

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89062; File No. SR-CBOE-2020-050)

June 12, 2020

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend Rules 5.37 and 5.73

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on June 3, 2020, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (“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 Rules 5.37 and 5.73. The text of the proposed rule change is provided below.

(additions are underlined; deletions are [bracketed])

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Rules of Cboe Exchange, Inc.

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Rule 5.37. Automated Improvement Mechanism (“AIM” or “AIM Auction”)

A Trading Permit Holder (the “Initiating TPH”) may electronically submit for execution an order it represents as agent (“Agency Order”) against principal interest or a solicited order(s) [(except for an order for the account of any Market-Maker with an appointment in the applicable class on the Exchange)] (an “Initiating Order”) provided it submits the Agency Order for electronic execution into an AIM Auction pursuant to this Rule. For purposes of this Rule, the term “NBBO” means the national best bid or national best offer at the particular point in time applicable to the reference, and

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

the term “Initial NBBO” means the national best bid or national best offer at the time an Auction is initiated. Bulk messages are not eligible for AIM.

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(c) AIM Auction Process. Upon receipt of an Agency Order that meets the conditions in paragraphs (a) and (b), the AIM Auction process commences.

(1) – (4) No change.

(5) AIM Auction Responses. [All Users] Any User other than the Initiating TPH (the System rejects a response with the same EFID as the Initiating Order) may submit responses to an AIM Auction that are properly marked specifying price, size, side of the market, and the Auction ID for the AIM Auction to which the User is submitting the response. An AIM response may only participate in the AIM Auction with the Auction ID specified in the response.

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Rule 5.73. FLEX Automated Improvement Mechanism (“FLEX AIM” or “FLEX AIM Auction”)

A FLEX Trader (the “Initiating FLEX Trader”) may electronically submit for execution an order (which may be a simple or complex order) it represents as agent (“Agency Order”) against principal interest or a solicited order(s) [(except, if the Agency Order is a simple order, for an order for the account of any FLEX Market-Maker with an appointment in the applicable FLEX Option class on the Exchange)] (an “Initiating Order”) provided it submits the Agency Order for electronic execution into a FLEX AIM Auction pursuant to this Rule.

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(c) FLEX AIM Auction Process. Upon receipt of an Agency Order that meets the conditions in paragraphs (a) and (b), the FLEX AIM Auction process commences.

(1) – (4) No change.

(5) FLEX AIM Responses. Any FLEX Trader other than the Initiating FLEX Trader (the System rejects a response with the same EFID as the Initiating Order) may submit responses to a FLEX AIM Auction that are properly marked specifying price, size, side, and the Auction ID for the FLEX AIM Auction to which the FLEX Trader is submitting the response. A FLEX AIM response may only participate in the FLEX AIM Auction with the Auction ID specified in the response.

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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 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 permit orders for the accounts of Market-Makers with an appointment in the applicable class to be solicited for the Initiating Order³ submitted for execution against an Agency Order in a proprietary index option class into a simple AIM Auction pursuant to Rule 5.37 or a simple FLEX AIM Auction pursuant to Rule 5.73. Currently, the introductory paragraphs of Rules 5.37 and 5.73 prohibit orders for the accounts of Market-Makers with an appointment in the applicable class to be solicited to execute against the Agency Order in a simple AIM or FLEX AIM Auction, respectively.⁴ This provision was initially

³ The "Initiating Order" is the order comprised of principal interest or a solicited order(s) submitted to trade against the order the submitting Trading Permit Holder (the "Initiating TPH" or "Initiating FLEX Trader," as applicable) represents as agent (the "Agency Order").

