

investors and the public interest and would therefore be consistent with Section 6(b)(5)⁸ of the Act. The proposed rule change would accordingly foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the mechanism of a free and open market and a national market system.

Finally, the Exchange further believes that the proposed change would be consistent with Section 6(b)(1)⁹ of the Act because it would provide increased clarity regarding the Exchange's ability to enforce compliance with its rules by persons associated with an ETP Holder, thereby reducing any potential confusion with respect to the Exchange's interpretation or application of its rules. As such, the proposed change would enable the Exchange to be so organized as to have the capacity to be able to enforce compliance by its exchange members and persons associated with its exchange members with the provisions of the Act, the rules and regulations thereunder, and the rules of the Exchange, consistent with Section 6(b)(1)¹⁰ of the Act.

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 proposed rule change is not intended to address competitive issues but rather is concerned solely with adding clarity and transparency to the Exchange's rules and providing greater harmonization with the rules of its affiliate NYSE and the approved rules of FINRA and the Nasdaq Exchanges.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act¹¹ and Rule 19b-4(f)(6)¹² thereunder. Because the

proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)¹³ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSENAT-2023-21 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-NYSENAT-2023-21. 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

the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

¹³ 15 U.S.C. 78s(b)(2)(B).

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-NYSENAT-2023-21 and should be submitted on or before October 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Sherry R. Haywood,
Assistant Secretary.

[FR Doc. 2023-21950 Filed 10-3-23; 8:45 am]

BILLING CODE 8011-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98596; File No. SR-CBOE-2023-038]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Its Fee Schedule Relating to the Options Regulatory Fee

September 28, 2023.

I. Introduction

On August 1, 2023, Cboe Exchange, Inc. ("Cboe" or "Exchange") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change (file number SR-CBOE-2023-038) to increase the

¹⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

⁸ 15 U.S.C. 78f(b)(5).

⁹ 15 U.S.C. 78f(b)(1).

¹⁰ 15 U.S.C. 78f(b)(1).

¹¹ 15 U.S.C. 78s(b)(3)(A)(iii).

¹² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file

amount of its Options Regulatory Fee (“ORF”).³ The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.⁴ The proposed rule change was published for comment in the **Federal Register** on August 16, 2023.⁵

Pursuant to Section 19(b)(3)(C) of the Act,⁶ the Commission is hereby: (1) temporarily suspending file number SR-CBOE-2023-038; and (2) instituting proceedings to determine whether to approve or disapprove file number SR-CBOE-2023-038.

II. Description of the Proposed Rule Change

The Exchange proposes to increase the amount of its ORF from \$0.0017 to \$0.0030 per contract.⁷ The Exchange assesses the ORF to each Trading Permit Holder (“TPH”) for options transactions cleared by the TPH that are cleared by the Options Clearing Corporation (“OCC”) in the “customer” range, regardless of the exchange on which the transaction occurs.⁸ The Exchange states that “[r]evenue generated from ORF, when combined with all of the Exchange’s other regulatory fees and fines, is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of TPH customer option business. . . .”⁹ Noting that it monitors the amount of ORF revenue it collects “to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange’s total regulatory costs,” the Exchange proposed to increase the amount of its ORF “based on the Exchange’s estimated projections for its regulatory costs, which have increased, coupled with a projected decrease in the Exchange’s other non-ORF regulatory fees.”¹⁰

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,¹¹ at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,¹² the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) 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. As discussed below, the Commission believes a temporary suspension of the proposed rule change is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

When exchanges file their proposed rule changes with the Commission, including fee filings like the Exchange’s present proposal, they are required to provide a statement supporting the proposal’s basis under the Act and the rules and regulations thereunder applicable to the exchange.¹³ The instructions to Form 19b-4, on which exchanges file their proposed rule changes, specify that such statement “should be sufficiently detailed and specific to support a finding that the proposed rule change is consistent with [those] requirements.”¹⁴

