

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-96742; File No. SR-CBOE-2023-007)

January 24, 2023

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Update 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 January 17, 2023, 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 update 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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 its Fees Schedule in connection with certain surcharges, the S&P 500 Index (“SPX”) options and SPX weekly (“SPXW”) options Lead Market Maker (“LMM”) Incentive Programs, and footnote 49 related to transaction fees in Mini-SPX Index (“XSP”) options.³

First, the Exchange proposes to increase the Index License Surcharge applicable to orders executed MSCI Emerging Markets Index (“MXEF”) options and MSCI EAFE Index (“MXEA”) options (collectively, “MSCI options”) in Rate Table – All Products Excluding Underlying Symbol List and to orders executed in A SPX (including SPXW) options in Rate Table –Underlying Symbol List A. Specifically, the Exchange currently assesses an Index License Surcharge fee of \$0.18 per contract for non-Customer orders executed in SPX/SPXW and an Index License Surcharge of \$0.12 per contract for non-Customer orders executed in MSCI options. The proposed rule change increases the Index License Surcharge fee applicable to orders executed in SPX/SPXW from \$0.18 per contract to \$0.20 per contract and the Index License Surcharge fee applicable to orders executed in MSCI options from \$0.12 to \$0.15. The Exchange notes that the Index

³ The Exchange initially filed the proposed fee changes on January 3, 2023 (SR-CBOE-2023-003). On January 17, 2023, the Exchange withdrew that filing and submitted this proposal.

License Surcharge fees in place for SPX/SPXW and MSCI options are designed to recoup some of the costs associated with the licenses for these indexes.⁴ The cost of the license however still works out to more than the current SPX/SPXW and MSCI Index License Surcharge fees and the Exchange therefore proposes changes to the current Index License Surcharge fees for SPX/SPXW and MSCI options in order to continue to offset some of the costs associated with the licenses for these indexes.

The Exchange proposes to next adopt a Floor Broker Solicitation Surcharge Fee in Rate Table - Underlying Symbol List A of the Fees Schedule. Specifically, the Exchange proposes to assess \$0.15 per contract which would apply to solicited SPX and SPXW orders where one side is a Customer and both sides are crossed in open outcry by the same Floor Broker (i.e., the executing Floor Broker acronym is the same on both the buy and sell side of the order). The surcharge fee will be assessed to the EFID of the buy (sell) side contra to the Customer sell (buy) side of the order. The proposed surcharge fee will not apply to customer-to-customer orders, facilitation orders, solicited orders executed as part of a box or jelly roll strategy or as a FLEX transaction. "Facilitation orders" for this purpose are defined as any order in which a Clearing Trading Permit Holder ("F" capacity code) or Non-Trading Permit Holder Affiliate ("L" capacity code) is contra to any other origin code, provided the same executing broker and clearing firm are on both sides of the transaction for open outcry following any post-trade changes made on the trade date. The proposed rule change appends footnote 40 to the line item containing the proposed Floor Broker Solicitation Surcharge Fee. Proposed footnote 40

⁴ See Securities Exchange Release Nos. 74854 (April 30, 2015), 80 FR 26124 (May 6, 2015) (SR-CBOE-2015-041); and 74422 (March 4, 2015), 80 FR 12680 (March 10, 2015) (SR-CBOE-2015-020).

will describe the proposed surcharge and exceptions. Over the past year, the Exchange has observed an increase in solicitations in SPX/SPXW by Floor Brokers in open outcry. A solicited order represented by a Floor Broker may receive certain participation advantages, including priority status.⁵ Additionally, the Exchange notes that solicited orders represented by a Floor Broker may originate from off-floor participants, who do not pay for a Floor Permit or other floor related facility fees as on-floor participants do. The proposed surcharge fee therefore only applies to solicited orders as to not discourage non-solicited participants on the trading floor from continuing to submit bids and offers in response to orders represented by Floor Brokers on the trading floor. As such, the proposed surcharge fee aims to balance incentives between the provision of solicited orders via a Floor Broker, which may originate from off-floor participants, and the provision of non-solicited responses originating from market participants on the trading floor, which the Exchange believes will maintain robust hybrid markets and continue to incentivize the provision of liquidity to its trading floor environment in order to support price discovery and increased execution opportunities in SPX/SPXW on the Exchange's trading floor to the benefit of all market participants.

