SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-98187; File No. SR-CBOE-2023-040)

August 21, 2023

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 Select Customer Options Reduction Program, Livevol Fees, and Routing Fee Codes

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 August 11, 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 amend 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 on the proposed rule change. The text of these statements may be examined at the places specified in

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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.[3]

The Exchange first notes that it operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. More specifically, the Exchange is only one of 16 options venues to which market participants may direct their order flow. Based on publicly available information, no single options exchange has more than 16% of the market share.[4] Thus, in such a low-concentrated and highly competitive market, no single options exchange possesses significant pricing power in the execution of option order flow. The Exchange believes that the ever-shifting market share among the exchanges from month to month demonstrates that market participants can shift order flow or discontinue to reduce use of certain categories of products in response to fee changes. Accordingly, competitive forces constrain the Exchange's transaction fees, and market participants can readily trade on competing venues if they deem pricing levels at those other venues to be more favorable. In response to competitive pricing, the Exchange, like other options exchanges, offers rebates and assesses fees for certain order types executed on or routed through the Exchange.

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3 The Exchange initially filed the proposed fee changes on August 1, 2023 (SR-CBOE-2023-037). On August 2, 2023, the Exchange withdrew that filing and submitted SR-CBOE-2023-039. On August 11, 2023 the Exchange withdrew SR-CBOE-2023-039 and submitted this proposal.

4 See Cboe Global Markets U.S. Options Monthly Market Volume Summary (July 26, 2023), available at https://markets.cboe.com/us/options/market_statistics/.

Select Customer Options Reduction Program Changes

The Exchange first proposes to amend the Select Customer Options Reduction program ("SCORe"). By way of background, SCORe is a discount program for Retail, Non-FLEX Customer ("C" origin code) volume in the following options classes: SPX (including SPXW), VIX, RUT, MXEA, & MXEF ("Qualifying Classes"). The SCORe program is available to any Trading Permit Holder ("TPH") Originating Clearing Firm or non-TPH Originating Clearing Firm that sign up for the program.[5]

Under the program, to determine the Discount Tier, an Originating Firm's Retail volume in the Qualifying Classes will be divided by total Retail volume in the Qualifying Classes executed on the Exchange. The program then provides a discount per retail contract, based on the determined Discount Tier thereunder. The program sets forth four discount tiers, with applicable discounts ranging from $0.00 to $0.14 per retail contract. Under the current program, and as set forth in Footnote 48 to the Fees Schedule, "Retail" volume is defined as Customer order ("C" capacity code) for which the original order size (in the case of a simple order) or largest leg size (in the case of a complex order) is 100 contracts or less. The Exchange proposes amending Footnote 48 to the Fees Schedule, to define "Retail" volume as Customer order ("C" capacity code) for which the original order size (in the case of a simple order) or the largest leg size (in the case of a complex order) is 20 contracts or less.

Additionally, the Exchange proposes to remove outdated language from Footnote 48 related to the SCORe program. Effective February 1, 2023, the Exchange amended the program

[5] For this program, an "Originating Clearing Firm" is defined as either (a) the executing clearing Options Clearing Corporation ("OCC") number on any transaction which does not also include a Clearing Member Trading Agreement ("CMTA") OCC clearing number or (b) the CMTA in the case of any transaction which does include a CMTA OCC clearing number.

by eliminating the Qualifying Tiers construct.[6] As amended, SCORe utilizes only one measure for participation and discount (i.e., the Discount Tiers). As such, the Exchange proposes to remove the outdated language related to the determination of an Originating Firm's Qualifying Tier.

Livevol Fee Changes

The Exchange proposes to amend certain fees related to its provision of Open-Close Data. By way of background, the Exchange currently offers End-of-Day ("EOD") and Intraday Open-Close Data (collectively, "Open-Close Data"). EOD Open-Close Data is an end-of-day volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), price, and transaction type (opening or closing). The customer and professional customer volume is further broken down into trade size buckets (less than 100 contracts, 100-199 contracts, greater than 199 contracts). The Open-Close Data is proprietary Cboe Options trade data and does not include trade data from any other exchange. It is also a historical data product and not a real-time data feed.

