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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-ICC-2023-011 and should be submitted on or before October 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>21</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023-21944 Filed 10-3-23; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98601; File No. SR-CBOE-2023-056]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Its Fees Schedule

September 28, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 25, 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 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.<sup>3</sup> 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 19% of the market share.<sup>4</sup> 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 or 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 the competitive environment, the Exchange offers tiered pricing in its Fees Schedule, like that of other options exchanges fees schedules,<sup>5</sup> which provides Trading Permit Holders ("TPHs") opportunities to qualify for higher rebates or reduced fees where certain volume criteria and thresholds are met. Tiered pricing provides an incremental incentive for TPHs to strive for higher tier levels, which provides increasingly higher benefits or discounts for satisfying increasingly more stringent criteria.

##### Customer Volume Incentive Program and Affiliated Volume Plan

The Exchange proposes to amend the Customer Volume Incentive Program ("VIP") and the Affiliated Volume Plan ("AVP"). Under the VIP, the Exchange credits each TPH the per contract amount set forth in the VIP table for Public Customer (origin code "C") orders transmitted by TPHs (with certain exceptions)<sup>6</sup> and executed electronically on the Exchange, provided the TPH meets certain volume thresholds in a month; volume for Professional Customers (origin code "U"), Broker-Dealers (origin code "B"), and Joint Back-Offices ("JBO") (origin code "J") orders are counted toward reaching such thresholds.<sup>7</sup> Specifically, the percentage thresholds are calculated based on the percentage of national customer volume in all underlying symbols excluding Underlying Symbol List A,<sup>8</sup> Sector Indexes,<sup>9</sup> the Dow Jones Industrial Average Index ("DJX"), the Mini Russell 2000 Index ("MRUT"), the MSCI EAFE Index ("MXEA"), the MSCI Emerging Market Index ("MXEF"), the Mini S&P 500 Index ("NANOS"), Mini-SPX Index ("XSP") and FLEX Micros entered and executed over the course of the month. VIP offers rates for both

<sup>5</sup> See e.g., NASDAQ Stock Market Rules, Options Rules, Options 7 Pricing Schedule, Sec. 2 Options Market—Fees and Rebates, Tiers 1-6; see also NYSE Arca Options, Fees and Charges, Customer Posting Credit Tiers in Non-Penny Issues.

<sup>6</sup> See Cboe Options Fees Schedule, Footnote 36.

<sup>7</sup> See Cboe Options Fees Schedule, Volume Incentive Program.

<sup>8</sup> See Cboe Options Fees Schedule, Footnote 34.

<sup>9</sup> See Cboe Options Fees Schedule, Footnote 47.

<sup>21</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The Exchange initially filed the proposed fee changes on September 1, 2023 (SR-CBOE-2023-045). On September 25, 2023, the Exchange withdrew that filing and submitted this proposal.

<sup>4</sup> See Cboe Global Markets U.S. Options Market Volume Summary (August 30, 2023), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

Complex and Simple orders (both in AIM and Non-AIM orders).

Currently, VIP offers 5 tiers. Particularly, a TPH may meet the criteria under Tier 1 if its qualifying volume in the qualifying classes is above 0% and up to 0.75% of national customer volume, under Tier 2 if its qualifying volume in qualifying classes is above 0.75% and up to 2.00% of national customer volume, under Tier 3 if its qualifying volume in the qualifying classes is above 2.00% and up to 3.00% of national customer volume, under Tier 4 if its qualifying volume in the qualifying classes is above 3.00% and up to 4.00% of national customer volume, and under Tier 5 if its qualifying volume in the qualifying classes is above 4.00% of national customer volume.

The Exchange proposes to eliminate Tier 4 and to amend the volume threshold for Tier 3 to be above 2.00% and up to 4.00% of national customer volume. The Exchange also proposes a corresponding non-substantive amendment to update current Tier 5 to become Tier 4.<sup>10</sup> The VIP credit rates for Simple and Complex orders remain unchanged under the proposed change.

