announcement of the change, along with the new time, date, and/or place of the meetings will be posted on the Commission's website at *https://www.sec.gov.*

The General Counsel of the Commission, or her designee, has certified that, in her opinion, one or more of the exemptions set forth in 5 U.S.C. 552b(c)(3), (5), (6), (7), (8), 9(B) and (10) and 17 CFR 200.402(a)(3), (a)(5), (a)(6), (a)(7), (a)(8), (a)(9)(ii) and (a)(10), permit consideration of the scheduled matters at the closed meetings.

The subject matter of the closed meetings will consist of the following topics:

Institution and settlement of injunctive actions;

Institution and settlement of administrative proceedings;

Resolution of litigation claims; and

Other matters relating to examinations and enforcement proceedings.

At times, changes in Commission priorities require alterations in the scheduling of meeting agenda items that may consist of adjudicatory, examination, litigation, or regulatory matters.

CONTACT PERSON FOR MORE INFORMATION: For further information; please contact Vanessa A. Countryman from the Office of the Secretary at (202) 551–5400.

(Authority: 5 U.S.C. 552b.)

Dated: August 2, 2023.

Vanessa A. Countryman,

Secretary.

[FR Doc. 2023–16867 Filed 8–2–23; 4:15 pm]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98025; File No. SR–CBOE–2023–035]

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

July 31, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on July 18, 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 to modify the fee for the SPX (and SPXW) Floor Market-Maker Tier Appointment Fee.[3]

By way of background, Exchange Rule 5.50(g)(2) provides that the Exchange may establish one or more types of tier appointments and Exchange Rule 5.50(g)(2)(B) provides such tier appointments are subject to such fees and charges the Exchange may establish. In 2010, the Exchange established the SPX Tier Appointment and adopted an initial fee of $3,000 per Market-Maker trading permit, per month.[4] The SPX (and SPXW) Tier Appointment fee for Floor Market-Makers currently applies to any Market-Maker that executes any contracts in SPX and/or SPXW on the trading floor.[5] The Exchange now seeks to increase the fee for the SPX/SPXW Floor Market-Maker Tier Appointment from $3,000 per Market-Maker Floor Trading Permit to $5,000 per Market-Maker Floor Trading Permit.

In connection with the proposed change, the Exchange also proposes to update Footnote 24 in the Fees Schedule, as well as remove the reference to Footnote 24 in the Market-Maker Tier Appointment Fee Table. By way of background, in June 2020, the Exchange adopted Footnote 24 to describe pricing changes that would apply for the duration of time the Exchange trading floor was being operated in a modified manner in connection with the COVID–19 pandemic.[6] Among other changes, Footnote 24 provided that the monthly fee for the SPX/SPXW Floor Market-Maker Tier Appointment Fee was to be increased to $5,000 per Trading Permit from $3,000 per Trading Permit. As the Exchange now proposes to maintain the $5,000 rate on a permanent basis (*i.e.,* regardless of whether the Exchange is operating in a modified state due to COVID–19 pandemic), the Exchange proposes to eliminate the reference to the SPX/SPXW Floor Market-Maker Tier Appointment Fee in Footnote 24.[7]

2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the

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

[2] 17 CFR 240.19b–4.

[3] The Exchange initially filed the proposed fee change, among other changes, on June 1, 2022 (SR–CBOE–2022–026). On June 10, 2022, the Exchange withdrew that filing and submitted SR–CBOE–2022–029. On August 5, 2022, the Exchange withdrew that filing and submitted SR–CBOE–2022–042. On September 26, 2022, the Exchange withdrew that filing and submitted SR–CBOE–2022–050 to address the proposed fee change relating to the SPX/SPXW Floor Market-Maker Tier Appointment Fee. On November 23, 2022, the Exchange advised of its intent to withdraw that filing and submitted SR–CBOE–2022–060. On January 20, 2023, the Exchange withdrew SR–CBOE–2022–060 and submitted SR–CBOE–2023–008. On March 21, 2023, the Exchange withdrew SR–CBOE–2023–008 and submitted SR–CBOE–2023–016. On May 19, 2023, the Exchange withdrew SR–CBOE–2023–016 and submitted SR–CBOE–2023–028. On July 18, 2023, the Exchange withdrew that filing and submitted this proposal. Notably, no comment letters were received in connection with any of the foregoing rule filings.

