

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-99326; File No. SR-CBOE-2024-002)

January 11, 2024

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

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on January 2, 2024, Cboe Exchange, Inc. (the “Exchange” or “Cboe Options”) filed with the Securities and Exchange Commission (“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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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 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, effective January 2, 2024.

Open-Close Data

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.<sup>3</sup> The

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<sup>3</sup> 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](http://datashop.cboe.com)). Customers may currently purchase Intraday 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 December 2023). The Exchange assesses a monthly fee of \$2,000 (or \$24,000 per year) for subscribing to the data feed and assesses a fee of \$1,000 per request per month for an ad-hoc request of historical Intraday Open/Close data covering all Exchange-listed securities. The Exchange notes that Open-Close Data is subject to direct competition from similar end-of-day and intraday options trading summaries offered by several other options exchanges.<sup>4</sup> All of these exchanges offer essentially the same end-of-day and intraday options trading summary information, which may be purchased on both a subscription and ad-hoc basis and which are similarly priced.<sup>5</sup>

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<sup>4</sup> These substitute products include: 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.

<sup>5</sup> See Price List – U.S. Derivatives Data for Nasdaq PHLX, LLC (“PHLX”), The Nasdaq Stock Market, LLC (“Nasdaq”), Nasdaq ISE, LLC (“ISE”), and Nasdaq GEMX, LLC (“GEMX”), available at <http://www.nasdaqtrader.com/Trader.aspx?id=DPPriceListOptions#web>. Particularly, PHLX offers “Nasdaq PHLX Options Trade Outline (PHOTO)” and assesses \$2,500 per month for an intraday subscription and \$1,000 per month for historical reports; Nasdaq offers the “Nasdaq Options Trade Outline (NOTO)” and assesses \$750 per month for an intraday subscription and \$500 per month for historical

The Exchange notes that the current fee for Intraday Open-Close Data has been in place, without change, since 2020 when the Exchange first adopted the Intraday Open-Close Data product offering. In the time since, the Exchange has made enhancements to the offering, including adding data from the Global Trading Hours (“GTH”)<sup>6</sup> session to the Intraday Open-Close Data, in addition to the Regular Trading Hours (“RTH”) and Curb sessions.<sup>7</sup> As a result, Intraday Open-Close Data is produced and updated every 10 minutes throughout all trading sessions. The Exchange now proposes to increase the fee for Intraday Open-Close Data.<sup>8</sup> The Exchange proposes to assess a monthly fee of \$3,000 (or \$36,000 per year) for subscribing to the data feed.

#### Historical Depth Data

By way of background, the Exchange currently makes available for purchase Depth Data, which is a daily archive of the Exchange’s depth of book real-time feed, which provides depth-of-book quotations and execution information based on options orders entered into the System.<sup>9</sup> The Exchange also offers Historical Depth Data, for no charge, which offers such data on a historical basis, i.e. T+1 or later, dating back to October 2019. The Depth Data and Historical Depth Data are

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reports; ISE offers the “Nasdaq ISE Open/Close Trade Profile” and assesses \$2,000 per month for an intraday subscription and \$1,000 per month for historical reports; and GEMX offers the “Nasdaq GEMX Open/Close Trade Profile” and assesses \$1,000 per month for an intraday subscription and \$750 per month for historical reports.

<sup>6</sup> See Rule 5.1(c). Except under unusual conditions as may be determined by the Exchange or the Holiday hours set forth in Rule 5.1(d), GTH starts at 8:15pm ET and continue through the next day until 9:15am ET. Currently trading is limited to SPX, VIX, and XSP.

<sup>7</sup> See Rule 5.1 (b) (Regular Trading Hours) and Rule 5.1(d) (Curb Trading Hours).

<sup>8</sup> As part of the proposed rule change, the Exchange proposes to delete language in the Fees Schedule regarding the provision of a 20% discount on fees assessed to Exchange Members and non-Members that purchase \$20,000 or more of historical Open-Close Data; such discount program was effective from November 15, 2023 through December 31, 2023, and is no longer in effect.

<sup>9</sup> See Exchange Fees Schedule. Daily end-of-day delivery is provided via the DataShop SFTP. Files will typically become available after 8pm ET; see also Exchange Rule 1.1, which defines “System.”

available to Members and Non-Members on the Cboe LiveVol, LLC (“LiveVol”) website<sup>10</sup>, for internal use only; LiveVol is a wholly owned subsidiary of the Exchange’s parent company, Cboe Global Markets, Inc.