The proposed changes are designed to incentivize more volume to earn the same credits while also maintaining an incremental incentive for TPHs to strive for the highest tier level. The Exchange expects the impact of the change to be minimal, as currently, no TPHs qualify for Tier 4. Further, under current Tiers 4 and 5, the VIP credit rates for Simple and Complex Non-AIM contracts are the same (*i.e.*, \$0.15 for Simple Non-AIM contracts and \$0.25 for Complex Non-AIM contracts), and the difference between VIP credit rates for Simple and Complex AIM contracts are \$0.01 (*i.e.*, \$0.13 for Tier 4 Simple AIM contracts and \$0.14 for Tier 5 Simple AIM contracts; \$0.23 for Tier 4 Complex AIM contracts and \$0.24 for Complex AIM contracts). The proposed changes are also designed to increase the amount of volume TPHs provide on the Exchange and further encourage them to contribute to a deeper, more liquid market, as well as to increase transactions and take such execution opportunities provided by such increased liquidity. The Exchange believes that this, in turn, benefits all market participants by contributing

<sup>10</sup> As part of the proposed change, the Exchange also proposes to eliminate reference to Tier 5 in the Fee Schedule table. Under the proposed change, a TPH will only receive the Complex credit rates for Complex volume if at least 32% for Tiers 1, 2, and 3 or 38% for Tier 4 of that TPH's qualifying VIP volume in the previous month was comprised of Simple volume.

towards a robust and well-balanced market ecosystem. The Exchange notes the proposed tiers are competitively achievable for all TPHs that submit significant customer order flow, in that all firms that submit the requisite significant customer order flow could compete to meet the tiers.

The Exchange proposes to make corresponding amendments to the Affiliated Volume Plan ("AVP"). Under AVP, if a Market-Maker Affiliate<sup>11</sup> ("Affiliate OFP") or Appointed OFP<sup>12</sup> receives a credit under the VIP, the Market-Maker will receive an access credit on its BOE Bulk Ports corresponding to the VIP tier reached as well as a transaction fee credit on its sliding scale Market-Maker transaction fees (not including any additional surcharges or fees assessed as part of the Liquidity Provider Sliding Scale Adjustment Table). In connection with the proposed changes to the VIP, the Exchange proposes to make a corresponding change to the AVP and eliminate VIP Tier 4 (and corresponding MM Affiliate Access Credits and Liquidity Provider Sliding Scale Credits). The Exchange proposes to rename current VIP Tier 5 as VIP Tier 4, with the same corresponding Market-Maker Affiliate Access Credit of 25% and Liquidity Provider Sliding Scale Credit of 35%. All other Tiers and corresponding Market-Maker Affiliate Access Credits and Liquidity Provider Sliding Scale Credits remain unchanged under the proposed rule change.

#### New AIM Responder Fee Code

The Exchange proposes to amend its Fees Schedule in connection with the fees related to orders and auction responses executed in the Automated Improvement Mechanism ("AIM") and Solicitation Auction Mechanism ("SAM") Auctions.

AIM and SAM include functionality in which a TPH (an "Initiating TPH") may electronically submit for execution an order it represents as agent on behalf of a customer,<sup>13</sup> broker dealer, or any other person or entity ("Agency Order") against any other order it represents as agent, as well as against principal

<sup>11</sup> For purposes of AVP, "Affiliate" is defined as having at least 75% common ownership between the two entities as reflected on each entity's Form BD, Schedule A.

<sup>12</sup> See Cboe Options Fees Schedule Footnote 23. Particularly, a Market-Maker may designate an Order Flow Provider ("OFP") as its "Appointed OFP" and an OFP may designate a Market-Maker to be its "Appointed Market-Maker" for purposes of qualifying for credits under AVP.

