

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98511; File No. SR-CBOE-2023-053)

September 25, 2023

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Automated Price Improvement Auction Rules

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 September 20, 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 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 its automated price improvement auction rules. 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.

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).

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 provisions in Rule 5.37 (Automated Price Improvement Mechanism (“AIM” or “AIM Auction”)) and Rule 5.38 (Complex Automated Improvement Mechanism (“C-AIM” or “C-AIM Auction”)) regarding concurrent AIM and C-AIM Auctions, respectively. The Exchange also proposes to update the provisions in those Rules regarding the permissible stop price.

By way of background, Rules 5.37 and 5.38 contain the requirements applicable to the execution of orders using AIM and C-AIM, respectively. The AIM and C-AIM auctions are electronic auctions intended to provide orders that Trading Permit Holders (“TPHs”) represent as agent (“Agency Orders”) with opportunities to receive price improvement (over the National Best Bid or Offer (“NBBO”) in AIM, or the synthetic best bid or offer (“SBBO”) on the Exchange in C-AIM). Upon submitting an Agency Order into an AIM or C-AIM auction, the initiating Trading Permit Holder (“Initiating TPH”) must also submit a contra-side second order (“Initiating Order”) for the same size as the Agency Order. The Initiating Order guarantees that the Agency Order will receive an execution at no worse than the auction price (i.e., acts as a stop). During an AIM or C-AIM Auction, market participants may submit responses to trade

against the Agency Order. At the end of an auction, depending on the contra-side interest available, the Initiating Order may be allocated a certain percentage of the Agency Order.⁵

An Initiating TPH may initiate an AIM or C-AIM auction provided that the Agency Order is in a class and of sufficient size as determined by the Exchange.⁶ Upon receipt of an Agency Order, the AIM or C-AIM auction process commences. Currently, under Rule 5.37(c)(1), for Agency Orders for less than 50 standard option contracts (or 500 mini-option contracts or 5,000 micro-option contracts), only one AIM Auction may be ongoing at any given time in a series, and AIM Auctions in the same series may not queue or overlap in any manner. One or more AIM Auctions in the same series for Agency Orders of 50 standard option contracts (or 500 mini-option contracts or 5,000 micro-option contracts) or more may occur at the same time. The Exchange proposes amending Rule 5.37(c)(1) to allow one or more AIM Auctions in the same series to occur at the same time for Agency Orders for less than 50 standard option contracts (or 500 mini-option contracts or 5,000 micro-option contracts). This would effectively allow for one or more AIM Auctions in the same series to occur at the same time for orders of all sizes. Concurrent AIM Auctions for these smaller-sized orders will occur in the same manner as concurrent AIM Auctions for orders of 50 or more contracts occur today.⁷

Similarly, under current Rule 5.38(c)(1)(A), with respect to Agency Orders for which the smallest leg is less than 50 standard option contracts (or 500 mini-option contracts or 5,000 micro-

⁵ See generally Rules 5.37(e) and 5.38(e).

⁶ See Rules 5.37(a) and 5.38(a), respectively.

⁷ See Rules 5.37(c)(1) (which provides that if there is more than one AIM Auction in a series underway at a time, those auctions will conclude sequentially based on the exact time each auction commenced, including if they are terminated early pursuant to Rule 5.37(d)); and Rule 5.38(c)(1)(B) and (C) (which provides that if there is more than one C-AIM Auction in a complex strategy underway at a time, those auctions will conclude sequentially based on the exact time each auction commenced, including if they are terminated early pursuant to Rule 5.38(d)).

option contracts), only one C-AIM Auction may be ongoing at any given time in a complex strategy, and C-AIM Auctions in the same complex strategy may not queue or overlap in any manner. One or more C-AIM Auctions in the same complex strategy for Agency Orders for which the smallest leg is 50 standard option contracts (or 500 mini-option contracts or 5,000 micro-option contracts) or more may occur at the same time. The Exchange proposes amending Rule 5.38(c)(1)(A) to allow one or more C-AIM Auctions in a complex strategy to occur at the same time for Agency Orders for which the smallest leg is less than 50 standard option contracts (or 500 mini-option contracts or 5,000 micro-option contracts). This would effectively allow for one or more C-AIM Auctions in the same complex strategy to occur at the same time for complex orders of all sizes. The Exchange believes this proposed functionality will allow more AIM Auctions in the same series and more C-AIM Auctions in the same complex strategy to be conducted, thereby increasing opportunities for price improvement on the Exchange to the benefit of all market participants.