Section 6 of the Act, including Sections 6(b)(4), (5), and (8), require the rules of an exchange to: (1) provide for the equitable allocation of reasonable fees among members, issuers, and other persons using the exchange’s facilities;¹⁵ (2) perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;¹⁶ and (3) not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.¹⁷

In justifying its proposal, the Exchange stated that its proposal “is reasonable because [the proposed

increase] would help ensure that revenue collected from the ORF, in combination with other regulatory fees and fines, would help offset, but not exceed, the Exchange’s total regulatory costs.”¹⁸ According to the Exchange, its ORF is designed to “generate revenues that would be less than or equal to 75% of the Exchange’s regulatory costs.”¹⁹ The Exchange stated that the proposed increase is reasonable based on “recent options volumes, coupled with the anticipated regulatory fees and anticipated reductions in other regulatory fees.”²⁰ The Exchange further stated that “although recent options volumes have increased, it has not increased its ORF rate in four years” and “has reduced its ORF rates twice” since 2019.²¹

The Exchange also asserted that the ORF is equitably allocated and not unfairly discriminatory because higher fees are assessed “to those TPHs that require more Exchange regulatory services based on the amount of customer options business they conduct.”²² In addition, the Exchange stated that “[r]egulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive.”²³ Further, the Exchange stated that it has “broad regulatory responsibilities with respect to its TPHs’ activities, irrespective of where their transactions take place” and therefore the surveillance programs for customer trading activity “may require the Exchange to look at activity across all markets.”²⁴ Consequently, the Exchange imposes the ORF “on all customer-range transactions cleared by a TPH, even if the transactions do not take place on the Exchange.”²⁵

In temporarily suspending the Exchange’s proposed rule change, the Commission intends to further consider whether the proposal to increase the amount of the ORF is consistent with the statutory requirements applicable to a national securities exchange under the Act. In particular, the Commission will consider whether the proposed rule

³ See Securities Exchange Act Release No. 98106 (August 10, 2023), 88 FR 55796 (August 16, 2023) (“Notice”).

⁴ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

⁵ See Notice, *supra* note 3.

⁶ 15 U.S.C. 78s(b)(3)(C).

⁷ See Notice, *supra* note 3, at 55796.

⁸ See *id.* The ORF is collected by OCC on behalf of the Exchange from either the Clearing Trading Permit Holder (“CTPH”) or the non-CTPH that ultimately clears the transaction. See *id.*

⁹ *Id.* at 55796.

¹⁰ *Id.* at 55797.

¹¹ 15 U.S.C. 78s(b)(3)(C).

¹² 15 U.S.C. 78s(b)(1).

¹³ See 17 CFR 240.19b-4 (Item 3 entitled “Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change”).

¹⁴ *Id.*

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(5).

¹⁷ 15 U.S.C. 78f(b)(8).

¹⁸ Notice, *supra* note 3, at 55797.

¹⁹ *Id.*

²⁰ *Id.* (stating that “the proposed change is reasonable as it would offset the anticipated increased regulatory costs, while still not exceeding 75% of the Exchange’s total regulatory costs.”).

²¹ *Id.* No exchange has increased its ORF rate since 2019.

²² Notice, *supra* note 3, at 55797.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 55796.

change satisfies the standards under the Act and the rules thereunder requiring, among other things, that an exchange's rules provide for the equitable allocation of reasonable fees among members, issuers, and other persons using its facilities; not permit unfair discrimination between customers, issuers, brokers or dealers; and do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.²⁶

Therefore, the Commission finds that it is necessary or appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act, to temporarily suspend the proposed rule change.²⁷

IV. Proceedings To Determine Whether To Approve or Disapprove the Proposed Rule Change

In addition to temporarily suspending the proposal, the Commission also hereby institutes proceedings pursuant to Sections 19(b)(3)(C)²⁸ and 19(b)(2)(B) of the Act²⁹ to determine whether the Exchange's proposed rule change should be approved or disapproved. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,³⁰ the Commission is providing notice of the grounds for possible disapproval under consideration:

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(4) of the

Act, which requires that the rules of a national securities exchange "provide for the *equitable allocation* of *reasonable* dues, fees, and other charges among its members and issuers and other persons using its facilities"³¹ (emphasis added);

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange not be "designed to permit *unfair discrimination* between customers, issuers, brokers, or dealers"³² (emphasis added); and

- Whether the Exchange has demonstrated how its proposed fee is consistent with Section 6(b)(8) of the Act, which requires that the rules of a national securities exchange "not impose any burden on competition not necessary or appropriate in furtherance of the purposes of [the Act]."³³

As noted above, the proposal purports to increase the amount of the ORF in response to "recent options volume"³⁴ and the Exchange's estimated projections for its regulatory costs and anticipated regulatory revenues in a manner that "is designed to recover a material portion of the regulatory costs to the Exchange of the supervision and regulation of TPH customer options business. . . ." ³⁵ However, those and other statements in support of its proposed regulatory fee increase are general in nature and lack sufficient detail and specificity.

For example, the Exchange does not discuss what "recent options volume" it considered or how that volume has impacted its regulatory expenses and regulatory revenues.³⁶

Further, the Exchange does not elaborate on the "material portion" of options regulatory expenses that it seeks to recover from the ORF and why the threshold it selected (*i.e.*, that ORF will "not exceed more than 75% of total

annual regulatory costs") correlates to the degree of regulatory responsibility and expenses borne by the Exchange as it relates to the regulation of customer options transactions.³⁷ For example, the Exchange has not provided any quantifiable information to support its assertion that regulating customer trading activity is "much more labor-intensive" and therefore, more costly. The Exchange does not claim in its filing that its regulation of customer activity consumes 75% of total regulatory costs nor does it assert that customer activity requires a level of effort that occupies 75% of the regulatory department's attention. The Exchange does not sufficiently analyze how funding 75% of its total regulatory costs (including direct and indirect expenses) from ORF, *e.g.*, constitutes an equitable allocation of reasonable fees among members, and it does not provide sufficient detail to allow the Commission and commenters to consider those issues.

Further, the Exchange has not provided specific or detailed information regarding the regulatory cost associated with monitoring and surveilling exchange activity compared to off exchange activity. In particular, the Exchange collects ORF on executions that do not occur on the Exchange. With a market share under 20% based on matched volume, that means that the Exchange seeks to collect ORF on the over 80% of executions that happen elsewhere.³⁸ However, the Exchange has not provided information or analysis in its filing to support the collection of ORF on away activity. The proposed ORF rate is the same for on-exchange and off-exchange activity, so the proposal would result in the Exchange funding a very significant portion of its total regulatory costs from a fee charged on contracts that execute away from the Exchange. The Exchange does not provide a sufficiently detailed analysis or present specific facts to show the level of regulatory effort and regulatory costs it expends on contracts that execute on other exchanges. Without more information in the filing on the Exchange's regulatory revenues, regulatory costs, and regulatory activities to supervise and regulate members, specifically, *e.g.*, customer versus non-customer activity and on-exchange versus off-exchange activity, the proposal lacks specific information that can speak to whether the proposed

²⁶ See 15 U.S.C. 78f(b)(4), (5), and (8), respectively.

²⁷ For purposes of temporarily suspending the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

²⁸ 15 U.S.C. 78s(b)(3)(C). Once the Commission temporarily suspends a proposed rule change, Section 19(b)(3)(C) of the Act requires that the Commission institute proceedings under Section 19(b)(2)(B) to determine whether a proposed rule change should be approved or disapproved.

²⁹ 15 U.S.C. 78s(b)(3)(c).

³⁰ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See *id.* The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding, or if the exchange consents to the longer period. See *id.*

³¹ 15 U.S.C. 78f(b)(4).

³² 15 U.S.C. 78f(b)(5).

³³ 15 U.S.C. 78f(b)(8).

³⁴ Notice, *supra* note 3, at 55797.