Next, the Exchange proposes to amend its SPX/SPXW LMM Incentive Programs during the Global Trading Hours ("GTH") session. In particular, the Exchange offers, among other LMM incentive programs, a GTH1 SPX/SPXW LMM Incentive Program that applies during GTH from 7:15 p.m. CST to 2:00 am CST ("GTH1") and a GTH2 SPX/SPXW LMM Incentive Program that apply during GTH from 2:00 a.m. CST to 8:15

⁵ As of January 3, 2023, the open outcry entitlement for solicitations in SPX and SPXW is 40% in accordance with Exchange Rule 5.87(f).

a.m. CST (“GTH2”). The Exchange notes that these LMM incentive programs in the Fees Schedule provide a rebate to Trading Permit Holders (“TPHs”) with LMM appointments that meet certain quoting standards in SPX/SPXW in a month during GTH. The Exchange notes that meeting or exceeding the quoting standards in SPX/SPXW to receive the applicable rebates (as currently offered and as proposed; described in further detail below) is optional for an LMM appointed to one of the SPX/SPXW LMM Incentive Programs. Rather, an LMM appointed to an incentive program is eligible to receive the corresponding rebate if it satisfies the applicable quoting standards (as currently offered and as proposed; described in further detail below), which the Exchange believes encourages an LMM to provide liquidity in the applicable program’s products during GTH. The Exchange may consider other exceptions to the program’s quoting standards based on demonstrated legal or regulatory requirements or other mitigating circumstances. In calculating whether an LMM appointed to a GTH1 SPX/SPXW or GTH2 SPX/SPXW incentive program meets the applicable program’s quoting standards each month, the Exchange excludes from the calculation in that month the business day in which the LMM missed meeting or exceeding the quoting standards in the highest number of series.

Currently, an LMM appointed to one of the GTH SPX/SPXW LMM Incentive Programs must provide continuous electronic quotes during GTH1 or GTH2, as applicable, that meet or exceed the quoting standards set forth in the Fees Schedule in at least 85% of each of the SPX and SPXW series, 90% of the time in a given month, in order to receive a rebate for that month in the amount of \$15,000 for SPX and \$35,000 for SPXW (or pro-rated amount if an appointment begins after the first trading day of the

month or ends prior to the last trading day of the month) for that month. The Exchange now proposes to combine the quoting requirements for SPX and SPXW and provide a single, instead of separate, rebate for meeting or exceeding the quoting standards. Specifically, in order to receive the proposed rebate during GTH1 and/or GTH2, an LMM no longer must meet the quoting standards in each of SPX and SPXW, but rather meet the quoting standard across both classes. As proposed, the SPX/SPXW LMM Incentive Program would provide a rebate of \$40,000 to LMMs that meet the quoting standards during GTH1 and/or GTH2 in the collective SPX and SPXW series. The Exchange notes that no changes are being made to the quoting standards under the GTH1 or GTH2 SPX/SPXW LMM Incentive Program.

Finally, the Exchange proposes to delete Footnote 49 from the Fees Schedule. Currently, pursuant to Footnote 49, transaction fees for Market-Maker orders in the XSP options are waived through December 31, 2022. The waiver was designed to encourage additional Market-Maker order flow in XSP options during the fourth calendar quarter of 2022. Therefore, as the waiver has expired and is no longer applicable, the Exchange proposes to remove Footnote 49 from the Fees Schedule.

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

⁶ 15 U.S.C. 78f(b).

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 the Section 6(b)(5)⁸ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that it is reasonable to increase the amount of the Index License Surcharge fees for orders in SPX/SPXW and MSCI options as the proposed increases are consistent with the purpose of such surcharge fees as they are intended to continue to help recoup some of the costs associated with the license for such products in light of recently renewed license arrangements between the Exchange and the applicable index providers. The proposed Index License Surcharge fees are also equitable and not unfairly discriminatory because the surcharge fees will continue to be assessed uniformly for all non-Customer orders in SPX/SPXW and MSCI options.

The Exchange believes the proposed Floor Broker Solicitation Surcharge Fee is equitable and reasonable. The proposed surcharge fee is within the range of the existing surcharge fees in place for various orders in SPX/SPXW.⁹ Further, as described above,

⁷ 15 U.S.C. 78f(b)(5).

