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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-82164; File No. SR-CBOE-2017-074)

November 28, 2017

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Clarifying How the Options Regulatory Fee is Assessed and Collected

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 17, 2017, 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

The Exchange proposes to amend its Fees Schedule relating to the Options Regulator Fee (“ORF”).

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in

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

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

Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization’s Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fees Schedule to clarify how the ORF is assessed and collected.<sup>3</sup>

Background

The ORF was established in October 2008 as a replacement of Registered Representative fees.<sup>4</sup> The ORF is assessed by the Exchange to each Trading Permit Holder for options transactions executed or cleared by the Trading Permit Holder that are cleared by The Options Clearing Corporation (“OCC”) in the customer range (i.e., transactions that clear in a customer account at OCC) regardless of the exchange on which the transaction occurs<sup>5</sup>.

The ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of Trading Permit Holder (“TPH”) customer options business, including performing routine surveillances, investigations, examinations, financial monitoring, as well as policy, rulemaking, interpretive and enforcement activities.<sup>6</sup> The Exchange believes that

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<sup>3</sup> The Exchange initially filed the proposed rule changes on November 16, 2017 (SR-CBOE-2017-073). On November 17, 2017 the Exchange withdrew SR-CBOE-2017-073 and then subsequently submitted this filing (SR-CBOE-2017-074).

<sup>4</sup> See Securities Exchange Act Release No. 58817 (October 20, 2008), 73 FR 63744 (October 27, 2008) (the “Original ORF Filing”).

<sup>5</sup> The ORF also applies to customer-range transactions executed during Extended Trading Hours as defined in Cboe Options Rule 1.1(rrr).

<sup>6</sup> The Exchange notes that its regulatory responsibilities with respect to TPH compliance with options sales practice rules have largely been allocated to FINRA under a 17d-2 agreement. The ORF is not designed to cover the cost of that options sales practice regulation. See Securities Exchange Act Release No. 76309 (October 29, 2015), 80 FR

revenue generated from the ORF, when combined with all of the Exchange's other regulatory fees and fines, will cover a material portion, but not all, of the Exchange's regulatory costs.

The Exchange monitors the amount of revenue collected from the ORF to ensure that it, in combination with its other regulatory fees and fines, does not exceed the Exchange's total regulatory costs. The Exchange monitors its regulatory costs and revenues at a minimum on a semi-annual basis. If the Exchange determines regulatory revenues exceed or are insufficient to cover a material portion of its regulatory costs, the Exchange will adjust the ORF by submitting a fee change filing to the Commission. The Exchange notifies TPHs of adjustments to the ORF via regulatory circular. The Exchange endeavors to provide TPHs with such notice at least 30 calendar days prior to the effective date of the change.

Under the Exchange's current process, the ORF is assessed to TPHs and collected indirectly from TPHs through their clearing firms by OCC on behalf of the Exchange. The following scenarios reflect how the ORF is currently assessed and collected (these apply regardless if the transaction is executed on the Exchange or on an away exchange):

1. If a TPH is the executing clearing firm on a transaction ("Executing Clearing Firm"), the ORF is assessed to and collected from that TPH by OCC on behalf of the Exchange.
2. If a TPH is the Executing Clearing Firm and the transaction is "given up" to a different TPH that clears the transaction ("Clearing Give-up"), the ORF is assessed to the Executing Clearing Firm (the ORF is the obligation of the Executing Clearing Firm). The ORF is collected from the Clearing Give-up.
3. If the Executing Clearing Firm is a non-TPH and the Clearing Give-up is a TPH, the ORF is assessed to and collected from the Clearing Give-up.

4. If a TPH is the Executing Clearing Firm and a non-TPH is the Clearing Give-up, the ORF is assessed to the Executing Clearing Firm. The ORF is the obligation of the Executing Clearing Firm but is collected from the non-TPH Clearing Give-up (for the reasons described below).