³⁵ Notice, *supra* note 3, at 55796.

³⁶ In recent years, several options exchanges have filed proposed rule changes to *reduce* their respective ORF rates due to unanticipated and sustained growth in customer options volume. See, *e.g.*, Securities Exchange Act Release Nos. 98054 (August 4, 2023) 88 FR 54362 (August 10, 2023) (SR-ISE-2023-14) (reducing ORF rate from \$0.0014 to \$0.0013 because of continued options volume growth in 2023 and noting in particular that March 2023 options volume was higher than any month in 2022); 98056 (August 4, 2023), 88 FR 54381 (August 10, 2023) (SR-GEMX-2023-09) (reducing ORF rate from \$0.0013 to \$0.0012); and 94065 (January 26, 2023), 87 FR 5548 (February 1, 2022) (SR-Phlx-2022-03) (reducing ORF rate from \$0.0042 to \$0.0034).

³⁷ See Notice, *supra* note 3, at 55796.

³⁸ Market share statistic as reported by the Exchange on September 26, 2023, available at https://www.cboe.com/us/options/market_statistics/.

ORF is reasonable, equitably allocated, and not unfairly discriminatory, particularly given that the ORF is assessed only on transactions that clear in the “customer” range and regardless of the exchange on which the transaction occurs.

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the [SRO] that proposed the rule change.”³⁹ The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,⁴⁰ and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.⁴¹

As explained above, the Exchange’s statements in support of the proposed rule change are general in nature and lack detail and specificity. The Commission cannot unquestionably rely on an exchange’s statements and representations.⁴² Instead, the Commission needs sufficient information to support independent findings that a proposal is consistent with the requirements of the Act.⁴³ Here, such an analysis includes, among other things, whether the proposed ORF is an equitable allocation of reasonable dues, fees, and other changes among the Exchange’s members, as well as whether the proposed ORF is equitable and not unfairly discriminatory.

The Commission needs additional information from the Exchange to demonstrate how the proposal meets those and other applicable requirements of the Act, to assess whether the Exchange has established a sufficient nexus between the proposed ORF and the Exchange’s regulation of customer trading activity both on and off exchange. While the Commission broadly solicits comment from all interested parties on the proposal, the Commission believes that the Exchange alone has access to much of the specific detail necessary to fully address these questions and concerns because these matters involve qualitative and

quantitative information about the Exchange’s operations. Specifically, among other things, the Commission asks that commenters address the sufficiency of the Exchange’s statements in support of the proposal contained in the Notice.⁴⁴ In particular, the Commission seeks comment on the following aspects of the proposal and asks commenters to submit data where appropriate to support their views:

1. *Information on the Exchange’s Projected Regulatory Costs and Revenues.* The Exchange states that its proposed ORF rate increase is reasonable after considering recent options volume, coupled with its projected increase in regulatory costs and anticipated reduction in non-ORF regulatory fees. The Exchange notes that its regulatory costs include direct regulatory expenses and certain indirect expenses for work “allocated in support of the regulatory function.”⁴⁵ According to the Exchange, indirect regulatory expenses (including, among other things, human resources, legal, compliance, information technology, facilities and accounting) are estimated to be approximately 30% of the Exchange’s total regulatory costs for 2023 and direct regulatory expenses are estimated to be approximately 70% of the Exchange’s total regulatory costs for 2023. The Exchange did not provide in the filing any further analysis regarding its projected regulatory cost increases, its anticipated non-ORF regulatory revenue decreases or in what way recent options volume was considered. Do commenters believe the Exchange has provided adequate detail regarding these metrics? If not, what additional information should be provided to demonstrate how the proposal is consistent with the Act? How have recent options volumes impacted the Exchange’s regulatory expenses and revenues? How should the Commission consider the Exchange’s proposal in light of recent proposals from other exchanges to reduce their ORF on account of increasing customer options volume placing them at risk of over-collecting ORF in excess of their regulatory expenses?