The Exchange also offers Intraday Open-Close Data, which provides similar information to that of Open-Close Data but is produced and updated every 10 minutes during the trading day. Data is captured in "snapshots" taken every 10 minutes throughout the trading day and is available to subscribers within five minutes of the conclusion of each 10-minute period.[7] The

6 See Securities Exchange Act Release No. 96856 (February 9, 2023), 88 FR 9938 (February 15, 2023) (SR-CBOE-2023-011).

7 For example, subscribers to the intraday product will receive the first calculation of intraday data by approximately 9:42 a.m. ET, which represents data captured from 9:30 a.m. to 9:40 a.m. Subscribers will receive the next update at 9:52 a.m., representing the data previously provided together with data captured from 9:40 a.m. through 9:50 a.m., and so forth. Each update will represent the aggregate data captured from the current "snapshot" and all previous "snapshots."

Intraday Open-Close Data provides a volume summary of trading activity on the Exchange at the option level by origin (customer, professional customer, broker-dealer, and market maker), side of the market (buy or sell), and transaction type (opening or closing). The customer and professional customer volume are further broken down into trade size buckets (less than 100 contracts, 100-199 contracts, greater than 199 contracts). The Intraday Open-Close Data is also proprietary Cboe Options trade data and does not include trade data from any other exchange.

Cboe LiveVol, LLC ("LiveVol"), a wholly owned subsidiary of the Exchange's parent company, Cboe Global Markets, Inc., makes the Open-Close Data available for purchase to TPHs and non-TPHs on the LiveVol DataShop website (datashop.cboe.com). Customers may currently purchase Open-Close Data on a subscription basis (monthly or annually) or by ad hoc request for a specified month (e.g., request for Intraday Open-Close Data for month of August 2023).

Open-Close Data is subject to direct competition from similar end-of-day and intraday options trading summaries offered by several other options exchanges.[8] All of these exchanges offer essentially the same end-of-day and intraday options trading summary information.

End-of-Day Open-Close Data

Currently, End-of-Day Open-Close Data is available to purchase and download in three formats. Customers may (1) download data on a per Cboe Security basis, (2) download data for all Cboe Securities (equities, indexes and ETFs), and/or (3) download daily updates for all Cboe Securities (equities, indexes and ETFs). Cboe is proposing to eliminate the End-of-Day Open-

8 These substitute products are: Nasdaq PHLX Options Trade Outline, Nasdaq Options Trade Outline, ISE Trade Profile, GEMX Trade Profile data; open-close data from C2, BZX, and EDGX; and Open Close Reports from MIAX Options, Pearl, and Emerald.

Close Data offering to download data on a per Cboe Security basis. The End-of-Day Open-Close Data offerings will remain available on an all Cboe Securities basis.

The Exchange notes that removing the offering to download data on a per Cboe Security basis and offering such data for all Cboe Securities only is consistent with the offering of Open-Close Data at the Exchange's affiliates,[9] as well as another exchange with a similar data product.[10] The Exchange further notes that the purchase of Open-Close historical data is discretionary and not compulsory.

The Exchange also proposes a technical amendment to its Livevol fees, correcting a spelling error of "Intrday" to "Intraday."

Options Institute Research Grant Program 2023

Through its educational division, the Options Institute, the Exchange has established the Options Institute Research Grant Program 2023 ("Grant Program"). Under the Grant Program, selected grant recipients will conduct a research project in an eligible topic(s), including Derivatives Products and Performance, Market Performance, Operations and Risk Management, and Decision Theory. The Exchange seeks to provide historical data sets to selected grant recipients for use as part of the research project. As such, the Exchange proposes to amend its Fee Schedule to add Footnote 51, applicable to the Livevol Fees table of the Fee Schedule, stating that fees for Open-Close Data will be waived for grant recipients of the Grant Program.