⁴ The proposed rule change amends the introductory paragraph of Rule 5.73 to add an end quotation market to the defined term "Initiating FLEX Trader" in the parenthetical, which was inadvertently omitted.

included in Rules regarding these auctions because the Exchange initially only permitted appointed Market-Makers (and TPHs representing customers at the top of the Book) to submit responses to AIM and FLEX Auctions. However, the Exchange now permits any user to submit responses to simple AIM and FLEX AIM Auctions.⁵ Therefore, while market participants other than appointed Market-Makers may contribute liquidity to these crossing auctions as either contra orders or responses, appointed Market-Makers, who are the primary source of liquidity on the Exchange in their appointed classes, are limited in the manner in which they may provide liquidity to these auctions. Given that contra orders that comprise Initiating Orders may be allocated a percentage of the Agency Order at the conclusion of the auctions, the limited ability of appointed Market-Makers to participate in simple AIM and FLEX AIM Auctions may reduce the execution opportunities for these liquidity providers, which execution opportunities are available to other market participants who may be solicited or submit responses. The Exchange believes providing appointed Market-Makers with an additional way to participate in electronic auctions will expand available liquidity for these auctions, which may increase execution and price improvement opportunities for customers' orders.

No similar restriction applies to crossing transactions in open outcry trading.⁶ Brokers seeking liquidity to execute against customer orders on the trading floor regularly solicit appointed Market-Makers in the applicable class for this liquidity, as they are generally the primary source of liquidity in a class (as noted above). Therefore, the Exchange believes the proposed rule change will further align open outcry and electronic crossing auctions and the

⁵ See Securities Exchange Act Release No. 87072 (September 24, 2019), 84 FR 51673 (September 30, 2019) (SR-CBOE-2019-045).

⁶ See Rules 5.86 and 5.87.

execution and price improvement opportunities available in both auctions by permitting the same participants to be solicited as contras in both types of auctions across all classes at all times.

As of March 16, 2020, the Exchange suspended open outcry trading to help prevent the spread of the novel coronavirus and began operating in an all-electronic configuration.⁷ As a result, the Exchange adopted a temporary rule change to permit Market-Makers to be solicited for electronic crossing transactions in its exclusively listed index options when the Exchange's trading floor was inoperable. The Exchange believed this would help ensure the same sources of liquidity for customer orders that executed in open outcry would be available for those orders in an electronic-only environment.⁸ The Exchange believed not permitting Market-Makers to participate as contras could have created a risk that brokers may have difficulty finding sufficient liquidity to fill their customer orders that may currently be traded against orders from solicited Market-Makers appointed in the applicable class. For example, when the Exchange operates in its normal hybrid manner (with electronic and open outcry trading), if a customer order is not fully executable against electronic bids and offers, a floor broker can attempt to execute the order, or remainder thereof, on the trading floor, where the liquidity to trade with this remainder is generally provided by Market-Makers in the open outcry trading crowd. Additionally, brokers may solicit liquidity from upstairs Market-Maker firms.

The Exchange believes appointed Market-Makers should have the ability to provide liquidity to these electronic auctions, including when the Exchange is operating in its normal hybrid trading environment. Market-Makers are subject to quoting obligations and must expend

⁷ The Exchange continues to operate in an all-electronic environment, but currently plans to reopen its trading floor on June 8, 2020.

⁸ See Rule 5.24(e)(1)(A); see also Securities Exchange Act Release No. 88886 (May 15, 2020), 85 FR 31008 (May 21, 2020) (SR-CBOE-2020-047).

resources to comply with these obligations to provide liquidity to the lit market. Given these additional costs and obligations, the Exchange does not believe these Market-Makers should have fewer execution opportunities with respect to volume submitted for execution through AIM auctions and not for electronic execution against interest in the book. The Exchange believes there is no reason to restrict Market-Makers' ability to provide liquidity into electronic auctions when they are able to similarly provide that liquidity in open outcry trading. By permitting brokers to solicit primary liquidity providers in a class for electronic auctions, regardless of whether the trading floor is operational, the Exchange believes brokers will be able to more efficiently locate liquidity to fill their customer orders, particularly during times of volatility, which may create additional execution and price improvement opportunities for customers at all times.

Appointed Market-Makers frequently serve as contra parties to crossing transactions on the trading floor. For example, during the last week of February 2020 (when the trading floor was open), over 70% of open outcry trades (consisting of over 30% of volume) across all classes executed on the trading floor consisted of a crossing transaction that included an order of a Market-Maker one side of the transaction. This demonstrates the importance of the liquidity appointed Market-Makers to the market with respect to crossing transactions, which they are currently unable to do with respect to electronic crossing transactions.