Currently, if an Agency Order of fewer than 50 contracts (or 500 mini-option contracts or 5,000 micro-option contracts) is submitted to AIM or C-AIM while an AIM or C-AIM Auction is in progress, the Agency order is rejected. The proposal to add concurrent AIM and C-AIM Auctions for Agency Orders of any size, including for Agency Orders of fewer than 50 contracts (or 500 mini-option contracts or 5,000 micro-option contracts), would also prevent the rejection of these smaller Agency Orders that occurs when such smaller Agency Orders are submitted while an AIM or C-AIM Auction is in progress. By eliminating this rejection scenario, the Exchange would increase execution and price improvement opportunities for these smaller Agency orders to the benefit of investors.

The Exchange notes that allowing more than one price improvement auction at a time in the same series for paired agency orders of fewer than 50 contracts is not new or novel and is current functionality on at least one other options exchange.⁸ While the Exchange is unaware of another options exchange that offers concurrent price improvement auctions for orders in complex strategies for which the smallest leg is fewer than 50 contracts, other options exchanges (as well as the Exchange) permit simple price improvement auctions to occur simultaneously with complex price improvement auctions for complex strategies involving the same series, with no size restrictions.⁹ Having simple price improvement auctions in multiple legs of a complex strategy in progress at the same time as a complex price improvement auction for that complex strategy for orders of any size is similar to two complex price improvement auctions in the same complex strategy being in progress at the same time. Additionally, the benefits of allowing concurrent price improvement auctions for simple orders of all sizes and complex strategies with 50 contracts in the smallest leg or more (as described above) would apply to concurrent price improvement auctions for complex strategies with fewer than 50 contracts in the smallest leg. Specifically, allowing concurrent C-AIM Auctions in the same complex strategy if the smallest leg has fewer than 50 contracts would benefit investors because it would afford smaller-sized complex orders increased opportunities to solicit price-improving auction interest. The Exchange further believes this proposed change would provide additional benefits to customers, as smaller-sized orders tend to represent retail interest, and could improve the customer experience on the Exchange by increasing trading opportunities in the C-AIM Auctions.

⁸ See, e.g., NYSE American LLC (“NYSE American”) Rule 971.1NYP(c) (as recently amended) (see Securities Exchange Act Release No. 97938 (July 18, 2023), 88 FR 47536 (July 24, 2023) (SR-NYSEAMER-2023-35) (permitting concurrent simple price improvement auctions).

⁹ See, e.g., NYSE American Rule 971.1NYP, Commentary .01; BOX Exchange LLC (“BOX”) Rules 7150, IM-7150-1 and 7245, IM-7245-2; and Nasdaq ISE, LLC (“ISE”) Options 3, Sections 11(g) and 13, Supplementary Material .04.

The proposal to allow concurrent AIM and C-AIM Auctions for Agency Orders for less than 50 contracts (or 500 mini-option contracts or 5,000 micro-option contracts) in the same series or complex strategy, respectively, would benefit investors because it would afford smaller-sized Agency Orders increased opportunities for price improvement, including because such smaller Agency Orders would no longer be rejected if submitted while an AIM or C-AIM Auction is in progress.

The Exchange will continue to protect smaller-sized simple Agency Orders in minimum increment-wide¹⁰ markets by requiring price improvement of at least one minimum increment for such orders and rejecting such orders in minimum increment-wide markets that do not provide for such price improvement.¹¹ Additionally, the Exchange will continue to protect Priority Customers on the Simple Book by requiring price improvement of at least one minimum increment better than the SBBO if the applicable side of the BBO on any component of the complex Agency Order complex strategy represents a Priority Customer on the Simple Book.¹² These protections would apply when the proposed concurrent Auctions are occurring. Thus, the Exchange believes this proposed change should allow the Exchange to better compete for auction-related order flow that may lead to an increase in Exchange volume, while continuing to

¹⁰ The Exchange proposes to amend Rule 5.37(b)(1) to require the stop price be at least one minimum increment better than the then-current NBBO if the NBBO width equals the minimum increment rather than \$0.01. The purpose of this provision is to require this price improvement if the width of the NBBO is as narrow as possible. However, if the minimum increment for a class is, for example, \$0.05, it would not be possible to price improve penny-wide market in the permissible minimum increment of \$0.05. The proposed rule change will ensure that smaller-sized orders receive this price improvement when the NBBO is as narrow as possible, as intended.

