

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-88786; File No. SR-CBOE-2020-042)

April 30, 2020

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend Rule 6.9 to Permit In-Kind Transfers of Positions off of the Exchange in Connection with Unit Investment Trusts (“UITs”)

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 April 28, 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 and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³ and Rule 19b-4(f)(6) thereunder.⁴ 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 Rule 6.9 to permit in-kind transfers of positions off of the Exchange in connection with unit investment trusts (“UITs”). 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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

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Rule 6.9. In-Kind Exchange of Options Positions and ETF Shares and UIT Units

Notwithstanding the prohibition set forth in Rule 5.12, positions in options listed on the Exchange may be transferred off the Exchange by a Trading Permit Holder in connection with transactions (a) to purchase or redeem creation units of ETF shares between an authorized participant and the issuer of such ETF shares or (b) to create or redeem units of a unit investment trust (“UIT”) between a broker-dealer and the issuer of such UIT units, which transfers would occur at the price(s) used to calculate the net asset value of such ETF shares or UIT units, respectively. For purposes of this Rule:

(a) an “authorized participant” is an entity that has a written agreement with the issuer of ETF shares or one of its service providers, which allows the authorized participant to place orders for the purchase and redemption of creation units (i.e., specified numbers of ETF shares); [and]

(b) an “issuer of ETF shares” is an entity registered with the Commission as an open-end management investment company under the Investment Company Act of 1940[.]; and

(c) an “issuer of UIT units” is a trust registered with the Commission as a unit investment trust under the Investment Company Act of 1940.

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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 amend Rule 6.9, which permits off-Exchange, in-kind transfers of options positions in connection with ETFs organized as open-end management investment companies under the Investment Company Act of 1940 (the “1940 Act”), to also permit in-kind transfers of options positions in connection with entities registered as UITs under the 1940 Act.

Rule 6.9 is an exception to the Exchange’s general requirement that transfers of options contracts listed on the Exchange be effected on an exchange, as set forth in Rule 5.12.⁵ Specifically, Rule 6.9 permits positions in options listed on the Exchange to be transferred off the Exchange by a Trading Permit Holder in connection with transactions to purchase or redeem “creation units” of ETF shares between an authorized participant and the issuer of such ETF shares. Such transfers pursuant to Rule 6.9 occur between two different parties, off the Exchange, and are considered position transfers, as opposed to transactions.⁶ Each of these transfers occurs at the price used to calculate the net asset value (“NAV”) of such ETF shares. Rule 6.9 also currently defines an “authorized participant” as an entity that has a written

⁵ See Rule 5.12(a) (Transactions Off the Exchange), which generally requires transactions of option contracts listed on the Exchange for a premium in excess of \$1.00 to be effected on the floor of the Exchange or on another exchange.

⁶ While the prices of options transactions effected on the Exchange are disseminated to OPRA, back-office transfers of options positions in clearing accounts held at The Options Clearing Corporation (“OCC”) (in accordance with OCC Rules) are not disseminated to OPRA or otherwise publicly available, as they are considered position transfers, rather than executions. OCC has represented to the Exchange that it has the operational capabilities to effect the position transfers and all transfers pursuant to Rule 6.9 are required to comply with OCC rules. See Rule 8.2 (which requires all TPHs that are members of OCC to comply with OCC’s Rules).

agreement with the issuer of ETF shares or one of its service providers, which allows the authorized participant to place orders for the purchase and redemption of creation units (i.e., specified numbers of ETF shares), and an “issuer of ETF shares” as an entity registered with the Commission as an open-end management investment company under the 1940 Act. The ability to effect in-kind transfers is a key component of the operational structure of an ETF and the exception under Rule 6.9 allows options-based ETFs to be more tax-efficient investment vehicles, to the benefit of their shareholders, and potentially result in transaction cost savings, which may be passed along to investors. The Exchange now proposes to expand Rule 6.9 to provide the same exemption from Rule 5.12 to off-floor, in-kind transfers in connection with the creation or redemption of units issued by a UIT, another type of investment company registered under the 1940 Act. Although UITs operate differently than ETFs in certain respects, as described below, the anticipated potential benefits to UIT investors (i.e., greater tax efficiencies and transaction cost savings) from the proposed exemption would be similar as discussed below.

Specifically, under the 1940 Act,⁷ a UIT is an investment company organized under a trust indenture or similar instrument that issues redeemable securities, each of which represents an undivided interest in a unit of specified securities.⁸ A UIT’s investment portfolio is relatively fixed, and, unlike an ETF, a UIT has a fixed life (a termination date for the trust is established when the trust is created). Similar to other types of investment companies (including ETFs), UITs invest their assets in accordance with their investment objectives and investment strategies,

⁷ 15 U.S.C. 80a-4(2).

