

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-98628; File No. SR-FINRA-2023-010)

September 28, 2023

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Provide Relief Relating to Specified Option Transactions under FINRA Rule 4210 (Margin Requirements)

I. Introduction

On June 30, 2023, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”), pursuant to Section 19(b)(1) of the Securities and Exchange Act of 1934 (“Exchange Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend FINRA Rule 4210 (Margin Requirements) to provide margin relief for specified index option transactions, known as “protected options,” and to make other minor conforming revisions with regard to the margin relief. The proposed rule change was published for comment in the Federal Register on July 19, 2023.<sup>3</sup> The Commission received two comment letters on the proposal.<sup>4</sup> On August 31, 2023, FINRA extended the time period in which the Commission must approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change to October 17, 2023.<sup>5</sup> The Commission is publishing this order pursuant to

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Exchange Act Release No. 97898 (Jul. 13, 2023), 88 FR 46204 (“Notice”).

<sup>4</sup> Comments received on the proposed rule change are available at <https://www.sec.gov/comments/sr-finra-2023-010/srfinra2023010.htm>.

<sup>5</sup> See Letter from Adam Arkel, Associate General Counsel, FINRA, to Sheila Swartz, Division of Trading and Markets, Commission (Aug. 31, 2023).

Section 19(b)(2)(B) of the Exchange Act<sup>6</sup> to solicit comments on the proposed rule change and to institute proceedings to determine whether to approve or disapprove the proposed rule change.

## II. Description of the Proposed Rule Change

In its filing with the Commission, FINRA stated that Cboe Exchange, Inc. (“Cboe” or the “Exchange”) filed with the Commission a proposed rule change to amend Cboe Rule 10.3 regarding margin requirements related to cash-settled index options written against exchange-traded funds (“ETF(s)”) that track the same index underlying the option,<sup>7</sup> which the Commission approved on March 2, 2023.<sup>8</sup>

FINRA stated that the Cboe rule change established a new exception to those margin requirements with respect to a “protected option” strategy, as set forth in new paragraph (c)(5)(C)(iv)(e) of Cboe Rule 10.3.<sup>9</sup> Subject to specified conditions, the exception is applicable to short option positions or warrants on indexes that are offset by positions in an underlying stock basket, non-leveraged index mutual fund, or non-leveraged ETF that is based on the same index option.<sup>10</sup> In approving Cboe’s rule change, FINRA observed that the Commission stated it believes the rule change will facilitate the use of protected options and reduce associated costs and burdens.<sup>11</sup> FINRA stated that, in the interest of regulatory harmony and ensuring that the

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<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> See Exchange Act Release No. 96395 (Nov. 28, 2022), 87 FR 74199 (Dec. 2, 2022) (Notice of Filing of a Proposed Rule Change to Amend Rule 10.3 Regarding Margin Requirements; File No. SR-CBOE-2022-058) (“Cboe Proposal”). See also Notice at 46205, n.3.

<sup>8</sup> See Exchange Act Release No. 97019 (Mar. 2, 2023), 88 FR 14416 (Mar. 8, 2023) (Order Approving a Proposed Rule Change to Amend Rule 10.3 Regarding Margin Requirements; File No. SR-CBOE-2022-058) (“Cboe Approval Order”).

<sup>9</sup> See Notice at 46205.

<sup>10</sup> Cboe distinguishes the “protected option” strategy from a “covered call,” which is a strategy of writing an option against a position in an underlying security and is addressed by separate margin requirements under Cboe rules. See Cboe Proposal at 74201. See also Notice at 46205, n.8.

<sup>11</sup> See Cboe Approval Order at 14418.

potential benefits of protected option treatment are available to FINRA members and their customers, FINRA proposed to conform its margin rule to the provisions Cboe adopted and to make other minor conforming revisions.<sup>12</sup>

Specifically, FINRA proposes to add new paragraph (f)(2)(H)(v)f. (“Protected Options”) to FINRA Rule 4210.<sup>13</sup> The new paragraph would provide that when an index call (put) option or warrant is carried “short” (the “protected option or warrant position”) and there is carried in the same account a “long” (short) position in an underlying stock basket, non-leveraged index mutual fund, or non-leveraged ETF (each referred to as the “protection”) that is based on the same index underlying the index option or warrant, the protected option or warrant position is not subject to the requirements set forth in paragraphs (f)(2)(E)(i) and (f)(2)(E)(iii) of Rule 4210<sup>14</sup> if the following conditions, which conform to the Cboe rule, are met:<sup>15</sup>

1. when the protected option or warrant position is created, the absolute value of the protection is not less than 100 percent of the aggregate current underlying index value associated with the protected option or warrant position determined at either:

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<sup>12</sup> See Notice at 46205.

<sup>13</sup> See Exhibit 5 to the proposed rule change, available at <https://www.sec.gov/files/rules/sro/finra/2023/34-97898-ex5.pdf>.

