

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-94201; File No. SR-CBOE-2022-004)

February 9, 2022

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 February 1, 2022, 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 to update the Index License Surcharge fee for transactions in Dow Jones Industrial Average Index (“DJX”) options and to make certain clarifying and corrective changes in the Fees Schedule, effective February 1, 2022.

The Exchange proposes to increase the Index License Surcharge fee currently applicable to orders executed in DJX options in Rate Table – Underlying Symbol List A. The Exchange currently assesses an Index License Surcharge fee of \$0.10 per contract for non-Customer orders executed in DJX options. The proposed rule change increases the Index License Surcharge fee applicable to orders executed in DJX options from \$0.10 per contract to \$0.12 per contract. The Exchange notes that the Index License Surcharge fee in place for DJX options is designed to recoup some of the costs associated with the licenses for this index.³ The Exchange has recently renewed its license arrangements for its DJX index license and, as a result, the proposed rule change amends the Index License Surcharge fee for DJX options in order to continue to offset some of the costs associated with the license for the index in light of the renewal of the license.

The proposed rule change also makes certain clarifying and corrective changes to the Fees Schedule. The proposed rule change removes language in the Floor Broker Trading Surcharge table related to the requirement that a Floor Broker Trading Permit Holder submit the SPX Tier Appointment Fee Exclusion for Multi-Class Broad-Based Index Spread Transactions

³ See Securities Exchange Release No. 52851 (November 29, 2005), 70 FR 72480 (December 5, 2005) (SR-CBOE-2005-84).

Form within three business days of execution of the applicable spread transaction(s) in order to receive the SPX Surcharge waiver for Floor Broker Trading Permit Holders who only execute SPX (including SPXW) options transactions as part of multi-class broad-based index spread transactions. Manual submission of such form by Floor Broker Trading Permit Holders is no longer necessary as the Exchange has automated the process for documenting such transactions for Floor Broker Trading Permit Holders.

The proposed rule change makes a clarifying change regarding Market-Maker Floor Permit Holders that execute contracts in SPX/SPXW in the Market-Maker Tier Appointment Fees table. Specifically, the proposed rule change adds that the SPX Surcharge will not be assessed to a Market-Maker Floor Permit Holder who only executes SPX (including SPXW) options transactions as part of multi-class broad-based index spread transactions. In 2019, the Exchange restructured its Fees Schedule in connection with a technology migration. The SPX Surcharge waiver provision in connection with Market-Maker Floor Permit Holders existed in the Fees Schedule prior to its 2019 restructuring; however, the Exchange inadvertently did not include this waiver provision in the restructured Fees Schedule. The Exchange notes that the same waiver provision related to Floor Broker Trading Permit Holders (as described above) was correctly carried over into the restructured Fees Schedule upon the technology migration. As such, the proposed rule change corrects this inadvertent omission and clarifies that the waiver continues to apply to Market-Maker Floor Permit Holders today.

The proposed rule change lastly amends footnote 5, which is appended to the Floor Brokerage Fees table. Currently, footnote 5 provides that floor brokerage fees are charged to the executing broker. To be eligible for the discounted “crossed” rate, the executing broker acronym and executing firm number must be the same on both the buy and sell side of an order. The

Exchange proposes to update footnote 5 to provide that in order to be eligible for the crossed rate, both the executing broker acronym and Executing Firm ID (“EFID”) must be the same on both the buy and sell side of an order. Particularly, upon the 2019 technology migration, the Exchange adopted (and codified in its Rulebook) EFIDs, which the System uses to identify the TPH and the clearing number for the execution of orders and quotes submitted to the System with that EFID. Indeed, since the 2019 technology migration, the Exchange’s billing system looks for the same executing broker acronym and EFID to be on both the buy and sell side of an order, in determining whether an order qualifies for the “crossed” rate. Accordingly, the proposed rule change now updates the reference to “executing firm number” in footnote 5 to reflect “EFID”.