[4] *See* Securities Exchange Act Release No. 62386 (June 25, 2010), 75 FR 38566 (July 2, 2010) (SR–CBOE–2010–060).

[5] The Exchange notes that the fee is not assessed to a Market-Maker Floor Permit Holder who only executes SPX (including SPXW) options transactions as part of multi-class broad-based index spread transactions. *See* Cboe Options Fees Schedule, Market-Maker Tier Appointment Fees, Notes.

[6] *See* Securities Exchange Act Release No. 89189 (June 30, 2020), 85 FR 40344 (July 6, 2020) (SR–CBOE–2020–058).

[7] The Exchange notes that since its transition to a new trading floor facility on June 6, 2022, it has not been operating in a modified manner. As such Footnote 24 (*i.e.,* the modified fee changes it describes) does not currently apply.

''Act'') and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of section 6(b) of the Act.[8] Specifically, the Exchange believes the proposed rule change is consistent with the section 6(b)(5)[9] 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)[10] 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, 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.

The Exchange operates in a highly competitive environment. On May 21, 2019, the SEC Division of Trading and Markets issued non-rulemaking fee filing guidance titled ''Staff Guidance on SRO Rule Filings Relating to Fees'' (''Fee Guidance''), which provided, among other things, that in determining whether a proposed fee is constrained by significant competitive forces, the Commission will consider whether there are reasonable substitutes for the product or service that is the subject of a proposed fee.[11] As described in further detail below, the Exchange believes substitutable products[12] are in fact available to market participants, including in the Over-the-Counter (OTC) markets. Indeed, there are currently 16 registered options exchanges that trade options, with a 17th options exchange expected to launch in 2023. Based on publicly available information, no single options exchange has more than 15% of the market share as of January 19, 2023.[13] Further, low barriers to entry mean that new exchanges may rapidly and inexpensively enter the market and offer additional substitute platforms to further compete with the Exchange and the products it offers, including exclusively listed products as discussed further below. For example, there are 3 exchanges that have been added in the U.S. options markets in the last 5 years (*i.e.,* Nasdaq MRX, LLC, MIAX Pearl, LLC, and MIAX Emerald LLC) and one additional options exchange that is expected to launch in 2023 (*i.e.,* MEMX LLC).

The Exchange believes that competition in the marketplace constrains the ability of exchanges to charge supracompetitive fees for access to its products exclusive to that market (''proprietary products''). Notably, just as there is no regulatory requirement to become a member of any one options exchange, there is also no regulatory requirement for any market participant to participate on the Exchange in any particular capacity, including as a Market Maker, nor trade any particular product. Additionally, there is no requirement that any Exchange create or indefinitely maintain any particular product.[14] The Exchange also highlights that market participants may trade an exchange's proprietary products through a third-party without directly or indirectly connecting to the exchange. Further, market participants, including Market-Makers, may trade the Exchange's products, including proprietary products, on or off the Exchange's trading floor (*i.e.,* all products are available both electronically and via open outcry on the Exchange's trading floor). Particularly, market participants are not obligated to trade on the Exchange's trading floor and therefore a market participant, including Market-Makers, can choose to trade a product electronically instead of on the Exchange's trading floor at any time and for any reason, including due to an assessment of the reasonableness of fees charged. Indeed, the Exchange notes that only one Market-Maker TPH trades SPX exclusively on the floor. The Exchange notes that nothing precludes such TPH from also deciding to trade SPX electronically. Rather, what products a market participant chooses to trade, and the manner in which they choose to do so, is ultimately determined by factors relevant and specific to each market participant, including its business model and associated costs.