The Exchange and affiliated equities and options exchanges (i.e., Cboe C2 Exchange, Inc. (“C2 Options”), Cboe EDGX Exchange, Inc. (“EDGX”), Cboe BYX Exchange, Inc. (“BYX”), Cboe BZX Exchange, Inc. (“BZX”), and Cboe EDGA Exchange, Inc. (“EDGA”) (collectively, “Affiliates”) also offer similar data products. Particularly, each of the Exchange’s Affiliates offer a daily and historical archive of their depth of book real-time feed with execution information based on their trading activity that is substantially similar to the information provided by the Exchange through its Depth Data products.

Currently, the Exchange provides Historical Depth Data to users without a charge. Since the Exchange first began offering access to historical quotation and transactions data, the Exchange has made a number of significant enhancements to its platform, including, among other things, implementing a more efficient means of data delivery (via SFTP rather than shipment of hard drives), which consequently increases the value of the market data product.

The Exchange now proposes to amend its Fees Schedule and assess a fee of \$1,500 per month of Historical Depth Data accessed by a user. As is currently the case, the data will be provided to data recipients for internal use only, and thus, no redistribution will be permitted.

The Exchange notes that the Depth Data products, including the Historical Depth Data, are completely voluntary products, in that the Exchange is not required by any rule or regulation to make the reports or services available and that potential subscribers may purchase it only if

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<sup>10</sup> See <https://datashop.cboe.com/cboe-us-options-multicast-pitch>.

they voluntarily choose to do so. Further, the Exchange notes that other exchanges offer similar products for a fee.<sup>11</sup>

## 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.<sup>12</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>13</sup> 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)<sup>14</sup> 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,<sup>15</sup> 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.

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<sup>11</sup> See, e.g., <https://www.nasdaqtrader.com/Trader.aspx?id=DPPPriceListOptions#nom>; and [https://www.nyse.com/publicdocs/nyse/data/NYSE\\_Market\\_Data\\_Fee\\_Schedule.pdf](https://www.nyse.com/publicdocs/nyse/data/NYSE_Market_Data_Fee_Schedule.pdf).

<sup>12</sup> 15 U.S.C. 78f(b).

<sup>13</sup> 15 U.S.C. 78f(b)(5).

<sup>14</sup> Id.

<sup>15</sup> 15 U.S.C. 78f(b)(4).

The Exchange believes the proposed changes to increase the fee for Intraday Open-Close Data subscriptions and adopt a fee for Historical Depth Data 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 also operates in a highly competitive environment. Indeed, there are currently 17 registered options exchanges that trade options. Based on publicly available information, no single options exchange has more than 12% of the market share.<sup>16</sup> 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.”<sup>17</sup> 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 product as more or less attractive than the competition they can and do switch between similar products.

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<sup>16</sup> See Cboe Global Markets U.S. Options Market Volume Summary (December 18, 2023), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

<sup>17</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

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 may enhance their ability to analyze option trade and volume data and create and test trading models and analytical strategies, especially given recent changes to the offering, including the addition of data from the GTH trading session. 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,<sup>18</sup> with similar pricing.

Further, the Exchange believes the proposed changes to the Intraday Open-Close Data fee are reasonable, given the enhancements to the offering, including the addition of data from the GTH session, in addition to the RTH and Curb sessions. As noted above, Intraday Open-Close Data is now produced and updated every 10 minutes throughout all trading sessions. The addition of the GTH session provides subscribers with more granular insight into trading activity in the products that trade during that session. The Exchange notes a wide variety of market participants purchase Intraday Open-Close Data, including, but not limited to, individual customers, buy-side investors, and investment banks. The Exchange believes the Intraday Open-Close Data product provides helpful trading information regarding investor sentiment that may allow market participants to make better trading decisions throughout the day and may be used to create and test trading models and analytical strategies and provides comprehensive insight into

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<sup>18</sup> See supra note 4.



trading on the Exchange. For example, intraday open data may allow a market participant to identify new interest or possible risks throughout the trading day, while intraday closing data may allow a market participant to identify fading interests in a security. The product is a completely voluntary product, in that the Exchange is not required by any rule or regulation to make this data available and that potential subscribers may purchase it only if they voluntarily choose to do so. The Exchange notes that other exchanges offer similar data products, which are similarly priced.<sup>19</sup>