2. *Information on the Exchange’s Imposition of ORF on Customer Orders.* The Exchange states that it is its “practice that revenue generated from ORF not exceed more than 75% of total annual regulatory costs.”⁴⁶ Do commenters believe that the Exchange has sufficiently analyzed and justified its proposal to fund 75% of its total

regulatory expenses from a fee imposed only on options transactions clearing in the customer-range, where those expenses include the regulation of transactions that clear in the non-customer-range (e.g., broker-dealer and market maker trades)? In addition, explaining that the proposed ORF would be charged to “all TPHs on all their transactions that clear in the customer-range at the OCC,” the Exchange states that such methodology “ensures fairness by assessing higher fees to those TPHs that require more Exchange regulatory services based on the amount of customer options business they conduct.”⁴⁷ The Exchange further asserts that “[r]egulating customer trading activity is much more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity, which tends to be more automated and less labor-intensive.”⁴⁸ According to the Exchange, “the costs associated with administering the customer component of the Exchange’s overall regulatory program are materially higher than the costs associated with administering the non-customer component (e.g., TPH proprietary transaction) of its regulatory program.”⁴⁹ Do commenters believe that the Exchange has provided sufficiently detailed quantitative and qualitative evidence in support of this aspect of its proposal? Specifically, examples of information that would be helpful to demonstrate how the assessment of ORF only on orders that clear in the customer-range correlates to the level of effort and costs the Exchange expends to regulate customer options transactions include: (a) the percentage of volume that clears in the customer-range both on and off the Exchange compared to the percentage of volume that clears in a range other than customer both on and off Exchange; (b) the percentage of the Exchange’s regulatory budget attributable to the regulation of orders that clear in the customer-range compared to the percentage of the Exchange’s regulatory budget attributable to orders that clear in a range other than customer; (c) the percentage of the Exchange’s regulatory level of effort attributable to the regulation of orders that clear in the customer-range compared to the percentage of the Exchange’s regulatory level effort attributable to orders that clear in a range other than customer; and (d) the proportion of the Exchange’s revenues, as reported in the most recent

³⁹ 17 CFR 201.700(b)(3).

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *Susquehanna Int’l Grp., LLP v. SEC*, 866 F.3d 442, 447 (August 8, 2017).

⁴³ See *id.*

⁴⁴ See Notice, *supra* note 3.

⁴⁵ See Notice, *supra* note 3, at 55796.

⁴⁶ See *id.*

⁴⁷ See *id.* at 55797.

⁴⁸ See *id.*

⁴⁹ See *id.*

annual financials it submitted on Form 1, represented by ORF revenue.

3. *Information on the Exchange's Assessment of ORF on Away-Market Activity.* The Exchange states that "it has broad regulatory responsibilities with respect to TPHs' activities, irrespective of where their transactions take place."⁵⁰ The Exchange therefore believes that it is appropriate to impose the ORF on "all customer-range transactions cleared by a TPH, even if the transactions do not take place on the Exchange."⁵¹ Do commenters believe that the Exchange has provided sufficiently detailed quantitative and qualitative evidence in support of how the assessment of ORF on away-market transactions correlates to the effort it expends on regulating away-market transactions compared to the level of effort the Exchange invests in regulating transactions on Exchange? Specifically, examples of information that would be helpful to assess the application of the ORF to executions that do not occur on the Exchange include: (a) the percentage of the Exchange's overall regulatory budget attributable to the regulation of away-market transactions compared to the percentage of the Exchange's overall regulatory budget allocated to regulating on-Exchange transactions; (b) the percentage of the Exchange's regulatory level of effort attributable to the regulation of away-market transactions compared to the percentage of the Exchange's regulatory level of effort attributable to the regulation of orders that execute on the Exchange; (c) the percentage of ORF revenue that is derived from away-market transactions compared to the percentage of ORF revenue that is derived from executions on the Exchange; and (d) more detail on the regulatory activities the exchange performs for trades that do not occur on the Exchange.

