

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-89831; File No. SR-CBOE-2020-084)

September 11, 2020

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

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 1, 2020, 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 with respect to its strategy fee cap. 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 amend its Fees Schedule in connection with its strategy fee cap, effective September 1, 2020.

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 16% 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 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 the competitive environment, the Exchange offers specific rates and credits in its fees schedule, like

³ See Cboe Global Markets U.S. Options Market Volume Summary (August 25, 2020), available at https://markets.cboe.com/us/options/market_statistics/.

that of other options exchanges' fees schedules, which the Exchange believes provide incentive to Trading Permit Holders ("TPHs") to increase order flow of certain qualifying orders.

Currently, pursuant to footnote 13 of the Fees Schedule, Market-Maker, Clearing TPH, Joint-Back Office ("JBO"), broker-dealer and non-TPH market-maker transaction fees are capped at (1) \$1,000 for all (i) merger strategies and (ii) short stock interest strategies and at (2) \$700 for all reversals, conversions and jelly roll strategies executed on the same trading day in the same option class for options on equities, ETFs and ETNs. Such transaction fees for these strategies are further capped at \$25,000 per month per initiating TPH or TPH organization (excluding Clearing TPHs). Additionally, surcharge fees are not included in the calculation of the \$1,000 per day per class fee cap or the \$25,000 per month fee cap for merger and short stock interest strategies.

The Exchange proposes to amend footnote 13 to provide that market-maker, Clearing Trading Permit Holder, JBO participant, broker-dealer and non-Trading Permit Holder market-maker transaction fees are capped at \$0.00 for all merger, short stock interest, reversal, conversion and jelly roll strategies executed in open outcry on the same trading day in the same option class across all symbols. Essentially, the proposed rule change removes the three different strategy fee cap amounts, including the language in connection with calculation of surcharges and the caps, and, instead, applies a \$0.00 cap for strategies executed in open outcry in all classes. In other words, all strategies transacted on the trading floor will be free.⁴ The proposed rule change also clarifies that the proposed \$0.00 cap applies to all symbols by denoting footnote 13 at the top of "Rate Table - All Products Excluding Underlying Symbol List

⁴ The Exchange notes that it maintains the current cap language so that it may raise the cap, if it chooses, in a future rule filing without causing any potential confusion.

A”⁵ and “Rate Table - Underlying Symbol List A”. The proposed change is designed to incentivize Trading Permit Holders to increase the number of strategy orders executed in open outcry.

Additionally, the proposed rule change to footnote 13 adds that the strategies defined in footnote 13 will not be eligible for an ORS/CORS subsidy. Participating TPHs or Participating Non-Cboe TPHs in the ORS and CORS Programs receive a payment from the Exchange for every executed contract routed to the Exchange through their system in certain classes. The Exchange notes that program participants do not receive payment for contracts executed in the Automated Improvement Mechanism (“AIM”) or for contracts executed as QCC orders because these contracts already have an opportunity to earn various rebates and discounts. Similarly, contracts executed as defined strategies on the trading floor would now have other opportunities to earn a full discount pursuant to proposed footnote 13.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,⁶ in general, and furthers the requirements of Section 6(b)(4),⁷ in particular, as it is designed to provide for the equitable allocation of reasonable dues, fees and other charges among its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. 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

⁵ The proposed change moves the current location of the footnote 13 notation from inside the table’s heading to the list of footnotes appended to “Options Transactions” directly above the table.

⁶ 15 U.S.C. 78f.

⁷ 15 U.S.C. 78f(b)(4).

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 trading floor, which the Exchange believes would enhance market quality to the benefit of all TPHs.

The Exchange believes that its proposed adoption of a \$0.00 strategy order cap for contracts executed in open outcry is consistent with Section 6(b)(4) of the Act in that the proposal is reasonable, equitable and not unfairly discriminatory. As noted above, the Exchange operates in highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges, and the Exchange itself, offer fees and credits in connection with transactions in open outcry⁸ or strategy executions⁹, as the Exchange now proposes. 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 or reduce use of certain categories of products, in response to fee changes.

Accordingly, competitive forces constrain options exchange transaction fees. Stated otherwise,

⁸ See NYSE American Options Fee Schedule, Section III(E), "Floor Broker Incentive and Rebate Programs"; and Cboe Options Fees Schedule, "Floor Broker ADV Discount"; footnote 8, which waives the transaction fee for public customer ("C" capacity code) orders in all ETF and ETN options that are executed in open outcry; and footnote 11, which provides that for facilitation orders executed in open outcry, Cboe Options will assess no Clearing Trading Permit Holder Proprietary transaction fees.