¹¹ See Rule 5.37(b)(1). The proposed rule change continues to provide price improvement assurances for those for buy (sell) Agency Orders submitted for AIM Auction processing with less than 50 standard option contracts (or 500 mini-option contracts or 5,000 micro-option contracts) and NBBO width of \$0.01, pursuant to Rule 5.37(b)(1)(A), which remains unchanged.

¹² See Rule 5.38(b)(1).

ensure that displayed customer interest on the Book is protected, to the benefit of all market participants.

The Exchange believes that its System has sufficient capacity to process a large volume of concurrent AIM and C-AIM Auctions for Agency Orders of any size, including for Agency Orders of fewer than 50 contracts (or 500 mini-option contracts or 5,000 micro-option contracts).

Additionally, the Exchange proposes to amend Rule 5.38(c)(1)(B) related to early termination priority in the event of concurrent AIM and C-AIM Auctions. Currently, if the System receives a simple order that causes AIM and C-AIM (or multiple AIM and/or C-AIM) Auctions to end in early termination, the System first processes AIM Auctions (in price-time priority) and then processes C-AIM Auctions (in price-time priority). The Exchange proposes to update Rule 5.38(c)(1)(B) to provide for the processing of early terminations in time priority in these instances. Under the proposed rule, if the System receives a simple order that causes AIM and C-AIM (or multiple AIM and/or C-AIM) Auctions to end in early termination, the System will continue to first process AIM Auctions (sequentially based on the exact time each AIM Auction commenced) and then process C-AIM Auctions (sequentially based on the exact time each C-AIM Auction commenced), which is consistent with the priority the System processes concurrent AIM Auctions and concurrent C-AIM Auctions.

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.¹³ Specifically, the

¹³ 15 U.S.C. 78f(b).

Exchange believes the proposed rule change is consistent with the Section 6(b)(5)¹⁴ 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)¹⁵ requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposal to permit concurrent AIM and C-AIM Auctions for Agency Orders for less than 50 contracts (or 500 mini-option contracts or 5,000 micro-option contracts) in the same series or complex strategy, respectively, would remove impediments to and perfect the mechanisms of a free and open market and a national market system because it would extend concurrent auction functionality to smaller-sized Agency Orders. The Exchange also believes this proposed change is non-controversial because it does not raise any issues that differ from those previously considered when the Exchange and other options exchanges adopted this functionality for larger-sized agency orders submitted to price improvement auctions, or when another options exchange adopted this functionality (pursuant to an immediately effective, noncontroversial rule filing) for smaller-sized simple agency orders submitted into a price improvement auction.¹⁶ The Exchange believes the proposal will benefit investors because it would afford smaller-sized Agency Orders increased opportunity to solicit price-improving

¹⁴ 15 U.S.C. 78f(b)(5).

¹⁵ Id.

¹⁶ See supra note 8.

auction interest. The Exchange further believes that this proposed rule change would provide additional benefits to customers, as smaller-sized Agency Orders tend to represent retail interest, and could improve the customer experience on the Exchange by increasing trading opportunities in AIM and C-AIM Auctions. Notwithstanding the proposal to allow concurrent AIM auctions for smaller-sized Agency Orders, the Exchange would continue to protect customer interest on the simple Book by requiring price improvement over the BBO to initiate an Auction for smaller-sized Agency Orders and rejecting such orders in increment wide markets when price improvement is not possible. Additionally, the Exchange will continue to protect Priority Customers on the Simple Book by requiring price improvement of at least one minimum increment better than the SBBO if the applicable side of the BBO on any component of the complex Agency Order complex strategy represents a Priority Customer on the Simple Book.¹⁷

Further, the Exchange believes the proposed new functionality to allow concurrent AIM and C-AIM auctions for Agency Orders of any size is consistent with the Act, as the proposed rule changes will prevent the rejection of these smaller Agency Orders that occurs when such smaller Agency Orders are submitted while an AIM or C-AIM Auction is in progress, which the Exchange believes will increase execution opportunities for these smaller Agency orders to the benefit of investors. For example, in July 2023, the new functionality would have provided investors with additional price improvement and execution opportunities via approximately 6,000 additional AIM or C-AIM Auctions that were otherwise rejected due to current concurrency limitations.