4. *Information on the Exchange's Regulatory Program Concerning Clearing Brokers.* The Exchange states that ORF is collected on "customer" range options transactions cleared by a CTPH regardless of the exchange on which the transaction occurs, including from a non-CTPH.⁵² Do commenters believe that the Exchange has provided sufficiently detailed quantitative and qualitative evidence in support of this aspect of its proposal? Specifically, examples of information that would be helpful to provide context for the collection of ORF from member and non-member clearing brokers and determine whether a sufficient nexus

exists between the ORF and the Exchange's regulation of CTPH clearing activity, include: (a) the percentage of the Exchange's regulatory expenses and level of regulatory activity that pertain to clearance and settlement activity and the percentage this accounts for with respect to the Exchange's overall regulatory costs and regulatory activity, and if that differs depending on whether the CTPH is an Exchange member or not and whether the contract executes on the Exchange or not; (b) the number of CTPHs compared to the number of non-CTPHs from which ORF is collected on behalf of the Exchange; and (c) the percentage of ORF revenues collected from member CTPHs compared to the percentage of ORF revenue collected from non-members.

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposed fees are consistent with the Act, and specifically, with the requirements that exchange fees be reasonable, equitably allocated, and not unfairly discriminatory.⁵³

V. Commission's Solicitation of Comments

The Commission requests written views, data, and arguments with respect to the concerns identified above as well as any other relevant concerns. Such comments should be submitted by October 25, 2023. Rebuttal comments should be submitted by November 8, 2023. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.⁵⁴

The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

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.

⁵³ See 15 U.S.C. 78f(b)(4), (5), and (8).

⁵⁴ 15 U.S.C. 78s(b)(2). Section 19(b)(2) of the Act grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by an SRO. See Securities Acts Amendments of 1975, Report of the Senate Committee on Banking, Housing and Urban Affairs to Accompany S. 249, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-CBOE-2023-038 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090.

All submissions should refer to file number SR-CBOE-2023-038. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CBOE-2023-038 and should be submitted on or before October 25, 2023. Rebuttal comments should be submitted by November 8, 2023.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(3)(C) of the Act,⁵⁵ that file number SR-CBOE-2023-038, be and hereby is, temporarily suspended. In addition, the Commission is instituting proceedings to determine whether the

⁵⁵ 15 U.S.C. 78s(b)(3)(C).

⁵⁰ See *id.*

⁵¹ See *id.* at 55796.

⁵² See *id.* at 55796.

proposed rule change should be approved or disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁶

Sherry R. Haywood,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98647; File No. SR–CboeBYX–2023–013]

Self-Regulatory Organizations; Cboe BYX Exchange, Inc.; Suspension of and Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Change To Amend Its Fee Schedule Related to Physical Port Fees

September 29, 2023.

I. Introduction

On September 1, 2023, Cboe BYX Exchange, Inc. (the “Exchange” or “BYX”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”),¹ and Rule 19b–4 thereunder,² a proposed rule change (File Number SR–CboeBYX–2023–013) to amend its fee schedule to increase the monthly fee for 10 gigabit (“Gb”) physical ports. The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.³ The proposed rule change was published for comment in the **Federal Register** on September 20, 2023.⁴ Pursuant to Section 19(b)(3)(C) of the Act,⁵ the Commission is hereby: (1) temporarily suspending the proposed rule change; and (2) instituting proceedings to determine whether to approve or disapprove the proposed rule change.

II. Background and Description of the Proposed Rule Change

The Exchange proposes to amend its fee schedule. The Exchange proposes to increase the monthly fee for 10 Gb

physical ports from \$7,500 to \$8,500 per port. The Exchange currently assesses the following physical connectivity fees for Members⁶ and non-Members on a monthly basis: \$2,500 per physical port for a 1 Gb circuit and \$7,500 per physical port for a 10 Gb circuit.⁷ According to the Exchange, the physical ports may also be used to access the systems for the following affiliate exchanges and only one monthly fee currently (and will continue) to apply per port: Cboe BZX Exchange, Inc. (options and equities platforms), Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc. (options and equities platforms), and Cboe C2 Exchange, Inc.