In order to qualify for the Grant Program, an applicant must be a faculty member or student of a qualifying, accredited educational institution that will use the data solely for their completion of the research project (i.e., academic use). The data must be used solely for the

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9 See e.g., Cboe EDGX U.S. Options Exchange Fee Schedule, Cboe LiveVol, LLC Market Data Fees.

10 See Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Nasdaq ISE Open/Close Trade Profile End of Day.

purposes of the research project, and any commercial or profit-seeking usage is excluded. Researchers interested in qualifying for the Grant Program are required to submit an application, which describes the proposed research project. The Options Institute has the discretion to review such applications and select grant recipients.

The Exchange believes that researchers at academic institutions provide a valuable service for the Exchange in studying and promoting the options market. Though academic institutions and researchers have a need for granular options data sets, they do not trade upon the data for which they subscribe. The Exchange believes the waiver of these Open-Close Data fees for any grant recipient under the Grant Program will encourage and promote research directed at increasing understanding and advancement of derivatives usage and financial exchange marketplace structures.

The Exchange notes other exchanges offer academic discounts or credit for similar data feeds.[11] The Exchange recognizes the high value of academic research and educational instruction and publications, and believes that the proposed waiver of historical Open-Close Data fees will encourage academic research of the options industry, which will serve to benefit all market participants while also opening up a new potential user base among students.

Routing Fee Codes Changes

Finally, the Exchange proposes to modify fees associated with certain routing fee codes. The Fees Schedule currently lists fee codes and their corresponding transaction fee for routed

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11 See e.g., Nasdaq ISE, Options 7 Pricing Schedule, Section 10A., Market Data. See also Securities Exchange Act Release No. 67955 (October 1, 2012) 77 FR 61037 (October 5, 2012) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt Reduced Fees for Historical ISE Open/Close Trade Profile Intraday Market Data Offering) (SR-ISE-2012-76); Securities and Exchange Act Release 34-60654 (September 11, 2009) 74 FR 47848 (September 17, 2009) (Notice of Filing of Proposed Rule Change Relating to Historical ISE Open/Close Trade Profile Fees) (SR-ISE-2009-64); Securities Exchange Act Release No. 53770 (May 8, 2006) 71 FR 27762 (May 12, 2006) (Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Establish an Annual Administrative Fee for Market Data Distributors That Are Recipients of Nasdaq Proprietary Data Products) (SR-NASD-2006-030).

Customer orders to other options exchanges specifically in Exchange Traded Funds ("ETF") and equity options, and for non-Customer orders routed in Penny and Non-Penny options classes.

The Exchange notes that its current approach to routing fees is to set forth in a simple manner certain sub-categories of fees that approximate the cost of routing to other options exchanges based on the cost of transaction fees assessed by each venue as well as a flat $0.15 assessment that covers costs to the Exchange for routing (i.e., clearing fees, connectivity and other infrastructure costs, membership fees, etc.) (collectively, "Routing Costs"). The Exchange then monitors the fees charged as compared to the costs of its routing services and adjusts its routing fees and/or sub-categories to ensure that the Exchange's fees do indeed result in a rough approximation of overall Routing Costs, and are not significantly higher or lower in any area. The Exchange notes that other options exchanges currently assess routing fees in a similar manner as the Exchange's current approach to assessing approximate routing fees.[12]

The Exchange assesses fees in connection with orders routed away to various exchanges. Currently, under the Routing Fees table of the Fee Schedule, fee codes RD, RF, RI, TD, TE, TF, TG, TH, and TI are appended to certain Customer orders in ETF and Equity options, as follows:

- fee code RD is appended to Customer orders in ETF/Equity options routed to NYSE American ("AMEX"), BOX Options Exchange ("BOX"), Nasdaq BX Options ("BX"), Cboe EDGX Exchange, Inc. ("EDGX"), ISE Mercury, LLC ("MERC"), MIAX Options Exchange ("MIAX") or Nasdaq PHLX LLC ("PHLX") (excluding orders in SPY options), and assesses a charge of $0.25 per contract;

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12 See e.g., MIAX Options Exchange Fee Schedule, Section 1(c), "Fees for Customer Orders Routed to Another Options Exchange."

