

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 (<http://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-CboeEDGX-2023-020 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-CboeEDGX-2023-020. 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 (<http://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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CboeEDGX-2023-020 and

should be submitted on or before April 10, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>25</sup>

**Sherry R. Haywood,**  
*Assistant Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-97137; File No. SR-CBOE-2023-013]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Update the Cboe Data Services, LLC Fee Schedule

March 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 28, 2023, Cboe Exchange, Inc. ("Exchange" or "Cboe Options") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

Cboe Exchange, Inc. (the "Exchange" or "Cboe Options") proposes to update the Cboe Data Services, LLC Fee 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 the fees set forth in the Cboe Data Services, LLC ("CDS") Fee Schedule.<sup>3</sup> The Exchange proposes to (i) relocate the fees in the CDS Fees Schedule to the Exchange's Fees Schedule (ii) harmonize various definitions to align with the definitions used by the Exchange's affiliates, and (iii) modify its fees relating to the distribution of the BBO data feed.<sup>4</sup>

##### Relocation of CDS Fees

The Exchange first proposes to consolidate the Cboe Data Services, LLC (CDS) Fee Schedule and the Cboe Options Fees Schedule. Historically, the CDS Fee Schedule set forth fees relating to real-time Cboe Options market data products and has been maintained separately from the Cboe Options Fees Schedule. The Exchange proposes to eliminate the CDS Fee Schedule in its entirety and relocate the fees under the CDS Fees Schedule to the Cboe Options Fees Schedule. The Exchange believes this provides a more streamlined fee schedule for Cboe Options fees and allows TPHs to more readily and easily find all fees applicable to Cboe Options. The Exchange notes that no substantive changes are being made with the relocation of the CDS fees other than those discussed further below. The Exchange lastly notes that each of its affiliated options exchanges also reflect

<sup>3</sup> The Exchange initially filed the proposed fee changes on January 3, 2023 (SR-CBOE-2023-001). On February 28, 2023, the Exchange withdrew that filing and submitted this proposal.

<sup>4</sup> The BBO Data Feed is a real-time data feed that includes the following information: (i) outstanding quotes and standing orders at the best available price level on each side of the market; (ii) executed trades time, size, and price; (iii) totals of customer versus non-customer contracts at the best bid and offer ("BBO"); (iv) all-or-none contingency orders priced better than or equal to the BBO; (v) expected opening price and expected opening size; (vi) end-of-day summaries by product, including open, high, low, and closing price during the trading session; (vii) recap messages any time there is a change in the open, high, low or last sale price of a listed option; (viii) COB information; and (ix) product IDs and codes for all listed options contracts. The quote and last sale data contained in the BBO data feed is identical to the data sent to the Options Price Reporting Authority ("OPRA") for redistribution to the public.

<sup>25</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.

their respective fees for their respective real-time exchange market data products in the respective exchange's fees schedule (instead of being maintained separately), including the Exchange's affiliate Cboe C2 Exchange, Inc., ("C2 Options"), which relocated its CDS fees schedule into the C2 Options Exchange Fees Schedule in 2018.<sup>5</sup> The Exchange also believes the proposed change more accurately reflects the Exchange's role as it relates to its market data products as CDS is merely an affiliate that is the Cboe contracting entity for all U.S.

equities and options market data products, but the data products themselves are made available by the Exchange.

#### Definitions

In order to provide consistent rules and terminology amongst the Exchange and its affiliated options exchanges, C2 Options, Cboe BZX Exchange, Inc. ("BZX Options") and Cboe EDGX Exchange, Inc. ("EDGX Options") (collectively, "Affiliates") the Exchange is proposing to amend various

definitions and product names to harmonize with such terms used by its affiliates BZX Options and EDGX Options, specifically.<sup>6</sup> As such, the proposed rule change deletes a defined term, adds certain defined terms, and makes certain non-substantive changes to existing definitions, as further described in the table below. The proposed rule change makes these changes throughout the market data fee language to conform to the proposed defined terms and the Exchange uses the proposed updated terms herein.