<sup>13</sup> The term "customer" means a Public Customer or a broker-dealer. The term "Public Customer" means a person that is not a broker-dealer. See Rule 1.1.

interest in AIM only, (an "Initiating Order") provided it submits the Agency Order for electronic execution into the AIM or SAM Auctions.<sup>14</sup> The Exchange may designate any class of options traded on Cboe Options as eligible for AIM or SAM. The Exchange notes that all Users, other than the Initiating TPH, may submit responses to an Auction ("AIM Responses").<sup>15</sup> AIM and SAM Auctions take into account AIM Responses to the applicable Auction as well as contra interest resting on the Cboe Options Book at the conclusion of the Auction ("unrelated orders"), regardless of whether such unrelated orders were already present on the Book when the Agency Order was received by the Exchange or were received after the Exchange commenced the applicable Auction. If contracts remain from one or more unrelated orders at the time the Auction ends, they are considered for participation in the AIM or SAM order allocation process.

The Exchange assesses fees for certain AIM Responses (the "AIM Response" fees set forth in the fees schedule). For example, the Exchange assesses a fee of \$0.50 per contract for non-Customer, non-Market-Maker AIM Responses in penny classes, yielding fee code NB, and a fee of \$1.05 per contract for Non-Customer, Non-Market-Maker AIM Responses in non-penny classes, yielding fee code NC.

The Exchange now proposes to add fee code "MD", which would be appended to Market-Maker AIM Responses<sup>16</sup> and assessed a fee of \$0.25 per contract.

The Exchange notes that the same FLEX AIM and FLEX SAM responses will be assessed the same fee, which is consistent with the structure of the Exchange's current fees for AIM Responses, which apply uniformly to qualifying orders in AIM, SAM, FLEX AIM, and FLEX SAM.<sup>17</sup> The Exchange also notes that the Market-Maker AIM Responder fee applies to AIM Responses in Equity, ETF and ETN Options, Sectors Indexes,<sup>18</sup> and all other index

<sup>14</sup> See Rule 5.37 (AIM); Rule 5.39 (SAM); Rule 5.38 (Complex AIM); Rule 5.40 (Complex SAM); Rule 5.73 (FLEX AIM); and Rule 5.74 (FLEX SAM).

<sup>15</sup> For purposes of this filing and the proposed fee, the term "AIM Response" will include responses submitted to AIM and SAM Auctions.

<sup>16</sup> Currently, such orders are appended fee code MA, and assessed a standard fee of \$0.23 per contract, subject to the Liquidity Provider Sliding Scale and Liquidity Provider Sliding Scale Adjustment Table.

<sup>17</sup> See Cboe Exchange Fees Schedule, Footnote 20.

<sup>18</sup> See Cboe Exchange Fees Schedule, Footnote 47.

products, executed in AIM, SAM, FLEX AIM, and FLEX SAM Auctions.

The Exchange also proposes to remove Market-Maker volume via AIM Market-Maker Responses (yielding fee code MD) from eligibility for credits pursuant to the Liquidity Provider Sliding Scale, similar to how Market-Maker orders transacted in open outcry (*i.e.*, manual) in Equity, ETF, and ETN Options, Sector Indexes and All Other Index Products, which yield fee code MB, are handled today. Currently, the Liquidity Provider Sliding Scale offers credits on Market-Maker orders where a Market-Maker achieves certain volume thresholds based on total national Market-Maker volume in all underlying symbols<sup>19</sup> during the calendar month. Footnote 10 (appended to the Liquidity Provider Sliding Scale) states that the Liquidity Provider Sliding Scale applies to Liquidity Provider (Cboe Options Market-Maker, DPM and LMM) transaction fees in all products except (1) Underlying Symbol List A<sup>20</sup> (34), MRUT, NANOS, XSP and FLEX Micros, and (2) volume executed in open outcry. The proposed rule change amends Footnote 10 to add volume executed via AIM Responses to the list of Liquidity Provider Sliding Scale exclusions. The proposed rule change also adds language to Footnote 10 to make it clear that the volume thresholds under the Liquidity Provider Sliding Scale will continue to include volume executed via AIM Responses. The Exchange notes that it continues to include volume executed via AIM Responses in a Market-Maker's volume eligible to meet the tier thresholds in order to continue to incentivize Market-Maker order flow to the trading floor. The Exchange offers a hybrid market system and aims to continue to balance incentives for Market-Makers to contribute to deep liquid markets for investors on both its electronic and open outcry platforms.

