



SECURITIES AND EXCHANGE COMMISSION

[Release No.34-98106; File No. SR-CBOE-2023-038]

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

August 10, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on August 1, 2023, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (“SEC” or “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.

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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 increase the Options Regulatory Fee ("ORF") from \$0.0017 per contract to \$0.0030 per contract, effective August 1, 2023.

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 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

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

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 most recent semi-annual review, the Exchange is proposing to increase the amount of ORF that will be collected by the Exchange from \$0.0017 per contract side to \$0.0030 per contract side. The proposed increase is 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.⁵ Particularly, based on the Exchange's estimated projections for its regulatory costs, the revenue being generated by ORF using the current rate, would result in projected revenue that is insufficient to cover a material portion of its regulatory

⁴ See Exchange Notice, C2023071301 "Cboe Options Exchanges Regulatory Fee Update Effective August 1, 2023."

⁵ The Exchange notes that in connection with proposed ORF rate changes, it provides 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.

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 current rate results is projected to result in combined revenue that is less than 100% of the Exchange's estimated regulatory costs for the year.

The Exchange will continue to monitor the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs.

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 Section 6(b)(4) of the Act⁷, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its TPHs and other persons using its facilities. 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 the proposed fee change is reasonable because it would help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would help offset, but not exceed, the Exchange's total regulatory costs. As discussed, the Exchange has designed the ORF to generate revenues that would be less than or equal to 75% of the Exchange's regulatory costs, which is consistent with the practice across the options industry and the view of the Commission that regulatory fees be used for regulatory purposes and not to

⁶ 15 U.S.C. 78f(b).

⁷ 15 U.S.C. 78f(b)(4).

⁸ 15 U.S.C. 78f(b)(5).

support the Exchange's business side. The Exchange determined to increase ORF after its semi-annual review of its regulatory costs and regulatory revenues, which includes revenues from ORF and other regulatory fees and fines. The Exchange notes that although recent options volumes have increased, it has not increased its ORF rate in four years. In fact, since 2019, the Exchange has reduced its ORF rates twice.⁹ Accordingly, when taking into account recent options volume, coupled with the anticipated regulatory fees and anticipated reductions in other regulatory fees, the Exchange believes it's reasonable to increase the ORF. Particularly, the proposed change is reasonable as it would offset the anticipated increased regulatory costs, while still not exceeding 75% of the Exchange's total regulatory costs. Moreover, the proposed amount is still lower than the amount of ORF assessed on other exchanges¹⁰ and significantly lower than the Exchange has assessed previously.¹¹

As noted above, the Exchange will also continue to monitor on at least a semi-annual basis the amount of revenue collected from the ORF, even as amended, to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. If the Exchange determines regulatory revenues would exceed its regulatory costs in a given year, the Exchange will reduce the ORF by submitting a fee change filing to the Commission.¹²

⁹ See Securities Exchange Act Release No. 89469 (August 4, 2020), 85 FR 48306 (August 10, 2020) (SR-CBOE-2020-069) and Securities Exchange Act Release No. 92597 (August 6, 2021), 86 FR 44454 (August 12, 2021) (SR-CBOE-2021-044).

¹⁰ See e.g., NYSE Arca Options Fees and Charges, Options Regulatory Fee ("ORF") and NYSE American Options Fees Schedule, Section VII(A), which provide that ORF is assessed at a rate of \$0.0055 per contract for each respective exchange. See also Nasdaq PHLX, Options 7 Pricing Schedule, Section 6(D), which provides for an ORF rate of \$0.0034 per contract.

¹¹ See e.g., Securities Exchange Act Release No. 71007 (December 6, 2013), 78 FR 75653 (December 12, 2013) (SR-CBOE-2013-117) (filing to increase ORF to \$0.0095 per contract). See also Securities Exchange Act Release No. 76993 (January 28, 2016), 81 FR 5800 (February 3, 2016) (SR-CBOE-2016-004) (filing to increase ORF to \$0.0081 per contract).

¹² Consistent with Rule 2.2 (Regulatory Revenue), the Exchange notes that should excess ORF revenue be collected prior to any reduction in an ORF rate, such excess revenue will not be used for nonregulatory purposes.

The Exchange also believes the proposed fee change is equitable and not unfairly discriminatory in that it is charged to all TPHs on all their transactions that clear in the customer range at the OCC. The Exchange believes the ORF ensures fairness by assessing higher fees to those TPHs that require more Exchange regulatory services based on the amount of customer options business they conduct. Regulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive. For example, there are costs associated with main office and branch office examinations (e.g., staff and travel expenses), as well as investigations into customer complaints and the terminations of Registered persons. 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.¹³ Moreover, the Exchange notes that it has broad regulatory responsibilities with respect to its TPHs' activities, irrespective of where their transactions take place. Many of the Exchange's surveillance programs for customer trading activity may require the Exchange to look at activity across all markets, such as reviews related to position limit violations and manipulation. Indeed, the Exchange cannot effectively review for such conduct without looking at and evaluating activity regardless of where it transpires. In addition to its own surveillance programs, the Exchange also works with other SROs and exchanges on intermarket surveillance related issues. Through its participation in the Intermarket Surveillance Group ("ISG")¹⁴ the Exchange shares information and coordinates inquiries and investigations with other exchanges designed to address potential intermarket manipulation and trading abuses. Accordingly, there is

¹³ If the Exchange changes its method of funding regulation or if circumstances otherwise change in the future, the Exchange may decide to modify the ORF or assess a separate regulatory fee on TPH proprietary transactions if the Exchange deems it advisable.

¹⁴ ISG is an industry organization formed in 1983 to coordinate intermarket surveillance among the SROs by cooperatively sharing regulatory information pursuant to a written agreement between the parties. The goal of the ISG's information sharing is to coordinate regulatory efforts to address potential intermarket trading abuses and manipulations.

a strong nexus between the ORF and the Exchange's regulatory activities with respect to its TPHs' customer trading activity.

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 not necessary or appropriate in furtherance of the purposes of the Act. This proposal does not create an unnecessary or inappropriate intra-market burden on competition because the ORF applies to all customer activity, thereby raising regulatory revenue to offset regulatory expenses. It also supplements the regulatory revenue derived from non-customer activity. The Exchange notes, however, the proposed change is not designed to address any competitive issues. Indeed, this proposal does not create an unnecessary or inappropriate inter-market burden on competition because it is a regulatory fee that supports regulation in furtherance of the purposes of the Act. The Exchange is obligated to ensure that the amount of regulatory revenue collected from the ORF, in combination with its other regulatory fees and fines, does not exceed 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)¹⁵ of the Act and subparagraph (f)(2) of Rule 19b-4¹⁶ 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

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(2).

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)¹⁷ 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:

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-2023-038 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-2023-038. 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

¹⁷ 15 U.S.C. 78s(b)(2)(B).

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-2023-038 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.¹⁸

Sherry R. Haywood,

Assistant Secretary.

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¹⁸ 17 CFR 200.30-3(a)(12).