Defined term	Provision	Current CDS location	Description of change
Customer .....	A "Customer" is any person, company or other entity that, pursuant to a market data agreement with CDS, is entitled to receive data, either directly from CDS or through an authorized redistributor (i.e., a Customer or an extranet service provider), whether that data is distributed externally or used internally. A third-party vendor of an Approved Third-Party Device, as defined in the CDS Fee Schedule, is not a Customer unless it has a market data agreement in place with CDS. A Floor Broker User, as defined in the CDS Fee Schedule, is not a Customer unless it has a market data agreement in place with CDS.	Section I .....	Deletes defined term to align terms with BZX Options and EDGX Options. The concept of "Customer" is also better captured through the proposed new term "Distributor".
Distributor .....	A Distributor of an Exchange Market Data product is any entity that receives the Exchange Market Data product directly from the Exchange or indirectly through another entity and then distributes it internally or externally to a third party.	N/A .....	Codifies definition of "Distributor" in Footnote 49 of the Cboe Options Fees Schedule. Definition is identical to the definition used by BZX Options and EDGX Options and substantially similar to the language in the first sentence of the definition of "Customer" in the CDS Fees Schedule.
Internal Distributor.	An Internal Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to one or more Users within the Distributor's own entity.	N/A .....	Codifies definition of "Internal Distributor" in Footnote 49 of the Cboe Options Fees Schedule. Definition is identical to the definition used by BZX Options and EDGX Options.
External Distributor.	An External Distributor of an Exchange Market Data product is a Distributor that receives the Exchange Market Data product and then distributes that data to a third party or one or more Users outside the Distributor's own entity.	N/A .....	Codifies definition of "External Distributor" in Footnote 49 of the Cboe Options Fees Schedule. Definition is identical to the definition used by BZX Options and EDGX Options.
User .....	A User of an Exchange Market Data product is a natural person, a proprietorship, corporation, partnership, or entity, or device (computer or other automated service), that is entitled to receive Exchange data.	N/A .....	Codifies definition of "User" in Footnote 49 of the Cboe Options Fees Schedule. Definition is identical to one used by BZX Options and EDGX Options.

<sup>5</sup> See BZX Options Exchange Fees Schedule, EDGX Options Exchange Fees Schedule and C2 Options Exchange Fees Schedule. *See also* Securities Exchange Act Release No. 83409 (June

12, 2011), 83 FR 28302 (June 18, 2018) (SR-C2-2018-012).

<sup>6</sup> C2 Options will be submitting a similar filing to harmonize its definitions and products names to

align with those of BZX Options and EDGX Options as well.

Defined term	Provision	Current CDS location	Description of change
Non-Professional User.	A "Non-Professional User" is a natural person or qualifying trust that uses Data only for personal purposes and not for any commercial purpose and, for a natural person who works in the United States, is not: (i) registered or qualified in any capacity with the Securities and Exchange Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); or (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt; or, for a natural person who works outside of the United States, does not perform the same functions as would disqualify such person as a Non-Professional User if he or she worked in the United States.	Sections I and III .....	Relocates definition to Footnote 49 of the Cboe Options Fees Schedule and updates the rule reference to "Section 201(11)" of the Investment Advisors Act of 1940 to "Section 202(a)(11)".
Professional User.	A Professional User of an Exchange Market Data product is any natural person recipient of an Exchange Market Data product who is not a Non-Professional User.	Sections I and III .....	Relocates definition to Footnote 49 of the Cboe Options Fees Schedule.
Display Only Service.	A "Display Only Service" allows a natural person end-user to view and manipulate data using the Distributor's computerized service, but not to save, copy, export or transfer the data or any results of the manipulation to any other computer hardware, software or media, except for printing it to paper or other non-magnetic media.	Section I .....	Relocates definition to Footnote 49 of the Cboe Options Fees Schedule.
Device .....	A "Device" means any computer, workstation or other item of equipment, fixed or portable, that receives, accesses and/or displays data in visual, audible or other form.	Section I under "Display Only User Fees".	Relocates definition to Footnote 49 of the Cboe Options Fees Schedule.
Approved Third-Party Device.	An "Approved Third-Party Device" means any computer, workstation or other item of equipment, fixed or portable, that receives, accesses and/or displays data in visual, audible or other form that has been provided by a third-party and that has been approved, by Cboe Options, for use on the Cboe Options trading floor.	Section I under "Floor Broker User Fees".	Relocates definition to Footnote 49 of the Cboe Options Fees Schedule.
Floor Broker User.	A "Floor Broker User" is a person or entity registered with Cboe Options as a floor broker pursuant to Cboe Options Rules.	Section I under "Floor Broker User Fees".	Relocates definition to Footnote 49 of the Cboe Options Fees Schedule.