#### Score Program Changes

The Exchange 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 & XSP ("Qualifying Classes"). The SCORE program is available to any TPH Originating Clearing Firm or non-TPH Originating Clearing Firm that sign

<sup>19</sup> Excluding products in Underlying Symbol List A (see Footnote 34), MRUT, NANOS, XSP and FLEX Micros.

<sup>20</sup> See Cboe Exchange Fees Schedule, Footnote 34.

up for the program.<sup>21</sup> SCORE utilizes Discount Tiers to determine the Originating Firm's applicable corresponding discounts. 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. Currently, the program sets forth four Discount Tiers, with applicable discounts ranging from \$0 to \$0.14 per retail contract.

The Exchange proposes to amend Footnote 48 to exclude from the SCORE program certain orders that are revised post-trade, using the Clearing Editor tool. Specifically, the Exchange proposes to exclude orders where the capacity is changed from another capacity to Customer using the Clearing Editor, and single leg orders created by hard-edits to complex orders using the Clearing Editor.

#### 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>22</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>23</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>24</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

As stated above, the Exchange operates in a highly competitive market

<sup>21</sup> 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.

<sup>22</sup> 15 U.S.C. 78f(b).

<sup>23</sup> 15 U.S.C. 78f(b)(5).

<sup>24</sup> *Id.*

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 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 TPHs.

#### Customer Volume Incentive Program and Affiliated Volume Plan

The Exchange believes the proposed amendments to the VIP (and corresponding amendments to AVP) to eliminate Tier 4 and to amend the volume threshold for Tier 3 to be above 2.00%–4.00%, is reasonable because it continues to encourage TPHs to take the opportunity to receive credits on Customer orders by reaching the proposed volume thresholds. The Exchange notes that relative volume-based incentives and discounts have been widely adopted by exchanges<sup>25</sup> and are reasonable, equitable and non-discriminatory because they are open to all TPHs on an equal basis and provide additional benefits or discounts that are reasonably related to (i) the value to an exchange's market quality and (ii) associated higher levels of market activity, such as higher levels of liquidity provision and/or growth patterns. Additionally, as noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow. Competing options exchanges offer similar tiered pricing structures to that of the Exchange, including schedules of rebates/credits and fees that apply based upon members achieving certain volume and/or growth thresholds. These competing pricing schedules, moreover, are presently comparable to those that the Exchange provides, including the pricing of comparable tiers.<sup>26</sup>

The Exchange believes adjusting the VIP volume thresholds by eliminating Tier 4 (and making corresponding changes to the AVP) and amending the volume threshold for Tier 3 is reasonable because it will continue to encourage TPHs to increase their overall order flow to the Exchange based on increasing their Customer, Professional Customer, Broker-Dealer, and JBO executed orders as a percentage of national customer volume. Particularly, the Exchange believes the proposed

<sup>25</sup> See *supra* note 5.

<sup>26</sup> *Id.*

threshold change is reasonable because it will encourage increased volume, thus a deeper, more liquid market, and an increase in transaction opportunities provided by the increased liquidity. In turn, these increases benefit all TPHs by contributing towards a robust and well-balanced market ecosystem. Increased overall order flow benefits all investors by deepening the Exchange's liquidity pool, providing greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency, and improving investor protection.

The proposed volume thresholds also do not represent a significant departure from the current required criteria under the Exchange's existing tiers and is therefore still reasonable based on the difficulty of satisfying the tiers' criteria and ensures the existing credit and proposed thresholds appropriately reflect the incremental difficulty to achieve the existing VIP tiers. Further, the Exchange believes that the amendments are reasonable because it will still allow TPHs transmitting qualifying orders that reach a threshold of above 3.00—4.00% to receive either the same credit for doing so, in the case of Simple and Complex Non-AIM Contracts, or a \$0.01 lesser credit for Simple and Complex AIM Contracts. Additionally, as noted above, currently, no TPHs qualify for Tier 4. Finally, the changes to the AVP are reasonable because the AVP utilizes the VIP tier structure, and thus, any changes to the VIP tiers must be incorporated into the AVP.