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.⁴ Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)⁵ requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change

⁴ 15 U.S.C. 78f(b).

⁵ 15 U.S.C. 78f(b)(5).

is consistent with Section 6(b)(4) of the Act,⁶ 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 that it is reasonable to increase the amount of the Index License Surcharge fee for orders in DJX options as the proposed increase is consistent with the purpose of such surcharge fee—it is intended to continue to help recoup some of the costs associated with the license for DJX index products in light of recently renewed license arrangements between the Exchange and the DJX index provider. The proposed Index License Surcharge fee is also equitable and not unfairly discriminatory because the surcharge fee will continue to be assessed uniformly for all non-Customer orders in DJX options.

The Exchange believes the proposed rule changes (1) to remove language related to the requirement that a Floor Broker Trading Permit Holder manually submit the SPX Tier Appointment Fee Exclusion for Multi-Class Broad-Based Index Spread Transactions Form (as the process is now automated), (2) to correct an inadvertent omission regarding the SPX Surcharge waiver for Market-Maker Floor Permit Holders that execute multi-class broad-based index spread transactions in SPX/SPXW and (3) to reflect an Exchange-defined term in footnote 5, are reasonable, equitable and not unfairly discriminatory because they do not change any of the fees or rebates assessed by the Exchange, but rather are clarifying changes intended to more accurately reflect the Exchange's current billing processes, thereby increasing transparency in the Fees Schedule and alleviating any potential investor confusion.

⁶ 15 U.S.C. 78f(b)(4).

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

The Exchange does not believe that the proposed rule changes 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 in connection with the DJX Index License Surcharge fee will impose any burden on intramarket competition because it applies uniformly to all similarly situated TPHs in a uniform manner (i.e., to all non-Customer executions in DJX options). The Exchange does not believe that the proposed change in connection with the DJX Index License Surcharge fee will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed amendment to the DJX Index License Surcharge fee applies only to an Exchange proprietary product, which is traded exclusively on Cboe Options and Cboe-affiliated options exchanges. In addition to this, the Exchange does not believe that the proposed rule changes to remove language related to an obsolete requirement, to correct an inadvertent omission, and to reflect a defined term will impose any burden on intramarket or intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed rule changes merely provide clarifications in the Fees Schedule that are designed to more accurately reflect current billing processes, thereby increasing transparency in the Fees Schedule and reducing potential confusion without having any impact on competition.

Additionally, the Exchange notes that it 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, as well as off-exchange venues, where competitive products are available for trading. Based on publicly available information, no single options

exchange has more than 15% of the market share.⁷ 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.”⁸ The fact that this market is competitive has also long been recognized by the courts. In *NetCoalition v. Securities and Exchange Commission*, the D.C. Circuit stated as follows: “[n]o one disputes that competition for order flow is ‘fierce.’ . . . As the SEC explained, ‘[i]n the U.S. national market system, buyers and sellers of securities, and the broker-dealers that act as their order-routing agents, have a wide range of choices of where to route orders for execution’; [and] ‘no exchange can afford to take its market share percentages for granted’ because ‘no exchange possesses a monopoly, regulatory or otherwise, in the execution of order flow from broker dealers’ . . .”⁹ Accordingly, the Exchange does not believe

⁷ See Cboe Global Markets U.S. Options Market Volume Summary, Month-to-Date (January 26, 2022), available at https://www.cboe.com/us/options/market_statistics/.

⁸ See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

⁹ *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)).

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 Act¹⁰ and paragraph (f) of Rule 19b-4¹¹ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-CBOE-2022-004 on the subject line.

¹⁰ 15 U.S.C. 78s(b)(3)(A).

¹¹ 17 CFR 240.19b-4(f).

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-2022-004. 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-2022-004 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.¹²

J. Matthew DeLesDernier
Assistant Secretary

¹² 17 CFR 200.30-3(a)(12).