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SECURITIES AND EXCHANGE COMMISSION  
[Release No. 34-89636; File No. SR-CBOE-2020-051]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Its Automated Price Improvement Auction Rules in Connection with Agency Order Size Requirements  
August 21, 2020.

## I. Introduction

On June 11, 2020, Cboe Exchange, Inc. (“Exchange” or “Cboe”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change permitting the Exchange to impose a maximum size requirement for an agency order submitted into the Automated Price Improvement Mechanism (“AIM” or “AIM Auction”) and the Complex Automated Price Improvement Mechanism (“C-AIM” or “C-AIM Auction”) in S&P 500® Index Options (“SPX”). The proposed rule change was published for comment in the Federal Register on June 18, 2020.<sup>3</sup> On July 23, 2020, the Exchange submitted Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule change in its entirety.<sup>4</sup> On July

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

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

<sup>3</sup> See Securities Exchange Act Release No. 89058 (June 12, 2020), 85 FR 36918. Comments received on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-cboe-2020-051/srcboe2020051.htm>.

<sup>4</sup> In Amendment No. 1, the Exchange: (1) amended its proposal to modify the proposed maximum size requirement for AIM and C-AIM agency orders in SPX to ten contracts rather than a size determined by the Exchange of up to 100 contracts, specify that this size requirement would apply to all agency orders in SPX, and make related conforming changes to its proposed rule text; and (2) provided additional data, justification, and support for its modified proposal. The full text of Amendment No. 1 is available on the

27, 2020, pursuant to Section 19(b)(2) of the Act,<sup>5</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>6</sup> The Commission is publishing this notice and order to solicit comment on the proposed rule change, as modified by Amendment No. 1, from interested persons and to institute proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>7</sup> to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.

## II. Exchange's Description of the Proposed Rule Change, as Modified by Amendment No. 1

The Exchange proposes to amend Rule 5.37(a)(3) and Rule 5.38(a)(8) to adopt a maximum size of 10 contracts for Agency Orders in SPX submitted through the Automated Price Improvement Mechanism ("AIM" or "AIM Auction") and the Complex Automated Price Improvement Mechanism ("C-AIM" or "C-AIM Auction").<sup>8</sup>

Currently, Rules 5.37(a)(3) and 5.38(a)(3), which govern the size requirements for AIM and C-AIM Agency and Initiating Orders, provide that there is no minimum size for orders submitted into AIM and C-AIM Auctions, respectively, and that the Initiating Order must be for the same size

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Commission's website at: <https://www.sec.gov/comments/sr-cboe-2020-051/srcboe2020051-7470738-221292.pdf>.

<sup>5</sup> 15 U.S.C. 78s(b)(2).

<sup>6</sup> See Securities Exchange Act Release No. 89399, 85 FR 46202 (July 31, 2020). The Commission designated September 16, 2020 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>7</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>8</sup> Amendment No. 1 adopts a fixed maximum size requirement of 10 contracts for SPX Agency Orders submitted to AIM and C-AIM and amends the Initial Rule Filing to reflect this fixed maximum.

as the Agency Order. As such, an Agency Order of any size may currently be submitted in an AIM or C-AIM Auction.

The Exchange now proposes to amend Rule 5.37(a)(3) to provide the maximum size for all Agency Orders in SPX is 10 contracts, and by amending Rule 5.38(a)(3) to provide that the maximum size for the smallest leg of all Agency Orders in SPX is 10 contracts.<sup>9</sup> The proposed maximum size limit for SPX Agency Orders submitted in an AIM or C-AIM Auction is designed to address the specific trading characteristics, market model, and investor basis of SPX. The Exchange notes that the maximum size requirement for Agency Orders in SPX would apply to all Agency Orders in the entire SPX class (including SPX Weeklys (“SPXW”)).

In particular, SPX has a different and more complicated market model, involves taking on greater risk, has a significantly higher notional value (e.g., they are ten times the notional size of SPY options), tends to trade in much larger size, tends to have a larger percentage of volume executed in open outcry than other classes, and tends to execute increasingly more complex strategies (e.g., SPX Combo orders) than in other options classes. The Exchange understands these factors may limit retail customer participation in SPX to simpler strategies and smaller-sized orders. While AIM and C-AIM have historically been activated for all other options classes, the unique and more complex characteristics of SPX have contributed to the Exchange’s historical determination to not activate AIM and C-AIM in SPX when the floor is open so to encourage liquidity on the trading floor as well as in the electronic book to accommodate these large and complex trades.<sup>10</sup> Therefore,

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<sup>9</sup> Application of the maximum size to the smallest leg of complex orders is consistent with the application of a size requirement for the Exchange’s Complex Solicitation Auction Mechanism, which is a similar price improvement auction mechanism on the Exchange. See Rule 5.40(a)(3).