The Exchange believes Tiers 3 and 4, as amended, remain in line with existing tiers, both in required criteria and credits. For example, the volume threshold amount under existing Tier 1 is currently set as a range within a 0.75 percentage point (0%–0.75%) and Tier 2 is currently set as a range within a 1.25 percentage point (between 0.75% up to 2.00%). It is reasonable to incrementally increase this range for Tier 3 to be within 2 percentage points (between 2.00% and 4.00%), and then over 4.00% for Tier 4, as proposed, since higher credits are available for higher tiers. The Exchange also believes that the tiers, as amended, are in a reasonable increment to encourage overall order flow to the Exchange without so significantly increasing the difficulty in reaching the tiers' criteria.

The Exchange believes that the proposal represents an equitable allocation of rebates and is not unfairly discriminatory because all TPHs have the opportunity to meet the tier

thresholds. The Exchange also notes that the proposed changes will not adversely impact any TPH's pricing or ability to qualify for other credit tiers. Rather, should a TPH not meet the proposed criteria, the TPH will merely not receive the proffered credit, for both the VIP and AVP.

#### New AIM Responder Fee Code

The Exchange believes that the proposed rule change to adopt a fee code and assess a standard rate for Market-Maker AIM Responses is reasonable, equitable and not unfairly discriminatory. As noted above, the Exchange operates in a highly competitive market. The Exchange is only one of several options venues to which market participants may direct their order flow, and it represents a small percentage of the overall market. The Exchange believes that the proposed fees are reasonable, equitable, and not unfairly discriminatory in that competing options exchanges,<sup>27</sup> including the Exchange's affiliated options exchanges,<sup>28</sup> offer substantially the same fees and credits in connection with similar price improvement auctions, as the Exchange now proposes.

Additionally, the Exchange believes that the proposed rule change is equitable and not unfairly discriminatory because the proposed fee will apply automatically and uniformly to all Market-Maker AIM Response orders. The Exchange also believes that the proposed fees in connection with Market-Maker AIM Response orders do not represent a significant departure from the fees and credits rebates currently offered under the fees schedule for these market participants. For example, under the existing fees schedule electronic orders in Equity, ETF and ETN Options, Sectors Indexes,<sup>29</sup> and all other index products with M Capacity Codes are assessed a fee of \$0.23 per contract in Penny and non-Penny Classes.

<sup>27</sup> See MIAAX Options Fee Schedule, Section 1(a)(v), "MIAAX Price Improvement Mechanism ("PRIME") Fees, which assesses a fee of \$0.50 (Penny Classes) and \$1.10 (non-Penny Classes) for Market-Maker PRIME responses; see also NYSE American Options Fee Schedule, Section I(G), "CUBE Auction Fees and Credits", which assesses a fee of \$0.50 (Penny Classes) and \$1.05 (non-Penny Classes) for Non-Customer CUBE (its Customer Best Execution Auction) responses.

<sup>28</sup> See EDGX Options Exchange Fee Schedule, "Fee Codes and Associated Fees", fee code BD is appended to AIM Responder Penny orders and is assessed a fee of \$0.50 per share, and fee code BE is appended to AIM Responder Non-Penny orders and is assessed a fee of \$1.05 per share.

<sup>29</sup> See Cboe Exchange Fees Schedule, Footnote 47.

