

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98660; File No. SR-CBOE-2023-058)

September 29, 2023

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend its Fees Schedule to Adopt a Temporary Options Regulatory Fee

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 28, 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 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 relating to the Options Regulatory Fee. 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.

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 the Fee Schedule to revise the ORF charged solely for the dates of September 28 and 29, 2023.

Background

By way of background, the ORF is assessed by Cboe Options to each Trading Permit Holder (“TPH”) for options transactions cleared by the TPH that are cleared by the Options Clearing Corporation (“OCC”) in the customer range, regardless of the exchange on which the transaction occurs.³ In other words, the Exchange imposes the ORF on all customer-range transactions cleared by a TPH, even if the transactions do not take place on the Exchange. The ORF is collected by OCC on behalf of the Exchange from the Clearing Trading Permit Holder (“CTPH”) or non-CTPH that ultimately clears the transaction. With respect to linkage transactions, Cboe Options reimburses its routing broker providing Routing Services pursuant to Cboe Options Rule 5.36 for options regulatory fees it incurs in connection with the Routing Services it provides.

Revenue generated from ORF, when combined with all of the Exchange's other regulatory

³ The Exchange notes ORF also applies to customer-range transactions executed during Global Trading Hours.

fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of TPH customer options business including performing routine surveillances, investigations, examinations, financial monitoring, and policy, rulemaking, interpretive, and enforcement activities. Regulatory costs include direct regulatory expenses and certain indirect expenses for work allocated in support of the regulatory function. The direct expenses include in-house and third-party service provider costs to support the day-to-day regulatory work such as surveillances, investigations and examinations. The indirect expenses include support from such areas as human resources, legal, compliance, information technology, facilities and accounting. These indirect expenses are estimated to be approximately 30% of Cboe Options' total regulatory costs for 2023. Thus, direct expenses are estimated to be approximately 70% of total regulatory costs for 2023. In addition, it is Cboe Options' practice that revenue generated from ORF not exceed more than 75% of total annual regulatory costs. These expectations are estimated, preliminary and may change. There can be no assurance that our final costs for 2023 will not differ materially from these expectations and prior practice; however, the Exchange believes that revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs.

The Exchange monitors its regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs in a given year, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. The Exchange also notifies TPHs of adjustments to the ORF via an Exchange Notice, including for the change being proposed herein.⁴ Based on the Exchange's

⁴ See Exchange Notice, C2023071301 "Cboe Options Exchanges Regulatory Fee Update Effective August 1,

most recent semi-annual review, the Exchange proposed to increase the amount of ORF collected by the Exchange from \$0.0017 per contract side to \$0.0030 per contract side, effective August 1, 2023.⁵ The proposed increase was based on the Exchange’s estimated projections for its regulatory costs, which have increased, coupled with a projected decrease in the Exchange’s other non-ORF regulatory fees.⁶ Particularly, based on the Exchange’s estimated projections for its regulatory costs, the revenue being generated by ORF using the then-current rate, would result in projected revenue that is insufficient to cover a material portion of its regulatory costs (i.e., less than 75% of total annual regulatory costs). Further, when combined with the Exchange’s projected other non-ORF regulatory fees and fines, the revenue being generated by ORF using the then-current rate results was projected to result in combined revenue that is less than 100% of the Exchange’s estimated regulatory costs for the year.

OIP and Current Proposal

As noted above, on August 1, 2023 the Exchange filed to increase ORF to \$0.0030 (from \$0.0017) per contract side (the “August ORF Filing”). However, on September 28, 2023, the Commission issued the Suspension of and Order Instituting Proceedings to Determine whether to Approve or Disapprove a Proposed Rule Change to Modify the Options Regulatory Fee (“the “OIP”).⁷ As a result of the OIP, on September 28, 2023, the ORF reverted back to the rate in place prior to August 1, 2023 (i.e., \$0.0017 per contract side).

2023.”

⁵ See Securities Exchange Act Release No. 98106 (August 10, 2023), 88 FR 55796 (August 16, 2023) (SR-CBOE-2023-038).

⁶ The Exchange notes that in connection with the August 1, 2023 ORF rate change, it provided the Commission confidential details regarding the Exchange’s projected regulatory revenue, including projected revenue from ORF, along with a breakout of its projected regulatory expenses, including both direct and indirect allocations.

⁷ See Securities Exchange Act Release No. 98596 (September 28, 2023) (SR-CBOE-2023-038).

To ensure consistency of ORF assessments for the full month of September 2023, the Exchange proposes to modify the Fee Schedule to specify that the amount of ORF that will be collected by the Exchange through September 29, 2023 (i.e., the last trading day of the month of September), will be \$0.0030 per contract side (the “September ORF Rate”) and that effective October 2, 2023, the ORF will be \$0.0017 per contract side.⁸ The Exchange believes that revenue generated from the ORF, including based on the September ORF Rate, will continue to cover a material portion, but not all, of the Exchange’s regulatory costs.