Additionally, market participants may trade any options product, including proprietary products, in the unregulated Over-the-Counter (OTC)[15] markets for which there is no requirement for fees related to those markets to be public. Given the benefits offered by trading options on a listed exchange, such as increased market transparency and heightened contra-party creditworthiness due to the role of the Options Clearing Corporation as issuer and guarantor, the Exchange generally seeks to incentivize market participants to trade options on an exchange, which further constrains fees that an Exchange may assess. Market participants may also access other exchanges to trade other similar or competing proprietary or multi-listed products. Alternative products to the Exchange's proprietary products may include other options products, including options on ETFs or options futures, as well as particular ETFs or futures. Particularly, exclusively listed SPX options (*i.e.,* a proprietary product) may compete with the following products traded on other markets: multiply-listed SPY options (options on the ETF that replicates performance of the S&P 500), E-mini S&P 500 Options (options on futures), and E-Mini S&P 500 futures (futures on index). Indeed, as a practical matter, investors utilize SPX and SPY options and their respective underlying instruments and futures to gain exposure to the same benchmark index: the S&P 500.

Notably, the Commission itself has affirmed that notwithstanding the exclusive nature of SPX options, alternatives to this product exist in the marketplace. For example, in approving a PM-settled S&P 500 cash settled contract (''SPXPM'') on its affiliate

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(5).

[10] *Id.*

[11] *See* Chairman Jay Clayton, Statement on Division of Trading and Markets Staff Fee Guidance, June 12, 2019. The Fee Guidance also recognized that ''products need to be substantially similar but not identical to be substitutable.''

[12] A substitute, or substitutable good, in economics and consumer theory refers to a product or service that consumers see as essentially the same or similar-enough to another product. *See https://www.investopedia.com/terms/s/substitute.asp.*

[13] *See* Cboe Global Markets U.S. Options Market Volume Summary (March 17, 2023), available at *https://markets.cboe.com/us/options/market_statistics/.*

[14] If an option class is open for trading on another national securities exchange, the Exchange may delist such option class immediately. For proprietary products, the Exchange may determine to not open for trading any additional series in that option class; may restrict series with open interest to closing transactions, provided that, opening transactions by Market-Makers executed to accommodate closing transactions of other market participants and opening transactions by TPH organizations to facilitate the closing transactions of public customers executed as crosses pursuant to and in accordance with Rule 6.74(b) or (d) may be permitted; and may delist the option class when all series within that class have expired. *See* Cboe Rule 4.4, Interpretations and Policies .11.

[15] Derivatives that are functionally identical to the Exchange's exclusively-listed options, including SPX, can be traded on the OTC market.

exchange Cboe C2 Exchange, Inc. (which product was later transferred to the Exchange), the Commission stated that it ''recognizes the potential impact on competition resulting from the inability of other options exchanges to list and trade SPXPM. In acting on this proposal, however, the Commission has balanced the potentially negative competitive effects with the countervailing positive competitive effects of C2's proposal. The Commission believes that the availability of SPXPM on the C2 exchange will enhance competition by providing investors with an additional investment vehicle, in a fully-electronic trading environment, through which investors can gain and hedge exposure to the S&P 500 stocks. Further, this product could offer a competitive alternative to other existing investment products that seek to allow investors to gain broad market exposure. Also, we note that it is possible for other exchanges to develop or license the use of a new or different index to compete with the S&P 500 index and seek Commission approval to list and trade options on such index.'' [16]

The economic equivalence of SPX and SPY options was further acknowledged and cited as a basis for the elimination of position limits for SPY options across the industry not long after the Commission's findings above in 2011.[17] Moreover, other exchanges have acknowledged that SPY options are considered to be an economic equivalent to SPX options.[18]

Additionally, in connection with a proposed amendment to the National Market System Plan Governing the Consolidated Audit Trail (''CAT NMS Plan'') the Commission again discussed the existence of competition in the marketplace generally, and particularly for exchanges with unique business models.[19] Similar to, and consistent with, its findings in approving SPXPM, the Commission recognized that while some exchanges may have a unique business model that is not currently offered by competitors, a competitor could create similar business models if demand were adequate, and if a competitor did not do so, the Commission believes it would be likely that new entrants would do so if the exchange with that unique business model was otherwise profitable.[20] Accordingly, although the Exchange may have proprietary products not offered by other competitors, not unlike unique business models, a competitor could create similar products to an existing proprietary product if demand were adequate. As an illustration of this point, MIAX created its exclusive product SPIKES specifically to compete against VIX options, another product exclusive to the Exchange.[21]