Additionally, the Exchange believes the proposed changes to the Historical Depth Data fee are reasonable, as the Exchange's Historical Depth Data is a competitively priced alternative to historical depth of book data disseminated by other national securities exchanges. The Exchange's Depth Data products, including Historical Depth Data, benefits a wide range of investors that participate in the national market system. As noted above, Nasdaq and NYSE have similar Depth Data offerings for a charge.<sup>20</sup> The Exchange therefore believes that the proposed fees are reasonable and set at a level to compete with other exchanges that offer similar reports. Indeed, proposing fees that are excessively higher than established fees for similar data products would simply serve to reduce demand for the Exchange's data product, which as noted, is entirely optional. As such, if a market participant views another exchange's potential report as more attractive, then such market participant can merely choose not to purchase the Exchange's Historical Depth Data offering and instead purchase another exchange's similar data product, which offers similar data points, albeit based on other market's trading activity. Further, the

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<sup>19</sup> See supra note 5.

<sup>20</sup> See supra note 11.

Exchange believes the fees are reasonable since, as proposed, they represent a relatively modest fee for historical depth of book data that has proven valuable for investors.

The Exchange also believes that the proposed fee is reasonable because it is reasonably aligned with the value and benefits provided to users that choose to purchase Historical Depth Data from the Exchange. As discussed above, Historical Depth Data may be beneficial to Members and non-Members as it may provide helpful trading information regarding investor sentiment that may allow market participants to make more informed trading decisions and may be used to create and test trading models and analytical strategies and provide comprehensive insight into trading on the Exchange. As noted above, since first offering Historical Depth Data, the Exchange has made a number of significant enhancements to its platform, including, among other things, implementing a more efficient means of data delivery (via SFTP rather than shipment of hard drives), which consequently increases the value of the market data product.

Finally, the Exchange believes that the proposed changes to the Exchange's Intraday Open-Close Data and Historical Depth Data offerings are equitable and not unfairly discriminatory because the changes to the offerings apply to all current and potential subscribers of the products uniformly, in that all subscribers will be assessed the new proposed fee for purchases of Intraday Open-Close Data or Historical Depth Data. As stated, purchase of Intraday Open-Close Data and Historical Depth Data is completely optional and not necessary for trading. Rather, the Exchange voluntarily makes Intraday Open-Close Data and Historical Depth Data available, and users may choose to purchase the data based on their own individual business needs.

**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. As

discussed above, the Exchange's Intraday Open-Close Data and Historical Depth Data offerings are subject to direct competition from several other exchanges that offer similar data products. The proposed rule changes are grounded in the Exchange's efforts to compete more effectively. In this competitive environment, potential purchasers are free to choose which, if any, similar product to purchase to satisfy their need for market information. As a result, the Exchange believes the proposed rule changes permit fair competition among national securities exchanges.

Additionally, the Exchange believes the proposed rule change does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The changes to the Intraday Open-Close Data and Historical Depth Data offerings apply to all current and potential subscribers of the product uniformly, in that all subscribers will be assessed the same fees for subscribing to receive Intraday Open-Close Data and Historical Depth Data. Moreover, purchase of Intraday Open-Close Data and Historical Depth Data is optional.

Further, 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 noted above, other exchanges offer similar data products, which are similarly priced.<sup>21</sup> 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 16 other options exchanges and off-exchange venues. Additionally, the Exchange represents a small percentage of the overall market. Based on publicly available information, no single options exchange has more than 12% of the market share.<sup>22</sup> Therefore, no

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<sup>21</sup> See supra notes 5 and 11.

<sup>22</sup> See supra note 16.

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.”<sup>23</sup> 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’ ....”<sup>24</sup> 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.

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.

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<sup>23</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>24</sup> *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)).

### 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<sup>25</sup> and paragraph (f) of Rule 19b-4<sup>26</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### 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](mailto:rule-comments@sec.gov). Please include file number SR-CBOE-2024-002 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.

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<sup>25</sup> 15 U.S.C. 78s(b)(3)(A).

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

All submissions should refer to file number SR-CBOE-2024-002. 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-2024-002 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.<sup>27</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>27</sup> 17 CFR 200.30-3(a)(12).