⁸ The Exchange also notes that, though a majority of ETFs are structured as open-ended funds (i.e. those ETFs currently covered by Rule 6.9), some ETFs are structured as UITs, and currently represent a significant amount of assets within the ETF industry. These include, for example, SPDR S&P 500 ETF Trust (“SPY”) and PowerShares QQQ Trust, Series 1 (“QQQ”).

and UIT units represent interests in a UIT's underlying assets. Like ETFs, UITs do not sell or redeem individual shares, but instead, through the creation and redemption process, a UIT's sponsor (a broker-dealer) may purchase and redeem shares directly from the UIT's trustee in aggregations known as "units." A broker-dealer purchases a unit of UIT shares from the UIT's trustee by depositing a basket of securities and/or other assets identified by the UIT. These transactions are largely effected by "in-kind" transfers, or the exchange of securities, non-cash assets, and/or other non-cash positions. The basket deposited by the broker-dealer is generally expected to be representative of the UIT's units and will be equal in value to the aggregate NAV of the shares of the UIT comprising a unit.⁹ The UIT then issues units that are publicly offered and sold. Unlike ETFs, UITs typically do not continuously offer their shares for sale, but rather, make a one-time or limited public offering of only a specific, fixed number of units like a closed-end fund (i.e., the primary period, which may range from a single day to a few months). Similar to the process for ETFs, UITs allow investor-owners of units to redeem their units back to the UIT's trustee on a daily basis and, upon redemption, such investor-owners are entitled to receive the redemption price at the UIT's NAV. While UITs provide for daily redemptions directly with the UIT's trustee, UIT sponsors frequently maintain a secondary market for units, also like that of ETFs, and will buy back units at the applicable redemption price per unit. To satisfy

⁹ The NAV is an investment company's total assets minus its total liabilities. UITs must calculate their NAV at least once every business day, typically after market close. See §270.2a-4(c), which provides that any interim determination of current net asset value between calculations made as of the close of the New York Stock Exchange on the preceding business day and the current business day may be estimated so as to reflect any change in current net asset value since the closing calculation on the preceding business day. This, however, is notwithstanding the requirements of §270.2a-4(a), which provides for other events that would trigger computation of a UIT's NAV.

redemptions, a UIT typically sells securities and/or other assets, which results in negative tax implications and an incurrence of trading costs borne by remaining unit holders.

Although ETFs and UITs operate differently in certain respects, the ability to effect in-kind transfers is significant to both types of investment vehicles. Currently, in-kind transfers of options pursuant to Rule 6.9 protect ETF shareholders from certain undesirable tax consequences and improve the overall tax efficiency of the products. Indeed, by effecting redemptions on an in-kind basis, as permitted by Rule 6.9, there is no need for an ETF to sell assets and potentially realize capital gains that would be distributed to shareholders. Additionally, by transacting on an in-kind basis, ETFs may currently avoid certain transaction costs they would otherwise incur in connection with purchases and sales of securities and other assets (including options). As stated, Rule 6.9 does not currently permit these in-kind transfers for UITs, as they are still generally required to sell options on an exchange to obtain the requisite cash when effecting redemption transactions with broker-dealers. Thus, the Exchange proposes to extend the Rule 6.9 exemption to UITs. As described above, UITs and ETFs are situated in substantially the same manner; the key differences being a UIT's fixed duration, and that a UIT generally makes a one-time public offering of only a specific, fixed number of units. Negative tax implication and trading costs for remaining unit holders would be mitigated by allowing a UIT sponsor or another broker-dealer to receive an in-kind distribution of options upon redemption. Therefore, permitting off-exchange in-kind transfers for UITs would benefit investors by potentially providing tax efficiencies and transaction cost savings similar to those that investors in ETFs may enjoy today. The Exchange does not believe the proposed extension of Rule 6.9 to UITs will adversely impact investors or the maintenance of a fair and orderly market as it does not circumvent the prohibition under Rule 5.12(a) nor does it compromise price discovery or transparency. To note, Rule 6.9 is already

applicable to options in connection with ETF creations and redemptions, previously approved by the Commission.¹⁰ Although options positions in connection with ETF and UIT (as proposed) creations and redemptions are transferred off of the Exchange, they are not closed or “traded”, and instead, merely reside in a different clearing account until closed in a trade on the Exchange or until they expire. The Exchange also notes that Rule 6.9 will continue to be clearly delineated and limited in scope, given that the exception will continue to apply only to transfers of options effected in connection with the creation and redemption process, and for certain investment companies registered under the 1940 Act. Moreover, the Exchange notes that transfers of options in connection with the creation or redemption of open-end fund ETFs constitute a minimal percentage of the total average daily volume (“ADV”) of options and the Exchange expects options transfers in connection with UITs to comprise a similar minimal percentage of ADV. . Additionally the options transfers that would be permitted by the exemption are generally expected to include corresponding transactions by a broker-dealer that would occur on an exchange and would be reported to OPRA.¹¹

¹⁰ See Securities Exchange Act Release No. 87340 (October 17, 2019), 84 FR 56877 (October 23, 2019) Order Approving on an Accelerated Basis a Proposed Rule Change, as Modified by Amendment Nos. 2 and 3, To Adopt Rule 6.9 (In-Kind Exchange of Options Positions and ETF Shares)) (SR-CBOE-2019-048).

