

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87799; File No. SR-CBOE-2019-124)

December 18, 2019

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 December 18, 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 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 various amendments to its Fees Schedule.³

SPX Select Market-Makers

Footnote 49 of the Fees Schedule currently provides that any appointed SPX Select Market-Maker (“SMM”) will receive a monthly rebate of \$8,000 if the SMM provides continuous electronic quotes in at least 99% of the SPX series 90% of the time in a given month. SMMs are not obligated to satisfy the heightened quoting standards described in the Fees Schedule. Rather, SMMs are eligible to receive a rebate if they satisfy the heightened standards. SMMs must still comply with the continuous quoting obligation and other obligations of Market-Makers described in Cboe Options Rules.⁴ The Exchange adopted the monthly rebate program to encourage SMMs to provide liquidity in SPX. The Exchange now proposes to eliminate the SMM rebate program. The Exchange no longer believes additional liquidity by an SMM is necessary and notes the Exchange is not required to maintain such an incentive program. The Exchange also notes that Market-Makers that were previously appointed as SMMs will still be required to comply with the continuous quoting obligation and other obligations of Market-Makers described in Cboe Options Rules.

³ The Exchange originally filed the proposed fee changes on December 2, 2019 (SR-CBOE-2019-114). On December 12, 2019, the Exchange withdrew that filing and submitted SR-CBOE-2019-120. On December 18, 2019, the Exchange withdrew that filing and submitted this filing.

⁴ See e.g., Cboe Options Rule 5.51.

Linkage

The Exchange currently assesses certain fees in connection with orders routed to other exchanges. The Exchange proposes to not pass through or otherwise charge customer (capacity code “C”) orders (of any size) routed to other exchanges that were originally transmitted to the Exchange from the trading floor through an Exchange-sponsored terminal (e.g. PULSe Workstation). The primary objective of linkage fees are to recoup some of the costs associated with large electronic orders that are initially transmitted to the Exchange by parties who, in many instances, could be seeking to avoid being assessed another market’s transaction fees. Orders that are initially transmitted from the trading floor are not attempting to avoid fees since they incur brokerage commission charges in connection with manual handling. Rather, orders that are generally transmitted from the floor are large, complex orders that are primarily executed on the Exchange, which only are transmitted to away markets if, during their execution on the Exchange, it is necessary to sweep some away markets. As such, the Exchange believes it’s appropriate to waive linkage fees for these orders. The Exchange lastly notes that the proposed waiver is not novel. Indeed, the Exchange maintained the proposed waiver prior to the migration to a new billing system on October 7, 2019, but had eliminated the waiver upon migration⁵. After further evaluation, the Exchange now wishes to re-adopt the proposed waiver. The Exchange notes the proposed waiver is identical to the waiver in place pre-migration.

Tier Appointment Fees

The Exchange currently assesses a SPX Tier Appointment Fee of \$3,000 per month to any Market-Maker holding a Market-Maker Electronic Access Permit (“EAP”) (“MM EAP”)

⁵ See Securities and Exchange Act Release No. 87495 (November 8, 2019), 84 FR 63701 (November 18, 2019) (SR-CBOE-2019-106).

that trades any SPX (including SPXW) contracts at any time during the month. The Exchange proposes to amend the Fees Schedule to adopt a contract threshold. Particularly, the Exchange proposes to provide that the SPX Tier Appointment Fee will be assessed to any MM EAP that executes at least 1,000 contracts in SPX (including SPXW) excluding contracts executed during the opening rotation on the final settlement date of VIX options and futures with the expiration used in the VIX settlement calculation. The Exchange proposes to exclude SPX and SPXW volume executed during opening rotation on the final settlement date of VIX options and futures which have the expiration that contribute to the VIX settlement, as such orders help to facilitate the calculation of a settlement price for VIX options and futures and the Exchange does not wish to discourage the sending of such orders.⁶ The Exchange notes that the SPX Tier Appointment fee is intended to be assessed to Market-Maker TPHs who actually act as Market-Makers in SPX and engage in trading in SPX (as opposed to those who primarily execute volume during the opening rotation on VIX settlement days and subsequently execute volume to close out of such positions). The electronic Tier Appointment Surcharges for VIX and RUT similarly have a 1,000 contract threshold.⁷

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

⁶ The Exchange notes that only electronic SPX and SPXW orders participate in the opening rotation on the final settlement date of VIX options and futures. As open-outcry volume does not facilitate the calculation of the settlement price for VIX options and futures, the Exchange does not believe it’s necessary to adopt a corresponding exception to the SPX Tier Appointment for Floor Market-Makers.

⁷ See Cboe Options Fees Schedule, Market-Maker Tier Appointment Fees.

Exchange and, in particular, the requirements of Section 6(b) of the Act.⁸ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁹ 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 does not unfairly discriminate between customers, issuers, brokers or dealers. Additionally, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁰ which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange believes eliminating the SPX SMM Program is reasonable, equitable and not unfairly discriminatory because the Exchange is not required to maintain such a rebate program and no longer desires to do so. The Exchange believes that there is sufficient liquidity in SPX and does not believe a rebate program is necessary to further incentivize liquidity. The Exchange believes the proposed change is not unfairly discriminatory because it will apply equally to all SMMs.

The Exchange believes it's reasonable to waive linkage fees for customer orders that were transmitted from the trading floor through an Exchange sponsored terminal (currently only PULSe workstation) as customers would not be subject to linkage fees. The proposed waiver

⁸ 15 U.S.C. 78f(b).

⁹ 15 U.S.C. 78f(b)(5).