5. No ORF is assessed if a TPH is neither the Executing Clearing Firm nor the Clearing Give-up.

The Exchange uses an OCC cleared trades file to determine the Executing Clearing Firm and the Clearing Give-up.<sup>7</sup>

In each of scenarios 1 through 4 above, if the transaction is transferred pursuant to a Clearing Member Trade Assignment (“CMTA”) arrangement to another clearing firm who ultimately clears the transaction, the ORF is collected from the clearing firm that ultimately clears the transaction (which firm may be a non-TPH) by OCC on behalf of the Exchange. Using CMTA transfer information provided by the OCC, the Exchange subtracts the ORF charge from the monthly ORF bill of the clearing firm that transfers the position and adds the charge to the monthly ORF bill of the clearing firm that receives the CMTA transfer (i.e., the ultimate clearing firm).<sup>8</sup> This process is performed at the end of each month on each transfer in the OCC CMTA transfer file for that month.<sup>9</sup>

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<sup>7</sup> The Exchange notes that in the case where a non-self-clearing TPH executes a transaction on the Exchange, the TPH’s guaranteeing Clearing Trading Permit Holder is reflected as the Executing Clearing Firm in the OCC cleared trades file and the ORF is assessed to and collected from the Executing Clearing Firm.

<sup>8</sup> See Cboe Options Regulatory Circular RG09-030 (“ORF FAQ”), Question 15.

<sup>9</sup> The Exchange notes that OCC provides the Exchange and other exchanges with information to assist in excluding CMTA transfers done to correct bona fide errors from the ORF calculation. Specifically, if a clearing firm gives up or CMTA transfers a position to the wrong clearing firm, the firm that caused the error will send an offsetting CMTA transfer to that firm and send a new CMTA transfer to the correct firm. The

## Proposed Amendments to the Fees Schedule

The Exchange proposes to amend its Fees Schedule in the following four respects to clarify how the ORF is assessed and collected.

First, the Exchange proposes to amend its Fees Schedule to clarify that the ORF is collected by OCC on behalf of the Exchange from the Clearing Trading Permit Holder (“CTPH”) or non-CTPH that ultimately clears the transaction. While the ORF is an obligation of TPHs, due to industry request the ORF is collected from the clearing firm that ultimately clears the eligible trade, even if such firm is a not a TPH. The Exchange, OCC and the industry agreed to this collection method in response to comments that by collecting the ORF in this manner TPHs and non-TPHs could more easily pass-through the ORF to their customers.<sup>10</sup> In the Original ORF Filing, the Exchange stated that it expects TPHs will pass-through the ORF to their customers in the same manner that firms pass-through to their customers the fees charged by self-regulatory organizations (“SROs”) to help the SROs meet their obligations under Section 31 of the Exchange Act.<sup>11</sup>

Accordingly, in scenario 4 above the ORF is collected from the non-CTPH that clears the transaction in order to facilitate the pass-through of the ORF to the end-customer. Likewise, collection of the ORF from the ultimate (CMTA) clearing firm facilitates the passing of the fee to the end-customer. In those cases where the ORF is collected from a non-CTPH, the Exchange (through OCC) collects the ORF as a convenience for the TPH whose obligation it is to pay the fee to the Exchange.

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offsetting CMTA transfer is marked with a CMTA Transfer ORF Indicator which results in the original erroneous transfer being excluded from the ORF calculation.

<sup>10</sup> See ORF FAQ, Question 9.

<sup>11</sup> See ORF FAQ, Question 10.

As described above, under the Exchange's current process the Exchange subtracts the ORF from a CMTA transferor's ORF bill and adds it to the CMTA transferee's ORF bill for every transfer in the monthly OCC CMTA transfer file. Going forward, in order to avoid potentially collecting the ORF on any transactions that are not subject to the ORF, the Exchange will perform a check to determine whether the CMTA transferor or transferee is a TPH. If either the CMTA transferor or transferee is a TPH, the Exchange will collect the ORF from the transferee through the process described above. If neither the transferor nor transferee is a TPH, the Exchange will not include that transfer as part of such process (i.e., the Exchange will not debit the ORF from the transferor or collect the ORF from the transferee). The consequence of this change is that there may be a very small number of instances each month in which a position that was assessed the ORF would not be passed to the ultimate clearing firm and the charge would remain with (and be collected from ) the original clearing firm. The Exchange expects to implement this change for December 2017 ORF billing after a necessary system enhancement has been completed.