The Exchange notes solicited orders submitted as the Initiating Order for AIM Auctions are almost always comprised of orders for the accounts of away market-makers. For example, in April of 2020, approximately 99.6% of the orders submitted into all AIM Auctions had Initiating Orders comprised of orders for accounts of away market-makers, making up approximately 86.2% of the volume executed through AIM auctions. The Exchange understands these away

market-makers often serve as both appointed Market-Makers on the Exchange and market-makers on other options exchanges, and thus have accounts for both purposes. These firms, as a result, can use their accounts for their away market-maker activities for being solicited with respect to AIM Auctions. Therefore, the Exchange believes the current restriction has a negative impact on the ability of firms that serve as Market-Makers on the Exchange but not other options exchanges, as well as Market-Makers for single or exclusively listed classes, to participate in AIM Auctions. During April 2020, when Initiating Orders could be comprised of orders for accounts of appointed Market-Makers pursuant to a temporary rule, while approximately 81.5% of the orders in exclusively listed index options submitted into all AIM Auctions had Initiating Orders comprised of orders for accounts of away market-makers, these orders represented only approximately 12.2% of the volume executed through AIM Auctions. The majority of the volume was represented by orders for accounts of appointed Market-Makers. This demonstrates the difficulty brokers have to find sufficient interest to fill customer orders in these classes when appointed Market-Makers may not be solicited. The Exchange believes there is no reason to not permit Initiating Orders to be comprised of orders for the accounts of appointed Market-Makers in all classes at all times. The Exchange believes the proposed rule change will provide all firms that act as Market-Makers on the Exchange in all classes with consistent access to AIM Auctions, which may further increase liquidity in these auctions and price improvement opportunities for customers.

The proposed rule change also amends Rules 5.37(c)(5) and 5.73(c)(5) to codify that any User or FLEX Trader, respectively, other than the Initiating TPH or FLEX Trader, respectively, may submit responses to AIM and FLEX AIM Auctions. As set forth in Rules 5.37(e) and 5.73(e), the Initiating Order may receive an entitlement of 40% or 50% of the Agency Order.

The Exchange believes it is appropriate to not permit the Initiating TPH or Initiating FLEX Trader, as applicable, to also submit responses in order to try to trade against a larger percentage of the Agency Order. This is consistent with allocation rules, pursuant to which the Initiating Order may only receive more than 40% or 50%, as applicable, of the Agency Order if there are remaining contracts after all other interest has executed.

The Rule change also notes that the System will reject a response with the same EFID⁹ as the Initiating Order. The Exchange notes that orders for the same User may have different EFIDs. However, the rule prohibits all responses from the same User, even with different EFIDs. The System is currently only able to reject responses with the same EFID as the Initiating Order, which is why that is specified in the proposed rule. If the same User submits a response to an auction in which that same User had an order comprising the Initiating Order (even with a different EFID), the Exchange may take regulatory action against that User for a violation of the proposed rule. The Exchange currently applies this restriction to simple AIM and FLEX AIM Auctions, but it was inadvertently omitted from the Rules, so the proposed rule change adds transparency to the Rules. This restriction is also currently in the Rules related to AIM for complex orders, so the proposed rule change adds consistency to the rules of Exchange auctions.¹⁰

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

⁹ See Rule 1.1, which defines EFID as an Executing Firm ID.

¹⁰ See Rule 5.38(c)(5).

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.

In particular, the Exchange believes the proposed rule change will benefit investors. The proposed rule change will provide the primary liquidity providers on the Exchange with an additional way to participate in electronic auctions. Additionally, by permitting brokers to solicit primary liquidity providers in a class for electronic auctions, regardless of whether the trading floor is operational, the Exchange believes brokers will be able to more efficiently locate liquidity to fill their customer orders, particularly during times of volatility. As a result, the Exchange believes the proposed rule change will likely expand available liquidity for these auctions, which may create additional execution and price improvement opportunities for customers at all times, which ultimately benefits investors.

The Exchange also believes the proposed rule change will promote just and equitable

¹¹ 15 U.S.C. 78f(b).