⁹ See e.g., BOX Options Market LLC ("BOX") fee schedule, Section II.D (Strategy QOO Order Fee Cap and Rebate). BOX caps fees for each participant at \$1,000 for strategies executed on the same trading day, and Floor Brokers, particularly, are eligible to receive a \$500 rebate per customer for presenting certain Strategy QOO Orders on the Trading Floor; see also NYSE American Options Fee Schedule, Section I(J), "Strategy Execution Fee Cap", which assesses a \$1,000 cap on transaction fees for all options Strategy Executions on the same trading day involving reversals and conversions, box spreads, short stock interest spreads, merger spreads, and jelly rolls.

changes to exchange transaction fees can have a direct effect on the ability of an exchange to compete for order flow. To respond to this competitive marketplace, the Exchange has established incentives to facilitate the execution of orders via open outcry, which promotes price discovery on the public markets. To the extent that these incentives succeed, the increased liquidity on the Exchange would result in enhanced market quality for all participants.

Particularly, the Exchange believes that the proposed \$0.00 strategy cap for all options executed in open outcry is reasonable because it is designed to incentivize Trading Permit Holders to increase their strategy orders submitted to and executed on the Exchange's trading floor. The Exchange offers a hybrid market system and aims to balance incentives for its Trading Permit Holders to continue to contribute to deep liquid markets for investors on both its electronic and open outcry platforms. As such, the Exchange believes the proposed strategy caps for executions in open outcry is a reasonable means to continue to encourage open outcry liquidity, and the Exchange provides other opportunities in its Fees Schedule for Trading Permit Holders to receive reduced fees or enhanced rebates for orders executed electronically.¹⁰ The Exchange notes that all market participants stand to benefit from any increase in volume transacted on the trading floor, which promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants.

The Exchange believes the proposed rule change is an equitable allocation of fees because the \$0.00 cap applies to all strategy orders executed on the trading floor equally and, in

¹⁰ See e.g., Cboe Options Fees Schedule, "Volume Incentive Program" and footnote 36, which credits each Trading Permit Holder the per contract amount resulting from each public customer ("C" capacity code) order transmitted by that Trading Permit Holder which is executed electronically on the Exchange (with some exceptions).

addition to this, because the Exchange believes that facilitating the execution of orders via open outcry encourages and supports increased liquidity and execution opportunities via open outcry, which functions as an important price-improvement mechanism. Likewise, the proposed rule change is not unfairly discriminatory because the proposed strategy cap is uniformly available to all similarly situated market participants, that is, all market-makers, Clearing Trading Permit Holders, JBO participants, broker-dealers and non-Trading Permit Holders that execute strategies in any class in open outcry will be eligible to for the cap, thus, will equally not be assessed a charge on such orders.

Additionally, the Exchange believes that the proposal to not apply an ORS/CORS subsidy to strategy orders that are eligible for the \$0.00 cap is reasonable, equitable and not unfairly discriminatory because such strategy orders will already have the opportunity to receive a full discount pursuant to proposed footnote 13 and all such strategy orders will equally not receive an ORS/CORS subsidy. This is consistent with the manner in which ORS/CORS program participants currently do not receive payment for contracts executed in AIM or as QCC orders as these transactions also already have an opportunity to earn various rebates and discounts.

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 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 auctions of a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution and price improvement 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."¹¹

The Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes (both the strategy cap as well as the non-application of ORS/CORS subsidies for eligible strategy orders) will apply uniformly to all market-makers, Clearing Trading Permit Holders, JBO participants, broker-dealers and non-Trading Permit Holders that execute strategies in open outcry, respectively. As described above, the Exchange aims to offer a hybrid market system in which it balances incentives for its Trading Permit Holders to contribute to deep liquid markets for investors on both its electronic and open outcry platforms. As such, the proposal will continue to encourage Trading Permit Holders to provide liquidity on the Exchange's trading floor, while Trading Permit Holders may continue to take other opportunities afforded by the Fees Schedule to receive reduced fees or enhanced rebates for their orders executed electronically. The proposed fee changes serve to enhance order flow directed to open outcry for execution, and the resulting increase in volume transacted on the trading floor promotes market depth, facilitates tighter spreads and enhances price discovery, and may lead to a corresponding increase in order flow from other market participants, which, in turn, benefits all market participants.

The Exchange also does not believe that the proposed fees will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the Act because, as

¹¹ Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

noted above, competing options exchanges, and the Exchange, currently have substantially similar fees in place in connection with strategy orders¹² and orders executed in open outcry.¹³ Additionally, and as previously discussed, the Exchange operates in a highly competitive market. TPHs have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges, many of which offer substantially similar price improvement auctions. Based on publicly available information, no single options exchange has more than 16% of the market share.¹⁴ 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 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.”¹⁵ 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

¹² See supra note 9.

¹³ See supra note 8.

¹⁴ See supra note 3.

¹⁵ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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'....".¹⁶ 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 Act¹⁷ and paragraph (f) of Rule 19b-4¹⁸ 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.

¹⁶ 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)).

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f).

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-2020-084 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-2020-084. 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-2020-084 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.¹⁹

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(12).