As noted above, the Exchange endeavors to notify TPHs of any change in the amount of the fee at least 30 calendar days prior to the effective date of the change via Exchange Notice; however, the Exchange notes that as a result of the OIP, such notice in this instance could not be given 30 days in advance.

For avoidance of doubt, the Exchange notes that the September ORF Rate applies only through September 29, 2023 and that the ORF, effective October 2, 2023, will be assessed at a rate of \$0.0017 per contract (i.e., the rate in place prior to the August ORF Filing).

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)⁹ of the Act, in general, and Section 6(b)(4) and (5)¹⁰ of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers, or dealers.

⁸ This proposal is not intended to be responsive to any issues that may be raised in the OIP, but to instead address the immediate issue of billing for September 28 and 29th.

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

The Proposal is Reasonable

The Exchange believes the proposed September ORF Rate is reasonable because it would help maintain fair and orderly markets and benefit investors and the public interest because it would ensure transparency and consistency of ORF for the entire month of September 2023. Specifically, the proposal would ensure that the amount of ORF collected by the Exchange for the trading days of September 28 and 29, 2023 will be the same rate collected on every other trading day in September (i.e., \$0.0030 per contract side). The Exchange believes this will avoid disruption to its TPHs that are subject to the ORF. As noted above, the Exchange may only use regulatory funds such as ORF “to fund the legal, regulatory, and surveillance operations” of the Exchange.

The Proposal is an Equitable Allocation of Fees

The Exchange believes its proposal is an equitable allocation of fees among its market participants. The Exchange believes that the proposed September ORF Rate would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from TPH clearing firms by the OCC on behalf of the Exchange, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such TPHs. In addition, the Exchange notes that the regulatory costs relating to monitoring TPHs with respect to Customer trading activity are generally higher than the regulatory costs associated with TPHs that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating TPHs that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers,

but also the TPH's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., TPH proprietary transactions) of its regulatory program. Thus, the Exchange believes the September ORF Rate (like the rate assessed for every other trading day in September 2023) would be equitably allocated in that it is charged to all TPHs on all their transactions that clear in the Customer range at the OCC.

The Proposed Fee is not Unfairly Discriminatory

The Exchange believes that the proposal is not unfairly discriminatory. The Exchange believes that the proposed September ORF Rate would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. Because the ORF is collected from TPH clearing firms by the OCC on behalf of the Exchange, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such TPHs. In addition, the Exchange notes that the regulatory costs relating to monitoring TPH with respect to Customer trading activity are generally higher than the regulatory costs associated with TPHs that do not engage in Customer trading activity, which tends to be more automated and less labor-intensive. By contrast, regulating TPHs that engage in Customer trading activity is generally more labor intensive and requires a greater expenditure of human and technical resources as the Exchange needs to review not only the trading activity on behalf of Customers, but also the TPH's relationship with its Customers via more labor-intensive exam-based programs. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory

program are materially higher than the costs associated with administering the non-customer component (e.g., TPH proprietary transactions) of its regulatory program. Thus, the Exchange believes the September ORF Rate (like the rate assessed for every other trading day in September 2023), is not unfairly discriminatory because it is charged to all TPHs on all their transactions that clear in the Customer range at the OCC.

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 change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition. The Exchange believes the proposed fee change would not impose an undue burden on competition as it is charged to all TPHs on all their transactions that clear in the Customer range at the OCC; thus, the amount of ORF imposed is based on the amount of Customer volume transacted. The Exchange believes that the proposed ORF would not place certain market participants at an unfair disadvantage because all options transactions must clear via a clearing firm. Such clearing firms can then choose to pass through all, a portion, or none of the cost of the ORF to its customers, i.e., the entering firms. In addition, because the ORF is collected from TPH clearing firms by the OCC on behalf of the Exchange, the Exchange believes that using options transactions in the Customer range serves as a proxy for how to apportion regulatory costs among such TPHs.

Intermarket Competition. The proposed fee change is not designed to address any competitive issues. Rather, the proposed change is designed to help the Exchange adequately fund

its regulatory activities while seeking to ensure that total regulatory revenues do not exceed total regulatory costs.

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 is effective upon filing pursuant to Section 19(b)(3)(A)¹¹ of the Act and subparagraph (f)(2) of Rule 19b-4¹² thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such 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 shall institute proceedings under Section 19(b)(2)(B)¹³ of the Act 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:

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(2).

¹³ 15 U.S.C. 78s(b)(2)(B).

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-2023-058 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-2023-058. 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-2023-058 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.¹⁴

Sherry R. Haywood,
Assistant Secretary.

¹⁴ 17 CFR 200.30-3(a)(12).