¹² 15 U.S.C. 78f(b)(5).

¹³ Id.

principles of trade and remove impediments to and perfect the mechanism of a free and open market and a national market system because it will further align open outcry and electronic crossing auctions and the execution and price improvement opportunities available in both auctions by permitting the same participants to be solicited as contras in both types of auctions across all classes. Currently, appointed Market-Makers may be solicited with respect to crossing transactions on the trading floor but may not be solicited with respect to electronic crossing transactions. The Exchange believes there is no reason to restrict Market-Makers ability to provide liquidity into electronic auctions when they are able to similarly provide that liquidity in open outcry trading. The Exchange notes the electronic crossing price improvement auction of another options exchange currently permits orders for the accounts of appointed market-makers to be solicited as the contra orders for that auction.¹⁴

Finally, the Exchange believes the proposed rule change is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers because it will be permit orders for accounts of appointed Market-Makers to be solicited in the same manner as orders for the accounts of all other market participants. Currently, all market participants other than appointed Market-Makers may be solicited as the contra and submit responses in AIM Auctions, while appointed Market-Makers are restricted to only submitting responses. Given the additional costs and obligations associated with being an appointed Market-Maker, the Exchange does not believe these Market-Makers should have fewer execution opportunities with respect to volume submitted for execution through AIM auctions and not for electronic execution against interest in the book. This is particularly true for Market-Makers that do not serve in a market-making capacity on other exchanges or that serve as a Market-Maker in a singly or exclusively listed

¹⁴ See NYSE Arca, Inc. (“Arca”) Rule 971.1NY.

class. While it is possible for an order to be solicited for the account of an away market-maker in a singly or exclusively listed class, it is less common given the order must be for market-making purposes with respect to that class. The Exchange believes the proposed rule change will provide all Market-Makers on the Exchange with the same ability to participate in AIM in all classes at all times. This may further increase execution and price improvement opportunities for customers, particularly those that submit orders in singly or exclusively listed classes where the ability for away market-makers to provide liquidity is limited.

The Exchange believes the proposed rule change to codify that any User or FLEX Trader, respectively, other than the Initiating TPH or FLEX Trader, respectively, may submit responses to AIM and FLEX AIM Auctions will promote just and equitable principles of trade so that market participants may not trade against a larger percentage of the Agency Order than permitted by the rules. The proposed rule change is consistent with allocation rules. The proposed rule change is consistent with current functionality and the rules related to AIM for complex orders, and therefore adds consistency and transparency to the Rules, which ultimately benefits investors.

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. The Exchange does not believe 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 because it provides the same execution opportunities in AIM Auctions to appointed Market-Makers that are currently available to all other market participants. Additionally, the proposed rule change it will further align open outcry and electronic crossing auctions and the

execution and price improvement opportunities available in both auctions by permitting the same participants to be solicited as contras in both types of auctions across all classes. The Exchange does not believe the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it relates to orders submitted into an auction mechanism on the Exchange.

Additionally, the Exchange notes that the rules of at least one other options exchange permits orders for the accounts of appointed market-makers to be solicited as contra orders for that exchange's electronic crossing price improvement auction.¹⁵ The Exchange believes the proposed rule change may improve price competition within AIM Auctions, because the primary liquidity providers will be able to increase participation in AIM Auctions.

The Exchange believes the proposed rule change to codify that any User or FLEX Trader, respectively, other than the Initiating TPH or FLEX Trader, respectively, may submit responses to AIM and FLEX AIM Auctions will not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it codifies current system functionality. Additionally, it applies to all market participants that submit orders into AIM Auctions. The Exchange believes the proposed rule change will not impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act, because it relates solely to which market participants may submit responses into Exchange auction. The proposed rule change is consistent with current allocation rules and the rules related to AIM for complex orders, and therefore adds consistency and transparency to the Rules, which ultimately benefits investors.

¹⁵ See Arca Rule 971.1NY.

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

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 e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2020-050 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-2020-050. 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, 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-CBOE-2020-050, 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.¹⁶

J. Matthew DeLesDernier
Assistant Secretary

¹⁶ 17 CFR 200.30-3(a)(12).