The Exchange also believes that assessing a fee applicable to Market-Maker responses that is lower than non-Customer, non-Market-Maker responses is equitable and not unfairly discriminatory because Market-Makers are already subject to certain other transaction fees not otherwise applicable to other market participants. In particular, in addition to Market-Maker-specific standard transaction fees,<sup>30</sup> Market-Makers are also currently assessed a marketing fee of \$0.25 in Penny Program classes and \$0.70 in all other classes on certain transactions resulting from customer orders,<sup>31</sup> including qualifying orders submitted as AIM Responses. Further, Market-Makers, unlike other market participants, take on a number of obligations, including quoting obligations that other market participants do not have, as well as added market making and regulatory requirements, which normally do not apply to other market participants. For example, Market-Makers have obligations to maintain continuous markets, engage in a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market, and to not make bids or offers or enter into transactions that are inconsistent with a course of dealing. Additionally, the Exchange notes that Market-Makers (with an appointment in the applicable class) may not submit solicited orders into an AIM Auction;<sup>32</sup> this restriction does not apply to Firm orders. As stated, the Exchange also recognizes that Market-Makers are the primary liquidity providers in the options markets, and particularly, during AIM auctions. Thus, the Exchange believes Market-Makers provide the most accurate prices reflective of the true state of the market and are primarily responsible for encouraging more aggressive quoting and superior price improvement during an AIM Auction. As a result, the Exchange believes it is important to continue to incentivize Market-Makers to actively participate in such auctions by means of assessing a lower transaction fee for Market-Maker AIM Response orders. Increased Market-Maker liquidity also increases trading opportunities and signals to other

<sup>30</sup> See Cboe Options Fees Schedule, "SPX Liquidity Provider Sliding Scale" table; "Liquidity Provider Sliding Scale" table; and "Liquidity Provider Sliding Scale Adjustment Table".

<sup>31</sup> That is, Market-Maker orders that execute against customer orders.

<sup>32</sup> This is also true for SAM Auctions. See Rule 5.39.

participants to increase their order flow, which benefits all market participants.

The proposed rule change to remove Market-Maker volume transacted via AIM Responses from eligibility for credits pursuant to the Liquidity Provider Sliding Scale is reasonable because it is also reasonably designed to balance incentivizing Market-Maker's participation in AIM Auctions with establishing a fee in-line with other AIM Response fees. The Exchange also believes that it is reasonable to continue to include Market-Maker AIM Response volume in the volume thresholds for meeting the Liquidity Provider Sliding Scale tiers because, as stated above, it is designed to continue to incentivize Market-Maker participation in AIM Auctions and would assist the Exchange in continuing to provide a robust hybrid market. The Exchange notes that the AIM and C-AIM Auctions generally deliver meaningful opportunities for price improvement to orders and provide an efficient manner of access to liquidity for members. Increased overall auction-related order flow benefits all investors by deepening the Exchange's liquidity pool, potentially providing even greater execution incentives and opportunities, offering additional flexibility for all investors to enjoy cost savings, supporting the quality of price discovery, promoting market transparency and improving investor protection. The Exchange notes, too, that other programs in the Fees Schedule include certain volume in meeting volume thresholds while not including the same volume as eligible for credits or reduced rates under such programs.<sup>33</sup> The proposed rule change is equitable and not unfairly discriminatory because the proposed rule change will apply equally to all Market-Maker AIM Response volume, in that, no such volume will be allotted credits under the Liquidity Provider Sliding Scale Program.

#### SCORE Program Changes

The Exchange believes the proposal to exclude certain orders that are revised post-trade, using the Clearing Editor tool is reasonable because it no longer wishes to include these orders as part of the program, and it is not required to do so. The Exchange notes that orders where the capacity is changed from

another capacity to Customer using the Clearing Editor and single leg orders created by hard-edits to complex orders using the Clearing Editor were not intended to be a part of the program and believes the intention of the program will continue to be achieved as a result of the proposed changes. The Exchange believes the proposed changes are reasonable because they provide further clarity regarding what orders are (and are not) eligible for the program. Further, the Exchange believes the changes remain equitable and reasonable by not materially changing 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. The Exchange believes the proposed change is equitable and not unfairly discriminatory because the exclusions of certain orders that are revised post-trade, using the Clearing Editor tool apply to all registered Originating Firms uniformly.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