Second, the Exchange proposes to amend its Fees Schedule to clarify that the ORF is assessed by the Exchange to each TPH for options transactions cleared by the TPH (as opposed to "executed or cleared" by the TPH) that are cleared by OCC in the customer range regardless of the exchange on which the transaction occurs. As described above, whether a transaction is subject to the ORF is determined by whether a TPH is the Executing Clearing Firm or the Clearing Give-up as reflected in the OCC cleared trades file. Only the Executing Clearing Firm and the Clearing Give-up on the transaction are identified on the OCC file. Accordingly, because the ORF is always assessed to a CTPH, the Exchange proposes to remove the words "executed

or” from the Fee Schedule description of the ORF to clarify that the ORF is assessed for options transactions cleared by a TPH.

Third, the Exchange proposes to clarify its process for assessing the ORF on linkage transactions. An options order entered on the Exchange may be routed to and executed on another exchange pursuant to the Options Order Protection and Locked/Crossed Market Plan. The Exchange may engage a routing broker to provide routing services to the Exchange as described in Cboe Options Rule 6.14B (“Routing Services”) to facilitate linkage transactions. A customer order routed by a routing broker for execution at another exchange results in a transaction on that exchange and an obligation of the routing broker to pay the options regulatory fee, if any, of that exchange. After receiving a fill on the away exchange, the routing broker trades against the original order entered on the Exchange and incurs the Cboe Options ORF. Pursuant to its agreement with the routing broker, the Exchange reimburses the routing broker for any options regulatory fee assessed by the Exchange and by the away market on which the customer order was executed. As a result, only the original customer order executed on the Exchange is assessed the ORF. The Exchange proposes to amend its Fees Schedule to clarify that, with respect to linkage transactions, the Exchange reimburses its routing broker providing Routing Services pursuant to Cboe Options Rule 6.14B for options regulatory fees it incurs in connection with the Routing Services it provides.

Fourth, the Exchange proposes to change the method it uses to assess the ORF to better align with the Exchange’s Fees Schedule. Currently, the Exchange assesses the ORF to a TPH based on the OCC clearing number(s) that the TPH registers with the Exchange. A TPH may have additional OCC clearing numbers that are not registered with the Exchange because they are used by the TPH to clear activity on other exchanges. If a TPH uses a non-CBOE Options

registered OCC clearing number on a transaction and that clearing number is denoted as the Executing Clearing Firm or the Clearing Give-up, the ORF is not assessed to that transaction because the clearing number is not known to the Exchange. Such transactions are subject to the ORF under the Exchange's Fees Schedule because the Executing Clearing Firm or the Clearing Give-up was a TPH. The ORF is assessed at the TPH entity level, not at the OCC clearing number level.

In order to conform its ORF billing practice to its Fees Schedule, the Exchange proposes to amend the Fees Schedule to require TPHs, pursuant to Cboe Options Rule 15.1<sup>12</sup>, to provide the Exchange with a complete list of its OCC clearing numbers. The Exchange would use the list provided solely for ORF billing purposes. TPHs would be required to keep such information up to date with the Exchange. The Exchange will issue a Regulatory Circular to provide TPHs with notice of this change and a deadline for initial submission of its OCC clearing numbers list. The Exchange expects to implement this change for December 2017 ORF billing in order for the Exchange to provide TPHs with notice of this new requirement and time to comply.<sup>13</sup>

The Exchange also proposes a couple of minor clean up changes to the Fees Schedule. The ORF is listed as being \$0.0064 per contract through January 31, 2016 and \$0.0081 per contract effective February 1, 2016. As these dates have passed and the ORF is now simply \$0.0081 per contract, the Exchange proposes to delete the reference to the ORF being \$0.0064

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<sup>12</sup> Cboe Options Rule 15.1 provides that no Trading Permit Holder shall refuse to make available to the Exchange such books, records or other information as may be called for under the Rules or as may be requested in connection with an investigation by the Exchange.