The Exchange also proposes to rename the following market data products and use the proposed names herein, in order to align with the naming convention used by the Exchange's affiliates, BZX Options and EDGX Options, for similar data products.<sup>7</sup>

Current name	Proposed name
BBO Data Feed .....	Cboe Options Top.
Book Depth Data Feed.	Cboe Options Depth.
Complex Order Book (COB) Data Feed.	Cboe Complex Order Book (COB).
FLEX Options Data Feed.	Cboe Options FLEX Options.

The Exchange believes the proposed changes to eliminate, modify and adopt the terms discussed above will add additionally transparency to the Fees Schedule and will protect investors, as the changes provide more clarity within

the rule and more harmonized rule language across the Fees Schedules of the Cboe affiliated options exchanges. Further, the Exchange notes that the changes are non-substantive changes or provide additional detail in the rule regarding current market participants that purchase or use the Exchange's market data products. None of these differences impact the manner in which any of the terms and corresponding fees apply, including how the Exchange would have otherwise characterized a Distributor or User (Professional or Non-Professional).

#### Cboe Options Top Fee Changes

The Exchange next proposes to modify the current monthly Data Fee for Cboe Options Top. Currently, the Exchange assesses a "Data Fee" of \$9,000 per month for internal use and external redistribution of the Cboe Options Top Data Feed. A Distributor receiving the Cboe Options Top Data Feed from another entity or directly from the Exchange is assessed the Data Fee by the Exchange and is entitled to

use the Data internally and/or distribute it externally. The Exchange now proposes to adopt separate fees for internal and external distribution. Specifically, the Exchange proposes to maintain the current monthly fee of \$9,000 for internal distribution but adopt a lower fee of \$5,000 per month for external distribution.

The Exchange next proposes to modify its current User Fees. The Exchange currently charges a "User Fee" of \$50 per month per Device or user ID for use of the data in the Cboe Options Top Data Feed by "Display Only Service" users. The current User fee is payable only for "external" Display Only Service users who receive Cboe Options Top.<sup>8</sup> Internal Distributors may currently distribute Cboe Options Top Data to an unlimited number of

<sup>8</sup> Pursuant to the Cboe Global Markets North American Data Policies, Distributors must report the number of authorized external devices that receive Cboe Options Top data during a calendar month within 15 days after such month in the manner and format specified by the Exchange from time to time to determine applicable fees.

<sup>7</sup> See BZX Options Exchange Fees Schedule, Market Data Fees and EDGX Options Exchange Fees Schedule, Market Data Fees.

internal users and Devices within the Distributor at no further cost. The Exchange proposes to eliminate the current Cboe Options Top User fee and in its place adopt Professional and Non-Professional User fees for Cboe Options Top that would apply to both Internal and External Distributors for all Professional and Non-Professional Users. The Exchange proposes to charge Cboe Options Top Distributors a monthly fee of \$15.50 per Professional User and a monthly fee of \$0.30 per Non-Professional User.<sup>9</sup>

Next, the Exchange proposes to eliminate a fee waiver for Customers of Cboe Options Top Data. In particular, the CDS Fee Schedule currently provides that the monthly data fee of \$9,000 per month for the Cboe Options Depth feed<sup>10</sup> is waived for Cboe Options Top Data Customers. The Exchange proposes to eliminate the fee waiver for Cboe Options Depth for External Distributors of Cboe Options Top (*i.e.*, the monthly \$9,000 data fee for Book Depth Data will only continue to be waived for Internal Distributors of Cboe Options Top Data).