- fee code RF is appended to Customer orders in ETF/Equity, Penny options routed to NYSE Arca, Inc ("ARCA"), Cboe BZX Exchange, Inc. ("BZX"), Cboe C2 Exchange, Inc. ("C2"), Nasdaq ISE ("ISE"), ISE Gemini, LLC ("GMNI"), MIAX Emerald Exchange ("EMLD"), MIAX Pearl Exchange ("PERL"), Nasdaq Options Market LLC ("NOM"), or PHLX (for orders in SPY options only) and assesses a charge of $0.75 per contract;
- fee code RI is appended to Customer orders in ETF/Equity, Non-Penny options routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL or NOMX, and assesses a charge of $1.25 per contract.
- fee code TD is appended to Customer orders in ETF options originating on an Exchange-sponsored terminal for greater than or equal to 100 contracts routed to AMEX, BOX, BX, EDGX, MERC, MIAX, or PHLX, and assesses a charge of $0.18 per contract;
- fee code TE is appended to Customer orders in ETF/Equity options originating on an Exchange-sponsored terminal for less than 100 contracts routed to AMEX, BOX, BX, EDGX, MERC, MIAX, PHLX, and assesses no charge per contract;
- fee code TF is appended to Customer orders in ETF, Penny options originating on an Exchange-sponsored terminal for greater than or equal to 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses a charge of $0.18 per contract;
- fee code TG is appended to Customer orders in ETF, Non-Penny options originating on an Exchange-sponsored terminal for greater than or equal to 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses $0.18 per contract;

- fee code TH is appended to Customer orders in ETF/Equity, Penny options originating on an Exchange-sponsored terminal for less than 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses no charge per contract; and
- fee code TI is appended to Customer orders in ETF/Equity, Non-Penny options originating on an Exchange-sponsored terminal for less than 100 contracts routed to ARCA, BZX, C2, ISE, GMNI, EMLD, PERL, or NOM, and assesses no charge per contract.

The Exchange proposes to amend fee codes RD, TD, and TE to exclude applicable Customer orders routed to ISE Mercury, LLC (MERC) and to amend fee codes RF, RI, TF, TG, TH, and TI to add applicable Customer orders routed to MERC. The Exchange further proposes to amend fee codes RF, RI, TF, TG, TH, and TI to add applicable Customer orders routed to MEMX LLC ("MEMX"), in anticipation of the launch of the new options exchange. The charges assessed per contract for each fee code remain the same under the proposed rule change.

The proposed changes result in an assessment of fees that, following fee changes by an away options exchanges and in anticipation of the launch of another options exchange, is more in line with the Exchange's current approach to routing fees, that is, in a manner that approximates the cost of routing Customer orders to other away options exchanges, based on the general cost of transaction fees assessed by the sub-category of away options exchanges for such orders (as well as the Exchange's Routing Costs).[13] The Exchange notes that routing through the Exchange is optional and that TPHs will continue to be able to choose where to route their Customer orders in ETF and equity options.

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[13] See Securities Exchange Act Release No. 97800 (June 26, 2023), 88 FR 42409 (June 30, 2023) (SR–MRX–2023–11).

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.[14] Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)[15] 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)[16] requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers. The Exchange also believes the proposed rule change is consistent with Section 6(b)(4) of the Act,[17] which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

First, the Exchange believes the proposal to amend the SCORe program to define "Retail" volume as Customer order ("C" capacity code) for which the original order size (in the case of a simple order) or the largest leg size (in the case of a complex order) is 20 contracts or less (changing from 100) is reasonable as Members are still eligible to receive discounts under

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14 15 U.S.C. 78f(b).

15 15 U.S.C. 78f(b)(5).