The Commission has also acknowledged competition with respect to OTC products. For example, in its proposal to eliminate position and exercise limits for broad-based index options, the Exchange had noted that ''[i]nvestors who trade listed options on the [Exchange] are placed at a serious disadvantage in comparison to the OTC market where index options and other types of index based derivatives (*e.g.,* forwards and swaps) are not subject to position and exercise limits. Member firms continue to express concern to the Exchange that position limits on [Exchange] products are an impediment to their business and that they have no choice but to move their business to the OTC market where position limits are not an issue.'' [22] In approving the Exchange's proposal to eliminate position and exercise limits for certain broad-based index options, including SPX, on a two-year pilot basis, the Commission stated that ''the index options and other types of index-based derivatives (*e.g.,* forwards and swaps) are not subject to position and exercise limits in the OTC market. The Commission believes that eliminating position and exercise limits for the SPX . . . options on a two-year pilot basis will better allow [the Exchange] to compete with the OTC market.'' [23]

The Exchange is not aware of any changes in the market that make the Commission's foregoing findings and assertions relating to competition for SPX and exclusively listed products generally any less true today. In fact, competitive forces within the market have resulted in an expansion of products. For example, in recent years, the exchange-traded fund (''ETF'') industry has experienced significant growth and diversification. ETFs that hold options have become increasingly popular. There are several examples of ETFs that hold SPX options and others that hold SPY options, as both types of options may offer investors different benefits. Accordingly, if a market participant views the Exchange's proprietary products, including SPX and SPXW, as more or less attractive than the competition they can and do switch between substantially similar products. Despite having economic differences, substitute products have significant similarities and may have characteristics that cause investors to find those products to beneficial to SPX options (*e.g.,* strike availability, settlement, liquidity, tax reasons, product size). As such, the Exchange is subject to competition and does not possess anti-competitive pricing power, even with its offering of proprietary products such as SPX.

The Exchange also believes the proposed fee is reasonable as the Exchange believes it remains commensurate with the value of operating as a Market-Maker on the Exchange's trading floor in the SPX pit, which has the largest physical presence on the Exchange's trading floor. For example, the Exchange recently transitioned from its previous trading floor, which it had occupied since the 1980s, to a brand new, modern and upgraded trading floor facility. The Exchange believes customers continue to find value in open outcry trading and rely on the floor for price discovery and the deep liquidity provided by floor Market-Makers. The build out of a new modern trading floor reflects the Exchange's commitment to open outcry trading and focus on providing the best possible trading experience for its customers, including Market-Makers. For example, the new trading floor

[16] *See* Securities Exchange Act Release No. 65256 (September 2, 2011), 76 FR 55969 (September 9, 2011) (SR–C2–2011–008). The Exchanges notes SPXPM was later transferred to the Exchange, where it currently remains listed. *See* Securities Exchange Act Release No. 68888 (February 8, 2013), 78 FR 10668 (February 14, 2013) (SR–CBOE–2012–120).

[17] *See, e.g.,* Securities Exchange Act Release No. 67936 (September 27, 2012), 77 FR 60491 (October 3, 2012) (SR–BOX–2012–013). *See also* Securities Exchange Act Release No. 67999 (October 5, 2012), 77 FR 62295 (October 12, 2012) (SR–Phlx–2012–122).

[18] NYSE Euronext, on behalf of its subsidiary options exchanges, NYSE Arca Inc. and NYSE Amex LLC, commented on a Nasdaq OMX PHLX LLC (''PHLX'') proposal to increase the position limits for SPY options, noting ''. . .when a contract that is considered by many to be economically equivalent to SPY options—namely SPX options . . .'' See (*http://www.sec.gov/comments/sr-phlx-2011-58/phlx201158-1.pdf*).