<sup>10</sup> The Exchange notes that, due to the Covid-19 pandemic, the trading floor was inoperable from March 16, 2020 through June 12, 2020 and, as a result, AIM and C-AIM were activated for SPX for the duration of the floor closure.

the Exchange believes the application of an Agency Order size ceiling may provide more price improvement opportunities in SPX geared towards retail customers when AIM and C-AIM are activated in SPX.<sup>11</sup> The Exchange believes this may incentivize increased retail customer auction participation in SPX and provide retail customers with execution and price improvement opportunities in SPX while incentivizing continued liquidity in the electronic book and on the trading floor for larger and more complex orders.

The Exchange has observed that smaller size order flow tends to attract liquidity provider responses, as such orders are generally easier to hedge than larger orders, which may encourage market participants to compete to provide price improvement in an electronic competitive auction process. This, in turn, may contribute to a deeper, more liquid auction process with additional price improvement opportunities for market participants that submit smaller size orders, particularly retail customers.

The Exchange notes that smaller orders in SPX are not commonly executed on the floor, and, without an opportunity to execute in AIM and C-AIM, smaller orders are primarily submitted into to the Book and trade at the market, whereas, with AIM and C-AIM, smaller orders may receive price improvement.<sup>12</sup> For example, the Exchange observed that during April and May 2020,

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<sup>11</sup> Amendment No. 1 adds additional clarification regarding the differences between SPX and other classes and the role of such differences in the Exchange's historical determination not to activate AIM and C-AIM for SPX.

<sup>12</sup> Amendment No. 1 provides additional detail regarding the typical order flow of smaller, retail-sized orders when the Exchange is operating in its historically normal environment (i.e., when the trading floor is operable and AIM/C-AIM is not activated in SPX). The Exchange notes, too, that Rule 5.37(b)(1)(A) guarantees price improvement for smaller order submitted to AIM. It provides that if a buy (sell) Agency Order is for less than 50 standard option contracts (or 500 mini-option contracts), the stop price of the Initiating Order must be at least one minimum increment better than the then-current NBO (NBB) or the Agency Order's limit price (if the order is a limit order), whichever is better.

while the trading floor was inoperable and AIM and C-AIM were activated for SPX, the average daily statistics for Agency Orders containing various quantities was as follows:

<b>Order Size Category</b>	<b>AIM</b>		<b>C-AIM</b>	
	<b># Agency Orders</b>	<b># Contracts</b>	<b># Agency Orders</b>	<b># Contracts</b>
1 to 10	1,668	4,229	2,123	17,231
11 to 50	103	2,759	189	17,226
51 to 100	19	1,654	30	12,696
101 to 250	5	977	21	16,373
251 to 500 <sup>13</sup>	3	1,335	12	19,144

The Exchange then observed that since the re-opening of the trading floor on June 15, 2020,<sup>14</sup> the average daily statistics for customer orders for various quantities has been as follows:

<b>Order Size Category</b>	<b>Simple Orders on Floor</b>		<b>Complex Orders on Floor</b>	
	<b># Customer Orders</b>	<b># Contracts</b>	<b># Customer Orders</b>	<b># Contracts</b>
1 to 10	11	50	12	1,481
11 to 50	11	376	41	11,894
51 to 100	8	688	44	16,305
101 to 250	9	1,487	30	20,635
251 to 500 <sup>15</sup>	6	2,240	19	22,489

The Exchange has observed that brokers generally cross customer orders on the trading floor, which is currently the only way to cross orders on the Exchange. Overall, as demonstrated in the tables above, the Exchange has observed that, when AIM and C-AIM were activated for SPX, there was a significant number of SPX orders (and resulting number of contracts) containing

<sup>13</sup> The Exchange also notes that orders for over 500 contracts did not exceed a daily average of 2 orders (for up to an average daily total of 3,425 contracts) in AIM nor over a daily average of 4 orders (for up to an average daily total of 50,971 contracts) in C-AIM.

<sup>14</sup> Through July 16, 2020, when this data was compiled.

<sup>15</sup> The Exchange also notes that orders for over 500 contracts have had up to a daily average of 4 orders (for up to an average daily total of 9,120 contracts) in AIM and up to 10 orders (for up to an average daily total of 60,091 contracts) in C-AIM.

quantities of one to ten contracts submitted through the electronic auctions over any other order size category. However, once the trading floor was again operable in June 2020, and AIM and C-AIM consequently switched off for SPX, the volume of customer orders in SPX for one to ten contracts submitted to the trading floor decreased significantly (approximately a 99% decrease in number of simple orders, total number of simple order contracts and number of complex orders, and approximately a 91% decrease in total number of complex order contracts) from the volume that had previously been submitted to the electronic auctions, whereas, larger order sizes experienced a notable increase in volume once the trading floor was again operable. Thus, the data demonstrates that when AIM is not available, brokers do not take advantage of the ability to cross smaller-sized orders on the trading floor, but when AIM is available, brokers use the electronic auction to cross these smaller-sized orders.

