

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-87742; File No. SR-CBOE-2019-112)

December 13, 2019

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating 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 2, 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 to amend its fees schedule in connection with the fees related to orders and auction responses executed in the Automated Improvement Mechanism (“AIM”) and Solicitation Auction Mechanism (“SAM”) Auctions, effective December 2, 2019.

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 21% 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 (November 26, 2019), 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.

AIM and SAM include functionality in which a Trading Permit Holder ("TPH") (an "Initiating TPH") may electronically submit for execution an order it represents as agent on behalf of a customer,⁴ broker dealer, or any other person or entity ("Agency Order") against any other order it represents as agent, as well as against principal interest in AIM only, (an "Initiating Order") provided it submits the Agency Order for electronic execution into the AIM or SAM Auctions.⁵ The Exchange may designate any class of options traded on Cboe Options as eligible for AIM or SAM. The Exchange notes that all Users, other than the Initiating TPH, may submit responses to an Auction ("AIM Responses").⁶ AIM and SAM Auctions take into account AIM Responses to the applicable Auction as well as contra interest resting on the Cboe Options Book at the conclusion of the Auction ("unrelated orders"), regardless of whether such unrelated orders were already present on the Book when the Agency Order was received by the Exchange or were received after the Exchange commenced the applicable Auction. If contracts remain from one or more unrelated orders at the time the Auction ends, they are considered for participation in the AIM or SAM order allocation process.

The Exchange notes that it recently updated its rules in connection with the AIM and SAM Auctions to permit all Users to respond to such Auctions; AIM responses were previously restricted to Market-Makers with an appointment in the applicable class and TPHs representing

⁴ The term "customer" means a Public Customer or a broker-dealer. The term "Public Customer" means a person that is not a broker-dealer. See Rule 1.1.

⁵ See Rule 5.37 (AIM); Rule 5.39 (SAM); Rule 5.38 (Complex AIM); Rule 5.40 (Complex SAM); Rule 5.73 (FLEX AIM); and Rule 5.74 (FLEX SAM).

⁶ For purposes of this filing and the proposed fee, the term "AIM Response" will include responses submitted to AIM and SAM Auctions.

orders at the top of the Book, and SAM responses were previously available to all TPHs, except responses could not be submitted for the account of an away market-maker.⁷ Because AIM Responses were limited to certain market participants, the Exchange did not impose separate fees on Auction responders (as it did for the Auction Agency and Contra orders). As a result, the Exchange now proposes to adopt fee codes for certain AIM Responses (the “AIM Response” fee as proposed in the fees schedule, which is consistent with other AIM-specific headings and fee codes in the fees schedule that also encompass orders in SAM). Specifically, the Exchange proposes to add: 1) fee code “NB”, which would be appended to non-Customer, non-Market-Maker AIM Responses in penny classes and assessed a fee of \$0.50 per contract; and 2) and fee code “NC”, which would be appended to Non-Customer, Non-Market-Maker AIM Responses in non-penny classes and assessed a fee of \$1.05. Non-Customer, non-Market-Maker orders include: Clearing Trading Permit Holder (“F” Capacity Code); non-Trading Permit Holder Affiliate (“L” Capacity Code); Broker-Dealer (“B” Capacity Code); Non-Trading Permit Holder Market-Maker (“N” Capacity Code); Join Back-Office (“J” Capacity Code); and Professional (“U” Capacity Code) orders. The Exchange also proposes to add footnote 20, which clarifies that the AIM Responder fee applies to AIM Responses of the aforementioned capacities in all products, except Sector Indexes⁸ and Underlying Symbol List A,⁹ executed in AIM, SAM, FLEX AIM, and FLEX SAM Auctions. The Exchange notes that the same FLEX AIM and FLEX SAM responses will be assessed the same fee, which is consistent with the structure of the Exchange’s current fees for AIM Agency/Primary and AIM Contra orders, which apply

⁷ See Securities Exchange Act Release No. 87072 (September 24, 2019), 84 FR 51673 (September 30, 2019) (SR-CBOE-2019-045); and Securities Exchange Act Release No. 87192 (October 1, 2019), 84 FR 53525 (October 7, 2019) (SR-CBOE-2019-063).

⁸ See Cboe Exchange, Inc. Fees Schedule, footnote 47.

⁹ See Cboe Exchange, Inc. Fees Schedule, footnote 34.

uniformly to qualifying orders in AIM, SAM, FLEX AIM, and FLEX SAM.¹⁰ Also, in light of the proposed fee, the Exchange also proposes to exclude non-Customer, non-Market-Maker AIM Responses from the Complex Surcharge, described in footnote 35. The Complex Surcharge is assessed per contract per side for non-customer complex order executions that remove liquidity from the Complex Order Book (“COB”) and auction responses in the Complex Order Auction (“COA”) and AIM in all classes except Sector Indexes and Underlying Symbol List A.