[19] *See* Securities Exchange Act Release No. 86901 (September 9, 2019), 84 FR 48458 (September 13, 2019) (File No. S7–13–19).

[20] *Id.*

[21] MIAX has described SPIKES options as ''designed specifically to compete head-to-head against Cboe's proprietary VIX® product.'' *See* MIAX Press Release, *SPIKES Options Launched on MIAX,* February 21, 2019, *available at https://www.miaxoptions.com/sites/default/files/press_release-files/MIAX_Press_Release_02212019.pdf.*

[22] *See* Securities Exchange Act Release No. 40158 (July 1, 1998), 63 FR 37153 (July 9, 1998) (SR–CBOE–1998–23).

[23] *See* Securities Exchange Act Release No. 40969 (January 22, 1999), 64 FR 4911 (February 1, 1999) (SR–CBOE–1998–23). The pilot program that was originally allowed for the elimination of position and exercise limits of SPX was approved on a permanent basis in 2001. *See* Securities Exchange Act Release No. 44994 (November 2, 2001), 66 FR 55722 (October 26, 2001) (SR–CBOE–2001–22).

provides a state-of-the-art environment and technology and more efficient use of physical space, which the Exchange believes better reflects and supports the current trading environment. The Exchange also believes the new infrastructure provides a cost-effective, streamlined, and modernized approach to floor connectivity. For example, the new trading floor has more than 330 individual kiosks, equipped with top-of-the-line technology that enables floor participants to plug in and use their devices with greater ease and flexibility. The new trading floor provided by the Exchange also provides floor Market-Makers with more space and increased capacity to support additional floor-based traders on the trading floor. Moreover, the new trading floor is conveniently located across the street from the LaSalle trading floor, which resulted in minimal disruption to TPH floor participants, many of whom have office space nearby, including in the same facility in which the trading floor is located. The Exchange believes the new location, which was also home to the Exchange's original trading floor in the 1970s and early 1980s, is also able to support robust trading floor infrastructure as it currently hosts several banks, trading firms and even trading floors (*i.e.,* trading floors for the Chicago Mercantile Exchange and BOX Options Market). The Exchange also believes the relocation to the new trading floor resulted in a streamlined and simplified trading floor and facility fee structure, as further described in the Exchange's proposal to amend certain facility fees in connection with the new trading floor.[24] The Exchange also notes that is has not sought to pass through a number of costs incurred in connection with the new trading floor, including design, construction and other on-going maintenance costs. The Exchange also intends to offer free coffee and beverages on the new trading floor. Moreover, the Exchange has not modified many of its facilities fees in several years. The Exchange therefore believes the proposed increase in the Tier Appointment Fee is also reasonable because it further enables the Exchange to recoup fees associated with the costs of operating a modern and cutting-edge trading floor and offset and keep pace with increasing technology costs.