The Exchange lastly proposes to establish a \$300,000 per month Enterprise Fee that will permit a Distributor to purchase a monthly (and optional) Enterprise license to receive the Cboe Options Top Data for distribution to an unlimited number of Professional and Non-Professional Users. The Enterprise Fee is an alternative to Professional and Non-Professional User fees and will permit a Distributor to pay a flat fee to receive the data for an unlimited number of Professional and Non-Professional Users, which the Exchange proposes to make clear in the Fee Schedule. Like User fees, the Enterprise Fee would be assessed in addition to the Distribution Fees. The Enterprise Fee may provide an opportunity to reduce fees. For example, if a Distributor has 20,000 Professional Users who each receive Cboe Options Top at \$15.50 per month (as proposed), then that Distributor will pay \$310,000 per month in Professional Users fees. If the Distributor instead were to purchase the proposed Enterprise license, it would

alternatively pay a flat fee of \$300,000 for an unlimited number of Professional and Non-Professional Users. A Distributor must pay a separate Enterprise Fee for each entity that controls the display of Cboe Options Top if it wishes for such Users to be covered by the Enterprise Fee rather than by per User fees.<sup>11</sup> A Distributor that pays the Enterprise Fee will not have to report its number of such Users on a monthly basis. Rather, every six months, the recipient firm must provide the Exchange with a count of the total number of Professional and Non-Professional Users of Cboe Options Top Data.<sup>12</sup> The Exchange notes that the purchase of an Enterprise license is voluntary, and a firm may elect to instead use the per User structure and benefit from the proposed per User Fees described above. For example, a firm that does not have a sufficient number of Users to benefit from purchase of the license need not do so.

## 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>13</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>14</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 Section 6(b)(4) of the Act,<sup>15</sup> which requires that Exchange rules provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

The Exchange first notes that it operates in a highly competitive environment. Indeed, there are currently 16 registered options exchanges that trade options. Based on publicly available information, no single options exchange has more than 17% of the market share.<sup>16</sup> The Exchange believes top-of-book quotation and transaction data is highly competitive as national securities exchanges compete vigorously with each other to provide efficient, reliable, and low-cost data to a wide range of investors and market participants. Indeed, there are several competing products offered by other national securities exchanges today, not counting products offered by the Exchange’s affiliates, and each of the Exchange’s affiliated U.S. options exchanges also offers similar top-of-book data.<sup>17</sup> Each of those exchanges offer top-of-book quotation and last sale information based on their own quotation and trading activity that is substantially similar to the information provided by the Exchange through the Cboe Options Top Feed. Further, the quote and last sale data contained in the Cboe Options Data Feed is identical to the data sent to OPRA for redistribution to the public, including data relating to the Exchange’s proprietary and exclusively listed products.<sup>18</sup> Accordingly, Exchange top-of-book data is widely available today from a number of different sources.

Moreover, the Cboe Options Top Data Feed is distributed and purchased on a voluntary basis, in that neither the Exchange nor market data distributors are required by any rule or regulation to make this data available. Accordingly, Distributors and Users can discontinue use at any time and for any reason, including due to an assessment of the reasonableness of fees charged. As described above, market participants have a wide variety of alternative market data products from which to choose, such as similar proprietary data products offered by other exchanges and consolidated data. Further, the Exchange is not required to make any proprietary data products available or to

<sup>9</sup> Distributors that receive Cboe Options Top Data will be required to count every Professional User and Non-Professional User to which they provide the data feed.

<sup>10</sup> The Cboe Options Depth feed is a real-time, low latency data feed that includes all data contained in the Cboe Options Top feed (as described above) plus outstanding quotes and standing orders for an additional four price levels on each side of the market, with aggregate size (“Book Depth”). The data in the Cboe Options Depth feed is refreshed periodically during the trading session.