<sup>14</sup> FINRA stated that the exception from the margin requirements under Cboe’s new rule is virtually identical to the margin requirements set forth in Cboe Rule 10.3(c)(5)(A), which sets forth margin requirements for listed options. According to FINRA, paragraph (f)(2)(E)(i) under FINRA Rule 4210 correspondingly addresses listed options and is virtually identical to the Cboe provisions. Paragraph (f)(2)(E)(iii) of FINRA Rule 4210 addresses margin requirements for over-the-counter (“OTC”) products. As such, FINRA proposed to include both listed and OTC products within the scope of the exception. FINRA stated that both types of products would be subject to the conditions specified under the rule which, according to FINRA, are virtually identical to Cboe’s provisions. FINRA stated that it believes this harmonized approach to both listed and OTC options is appropriate for purposes of the rule change to broaden availability of the benefits of the protected option strategy to, for example, non-Cboe FINRA members, and would thereby prevent a potential gap between listed and OTC options. See also Notice at 46205, n.12.

<sup>15</sup> See *id.* at 46205.

- A. the time the order that created the protected option or warrant position was entered or executed; or
  - B. the close of business on the trading day the protected option or warrant position was created;
2. the absolute value of the protection is at no time less than 95 percent of the aggregate current underlying index value associated with the protected option or warrant position; and
3. margin is maintained in an amount equal to the greater of:
  - A. the amount, if any, by which the aggregate current underlying index value is above (below) the aggregate exercise price of the protected call (put) option or warrant position; or
  - B. the amount, if any, by which the absolute value of the protection is below 100 percent of the aggregate current underlying index value associated with the protected option or warrant.<sup>16</sup>

FINRA also proposes to expand the protected options treatment to OTC options, so they are subject to the same conditions as listed options. FINRA stated that it believes that harmonizing the FINRA margin requirements for OTC options with the amended Cboe rule would reduce potential regulatory arbitrage that would favor listing options on Cboe. FINRA stated that while it does not have sufficient information on how many investors or members would choose to make use of the protected options treatment for either listed or OTC options, it believes the number is small and would be limited to institutional investors.<sup>17</sup>

FINRA stated that in proposing the margin exception for protected options, Cboe

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<sup>16</sup> See id.

<sup>17</sup> See id. at 46206. See also supra note 14.

emphasized that the exception is not intended to and does not apply to leveraged instruments.<sup>18</sup>

In addition, FINRA proposes minor revisions to paragraphs (f)(2)(H)(v)a. through d. of FINRA Rule 4210 to conform with the usage of the term “in the same account” as used in proposed paragraph (f)(2)(H)(v)f.<sup>19</sup> Specifically:

- in paragraph (f)(2)(H)(v)a., the phrase “in an account in which there is also carried . . .” would be changed to read “in the same account as . . .”
- in paragraphs (f)(2)(H)(v)b. through d., the phrase “is also carried with . . .” would be changed to read “there is carried in the same account . . .”<sup>20</sup>

FINRA stated that it believes these changes are appropriate because they clarify the rule text and conform with the new proposed protected option provisions.<sup>21</sup>

Lastly, FINRA stated that if the Commission approves the proposed rule change, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice.<sup>22</sup> The effective date will be no later than 30 days following publication of the Regulatory Notice announcing Commission approval of the proposed rule change.<sup>23</sup>

### III. Proceedings to Determine Whether to Approve or Disapprove SR-FINRA-2023-010 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act to determine whether the proposed rule change should be approved or

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<sup>18</sup> See Cboe Proposal at 74201; see also Cboe Approval Order at 14417 and Notice at 46205.

<sup>19</sup> See Notice at 46205.

<sup>20</sup> See id.

<sup>21</sup> See id.

<sup>22</sup> See id.

<sup>23</sup> See id. at 46205-46206. FINRA stated that the proposed rule change would not impact funding portal members and would not impact members that have elected to be treated as capital acquisition brokers (“CABs”). According to FINRA, these members are not subject to Rule 4210. See id. at 46205, n.14.

disapproved.<sup>24</sup> Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Exchange Act,<sup>25</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis and input concerning whether the proposed rule change is consistent with the Exchange Act and the rules thereunder.

In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

- What are commenters' views on FINRA's proposal to expand the protected options treatment to OTC options so they are subject to the same conditions as listed options? Would the expansion of the protected options treatment to OTC options help to reduce potential regulatory arbitrage that may favor listing options on certain exchanges?
- What are commenters' views on the types of market participants that would utilize the protected options treatment for either listed or OTC options? For example, would use of the protected options treatment for either listed or OTC options be generally limited to institutional investors? Please explain why or why not.

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<sup>24</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>25</sup> Id.

#### IV. Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposed rule change. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with the Exchange Act and the rules thereunder.

Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Exchange Act,<sup>26</sup> any request for an opportunity to make an oral presentation.<sup>27</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [insert date 21 days after the date of publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days after the date of publication in the Federal Register].

Comments may be submitted by any of the following methods:

##### Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or

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<sup>26</sup> 17 CFR 240.19b-4.

<sup>27</sup> Section 19(b)(2) of the Exchange Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-FINRA-2023-010 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-FINRA-2023-010. 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 such filing also will be available for inspection and copying at the principal office of FINRA. 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-FINRA-2023-010, and should be submitted on or before [insert date 21 days after the date of publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days after the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>28</sup> 17 CFR 200.30-3(a)(57).