The Exchange also proposes to adopt Break-Up Credits, applicable to Customer Agency orders when traded against a qualifying AIM response (yielding fee code NB or NC, as proposed). Specifically, the Exchange proposes a Break-Up Credit of \$0.25 per contract with respect to a Customer Agency order in a Penny Pilot Class and a Break-Up Credit of \$0.60 per contract with respect to a Customer Agency order in a Non-Penny Pilot Class.

The proposed AIM Responder fees for non-Customer, non-Market-Maker AIM Responses, which covers the market participants recently permitted to respond to Auctions, are designed as an additional incentive for Market-Makers to increase their responses to AIM and SAM Auctions. Prior to opening up the Auctions to all market participants, Market-Makers were naturally incentivized to respond to Auctions as they were the exclusive (or among the exclusive) market participants permitted to submit responses. Therefore, the Exchange believes the proposed AIM Responder fees for non-Customer, non-Market-Maker responses will encourage Market-Makers to continue to respond to Auctions and compete to provide price improvement in a competitive auction process, thus contributing to a deeper, more liquid auction process with additional execution opportunities which benefits all market participants. Likewise, the Exchange believes the proposed Break-Up Credits will encourage Customer order flow to

¹⁰ See Cboe Exchange, Inc. Fees Schedule, footnotes 18 and 19.

Auctions. Increased Customer order flow benefits all market participants because it continues to attract liquidity to the Exchange by providing more trading opportunities. This attracts Market-Makers and other liquidity providers, thus, facilitating price improvement in the auction process, signaling additional corresponding increase in order flow from other market participants, and, as a result, contributing towards a robust, well-balanced market ecosystem.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6 of the Act,¹¹ in general, and furthers the requirements of Section 6(b)(4),¹² 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 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 price improvement Auctions, which the Exchange believes would enhance market quality to the benefit of all TPHs.

The Exchange believes that its proposed adoption of fees for non-Customer, non-Market-Maker responses and Break-Up Credits for Customer Agency orders is consistent with Section 6(b)(4) of the Act in that the proposal is reasonable, equitable and not unfairly discriminatory. Also, 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

¹¹ 15 U.S.C. 78f.

¹² 15 U.S.C. 78f(b)(4).

fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges,¹³ including the Exchange's affiliated options exchanges,¹⁴ offer substantially the same fees and credits in connection with similar price improvement auctions, as the Exchange now proposes.

The Exchange believes that it is reasonable to assess a fee for non-Customer, non-Market-Maker AIM Responses because it is reasonably designed to incentivize Market-Makers to continue to respond, and potentially increase their responses, to AIM and SAM Auctions in light of the recent opening of the Auctions to other market participants not previously permitted to respond to such Auctions. The Exchange believes that encouraging increased Market-Maker order flow will increase liquidity and Auction execution and price improvement opportunities to the benefit of all participants. Deepening the Exchange's liquidity pool and offering additional opportunities enables all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange believes excluding non-Customer, non-Market-Maker AIM Responses from the Complex Surcharge is reasonable as such market participants will not be assessed the extra surcharge. The

¹³ See MIAAX Options Fee Schedule, Section 1(a)(v), "MIAAX Price Improvement Mechanism ("PRIME") Fees, which assesses a fee of \$0.50 (Penny Classes) and \$0.99 (non-Penny Classes) for PRIME responses, and offers a break-up credit of \$0.25 (Penny Classes) and \$0.60 (non-Penny Classes) for PRIME Agency orders; see also NYSE American Options Fee Schedule, Section I(G), "CUBE Auction Fees and Credits", which assesses a fee of \$0.50 (Penny Classes) and \$0.99 (non-Penny Classes) for CUBE (its Customer Best Execution Auction) responses, and offers a break-up credit of \$0.25 (Penny Classes) and \$0.60 (non-Penny Classes) for PRIME Agency orders, and an Initiating Participant Credit (akin to an Agency Order) of \$0.30 (Penny Pilot) and \$0.70 (non-Penny Pilot).

¹⁴ See EDGX Options Exchange Fee Schedule, "Fee Codes and Associated Fees", fee code BD is appended to AIM Responder Penny Pilot orders and is assessed a fee of \$0.50 per share, and fee code BE is appended to AIM Responder Non-Penny Pilot orders and is assessed a fee of \$1.05 per share; and "AIM Break-Up Credits", which offers a credit of \$0.25 for AIM Agency Orders in Penny Pilot securities and \$0.60 for such orders in non-Penny Pilot securities.