<sup>11</sup> For example, if a Distributor that distributes Cboe Options Top to Retail Brokerage Firm A and Retail Brokerage Firm B and wishes to have the Users under each firm covered by an Enterprise license, the Distributor would be subject to two Enterprise Fees.

<sup>12</sup> See Cboe Global Markets North American Data Policies.

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

<sup>14</sup> 15 U.S.C. 78f(b)(5).

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

<sup>16</sup> See Cboe Global Markets U.S. Options Market Month-to-Date Volume Summary (February 24, 2023), available at [https://markets.cboe.com/us/options/market\\_statistics/](https://markets.cboe.com/us/options/market_statistics/).

<sup>17</sup> See *e.g.*, NYSE Arca Options Proprietary Market Data Fees Schedule, MIAX Options Exchange, Fee Schedule, Section 6 (Market Data Fees), Nasdaq PHLX Options 7 Pricing Schedule, Section 10 (Proprietary Data Feed Fees) and C2 Options Exchange Fees Schedule, Cboe Data Services, LLC Fees.

<sup>18</sup> The Exchange notes that it makes available the BBO data and last sale data that is included in the Cboe Options Top Data Feed no earlier than the time at which the Exchange sends that data to OPRA.

offer any specific pricing alternatives to any customers. Moreover, persons (including broker-dealers) who subscribe to any exchange proprietary data feed must also have equivalent access to consolidated Options Information<sup>19</sup> from OPRA for the same classes or series of options that are included in the proprietary data feed (including for exclusively listed products), and proprietary data feeds cannot be used to meet that particular requirement.<sup>20</sup> As such, all proprietary data feeds are optional.

The Commission has repeatedly expressed its preference for competition over regulatory intervention in determining prices, products, and services in the securities markets. Particularly, in Regulation NMS, the Commission highlighted the importance of market forces in determining prices and SRO revenues and, also, recognized that current regulation of the market system “has been remarkably successful in promoting market competition in its broader forms that are most important to investors and listed companies.”<sup>21</sup> Making similar data products available to market participants fosters competition in the marketplace, and constrains the ability of exchanges to charge supracompetitive fees. In the event that a market participant views one exchange’s data product as more or less attractive than the competition they can and do switch between similar products. The proposed fees are a result of the competitive environment, as the Exchange seeks to adopt fees to attract purchasers of Cboe Options Top Data.

The Exchange believes the proposed External Distribution fee is reasonable as it would represent a decreased fee for any Distributor who is only interested in distributing Cboe Options Top externally. By providing an opportunity for lower cost access to U.S. options market data, Cboe Options Top benefits

a wide range of investors that participate in the national market system and makes it more broadly available. The Exchange believes the proposed fees for external distribution of Cboe Options Top will also continue to be allocated fairly and equitably, and are not unfairly discriminatory, as the proposed fee will apply equally to all Distributors that choose to subscribe to Cboe Options Top and distribute that data to external Users. More specifically, as proposed, all External Distributors of Cboe Options Top will be subject to the same external distribution fee, regardless of the type of business that they operate, or the use they plan to make of the data feed. Thus, all External Distributors would have access to Cboe Options Top for purposes of external distribution on the same equitable and non-discriminatory terms.

The Exchange believes that it is also fair and equitable, and not unfairly discriminatory to charge different fees for internal and external distribution of the Cboe Options Top. Although the proposed distribution fee charged to External Distributors will be lower than the existing distribution fee charged to Internal Distributors, External Distributors are subject to Non-Professional user fees to which Internal Distributors are not subject, in addition to Professional User fees (or alternatively the proposed Enterprise Fee). Furthermore, the proposal is designed to incentivize External Distributors to subscribe to Cboe Options Top Data. Moreover, as noted above, Internal Distributors of Cboe Options Top will still have the benefit of receiving Cboe Options Depth at no additional cost, whereas such waiver will not be available for External Distributors of Cboe Options Top. The Exchange also notes that Cboe Options Depth is more likely to be used by Professional Users, including employees of Distributors, whereas Cboe Options Top is more likely to be used by Non-Professional Users who, by definition, do not receive the data for commercial purposes (e.g., retail investors).

