

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-93744; File No. SR-CBOE-2021-072)

December 9, 2021

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 1, 2021, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) proposes to amend its Fees Schedule. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule in connection with its strategy order fee cap and the installation fee for the tethering of new equipment in connection with Market-Maker handheld terminals for indexes, effective December 1, 2021.

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 15% of the market share.³ Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow, or discontinue 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, Month-to-Date (November 22, 2021), available at https://www.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.

The Exchange proposes to amend footnote 13 of the Fees Schedule in connection with its strategy fee cap. Currently, footnote 13 provides that Market-Maker, Clearing TPH, JBO participant, broker-dealer and non-TPH 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 in equities, ETFs and ETNs.⁴ Strategies tied to QCC orders are not eligible to receive a strategy rebate and strategies defined in footnote 13⁵ are not eligible for an ORS/CORS subsidy. Specifically, the proposed rule change amends footnote 13 so that the strategy fee cap also applies to Professional transaction fees. The proposed change is designed to incentivize an increase in the number of strategy orders executed in a Professional capacity in equity, ETF and ETN options (i.e., multiply-listed options) in open outcry. Professionals generally provide a greater competitive stream of order flow (by definition, more than 390 orders in listed options per day on average during a calendar month), thus, applying the strategy cap to Professional strategies executed in multiply-listed options in

⁴ A “merger strategy” is defined as transactions done to achieve a merger arbitrage involving the purchase, sale and exercise of options of the same class and expiration date, each executed prior to the date on which shareholders of record are required to elect their respective form of consideration, i.e., cash or stock. A “short stock interest strategy” is defined as transactions done to achieve a short stock interest arbitrage involving the purchase, sale and exercise of in-the-money options of the same class. A “reversal strategy” is established by combining a short security position with a short put and a long call position that shares the same strike and expiration. A “conversion strategy” is established by combining a long position in the underlying security with a long put and a short call position that shares the same strike and expiration. A “jelly roll strategy” is created by entering into two separate positions simultaneously. One position involves buying a put and selling a call with the same strike price and expiration. The second position involves selling a put and buying a call, with the same strike price, but with a different expiration from the first position.

⁵ See id.

open outcry is designed to incentivize increased competitive execution and improved pricing opportunities in such options to the benefit of all market participants.

The Exchange also proposes to waive the installation fee for Cloud9 handheld tethering services. The Exchange is currently working to relocate its trading floor and anticipates its opening at the new location in mid-2022. Currently, pursuant to the Facility Fees table of the Fees Schedule, the Exchange assesses a \$900 fee for the electrician services in connection with the installation of the infrastructure related to the tethering of Market-Maker handheld terminals for indexes. The Exchange plans to implement a new voice communication service, Cloud9, for the new trading floor, and all index trading pits will support Market-Maker handheld terminals using Cloud9 equipment once on the new trading floor. The Exchange wishes to encourage TPHs to install the Cloud9 equipment for their handheld terminals on the current trading floor prior to the move to the new trading floor in order to make the transition to Cloud9 services on the new trading floor as seamless as possible. As such, the Exchange proposes to waive the installation fee for the tethering of Cloud9 equipment for Market-Maker handheld terminals for indexes on the Exchange's current trading floor. Specifically, the proposed rule change adopts footnote 38, which provides that the Exchange will waive the installation fee for installation services in connection with the tethering of Cloud9 equipment for Market-Maker handheld terminals for indexes on the Cboe Options trading floor located at 400 S LaSalle Street, and appends footnote 38 to the line item in the Facility Fees table for Market-Maker handheld terminal tethering services for indexes.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the "Act") and the rules and regulations thereunder applicable to the Exchange and, in

particular, the requirements of Section 6(b) of the Act.⁶ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁷ 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 Section 6(b)(4) of the Act,⁸ which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities.

The Exchange believes that proposed rule change to apply the strategy order fee cap to Professional transactions in multiply-listed options 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 the Exchange and competing options exchanges currently offer reduced fees or credits in connection with strategy orders executed in open outcry.⁹ The Exchange believes that the ever-shifting market share

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78f(b)(4).