16 Id.

17 15 U.S.C. 78f(b)(4).

the program, albeit at a smaller scale. Moreover, the Exchange is not required to maintain this program nor provide such discounts as are provided under the program. Further, the Exchange believes the program remains equitable and reasonable, as the proposed change to the number of contracts in the "Retail" definition does not substantively change the program, but rather adjusts a considered metric of the program. The Exchange believes the proposed change is also equitable and not unfairly discriminatory because it applies uniformly to any TPH Originating Clearing Firm or non-TPH Originating Firm who participates in the program. The Exchange believes SCORe, currently and as amended, continues to provide an incremental incentive for Originating Firms to strive for the highest tier level, which provides increasingly higher discounts. As such, the changes are designed to encourage increased Retail volume in the Qualifying Classes, which provides increased volume and greater trading opportunities for all market participants. Finally, the Exchange believes eliminating outdated language from Footnote 48 related to the SCORe program is reasonable as the Exchange no longer utilizes Qualifying Tiers under the program. The proposed deletions reduce potential confusion and maintain clarity in the Fees Schedule.

The Exchange also believes the proposed changes to amend its End-of-Day Open-Close Data offering to remove the offering to download data on a per Cboe Security basis and to offer such data on an all Cboe Securities basis only are reasonable. In adopting Regulation NMS, the Commission granted self-regulatory organizations ("SROs") and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data. The Exchange believes the proposed change will continue to broaden the availability of U.S. option market data to investors consistent with the principles of Regulation NMS. Open-Close Data is designed to help investors understand underlying market trends to improve the quality of investment decisions. Indeed, subscribers to the data will still be able to enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies. The Exchange believes Open-Close Data continues to provide a valuable tool that subscribers can use to gain comprehensive insight into the trading activity in a particular series, but also emphasizes such data is not necessary for trading and as noted above, is entirely optional. Moreover, several other exchanges offer a similar data product which offer the same type of data content through end-of-day or intraday reports.[18]

The Exchange also operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. Based on publicly available information, no single options exchange has more than 16% of the market share.[19] The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, 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."[20] Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange's data

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18 See supra note 8.

19 See supra note 4

20 See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) ("Regulation NMS Adopting Release").

product as more or less attractive than the competition they can and do switch between similar products. The Exchange notes the proposed change merely aligns the Exchange's offering of End-of-Day Open-Close Data with the data products of the Exchange's affiliates,[21] as well as another exchange with a similar data product, in that such offerings do not include the ability to purchase the End-of-Day Open-Close Data on a per securities basis.[22] The Exchange believes that the proposed changes to the Exchange's End-of-Day Open-Close Data offering are equitable and not unfairly discriminatory because the change to the offering applies to all current and potential subscribers of the product uniformly, in that no subscriber will be able to purchase the End-of-Day Open-Close Data on a per Cboe Securities basis. Further, End-of-Day the Open-Close Data will continue to be available for purchase to all subscribers on an all Cboe Securities basis.

The Exchange also believes that the waiver of Open-Close data fees for recipients of the Grant Program is reasonable because such data is utilized for a strict, limited purpose under the terms of the Grant Program and selected grant recipients are not able to monetize access to the data as they do not trade on the data set. The Exchange believes the waiver of fees for grant recipients will promote research and studies of the options industry to the benefit of all market participants. The Exchange believes that the proposed waiver is equitable and not unfairly discriminatory because it will apply equally to all selected grant recipients and in exchange, the Exchange will be granted certain usage rights with respect to the recipients' final research papers. Further, as noted above, other exchanges offer academic discounts or credit for similar data feeds.[23]

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21 See supra note 9.