The Exchange believes the proposed changes to adopt new Professional and Non-Professional User fees are reasonable as the User fees continue to be in line with User fees assessed by other exchanges for similar data.<sup>22</sup>

Moreover, External Distributors will now be subject to lower fees as the Exchange proposes to significantly reduce the monthly User fees from \$50 per External User to \$15.50 per Professional User or \$0.30 per Non-Professional User. Although External Distributors are currently only subject to fees for external users, the fee for external users (which are likely to be Non-Professional Users) are significantly lower (i.e., \$0.30 per Non-Professional User) than the current \$50 fee for external users. Moreover, the proposed fee structure of differentiated Professional and Non-Professional fees that are paid by both Internal and External Distributors has long been used by other exchanges, including the Exchange, for their proprietary data products, and by the OPRA plan in order to reduce the price of data to retail investors and make it more broadly available.<sup>23</sup> The Exchange also believes offering Cboe Options Top Data to Non-Professional Users at a lower cost than Professional Users results in greater equity among data recipients, as Professional Users are categorized as such based on their employment and participation in financial markets, and thus, are compensated to participate in the markets. Although Non-Professional Users too can receive significant financial benefits through their participation in the markets, the Exchange believes it is reasonable to charge more to those Users who are more directly engaged in the markets. The Exchange believes that the

to professional users and \$1.00 per month to non-professional users of American Options Top Data, American Options Deep and American Options Complex products. By comparison, the total Professional User fee for Cboe Options Top and Cboe Options COB is in line with the above Professional User fee at \$40.50 per Professional User (i.e., \$15.50 per Professional Users of Cboe Options Top, as proposed, and \$25 per Professional User of Cboe Options COB). The Exchange’s combined Non-Professional User Fee at \$0.30 per Non-Professional User (i.e., \$0.30 per Non-Professional User of Cboe Options Top, as proposed, and \$0 per Non-Professional User of Cboe Options COB) is lower than PHLX’s and NYSE American’s aforementioned Non-Professional User fees. As discussed above, Cboe Options Depth does not charge users based on Professional or Non-Professional classification and market participants were always subject to separate User fees across Cboe Options market data products.

<sup>23</sup> See, e.g., Securities Exchange Act Release No. 59544 (March 9, 2009), 74 FR 11162 (March 16, 2009) (SR-NYSE-2008-131) (establishing the \$15 Non-Professional User Fee (Per User) for NYSE OpenBook); See, e.g., Securities Exchange Act Release No. 67589 (August 2, 2012), 77 FR 47459 (August 8, 2012) (revising OPRA’s definition of the term “Nonprofessional”); and See Securities Exchange Act Release No. 70683 (October 15, 2013), 78 FR 62798 (October 22, 2013) (SR-CBOE-2013-087) (establishing Professional and Non-Professional User fees for Cboe Options COB Data Feed).

<sup>19</sup> “Consolidated Options Information” means consolidated Last Sale Reports combined with either consolidated Quotation Information or the BBO furnished by OPRA. Access to consolidated Options Information is deemed “equivalent” if both kinds of information are equally accessible on the same terminal or work station. See Limited Liability Company Agreement of Options Price Reporting Authority, LLC (“OPRA Plan”), Section 5.2(c)(iii). The Exchange notes that this requirement under the OPRA Plan is also reiterated under the Cboe Global Markets Global Data Agreement and Cboe Global Markets North American Data Policies, which subscribers to any exchange proprietary product must sign and are subject to, respectively. Additionally, the Exchange’s Data Order Form (used for requesting the Exchange’s market data products) requires confirmation that the requesting market participant receives data from OPRA.

<sup>20</sup> Id.