The Exchange further believes the proposal to increase the fee is reasonable as the Exchange has provided further value to Market-Makers by expanding the suite of SPX products available to Market-Makers on the trading floor since 2010 when the SPX (and SPXW) Floor Market-Maker Tier Appointment fee was first adopted. For example, in 2013, the Exchange began listing SPXPM.[25] In 2016, the Exchange began listing SPX Weekly options with Monday and Wednesday expirations.[26] Most recently in 2022, the Exchange added SPX Weekly options with Tuesday and Thursday expirations.[27] The introduction of these products means SPX options now have an available expiration every trading day of the week, thereby providing Floor Market-Makers with additional opportunities to trade SPX and greater trading flexibility as compared to 2010. Moreover, average daily volume (ADV) in SPX has increased nearly 30%. In particular, Market-Maker open outcry ADV in SPX has increased nearly 15% since 2010. Therefore, increasing the price to trade SPX on the trading floor is consistent with the simple law of supply and demand—demand to trade SPX options has increased (as evidenced by the ADV increase), and therefore the Exchange is proposing to increase the price to trade these options. Further, increased ADV, and specifically increased Market-Maker open ourcry in SPX provides increased trading opportunities for SPX Market-Makers which the Exchange believes is commensurate with the value of the proposed increase of the Tier Appointment Fee. Additionally, the notional ADV in SPX has increased over 380% on the trading floor since July 2010 when the fee was first adopted. Consistent with basic economic principles, if the value of a good increases, it is reasonable for the price of that good to also increase. In this case, the percentage the Exchange is proposing to increase the tier appointment fee is significantly lower than percentage that the notional ADV in SPX has increased. Moreover, given the significant increase of the notional value of one SPX option contract, compared to the SPX Tier Appointment Fee, it is actually cheaper to trade SPX options on the trading floor currently than it was in 2010 when the fee was first adopted. For example, on December 31, 2010, the S&P 500 Index closed at 1,257.64, making the notional value of one SPX contract $125,764 on that date. On March 20, 2023, the S&P 500 Index closed at 3,951.57, making the notional value of one SPX contract $395,157 on that date. The notional value of one SPX option contract increased over 200% from December 31, 2010, to March 20, 2023, which far exceeds the percentage increase of the proposed fee change. That said however, based on the cost of the SPX Floor Market Maker Tier Appointment fee of $3,000 in 2010 and $5,000 in 2023, it is still cheaper per SPX contract despite the higher fee ($0.0239 ($3,000/$125,764) v. $0.0127 ($5,000/$393,157)).

To demonstrate the value the Exchange believes Marker-Makers find transacting with SPX on the trading floor (notwithstanding the proposed fee change), Market-Maker presence on the new trading floor in SPX and SPXW has actually increased. Particularly, as of December 30, 2022, there are 12 additional Market-Makers trading SPX and SPXW on the trading floor as compared to May 2022 (which was the month prior to the proposed fee change being implemented on a permanent basis and transition to the new trading floor).[28] Further, in June 2022, the month in which the proposed fee change took effect on the new trading floor on a permanent basis, there were 5 additional Market-Makers trading SPX and SPXW on the trading Floor as compared to May 2022. Further, as of December 30, 2022, there are 4 additional Market-Makers trading SPX and SPXW on the trading floor as compared to March 2020, which was the last month the Exchange assessed $3,000 for the SPX and SPXW Floor Market Maker Tier Appointment fee. The Exchange believes the increasing SPX and SPXW Market-Maker presence on the trading floor since the last time the Exchange assessed $3,000 for the SPX and SPXW Floor Market Maker Tier Appointment fee (*i.e.,* March 2020) and since the time the current proposal was submitted (*i.e.,* June 2020) speaks not only to the value Market-Makers find in participating as a Market-Maker in SPX and SPXW on the (new and improved) trading floor, but also to the reasonableness of the fee. Moreover, as established above, if a Market-Maker viewed trading SPX and SPXW as less attractive than competitive products, including those described above, they

[24] *See* Securities Exchange Act Release No. 96001 (October 6, 2022), 87 FR 62129 (October 13, 2022) (SR–CBOE–2022–049).

[25] *See* Securities Exchange Act Release No. 68888 (February 8, 2013), 78 FR 10668 (February 14, 2013) (SR–CBOE–2012–120).

[26] *See* Securities Exchange Act Release No. 76909 (January 14, 2016), 81 FR 3512 (January 21, 2016) (SR–CBOE–2015–106). *See also* Securities Exchange Act Release No. 78531 (August 10, 2016), 81 FR 54643(August 16, 2016) (SR–CBOE–2016–146).

[27] *See* Securities Exchange Act Release No. 94682 (April 12, 2022), 87 FR 22993 (April 18, 2022) (CBOE–2022–005).

[28] As noted above, the Exchange has been assessing $5,000 for the SPX and SPXW Floor Market Maker Tier Appointment fee since June 2020 as the Exchange was operating in a modified state until its transition to the new trading floor in June 2022, at which time the Exchange submitted this proposal to make such increase permanent.

can switch between such similar products and choose not to remain as a Market-Maker trading SPX and SPX on the trading floor. As such, the Exchange is subject to competition and does not possess anti-competitive pricing power, even with its offering of proprietary products such as SPX.