⁸ Id.

⁹ See e.g., Cboe Options Fees Schedule, Rate Tables.

the Exchange believes that the proposed surcharge fee is reasonably designed to not discourage non-solicited market participants on the Exchange's trading floor from continuing to provide bids and offers in response to orders represented by Floor Brokers, particularly in light of the recent influx of solicited order executions (which are represented by Floor Brokers and may originate from off-floor participants) in SPX/SPXW in open outcry. More specifically, the Exchange believes the proposed change is reasonable, equitable and not unfairly discriminatory as solicited orders represented by Floor Brokers may receive certain participation advantages, including priority status that non-solicited market participants on the Exchange's trading floor do not.¹⁰ Additionally, as noted above, solicited orders represented by a Floor Broker may originate from off-floor participants, who do not pay for a Floor Permit or other floor related facility fees as on-floor participants do. The Exchange believes that the proposed surcharge fee will therefore not preclude economic opportunities for non-solicited participants on the trading floor to continue to, and potentially increase, bids and offers in response to SPX/SPXW orders represented by a Floor Broker. As such, the proposed surcharge fee aims to balance incentives between the provision of solicited orders and the provision of non-solicited responses originating from market participants on the trading floor, which the Exchange believes will maintain robust hybrid markets and continue to encourage the provision of liquidity, execution opportunities, and improved pricing opportunities in SPX/SPXW on the Exchange's trading floor to the benefit of all market participants. The Exchange notes that it is reasonable, equitable and not unfairly

¹⁰ As of January 3, 2023, the open outcry entitlement for solicitations in SPX and SPX is 40% in accordance with Exchange Rule 5.87(f).

discriminatory to not assess the proposed surcharge fee to solicited customer-to-customer orders, facilitation orders, or solicited orders that are executed as part of a box or jelly roll strategy or as a FLEX transaction (pursuant to proposed footnote 40). The Exchange notes that with respect to not assessing the proposed surcharge to Customer-to-Customer orders, there is a history in the options markets of providing preferential treatment to customers and customer order flow attracts additional liquidity to the Exchange, providing market participants with more trading opportunities and signaling an increase in Market-Maker activity, which facilitates tighter spreads. This may cause an additional corresponding increase in order flow from other market participants, contributing overall towards a robust and well-balanced market ecosystem. The Exchange believes it's equitable and not unfairly discriminatory to exclude solicitation orders executed as part of a box or jelly roll strategy or as a FLEX transaction as such orders do not generally receive the same participant advantages as solicited orders that are not otherwise a part of complex strategies and FLEX transactions. Further, the Exchange does not wish to discourage the user of such orders. The Exchange also believes its equitable and not unfairly discriminatory to exclude facilitation orders as the Exchange recognizes that Firms are acting as important sources of liquidity in these instances by facilitating their own customers' trading activity and the Exchange does not wish to assess such orders an additional surcharge. The Exchange believes the proposed surcharge fee generally is equitable and not unfairly discriminatory as the proposed surcharge fee will otherwise apply uniformly to all solicited orders in SPX/SPXW where one side is a Customer and where the order was represented by the same Floor Broker and executed in open outcry.

Regarding the SPX/SPXW LMM Incentive Programs, generally, the Exchange believes it is reasonable, equitable and not unfairly discriminatory to continue to offer these financial incentives, including as amended, to LMMs appointed to the programs, because it benefits all market participants trading in SPX/SPXW during GTH. These incentive programs encourage LMMs appointed to such programs to satisfy the applicable quoting standards, which may increase liquidity and provide more trading opportunities and tighter spreads. Indeed, the Exchange notes that these LMMs serve a crucial role in providing quotes and the opportunity for market participants to trade SPX/SPXW options, which can lead to increased volume, providing for robust markets. The Exchange ultimately offers the LMM Incentive Programs, as amended, to sufficiently incentivize LMMs appointed to the programs to provide key liquidity and active markets in the program's products during the corresponding trading sessions. The Exchange believes that these incentive programs, as amended, will continue to encourage increased quoting to add liquidity in SPX and SPXW during GTH, thereby protecting investors and the public interest. The Exchange also notes that an LMM appointed to an incentive program may undertake added costs each month to satisfy that heightened quoting standards (e.g., having to purchase additional logical connectivity).