<sup>13</sup> The Exchange notes that its Fees Schedule includes other requirements for TPHs to provide certain information to the Exchange related to Exchange fees. For example, footnote 13 of the Fees Schedule requires TPHs to submit a rebate request form with supporting documentation in order to receive a rebate of transaction fees for certain options transactions.

per contract through January 31, 2016 and the February 1, 2016 effective date of the \$0.0081 per contract ORF.

## 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>14</sup> Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act<sup>15</sup>, which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>16</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes the proposal to collect the ORF from non-TPHs that ultimately clear the transaction is an equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities. The Exchange notes that there is a material distinction between “assessing” the ORF and “collecting” the ORF. The Exchange does not assess the ORF to non-TPHs. The ORF is an obligation of TPHs. Once, however, the ORF is assessed to a TPH for a particular transaction, the ORF may be collected from a TPH or a non-TPH, depending on how the transaction is cleared at OCC. If there was no change to the clearing number of the original transaction, the ORF would be collected from the TPH. If there was a change to the clearing number of the original transaction and a non-TPH becomes the

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

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

<sup>16</sup> 15 U.S.C. 78f(b)(5).

ultimate clearing firm for that transaction, then the ORF will be collected from that non-TPH. The Exchange believes that this collection practice is reasonable and appropriate, and was originally instituted at the request of the industry for the ORF be collected from the clearing firm that ultimately clears the transaction in order to facilitate the passing of the fee to the end-customer.

The Exchange believes it is reasonable, equitable and nondiscriminatory not to pass the ORF to a CMTA transferee when neither the CMTA transferor nor the transferee is a TPH because this would help ensure the ORF is not collected on any transactions that may not be subject to the ORF.

The Exchange believes the proposal to clarify that the ORF is assessed to TPHs for options transactions cleared by the TPH (as opposed to executed or cleared) is reasonable because it adds clarity to the Fees Schedule by better and more accurately describing the application of the ORF. The Exchange believes it is appropriate to charge the ORF only to transactions that clear as customer at the OCC. The Exchange believes that its broad regulatory responsibilities with respect to its TPH's activities supports applying the ORF to transactions cleared by a TPH. The Exchange's regulatory responsibilities are the same regardless of whether a TPH executes a transaction or clears a transaction executed on its behalf. The Exchange regularly reviews all such activity, including performing surveillance for position limit violations, manipulation, insider trading, front-running and contrary exercise advice violations. The Exchange believes the proposal is equitable and not unfairly discriminatory because it would apply in the same manner to TPHs subject to the ORF. The ORF is only assessed to a TPH with respect to a particular transaction in which it is either the Executing Clearing Firm or the Clearing Give-up.

The Exchange believes it is reasonable, equitable and nondiscriminatory to reimburse its routing broker for any options regulatory fees the broker incurs in connection with Routing Services because this helps ensure the Exchange does not charge the ORF more than once to a single customer order.

The Exchange believes the proposal to require TPHs to provide the Exchange with a complete list of its OCC clearing numbers is reasonable because it would enable the Exchange to conform its ORF billing practice to its Fees Schedule by capturing transactions executed or cleared by TPHs. The Exchange believes the proposal is equitable and not unfairly discriminatory because it would apply in the same manner to TPHs subject to the ORF.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address any competitive issues but rather to provide more clarity and transparency regarding how the Exchange assesses and collects the ORF. The Exchange believes any burden on competition imposed by the proposed rule change is outweighed by the need to help the Exchange adequately fund its regulatory activities to ensure compliance with the Exchange 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<sup>17</sup> and paragraph (f) of Rule 19b-4<sup>18</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

### IV. Solicitation of Comments

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

#### Electronic Comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File No. SR-CBOE-2017-074 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 No. SR-CBOE-2017-074. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

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<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> 17 CFR 240.19b-4(f).

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 No. SR-CBOE-2017-074, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

Eduardo A. Aleman  
Assistant Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).

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