¹⁰ 15 U.S.C. 78f(b)(4).

would apply to all similarly situated market participants. The Exchange believes limiting the exception to customer orders that were originally transmitted from the trading floor through an exchange-sponsored terminal is equitable, reasonable and not unfairly discriminatory as the primary objective of linkage fees are to recoup some of the costs associated with large electronic orders that are initially transmitted to the Exchange by parties who, in many instances, could be seeking to avoid being assessed another market's transaction fees. As discussed above, orders that are generally transmitted from the floor are large, complex orders that are primarily executed on the Exchange and transmitted to away markets if, during their execution on the Exchange, it is necessary to sweep some away markets. The Exchange also believes limiting the exception from Linkage Fees to customer orders is equitable, reasonable and not unfairly discriminatory because non-customer (e.g., broker-dealer proprietary) orders originate from broker-dealers who are by and large more sophisticated than public customers (i.e., orders yielding capacity code "C") and can readily control the exchange to which their orders are routed. While there may be some customers who direct the exchange to which their orders are routed, generally, customers submit orders to their brokerages but do not or cannot specify the exchange to which its order is sent. Therefore, non-customer order flow can, in most cases, more easily route directly to other markets if desired and thus avoid Linkage Fees. This includes the ability of broker-dealers to sweep better-priced away markets in connection with routing large orders to the Exchange's floor for handling by floor brokers. Moreover, the Commission has a long history of permitting differential treatment of customers and non-customer investors.

Finally, as noted above, the proposed waiver is not novel. Indeed, the Exchange maintained the proposed waiver prior to the migration to a new billing system on October 7, 2019, but had

eliminated the waiver upon migration¹¹. After further evaluation, the Exchange has determined to re-adopt the proposed waiver, which waiver is identical to the waiver in place pre-migration.

The Exchange believes the proposed change to adopt a contract threshold to trigger the electronic SPX Tier Appointment Surcharge is reasonable as MM EAPs that trade below such threshold will not be subject to the MM EAP SPX Tier Appointment Fee. The Exchange believes the proposed change is reasonable as the SPX Tier Appointment surcharge was intended to apply to TPHs who act as Market-Makers in SPX, not those that do not regularly trade SPX electronically. Additionally, while liquidity is important to open all series on the Exchange, given the potential impact on the exercise settlement value determined for expiring volatility index derivatives, it is very important to encourage a fair and orderly opening of the series that are used to calculate the final settlement value of expiring VIX derivatives. Accordingly, the Exchange does not wish to assess the SPX Tier Appointment fee to MM EAPs who do not conduct significant electronic volume in SPX (or SPXW) other than volume executed during opening rotation on the final settlement date of VIX options and futures which have the expiration that are used in the VIX settlement calculation and subsequent volume executed to close out of such positions. The Exchange believes it's equitable and not unfairly discriminatory to adopt a threshold for off-floor Markets-Markets and not on-floor Market-Makers as only electronic SPX and SPXW orders participate in the opening rotation on the final settlement date of VIX options and futures. As open-outcry volume does not facilitate the calculation of the settlement price for VIX options and futures, the Exchange does not believe it's necessary to adopt a corresponding exception to the SPX Tier Appointment for on-floor Market-Makers. The

¹¹ See Securities and Exchange Act Release No. 87495 (November 8, 2019), 84 FR 63701 (November 18, 2019) (SR-CBOE-2019-106).

Exchange notes that any TPH that electronically executes more than 1 contract but less than 1,000 contracts in SPX (including SPXW), excluding volume executed during opening rotation on the final settlement date of VIX options and futures which have the expiration that are used in the VIX settlement calculation will no longer have to pay the Tier Appointment fee. As noted above, the Exchange is not proposing to change the amount assessed for the electronic SPX Tier Appointment Fee. The proposed change is equitable and not unfairly discriminatory because it will apply uniformly to all TPHs. The Exchange lastly notes that a similar 1,000 contract threshold also applies to MM EAP Tier Appointment Fees in RUT and VIX.¹²

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. Specifically, the Exchange does not believe that the proposed change will impose any burden on intramarket competitions that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes will be applied equally to all similarly situated market participants. For example, although the proposed routing exception only applies to Customers, as discussed, above, the Exchange believes limiting the exception to customer orders is not unfairly discriminatory because non-customer (e.g., broker-dealer proprietary) orders originate from broker-dealers who are by and large more sophisticated than public customers and can readily control the exchange to which their orders are routed. Moreover, as discussed, the Commission has a long history of permitting differential treatment of customers and non-customer investors.

The Exchange does not believe that the proposed rule change regarding the SMM Program or the SPX Tier Appointment Fee will impose any burden on intermarket competition

¹² See Cboe Options Fees Schedule, Market-Maker Tier Appointment Fees.

that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed waiver applies to a product traded exclusively on the Exchange. Additionally, the Exchange believes the proposed rule change relating to linkage does not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, 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 and off-exchange venues. The Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 24% of the market share.¹³ Therefore, no exchange possesses significant pricing power in the execution of option order flow. Indeed, participants can choose to send their orders to other exchanges and off-exchange venues if they deem fee levels at those other venues to be more favorable. Moreover, the Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Specifically, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”¹⁴ 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.

¹³ See Cboe Global Markets U.S. Options Market Volume Summary (December 2, 2019), available at https://markets.cboe.com/us/options/market_statistics/.

¹⁴ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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’....”¹⁵ Accordingly, the Exchange does not believe its proposed fee changes imposes any burden on competition that are 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 Act¹⁶ and paragraph (f) of Rule 19b-4¹⁷ 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

¹⁵ 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)).

¹⁶ 15 U.S.C. 78s(b)(3)(A).

¹⁷ 17 CFR 240.19b-4(f).

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-2019-124 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-2019-124. 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-2019-124 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.¹⁸

J. Matthew DeLesDernier
Assistant Secretary

¹⁸ 17 CFR 200.30-3(a)(12).