<sup>21</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496, 37499 (June 29, 2005) (“Regulation NMS Adopting Release”).

<sup>22</sup> See e.g., Nasdaq PHLX Options 7 Pricing Schedule, Section 10 (Proprietary Data Feed Fees), which provides for a fee of \$40 per month to professional users and \$1.00 per month to non-professional users to cover the usage of PHLX Options (TOPO) Data, TOPO Plus Orders, PHLX Orders and PHLX Depth Data feeds. See also NYSE American Options Proprietary Market Data Fees schedule, which provides for a fee of \$50 per month

proposed fees are equitable and not unfairly discriminatory because they will be charged uniformly to Distributors for their Professional and Non-professional Users.

The Exchange next notes it is not required to charge a single distribution fee to cover more than one of its available data products, but none-the-less has opted to not charge for separate data fees for Cboe Options Depth and Cboe Options COB for Distributors of Cboe Options Top, since such waiver was adopted in January 1, 2015.<sup>24</sup> However, the Exchange no longer wishes to maintain a fee waiver of Cboe Options Depth and Cboe Options COB for External Distributors of Cboe Options Top. Although External Distributors will not receive the benefit of the fee waiver, they will be subject to a lower distribution fee as compared to Internal Distributors who will continue to be charged the higher fee of \$9,000. Moreover, Distributors are less likely to distribute Cboe Options Depth externally, as such data feed is generally used more often by Professional Users. Moreover, the Cboe Options Depth feed and Cboe Options COB, like all of the Exchange's market data products, are purely optional. Only those Distributors that deem the product to be of sufficient overall value and usefulness would purchase them for distribution to Users. Further, Distributors are not required to distribute, and Users are not required to receive, any one particular data product and may choose to receive none, one, or several of the Exchange's market data products. Indeed, only approximately 30% of the Exchange's market data subscriptions is for Cboe Options Top. Additionally, the Exchange is not required to provide any such waiver to any Distributors of Cboe Options Top. The Exchange believes the proposed change is equitable and not unfairly discriminatory as it will apply uniformly to External Distributors.

The proposed Enterprise Fee for Cboe Options Top Feed is equitable and reasonable as the proposed fee could result in a fee reduction for Distributors with a large number of Professional and Non-Professional Users. If a Distributor has a smaller number of Professional Users of Cboe Options Top Data, then it may continue using the per User structure and benefit from the proposed per Cboe Options Top User Fee reductions. By reducing prices for recipient firms with a large number of Professional and Non-Professional Users, the Exchange believes that more

firms may choose to receive and to distribute Cboe Options Top Data, thereby expanding the distribution of this market data for the benefit of investors.

The Exchange further believes that the proposed Enterprise Fee is reasonable because it will simplify reporting for certain recipients that have large numbers of Professional and Non-Professional Users. Firms that pay the proposed Enterprise Fee will not have to report the number of Users on a monthly basis as they currently do, but rather will only have to count Professional and Non-Professional users every six months, which is a significant reduction in administrative burden. Finally, as described above the Enterprise Fee is entirely optional. A firm that does not have a sufficient number of Users to benefit from purchase of the license need not do so.

The Exchange lastly believes the proposed changes relating to the defined terms and terminology will provide additional specificity and clarity, while also harmonizing the various definition with that of its affiliates. Doing so would ensure consistent terms amongst the Exchange and its affiliates, thereby reducing the potential for confusion amongst market data subscribers of the Exchange's and its affiliates' market data products. Additionally, the proposed new terms are identical to the terms already used by the Exchange's affiliates BZX Options and EDGX Options. Similarly, the Exchange believes the proposal to relocate the fees in the CDS Fees Schedule to the Cboe Options Fees Schedule will provide for a more streamlined fees schedule and allow TPHs to more readily and easily find all fees applicable to Cboe Option, thereby reducing potential confusion. Further, the Exchange is the only exchange of the Cboe options exchanges that currently maintains a separate fees schedule for its market data product fees.