The Exchange does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. Specifically, the Exchange believes the proposed rule change to the VIP and AVP does not impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed changes to the VIP, and corresponding changes to the AVP, will encourage the submission of additional liquidity to a public exchange, thereby promoting market depth, price discovery and transparency and enhancing order execution opportunities for all TPHs. As a result, the Exchange believes that the proposed change furthers the Commission's goal in adopting Regulation NMS of fostering competition among orders, which promotes "more efficient pricing of individual stocks for all types of orders, large and small."<sup>34</sup> Further, the proposed change applies to all TPHs submitting qualified orders equally, in that all TPHs submitting such orders are

eligible for the tiers (as amended), have a reasonable opportunity to meet the tiers' criteria (as amended) and will all receive the existing credit if such criteria is met. As described above, while only certain orders would count towards the qualifying thresholds, specifically, Customers, Professionals, Broker-Dealers and JBOs, these market participants' orders are primarily executed as agency orders, whose order flow would bring greater volume and liquidity, which benefits all market participants by providing more trading opportunities and tighter spreads. Overall, the proposed change is designed to encourage additional order flow to the Exchange, which the Exchange believes benefits all market participants on the Exchange by providing more liquidity, thus trading opportunities, encouraging even more TPHs to send orders, thereby contributing towards a robust and well-balanced market ecosystem to the benefit of all market participants.

The Exchange does not believe that the proposed rule change to adopt a new fee code for Market-Maker AIM Responses will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Particularly, the proposed changes will apply uniformly to all Market-Maker AIM Responses, in that all such orders will automatically and uniformly yield fee code MD and be assessed the standard fee for MD. Further, all such orders will uniformly not be eligible for credits under the Liquidity Provider Sliding Scale.

Additionally, the Exchange does not believe that the proposed changes to the SCORE program will impose any burden on intramarket competition because the proposed changes apply to all registered Originating Firms uniformly, in that exclusions of certain orders that are revised post-trade, using the Clearing Editor tool apply to all registered Originating Firms uniformly.

Finally, the Exchange believes the proposed rule changes do not 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. Based on publicly available information, no single options exchange has more than 19% of the market share.<sup>35</sup> Therefore, no exchange possesses significant pricing

<sup>33</sup> See e.g., Cboe Options Fees Schedule, Volume Incentive Program (VIP) table (which counts volume for capacity B, J and U towards tier qualification but not as eligible for the VIP credit), and Cboe Options Clearing Trading Permit Holder Proprietary Products Sliding Scale table (which counts volume in products not included in Underlying Symbol List A towards reaching the tiers, but provides reduced rates to volume in products included in Underlying Symbol List A).

<sup>34</sup> See Securities Exchange Act Release No. 51808, 70 FR 37495, 37498-99 (June 29, 2005) (S7-10-04) (Final Rule).

<sup>35</sup> See supra note 4.

power in the execution of option order flow. Indeed, participants can readily choose to send their orders to other exchange, and, additionally 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>36</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>37</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.

### 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)(ii) of the Act,<sup>38</sup> and Rule 19b-4(f)(2)<sup>39</sup> thereunder. At any time

<sup>36</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005).

<sup>37</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)).

<sup>38</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>39</sup> 17 CFR 240.19b-4(f)(2).

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 shall institute proceedings to determine whether the proposed rule 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-2023-056 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-2023-056. 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-2023-056 and should be submitted on or before October 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>40</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023-21943 Filed 10-3-23; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98618; File No. SR-PEARL-2023-50]

### Self-Regulatory Organizations; MIAX PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by MIAX PEARL, LLC To Amend the MIAX Pearl Equities Fee Schedule

September 28, 2023.

Pursuant to the provisions of 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 September 27, 2023, MIAX PEARL, LLC (“MIAX Pearl” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) a 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

The Exchange is filing a proposal to amend the fee schedule (the “Fee Schedule”) applicable to MIAX Pearl Equities, an equities trading facility of the Exchange.

The text of the proposed rule change is available on the Exchange’s website at <https://www.miaxglobal.com/markets/us-options/pearl-options/rule-filings>, at MIAX Pearl’s principal office, and at the Commission’s Public Reference Room.

<sup>40</sup> 17 CFR 200.30-3(a)(12).

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

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