Moreover, as noted above, market participants are not obligated to trade on the Exchange's trading floor and therefore a market participant, including Market-Makers, can choose to trade a product electronically instead of on the Exchange's trading floor at any time and for any reason, including due to an assessment of the reasonableness of fees charged. In particular, as of January 2023, SPX and SPXW open outcry volume accounted for approximately 26% of total SPX and SPXW volume (*i.e.,* approximately 74% is traded electronically). Accordingly, Market-Makers may continue to choose to trade SPX and SPXW electronically should they deem fees associated with trading on the trading floor as unreasonable, further demonstrating that the Exchange is constrained from imposing unreasonable and supracompetitive fees. The Exchange notes this applies to all SPX Market-Makers, even a Market-Maker who may currently not participate electronically and only trades SPX in open outcry. Should any Market-Maker find the costs for executing SPX in open outcry unreasonable based on its business model and needs, such Market-Maker could instead elect to execute SPX solely electronically (or choose to trade other competing products). Accordingly, the Exchange believes that SPX Floor Market-Makers that continue to participate in open outcry trading find value in doing so.

The Exchange finally believes its proposal to increase the SPX (and SPXW) Floor Market-Maker Tier Appointment fee is reasonable because the proposed amount is not significantly higher than was previously assessed (and is the same amount that has been assessed under Footnote 24 for the last two years). Additionally, the Exchange believes its proposal to increase the fee is reasonable as the fee amount has not been increased since it was adopted over 12 years ago in July 2010.[29] Particularly, since its adoption 13 years ago, there has been notable inflation. Indeed, the dollar has had an average inflation rate of 2.6% per year between 2010 and today, producing a cumulative price increase of approximately 40% inflation since 2010, when the SPX and SPXW Floor Market-Maker Tier Appointment was first adopted.[30] Additionally, for nearly ten years, Market-Makers were only subject to the original rate that was adopted in 2010 (*i.e.,* $3,000) notwithstanding an average inflation rate of 2.6% per year. The Exchange acknowledges its proposed fee exceeds 40%. However, the Exchange believes such increase is reasonable given many Market-Makers for nearly 10 years did not have to pay increased fees notwithstanding yearly inflation. For example, by not increasing the fee each year to correspond to the average per year inflation rate of 2.6%, Market-Makers trading SPX on the trading floor since 2011 through 2020 (when then Exchange originally increased the fee due to the COVID–19 pandemic) have saved nearly $10,000. Moreover, the Exchange historically does not increase fees every year, notwithstanding inflation. The Exchange therefore believes that proposing a fee in excess of the cumulative 40% inflation rate is still reasonable, especially when considered in conjunction with all of the additional and further rationale discussed above. The Exchange is also unaware of any standard that suggests any fee proposal that exceeds a yearly or cumulative inflation rate is unreasonable.

The proposed change is also equitable and not unfairly discriminatory as it applies to all Market-Makers that trade SPX on the trading floor uniformly. The Exchange believes it's reasonable equitable and not unfairly discriminatory to increase the SPX/SPXW floor Market-Maker Tier Appointment fee and not the SPX/SPXW electronic Market-Maker Tier Appointment fee, as Floor Market-Makers are not subject to other costs that electronic Market-Makers are subject to. For example, while all Floor Market-Makers automatically have an appointment to trade open outcry in all classes traded on the Exchange and at no additional cost per appointment, electronic Market-Makers must select an appointment in a class (such as SPX) to make markets electronically and such appointments are subject to fees under the Market-Maker Electronic Appointments Sliding Scale.[31]