⁹ See e.g., BOX Options Market LLC (“BOX”) Fee Schedule, Section II.D, Strategy Qualified Open Outcry “QOO” Order Fee Cap and Rebate; and NYSE American Options Fee Schedule, Section I(J), Strategy Execution Fee Cap.

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, 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 applying the strategy fee cap to Professional transactions in multiply-listed options in open outcry is reasonable because it is designed to incentivize Professionals to increase their strategy orders in multiply-listed options submitted to and executed on the Exchange's trading floor. As stated above, Professionals generally provide a greater competitive stream of order flow, thus, incentivizing an increase in Professional strategies executed in multiply-listed options in open outcry may encourage competitive execution and improved pricing opportunities in such options to the benefit of all market participants. The Exchange offers a hybrid market system and aims to balance incentives for its TPHs 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 applications of the strategy fee cap to Professional transactions in open outcry is a reasonable means to further encourage open outcry liquidity. The Exchange provides other opportunities in its Fees Schedule for TPHs, including those that submit order flow to the Exchange in a Professional capacity, 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.

In addition, the Exchange believes that the proposed rule change to waive the installation fees in connection with the tethering of Cloud9 equipment for Market-Maker handheld terminals is reasonably designed to encourage TPHs to install the new Cloud9 equipment for their handheld terminals on the current trading floor prior to the move to the new trading floor in order to make TPHs' transition to Cloud9 services on the new trading floor as seamless as possible.

The Exchange believes the proposed rule change is equitable and not unfairly discriminatory because, as proposed, the strategy fee cap applies to all strategy orders executed by Professionals on the trading floor equally and because the Exchange believes that facilitating strategy orders submitted by Professionals via open outcry encourages and supports increased liquidity and execution opportunities in open outcry, which functions as an important price-improvement mechanism. Also, the proposed strategy fee cap already applies in the same manner to other market participants that execute strategies in multiply-listed options in open outcry.

The Exchange also believes that the proposed waiver of the installation fees in connection with the installation of Cloud9 equipment is equitable and not unfairly discriminatory because the proposed waiver will apply uniformly to all TPHs that require the Exchange to

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

provide installation services for the new Cloud9 equipment on the Exchange's current trading floor in anticipation of the transition to the new trading floor.

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.

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 change regarding the application of the strategy fee cap will apply uniformly to all Professionals that execute strategy orders in multiply-listed options in open outcry, in the same way the cap applies today to such orders submitted by Market-Makers, Clearing TPHs, JBO participants, broker-dealers and non-TPH market-makers. By applying the strategy fee cap to Professionals, which generally provide a greater competitive stream of order flow, the proposed fee change is designed to enhance order flow directed to open outcry for execution and increase volume transacted on the trading floor, thus promoting market depth, facilitating tighter spreads and enhancing price discovery to the benefit of all market participants. Additionally, the proposed waiver of the installation fees in connection with the installation of Cloud9 equipment will apply uniformly to all TPHs that require the Exchange to provide installation services for the new Cloud9 equipment on the Exchange's current trading floor in anticipation of the transition to the Exchange's new trading floor.

The Exchange also does not believe that the proposed rule change in connection with the strategy fee cap will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the Act because, as noted above, competing options exchanges, as

well as the Exchange, currently have similar fee programs in place in connection with strategy orders executed in open outcry.¹¹ The Exchange also does not believe that the proposed rule change in connection with the waiver of the installation fee will impose any burden on intermarket competition because it is not competitive in nature, but merely relates to installation services provided by the Exchange in connection with the relocation of its trading floor. 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. Based on publicly available information, no single options exchange has more than 16% of the market share.¹² 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.”¹³ 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

¹¹ See supra note 10.

¹² See supra note 3.

¹³ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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’....”¹⁴ 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 Act¹⁵ and paragraph (f) of Rule 19b-4¹⁶ 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.

¹⁴ 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)).

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 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-2021-072 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-2021-072. 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-2021-072 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.¹⁷

J. Matthew DeLesDernier
Assistant Secretary

¹⁷ 17 CFR 200.30-3(a)(12).