The Exchange also believes this proposed new functionality to allow concurrent AIM and C-AIM auctions for Agency Orders of any size should promote and foster competition and

¹⁷ See supra note 12.

provide more options contracts with the opportunity for price improvement, which should benefit all market participants. In addition, this proposed change may lead to an increase in Exchange volume and should allow the Exchange to better compete against other markets that permit overlapping price improvement auctions, while continuing to ensure that displayed customer interest on the simple Book is protected. The proposed enhancement to allow concurrent auctions for Agency Orders of any size would be a competitive change and may make the Exchange a more attractive venue for auction-related order flow. As noted above, the Exchange believes that its trading platform has sufficient capacity to process a large volume of concurrent Auctions for Agency Orders of any size, including for Agency Orders of fewer than 50 contracts (or 500 mini-option contracts or 5,000 micro-option contracts).

Further, the Exchange believes its proposal to amend its AIM Rules to require the stop price be at least one minimum increment better than the then-current NBBO if the NBBO width equals the minimum increment for the class rather than \$0.01 would remove impediments to and perfect the mechanisms of a free and open market and a national market system. As stated above, the purpose of this provision is to require this price improvement if the width of the NBBO is as narrow as possible. However, if the minimum increment for a class is, for example, \$0.05, it would not be possible to price improve penny-wide market in the permissible minimum increment of \$0.05. The Exchange believes the proposal, which is consistent with the original intention of current AIM stop price rules (which permit the Exchange to determine different AIM minimum increments for classes), will ensure that smaller-sized orders receive this price improvement when the NBBO is as narrow as possible, to the benefit of the marketplace and investors.

Finally, the Exchange believes the proposed rule change related to the processing of AIM and C-AIM Auctions in the event of early termination will promote just and equitable principles of trade, in accordance with the Act. The Exchange believes processing concurrent AIM and C-AIM Auctions that end in early termination in time priority is a fair and equitable process, and consistent with the priority applicable to concurrent AIM Auctions and concurrent C-AIM Auctions when they are terminated early.

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 it will apply uniformly to TPHs. The proposed rule change will result in smaller orders receiving the same opportunities for execution and price improvement through AIM and C-AIM that are already afforded to larger orders, which are not subject to the concurrency restriction. As noted above, the proposed rule change to require the stop price in AIM Auctions be at least one minimum increment better than the then-current NBBO if the NBBO width equals the minimum increment for the class rather than \$0.01 will ensure that smaller-sized orders receive this price improvement when the NBBO is as narrow as possible, which the Exchange believes will result in orders in all classes receiving the same price improvement opportunities through AIM and C-AIM in a manner consistent with the applicable minimum increment. Further, the Exchange does not believe the proposed rule change related to the processing of AIM and C-AIM Auctions in the event of early termination will impose any burden on intramarket competition that is not

necessary or appropriate in furtherance of the purposes of the Act, as it will apply in the same manner to all Agency Orders.

Additionally, the Exchange notes that participation in the AIM and C-AIM Auctions is completely voluntary. The Exchange believes all market participants, particular those that submit smaller orders, may benefit from any additional liquidity, execution opportunities, and price improvement in the AIM and C-AIM Auctions that may result from the proposed rule change.

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. The Exchange notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues who offer similar functionality. The Exchange believes this proposed rule change would promote fair competition among the options exchanges and establish more uniform functionality across the various price improvement auctions offered by other options exchanges. The proposed functionality may lead to an increase in Exchange volume and should allow the Exchange to better compete against other options markets that already offer similar price improvement mechanisms and for this reason the proposal does not create an undue burden on intermarket competition. By contrast, not having the proposed functionality places the Exchange at a competitive disadvantage vis-à-vis other exchanges that offer similar price improvement mechanisms. As noted above, another options exchange adopted this functionality (pursuant to an immediately effective, noncontroversial rule filing) to allow for concurrent price improvement auctions for smaller-sized simple agency orders,¹⁸ and other options exchanges (as well as the Exchange) permit

¹⁸ See supra note 8.

simple price improvement auctions to occur simultaneously with complex price improvement auctions for complex strategies involving the same series, with no size restrictions.¹⁹

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

Because the foregoing 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 Act²⁰ and Rule 19b-4(f)(6)²¹ 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:

¹⁹ See supra note 9.

²⁰ 15 U.S.C. 78s(b)(3)(A).

²¹ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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.

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CBOE-2023-053 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-2023-053. This file number should be included on the subject line if email 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 (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright

protection. All submissions should refer to file number SR-CBOE-2023-053 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Sherry R. Haywood,

Assistant Secretary.

²² 17 CFR 200.30-3(a)(12).