Accordingly, the Exchange believes the proposed changes remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.

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

The Exchange does not believe that the proposed rule change would result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange operates in a highly competitive environment, and its ability to price top-of-book data is constrained by competition among exchanges that offer similar data products to their

customers. Top-of-book data is broadly disseminated by competing U.S. options exchanges and through OPRA. There are therefore a number of alternative products available to market participants and investors, including products offered by certain competing exchanges, as well as OPRA. Further, the Exchange's proposal to eliminate the waiver for the Cboe Options Depth data fee for External Distributors of Cboe Options Top does not modify the existing fee amounts, but simply eliminates a waiver to receive such data free of charge that the Exchange is not required to maintain. Other exchanges are free to adopt a similar waiver if they choose. In this competitive environment potential Distributors are free to choose which competing product to purchase to satisfy their respective needs for market information. Often, the choice comes down to price, as market data participants look to purchase cheaper data products, and quality, as market participants seek to purchase data that represents significant market liquidity.

The Exchange believes that the proposed fees do not put any market participants at a relative disadvantage compared to other market participants. As discussed, the proposed fees and eliminated waiver would apply to all similarly situated Distributors of Cboe Options Top on an equal and non-discriminatory basis. The Exchange believes the reduced fees for External Distributors and not Internal Distributors of Cboe Options Top is appropriate given External Distributors are subject to the proposed Non-Professional user fees to which Internal Distributors are not subject, in addition to the proposed Professional User fees. Additionally, Internal Distributors will continue to receive the benefit of a fee waiver for Cboe Options Depth, which is the more commonly used product for internal distribution amongst Professional Users. The Exchange believes the differentiated fees for Professional and Non-Professional Users of Cboe options Top is appropriate given Professional Users are categorized as such based on their employment and participation in financial markets, and thus, are compensated to participate in the markets. Non-Professional Users too can receive significant financial benefits through their participation in the markets, however the Exchange believes it is reasonable to charge more to those Users who are more directly engaged in the markets. The Exchange therefore believes that the proposed fee neither favors nor penalizes one or more categories of market participants in a

<sup>24</sup> See Securities Exchange Act Release No. 70683 (October 15, 2013), 78 FR 62798 (October 22, 2013) (SR-CBOE-2013-087).

manner that would impose an undue burden on competition.

The Exchange believes that the proposed fees do not impose a burden on competition or on other SROs that is not necessary or appropriate in furtherance of the purposes of the Act. In particular, market participants are not forced to subscribe to Cboe Options Top Data, or any of the Exchange's data feeds, as described above. As noted, the quote and last sale data contained in the Exchange's Cboe Options Top feed is identical to the data sent to OPRA for redistribution to the public, including data relating to the Exchange's proprietary and exclusively listed products. Accordingly, Exchange top-of-book data is therefore widely available today from a number of different sources.

Because market data customers can find suitable substitute feeds, an exchange that overprices its market data products stands a high risk that users may substitute another product. These competitive pressures ensure that no one exchange's market data fees can impose an undue burden on competition, and the Exchange's proposed fees do not do so here.

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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any written comments from members or other interested parties.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>25</sup> and paragraph (f) of Rule 19b-4<sup>26</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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

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

### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's internet comment form (<http://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-2023-013 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-2023-013. 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 (<http://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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2023-013 and should be submitted on or before April 10, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

[FR Doc. 2023-05544 Filed 3-17-23; 8:45 am]

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-97133; File No. SR-Phlx-2023-08]

### **Self-Regulatory Organizations; Nasdaq PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Options 7, Section 4 Regarding Multiply Listed Options Fees**

March 14, 2023.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 1, 2023, Nasdaq PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "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**

The Exchange proposes to amend Phlx's Pricing Schedule at Options 7, Section 4, "Multiply Listed Options Fees (Includes options overlying equities, ETFs, ETNs and indexes which are Multiply Listed) (Excludes SPY)."

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/phlx/rules>, at the principal office of the Exchange, 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

<sup>27</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.