The Exchange believes that the proposed change to the rebates under the SPX/SPXW GTH LMM Programs is reasonable as a SPX GTH LMMs will still be eligible to receive the proposed financial payment (albeit at a slightly lesser amount and across both SPX and SPXW). The Exchange believes that, even as amended, the SPX/SPXW GTH LMM Incentive Programs are reasonably designed to incentivize an appointed LMM to meet the applicable quoting standards for SPX/SPXW options during

GTH, thereby providing liquid and active markets, which facilitates tighter spreads, increased trading opportunities, and overall enhanced market quality to the benefit of all market participants. Further, the Exchange believes the monthly payment continues to be commensurate with the heightened quoting standard, even as amended. Further, the Exchange believes the proposed rebates applicable to the GTH SPX/SPXW LMM Incentive Programs are equitable and not unfairly discriminatory because they will continue to apply equally to any TPH that is appointed as an LMM to the GTH1 and GTH2 SPX/SPXW LMM Incentive Program. Additionally, the Exchange notes if an LMM appointed to either of the GTH SPX/SPXW LMM Incentive Programs does not satisfy the corresponding quoting standards for any given month, then it simply will not receive the rebate offered by the program for that month.

The Exchange believes that the proposed rule change to eliminate the waiver for Market-Maker XSP orders executed during GTH is reasonable as the waiver is no longer applicable and was set to expire on December 31, 2022. Eliminating the now obsolete waiver language from the Fees Schedule avoids potential confusion. The proposed change is also equitable and not unfairly discriminatory as it applies uniformly to all Market-Makers.

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 that the proposed rule changes in connection with License Index Surcharges fees will impose any burden on intramarket competition because each applies uniformly to all similarly situated TPHs in a uniform manner (i.e., to all non-Customer executions in SPX/SPXW or MSCI options). The Exchange does not

believe that the proposed rule changes in connection with the Floor Broker Solicitation Surcharge will impose any burden on intramarket competition because it applies uniformly to all similarly situated market participants in a uniform manner. Additionally, the proposed changes to the existing GTH SPX/SPXW LMM Incentive Programs will apply to all LMMs appointed to either of the programs in a uniform manner. To the extent these LMMs appointed to an incentive program receive a benefit that other market participants do not, as stated, these LMMs in their role as Mark-Makers on the Exchange have different obligations and are held to different standards. For example, Market-Makers play a crucial role in providing active and liquid markets in their appointed products, thereby providing a robust market which benefits all market participants. Such Market-Makers also have obligations and regulatory requirements that other participants do not have. The Exchange also notes that an LMM appointed to an incentive program may undertake added costs each month that it needs to satisfy that heightened quoting standards (e.g., having to purchase additional logical connectivity). The Exchange also notes that the incentive programs are designed to attract additional order flow to the Exchange, wherein greater liquidity benefits all market participants by providing more trading opportunities, tighter spreads, and added market transparency and price discovery, and signals to other market participants to direct their order flow to those markets, thereby contributing to robust levels of liquidity. Finally, the Exchange does not believe that the proposed rule change to remove Footnote 49 will impose any burden on intramarket competition because it simply removes a reference to a waiver that is expired and thus no longer applicable.

The Exchange does not believe that the proposed rule changes will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed amendments to the surcharges, LMM Incentive Programs, and standard applicable transaction fees for XSP during GTH apply only to Exchange proprietary products, which are traded exclusively on Cboe Options.

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 19% of the market share.¹¹ 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.”¹² The fact that this market is competitive has also long been

¹¹ See Cboe Global Markets U.S. Options Market Volume Summary, Month-to-Date (December 20, 2022), available at https://www.cboe.com/us/options/market_statistics/.

¹² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

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’ . . .”¹³ 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 Act¹⁴ and paragraph (f) of Rule 19b-4¹⁵ 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

¹³ *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)).

¹⁴ 15 U.S.C. 78s(b)(3)(A).

¹⁵ 17 CFR 240.19b-4(f).

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-2023-007 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-2023-007. 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, D.C. 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-2023-007 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.¹⁶

Sherry R. Haywood,
Assistant Secretary.

¹⁶ 17 CFR 200.30-3(a)(12).