III. Suspension of the Proposed Rule Change

Pursuant to Section 19(b)(3)(C) of the Act,⁸ at any time within 60 days of the date of filing of an immediately effective proposed rule change pursuant to Section 19(b)(1) of the Act,⁹ the Commission summarily may temporarily suspend the change in the rules of a self-regulatory organization (“SRO”) 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. The Commission believes a temporary suspension of the proposed rule change is necessary and appropriate to allow for additional analysis of the proposed rule change’s consistency with the Act and the rules thereunder.

In support of the proposal, the Exchange states its belief that the proposed fee change is reasonable as it reflects a moderate increase in physical connectivity fees for 10 Gb physical ports.¹⁰ The Exchange states that the current 10 Gb physical port fee has remained unchanged since June 2018.¹¹ The Exchange states that during this 5-year span there has been an average inflation rate of 3.9%, producing a cumulative price increase of approximately 21.1% inflation since the fee for the 10 Gb physical port was last modified.¹² In support of its claim of reasonableness, the Exchange compares its proposed rate increase from the rates

adopted five years ago of approximately 13% to the cumulative inflation rate of 21.1%.¹³

In further support of the proposal, the Exchange states that the proposed fee is reasonable, fair, and equitable, and not unfairly discriminatory.¹⁴ The Exchange believes that the proposed fee is reasonable as it is still in line with, or even lower than, amounts assessed by other exchanges for similar connections.¹⁵ The Exchange also states its belief that the fee is not unfairly discriminatory, because the fee would be assessed uniformly across all market participants that purchase the physical ports.¹⁶ The Exchange states that the fee is equitable because increasing the fee for 10 Gb physical ports and charging a higher fee as compared to the 1 Gb physical port as the 1 Gb physical port is 1/10 the size of the 10 Gb physical port and does not offer access to many of the products and services offered by the Exchange.¹⁷ The Exchange also states its belief the proposed fee is reasonable and appropriately allocated because, the Exchange states, market participants that purchase 10 Gb physical ports use the most bandwidth and therefore consume the most resources from the network.¹⁸

In further support of its proposed fee, the Exchange states that Members and non-Members will continue to choose the method of connectivity based on their specific needs and no broker-dealer is required to become a Member of, or connect directly to, the Exchange.¹⁹ The Exchange also states its belief that substitutable products and services are available to market participants, including, among other things, other equities exchanges that a market participant may connect to in lieu of the Exchange, indirect connectivity to the Exchange via a third-party reseller of connectivity, and/or trading of any equities product, such as within the Over-the-Counter markets.²⁰ Additionally, the Exchange believes that low barriers to entry mean that new exchanges may rapidly enter the market and offer additional substitute platforms to further compete with the Exchange

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.* The Exchange states there are currently 16 registered equities exchanges that trade equities (12 of which are not affiliated with Cboe), some of which have similar or lower connectivity fees; and based on publicly available information, no single equities exchange has more than approximately 16% of the market share.

⁵⁶ 17 CFR 200.30–3(a)(57) and (58).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as “establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.” 15 U.S.C. 78s(b)(3)(A)(ii).

⁴ See Securities Exchange Act Release No. 98393 (September 14, 2023), 88 FR 64933 (“Notice”).

⁵ 15 U.S.C. 78s(b)(3)(C).

⁶ The term “Member” means any registered broker or dealer that has been admitted to membership in the Exchange. See Exchange Rule 1.5(n).

⁷ A physical port is utilized by a Member or non-Member to connect to the Exchange at the data centers where the Exchange’s servers are located.

⁸ 15 U.S.C. 78s(b)(3)(C).

⁹ 15 U.S.C. 78s(b)(1).

¹⁰ See Notice, *supra* note 4, at 64934.

¹¹ See *id.*

¹² See *id.*