Exchange also notes that auction responses in COA and AIM are currently capped at \$0.50 per contract for non-customer complex orders in Penny classes (which includes the applicable transaction fee, Complex Surcharge and Marketing Fee (if applicable))¹⁵. As such, given the proposed fee for AIM Responses is \$0.50 per contract, the Complex Surcharge would, in effect, not be assessed for non-customer, non-Market-Maker complex orders in Penny classes. The Exchange also notes that other types of orders are currently excluded from the Complex Surcharge.¹⁶ Similarly, the Exchange believes that applying a Break-Up Credit to Customer Agency orders is a reasonable means to encourage Customer order flow to Exchange Auctions. As stated, increased Customer order flow provides continued liquidity to the Exchange, in that it provides additional transaction opportunities which attract Market-Makers and other liquidity providers (by means of both unrelated orders and responses in connection with the Auctions), thus facilitating price improvement and signals an increase in additional order flow from other market participants. In turn, these increases benefit all market participants by contributing towards a robust and well-balanced market ecosystem.

The Exchange also believes that the proposed fees in connection with AIM Responses and Customer Agency orders does not represent a significant departure from the fees and credits rebates currently offered under the fees schedule for these market participants. For example, under the existing fees schedule orders with F and L Capacity Codes are assessed a fee of \$0.43 per contract in Penny Classes and \$0.70 per contract in non-Penny Classes, while orders with B, N, U, or J Capacity Codes are assessed a fee of \$0.47 per contract in Penny Classes and \$0.75 per contract in non-Penny Classes. Additionally, under the existing “Volume Incentive

¹⁵ See Cboe Options Fees Schedule, Footnote 35.

¹⁶ See e.g. Cboe Options Fees Schedule, Footnote 35. Stock-option orders are currently excluded from the Complex Surcharge.

Program”, Customer orders may receive credits ranging from \$0.09 to \$0.24 per contract executed in AIM.

The Exchange also believes that the proposed fees are equitable and not unfairly discriminatory because the proposed fee for AIM Responses will apply equally to all non-Customer, non-Market-Maker responses, i.e. all such TPHs will be assessed the same amount. Similarly, the exclusion of Aim Responses from the Complex Surcharge is equitable and not unfairly discriminatory as it applies equally to all non-Customer, non-Market-Maker responses. The Exchange also believes that not assessing a fee for Market-Maker responses is equitable and not unfairly discriminatory because Market-Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have. Further, Market-Makers have added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market-Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing. As stated, the Exchange also recognizes that Market-Makers are the primary liquidity providers in the options markets, thus, the Exchange believes Market-Makers provide the most accurate prices reflective of the true state of the market. Increased Market-Maker liquidity also increases trading opportunities and signals to other participants to increase their order flow, which benefits all market participants. Market-Makers Likewise, the proposed Break-Up Credit will apply equally to all Customer Agency orders that execute in an Auction against qualifying responses. The Exchange notes that while Customer Agency orders will receive the Break-Up Credit, as opposed to other Agency orders, the Exchange believes that this application of the credit is equitable and not

unfairly discriminatory because, as stated above, Customer order flow enhances liquidity on the Exchange, in turn providing more trading opportunities and attracting other market participants, thus, facilitating tighter spreads, increased order flow and trading opportunities to the benefit of all market participants. Moreover, the options industry has a long history of providing preferential pricing to Customers, and the Exchange's current fees schedule currently does so in many places, as do the fees structures of multiple other exchanges.¹⁷

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 price improvement 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."¹⁸

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 will apply uniformly to all non-Customer, non-Market-Maker

¹⁷ See MIAX Options Fee Schedule, Section 1(a)(v), "MIAX Price Improvement Mechanism ("PRIME") Fees, and NYSE American Options Fee Schedule, Section I(G), "CUBE Auction Fees and Credits", each of which assesses a lower transaction fee for customer orders than that of other market participants for executions in their respective auctions.

¹⁸ Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

responses and to all Customer Agency orders, respectively. As described above, different market participants have different circumstances, such as the fact that Market-Makers have quoting obligations that other market participants do not have and have recently lost their exclusive Auction response incentive, as well as the fact that preferential pricing to Customers is a long-standing options industry practice. The proposed fee changes serve to enhance Market-Maker and Customer order flow to the Exchange's Auctions, and, as a result, facilitate increased liquidity and execution opportunities to the benefit of all market participants. In addition to this, the Exchange notes that it currently assesses similar fees for certain non-Customer, non-Market-Maker orders and similar credits for certain Customer orders.

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 noted above, competing options exchanges,¹⁹ including the Exchange's affiliated options exchange,²⁰ currently have substantially similar fees in place in connection with similar price improvement auctions. 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 21% of the market share.²¹ 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

¹⁹ See supra note 13.

²⁰ See supra note 14.

²¹ See supra note 3.

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.”²² 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’”²³ 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.

²² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

²³ *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)).

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 Act²⁴ and paragraph (f) of Rule 19b-4²⁵ 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-2019-112 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-2019-112. 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

²⁴ 15 U.S.C. 78s(b)(3)(A).

²⁵ 17 CFR 240.19b-4(f).

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-2019-112 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.²⁶

J. Matthew DeLesDernier
Assistant Secretary

²⁶ 17 CFR 200.30-3(a)(12).