¹¹ The Exchange notes that in conjunction with depositing options with a UIT’s trustee and creating units, the necessary options positions will be acquired in an on-exchange transaction that is reported to OPRA. In conjunction with redemptions, the sponsor or other broker-dealer will generally acquire both the units redeemed by a redeeming unit holder and an options position to offset the position that it will receive as proceeds for the redemption. Such an options position is likely acquired in an on-exchange transaction that would be reported to OPRA. Thus, while the transfer of options positions between the sponsor or other broker-dealer and the UIT would not necessarily be reported, there are generally corresponding transactions that would be reported, providing transparency into the transactions.

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.¹² Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹³ 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.

The Exchange believes that permitting off-floor transfers in connection with the in-kind UIT creation and redemption process promotes just and equitable principles of trade and helps remove impediments to and perfect the mechanism of a free and open market and a national market system, as it would permit UITs that invest in options traded on the Exchange to transfer options off of the Exchange in connection with their in-kind creation and redemption process as ETFs are currently able to do under Rule 6.9, as previously approved by the Commission.¹⁴ Further, the Exchange believes that permitting a comparable investment vehicle, also registered as an investment company under the 1940 Act, to be included in the Rule 6.9 exemption, removes impediments to and perfect the mechanism of a free and open market and national market system as it would enable UITs to compete more effectively with other investment

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ See supra note 10.

vehicles that, based on their portfolio holdings, may effect in-kind creations and redemptions without restriction. The Exchange notes that the ability to effect in-kind transfers is significant to both ETFs and UITs as investment vehicles. By permitting UITs that invest in options traded on the Exchange to benefit from potential tax efficiencies and transaction cost savings similar to those that ETFs may currently enjoy, the proposed rule change would protect investors and the public interest by passing along such potential benefits to investors that participate in UITs. The Exchange does not believe that the proposed rule change affects the protection of investors or the maintenance of a fair and orderly market because the Rule 6.9 exception would continue to be clearly delineated and limited in scope. Rule 6.9 already applies to ETFs, which operate in a similar manner as UITs, and the proposed rule change to make the transfer exemption available to UITs is based on a similar rationale and does not raise any new or novel issues. In this regard, as with in-kind, off-exchange transfers of options in connection with ETFs, those transfers in connection with UITs would also occur at a price related to the NAV of the applicable UIT units, which removes the need for price discovery on an exchange. As stated above, the Exchange expects that off-exchange options transfers in connection with the creation and redemption process for UITs will comprise a minimal percentage of ADV, just as such transfers currently permissible in connection with ETFs comprise a minimal percentage of ADV. Further, the general price at which UIT-related transfers are effected will be publicly available as they are based on the disseminated closing prices and are generally expected to include corresponding, transactions by a broker-dealer that would occur on an exchange and be reported to OPRA.¹⁵

¹⁵ See supra note 11.

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 invoking the exception under Rule 6.9 in connection with UITs is voluntary and the proposed exception for UITs is not intended as a competitive trading tool. Instead, it is intended as an alternative to the normal auction process to provide market participants with an efficient and effective means to transfer option positions as part of the UIT creation and redemption process under the same specified circumstances currently applicable to ETFs in connection with creating and redeeming units of UITs. The proposed expansion of the Rule 6.9 exception to UITs would enable this investment vehicle, which is comparable to ETFs, to enjoy the potential benefits of off-exchange, in-kind transfers of option positions in connection with creating and redeeming, and to pass these benefits along to investors. Use of the in-kind, off-exchange transfer process in connection with creating UIT units and the redemption process would be voluntary and would apply in the same manner to all broker-dealers choosing to invoke such process.

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 the in-kind transfer rule would continue to provide a clearly delineated and limited exception to the requirement that options positions in connection with certain entities registered as a type of investment company under the 1940 Act be transferred on the floor of an exchange. The proposed rule change merely extends the Rule 6.9 exemption (and any potential benefits) to

UITs. The Exchange again notes that Rule 6.9 was previously approved by the Commission¹⁶ and is currently applicable to ETFs that are similarly situated and also invest in options. Also, as indicated above, in light of the significant benefits provided (e.g., potential tax efficiencies and transaction cost savings), the proposed exception may lead to further development of UITs that invest in options, thereby fostering competition and resulting in additional choices for investors, which ultimately benefits the marketplace and the public. Other options exchanges in their discretion may pursue the adoption of similar exceptions.

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 written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁷ and subparagraph (f)(6) of Rule 19b-4 thereunder.¹⁸

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

¹⁶ See supra note 10.

¹⁷ 15 U.S.C. 78s(b)(3)(A).

¹⁸ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

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 shall 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-2020-042 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-2020-042. 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-2020-042, 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).