The Exchange lastly notes that it is not required by the Exchange Act, nor any other rule or regulation, to undertake a cost-of-service or rate-making approach with respect to fee proposals. Moreover, Congress's intent in enacting the 1975 Amendments to the Act was to enable competition—rather than government order—to determine prices. The principal purpose of the amendments was to facilitate the creation of a national market system for the trading of securities. Congress intended that this ''national market system evolve through the interplay of *competitive forces* as unnecessary regulatory restrictions are removed.'' [32] Other provisions of the Act confirm that intent. For example, the Act provides that an exchange must design its rules ''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.'' [33] Likewise, the Act grants the Commission authority to amend or repeal ''[t]he rules of [an] exchange [that] impose any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter.'' [34] In short, the promotion of free and open competition was a core congressional objective in creating the national market system.[35] Indeed, the Commission has historically interpreted that mandate to promote competitive forces to determine prices whenever compatible with a national market system. Accordingly, the Exchange believes it has met its burden to demonstrate that its proposed fee change is reasonable and consistent with the immediate filing process chosen by Congress, which created a system whereby market forces determine access fees in the vast majority of cases, subject to oversight only in particular cases of abuse or market failure. Lastly, and importantly, the Exchange believes that, even if it were possible as a matter of economic theory, cost-based pricing for the proposed fee would be so complicated that it could not be done practically.

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

The Exchange does not believe that the proposed rule change will impose

[29] *See* Securities Exchange Act Release No. 62386 (June 25, 2010), 75 FR 38566 (July 2, 2010) (SR–CBOE–2010–060).

[30] *See https://www.officialdata.org/us/inflation/2010?amount=1.*

[31] *See* Cboe Options Rules 5.50(a) and (e). *See also* Cboe Options Fees Schedule, Market-Maker EAP Appointments Sliding Scale.

[32] *See* H.R. Rep. No. 94–229, at 92 (1975) (Conf. Rep.) (emphasis added).

[33] 15 U.S.C. 78f(b)(5).

[34] 15 U.S.C. 78f(8).

[35] *See also* 15 U.S.C. 78k–l(a)(1)(C)(ii) (purposes of Exchange Act include to promote ''fair competition among brokers and dealers, among exchange markets, and between exchange markets and markets other than exchange markets''); Order, 73 FR at 74781 (''The Exchange Act and its legislative history strongly support the Commission's reliance on competition, whenever possible, in meeting its regulatory responsibilities for overseeing the SROs and the national market system.'').

any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed rule changes will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed changes would be applied in the same manner to all Floor Market-Makers that trade SPX (and/or SPXW). As noted above, the Exchange believes it's reasonable to increase the SPX/SPWX Tier Appointment Fee for only Floor Market-Makers only as opposed to electronic Market-Makers, because electronic Market-Makers are subject to costs Floor Market-Makers are not, such as the fees under Market-Maker EAP Appointments Sliding Scale.

The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because the proposed rule changes apply only to a fee relating to a product exclusively listed on the Exchange. Additionally, the Exchange operates in a highly competitive market. In addition to Cboe Options, TPHs have numerous alternative venues that they may participate on (which, as described above, list products that compete with SPX options) and direct their order flow, including 15 other options exchanges (four of which also maintain physical trading floors), as well as off-exchange venues, where competitive products are available for trading. Based on publicly available information, no single options exchange has more than 15% of the market share of executed volume of options trades.[36] Therefore, no exchange possesses significant pricing power in the execution of option order flow. Moreover, as discussed above, 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.'' [37] 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' . . . .''.[38] Accordingly, the Exchange does not believe its proposed changes to the incentive programs impose 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) of the Act [39] and paragraph (f) of Rule 19b–4 [40] 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.* Please include file number SR–CBOE–2023–035 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–2023–035. 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–2023–035 and should be submitted on or before August 25, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[41]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2023–16621 Filed 8–3–23; 8:45 am]

BILLING CODE 8011–01–P

[36] *See* Cboe Global Markets, U.S. Options Market Volume Summary by Month (January 19, 2023), available at *http://markets.cboe.com/us/options/market_share/.*

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

[38] *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)).

[39] 15 U.S.C. 78s(b)(3)(A).

[40] 17 CFR 240.19b–4(f).

[41] 17 CFR 200.30–3(a)(12).