing of comparable tiers.¹²

The Exchange believes adjusting the VIP volume thresholds for Tiers 4 and 5 is reasonable because it adjusts for the current volume trends and is a reasonable means to continue to encourage TPHs to increase their overall order flow to the Exchange based on increasing their Customer, Professional Customer, Broker-Dealer, and JBO executed orders as a percentage of national customer volume. Particularly, the Exchange believes the proposed threshold change is reasonable because it will encourage increased volume, thus a deeper, more liquid market, and an increase in transaction opportunities provided by the increased liquidity. In turn, these increases benefit all TPHs 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 proposed volume thresholds also do not represent a significant departure from the current required criteria under the Exchange's existing tiers and is therefore still reasonable based on the difficulty of satisfying the tiers' criteria and ensures the existing credit and proposed thresholds appropriately reflect the incremental difficulty to achieve the existing VIP tiers. For example, the volume threshold amount under existing Tier 3 is currently set as a range within a whole percentage point, between 2.00% up to 3.00%. The Exchange believes the proposed tiers are in line with this existing tier, as the natural

¹² Id.

next highest tier, both in required criteria and credits, is reasonable to also set as a range within a whole percentage point, between 3.00% and 4.00%, and then over 4.00%, as proposed. The Exchange also believes that a volume threshold increase of .25 percentage points is a reasonable increment to encourage overall order flow to the Exchange without so significantly increasing the difficulty in reach the tiers' criteria.

The Exchange believes that the proposal represents an equitable allocation of rebates and is not unfairly discriminatory because all TPHs have the opportunity to meet the proposed tier thresholds. Given that TPHs change their trading strategies and patterns month-to-month to align with changing market trends and conditions, as well as pricing and functionality changes across other exchanges, and without having a view of activity on other markets and off-exchange venues, the Exchange has no way of knowing whether this proposed rule change would definitively result in a shift of TPHs qualifying for the proposed tiers. While the Exchange has no way of predicting with certainty how the rule change will impact Trading Permit Holders, the Exchange anticipates the impact of the proposed change to be minimal in at least one TPH will be able to reach proposed Tier 5. The Exchange notes that typically five or six firms compete to qualify across all of the VIP tiers and at least two such firms typically compete to qualify for the top two tiers. As stated, the Exchange believes that the proposed threshold increases do not represent a significant departure from the current required criteria, is still reasonable based on the difficulty of satisfying each tier's criteria, and is appropriately aligned with the incremental difficulty to achieve the existing VIP tiers. As such, the Exchange does not anticipate the proposed threshold change to impact the number of firms that compete across all tiers, including those that regularly compete across the top two tiers, but instead

encourages competition by encouraging increase in order flow to meet the proposed tiers. Therefore, the Exchange does not believe that the proposed tiers are unfairly discriminatory as it would not impact the range of typical competition across such tiers.

The Exchange also notes that the proposed tier will not adversely impact any TPH's pricing or ability to qualify for other credit tiers. Rather, should a TPH not meet the proposed criteria, the TPH will merely not receive the proffered credit.

The Exchange also notes that, while only certain orders would count towards the qualifying thresholds, specifically, Customer, Professional Customer, Broker-Dealer and JBO order, these market participants' orders are primarily executed by an agent and VIP is an incentive program for agency trading, whose order flow would bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads. The Exchange notes that incentive programs based on aggregate volume of certain agency trading market participants also exist on other options exchanges.¹³

Additionally, the Exchange believes that it is equitable and not unfairly discriminatory to continue to only apply credits to Customer orders (i.e., "C" origin code) because Customer order flow enhances liquidity on the Exchange for the benefit of all market participants. Specifically, Customer volume is important because it continues to attract liquidity to the Exchange, which benefits all market participants by providing more trading opportunities, which attracts Market-Makers. An increase in Market-Maker activity, in turn, facilitates tighter spreads, which may cause an additional corresponding increase in order flow from other market participants. Moreover, the options industry has

¹³ See NASDAQ Stock Market Rules, Options Rules, Options 7 Pricing Schedule, Sec. 2 Options Market - Fees and Rebates, Tiers 1-6.

a long history of providing preferential pricing to Customers orders and the Exchange's current Fees Schedule currently does so in many places, as do the fees structures of multiple other exchanges.¹⁴

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will not impose any burden on intramarket or intermarket 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 liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all TPHs. As a result, the Exchange believes that the proposed change furthers 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."¹⁵

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 change applies to all TPHs submitting qualified orders equally, in that all TPHs submitting such orders are eligible for the proposed tiers, have a reasonable opportunity to meet the tiers' criteria and will all receive the existing credit if such criteria is met. As described above, while only certain orders would count towards the qualifying thresholds, specifically, Customers, Professionals, Broker-Dealers and JBOs, these market participants' orders are primarily

¹⁴ See id., specifically, Tier 6.

¹⁵ See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

executed as agency orders, whose order flow would bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads. Moreover, the Exchange does not believe the current application of the credit to Customer orders imposes any burden on intermarket competition because, as stated, preferential pricing to Customers is a long-standing options industry practice which serves to enhance Customer order flow, thereby attracting Market-Makers to facilitate tight spreads and trading opportunities to the benefit of all market participants. Overall, the proposed change is designed to encourage additional order flow to the Exchange, which the Exchange believes benefits all market participants on the Exchange by providing more liquidity, thus trading opportunities, encouraging even more TPHs to send orders, thereby contributing towards a robust and well-balanced market ecosystem to the benefit of all market participants.

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 15 other options exchanges. Based on publicly available information, no single options exchange has more than 20% of the market share.¹⁶ 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, additionally off-exchange venues, if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly

¹⁶ See supra note 4.

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.”¹⁷ 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’”¹⁸ 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.

¹⁷ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

¹⁸ *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)).

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 Act¹⁹ and paragraph (f) of Rule 19b-4²⁰ 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 e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2019-047 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.

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f).

All submissions should refer to File Number SR-CBOE-2019-047. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the 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, D.C. 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-CBOE-2019-047 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Jill M. Peterson
Assistant Secretary

²¹ 17 CFR 200.30-3(a)(12).