22 See supra note 10.

23 See supra note 11.

The Exchange also believes the proposed rule change to amend fee codes RD, RF, RI, TD, TE, TF, TG, TH, and TI to account for MERC's current assessment of fees for Customer orders and MEMX's expected assessment of fees for Customer orders is reasonable because it is reasonably designed to assess routing fees in line with the Exchange's current approach to routing fees. That is, the proposed rule change is intended to include Customer orders in ETF and equity options routed to MERC and MEMX in the most appropriate sub-category of fees that approximates the cost of routing to a group of away options exchanges based on the cost of transaction fees assessed by each venue as well as Routing Costs to the Exchange. As noted above, the Exchange operates in a highly competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive or incentives to be insufficient. The Exchange notes that routing through the Exchange is optional and that TPHs will continue to be able to choose where to route their Customer orders in ETF and equity options in the same sub-category group of away exchanges as they currently may choose to route. The proposed rule change reflects a competitive pricing structure designed to incentivize market participants to direct their order flow to the Exchange, which the Exchange believes would enhance market quality to the benefit of all Members. The Exchange further notes that other options exchanges currently approximate routing fees in a similar manner as the Exchange's current approach.[24] The Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because all Members' applicable Customer orders in ETF and equity options routed to MERC and MEMX will be automatically and uniformly assessed the applicable routing charges.

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[24] See supra note 12.

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 changes to the SCORe program will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes apply to all registered Originating Firms uniformly, in that the updated definition of "Retail" volume will, for purposes of calculating discounts under the program, be applied to all Originating Firms.

Further, the Exchange does not believe that the proposed changes to its offering of End-of-Day Open-Close Data will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. As noted above, the proposed amendments align the Exchange's offering of End-of-Day Open-Close Data with the data products of the Exchange's affiliates,[25] as well as another exchange with a similar data product.[26] The changes to the offering apply to all current and potential subscribers of the product uniformly, in that no subscriber will be able to purchase the End-of-Day Open-Close Data on a per Cboe Securities basis. Further, End-of-Day the Open-Close Data will continue to be available for purchase to all subscribers on an all Cboe Securities basis.

Additionally, the Exchange does not believe that the proposed waiver of Open-Close data fees for recipients of the Grant Program will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. All qualifying researchers are eligible to apply to the Grant Program, and the waiver of Open-Close data fees

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[25] See supra note 9.

[26] See supra note 10.

for recipients of the Grant Program will apply equally to all selected grant recipients. In exchange, the Exchange will be granted certain usage rights with respect to the recipients' final research papers. Further, while the waiver applies only to grant recipients, academic institutions' research and publications as a result of access to historical market data benefits all market participants.

Finally, the Exchange does not believe the proposed rule change to amend fee codes RD, RF, RI, TD, TE, TF, TG, TH, and TI will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. All Members' Customer orders routing to MERC and currently yielding fee code RD, TD, or TE will yield fee code RF, RI, RF, TG, TH, or TI (depending on the order) and will automatically and uniformly be assessed the current fees already in place for such routed orders, as applicable. Likewise, all Members' Customer orders routed to MEMX will automatically yield fee code RF, RI, RF, TG, TH, or TI (depending on the order) and uniformly be assessed the corresponding fee. The Exchange notes that other options exchange approximate routing costs in a similar manner as the Exchange's current approach.[27]

The Exchange also 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. As previously discussed, the Exchange operates in a highly competitive market. Members have numerous alternative venues that they may participate on and direct their order flow, including 15 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available

[27] See supra note 12.

information, no single options exchange has more than 16% of the market share.[28] 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 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."[29] The fact that this market is competitive has also long been 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'….".[30] 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.

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28 See supra note 4.

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

30 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)).

Additionally, the Exchange also does not believe that the proposed rule change to waive Open-Close data fees for recipients of the Grant Program will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act as other options exchanges offer academic discounts or credit for similar data feeds.[31] Offering a discount for qualifying academic institutions that purchase the Exchange's historical Open-Close Data may make that data more attractive to such academic institutions and further increase competition with exchanges that offer similar historical data products.

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 Act[32] and paragraph (f) of Rule 19b-4[33] 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.

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31 See supra note 11.

32 15 U.S.C. 78s(b)(3)(A).

33 17 CFR 240.19b-4(f).

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-2023-040 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-2023-040. 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-2023-040 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.[34]

Sherry R. Haywood,

Assistant Secretary.

[34] 17 CFR 200.30-3(a)(12).