In addition to this, the Exchange observed that, in a sample of SPX orders submitted into simple AIM during a week of trading in April 2020,<sup>16</sup> orders containing quantities from one to ten contracts submitted through AIM received an average price improvement of approximately \$0.34 over their limit prices, whereas orders containing quantities from 11 to 50 contracts received an average price improvement of approximately \$0.22, and orders for 51 to 250 contracts received an average price improvement of \$0.08 and orders containing quantities of between 251 and 500 received an average of \$0.15. That is approximately a 55% larger average price improvement than orders for one to ten contracts received than orders for 11 to 50 contracts, a 325% larger average price improvement than orders for 51 to 250 contracts and approximately 127% larger average price improvement than orders for 251 to 500 contracts. While the Exchange did not observe such a

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<sup>16</sup> Amendment No. 1 amends the data sample presented by expanding the time frame in which the sample was taken for average price improvement over the limit price of Agency Orders submitted into AIM and C-AIM from through.

significant increase in price improvement for complex orders from one to ten contracts in the sample of SPX orders submitted to C-AIM, it notes that greater price improvement generally did occur for smaller sized complex orders as compared to larger sized orders. The Exchange notes, however, that it is simultaneously submitting a rule filing to amend the manner in which price improvement occurs for certain complex SPX orders submitted to C-AIM so that price improvement received through the C-AIM Auction is better aligned with pricing that typically occurs on the trading floor. The Exchange believes that this, paired with the proposed maximum quantity, will greatly incentivize more retail-sized order flow through C-AIM. Overall, as this data demonstrates, price improvement on smaller orders (particularly for one to ten contracts) in SPX, a class which generally exhibits more complicated trading characteristics and complex market factors, is generally more beneficial than price improvement on larger orders submitted through AIM and C-AIM, and customers are more inclined to submit smaller orders (1-10 contracts) in SPX into the electronic auctions when activated for SPX, rather than to the trading floor, when operable. As a result, if the Exchange is able to implement a maximum size requirement of up to 10 contracts for SPX as proposed,<sup>17</sup> it may determine to activate AIM and C-AIM when the trading floor is open. The Exchange believes this could provide incentive for the submission of smaller size SPX orders to the Exchange and into the electronic auction. As a result, the Exchange believes the proposed rule change will provide retail customers with additional price improvement opportunities overall when the trading floor is open while preserving liquidity available in the market, particularly on the trading floor, for larger and more complicated orders.

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<sup>17</sup> The proposed rule change to designate a maximum size of 10 contracts is based on this data, which demonstrates that orders with size up to 10 contracts generally experience the most volume when AIM and C-AIM are activated for SPX and generally receive the most beneficial price improvement (and are considered to be “retail” sized orders).

The Exchange notes that the trading floor is generally better suited for the larger complex orders typical in SPX. Therefore, while permitting retail-sized orders in SPX to execute in AIM and C-AIM will provide additional price improvement opportunities for smaller orders, it is also designed to maintain SPX liquidity, and incentive Market-Maker activity in SPX, on the trading floor and in the electronic book when AIM and C-AIM is activated for SPX, creating a liquid hybrid environment for orders in this class. Indeed, the Exchange has observed that open outcry trading is the generally preferred execution mechanism for orders in such a complex and nuanced class as SPX, which has been indicated, among other observations, by a significant decrease in SPX executions while the Exchange operated in an all-electronic environment. Data from February 3, 2020 through March 13, 2020 (the last trading day prior to the temporary close of the trading floor) shows that a total of 2,717,383 contracts for simple orders in SPX and 27,242,625 contracts for complex orders in SPX were executed in open outcry auctions, whereas data for approximately the same timeframe, from March 16, 2020 through April 21, 2020, shows that 534,790 contracts were executed in AIM in SPX and 13,059,041 contracts were executed in C-AIM in SPX. The Exchange notes, too, that the Exchange's trading floor may be better suited for crosses in SPX with more complex orders, complicated strategies and larger size. Such orders are more commonly executed on the trading floor as Trading Permit Holders ("TPHs") are able to negotiate and fine-tune the terms of a trade on the trading floor and are permitted to submit complex orders with a ratio less than one-to-three (.333) or greater than three-to-one (3.00) for execution on the trading floor.<sup>18</sup> TPHs are not currently permitted to submit complex orders with such ratios for electronic processing. In addition to this, the trading crowd in open outcry is able to provide markets that are more tailored to the complexity and size of orders typically submitted in SPX. Greater execution

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<sup>18</sup> See Rule 5.83(b).

and price improvement opportunities for SPX orders may result from the markets given by the trading crowd that better define the nuanced complexity and size of such orders than if the same orders were submitted via AIM or C-AIM –which, instead, may provide greater price improvement opportunities for simpler and smaller orders (as demonstrated in the data sample explained above).<sup>19</sup>

Finally, pursuant to current Rule 5.37.02 and Rule 5.38.02, it is deemed conduct inconsistent with just and equitable principles of trade and a violation of Exchange Rule 8.1 to engage in a pattern of conduct where the Initiating Member breaks up an Agency Order into separate orders for the purpose of gaining a higher allocation percentage than the Initiating TPH would have otherwise received in accordance with the allocation procedures contained in the AIM and C-AIM Rules, respectively. In light of the proposed rule change, the Exchange also proposes to amend Rules 5.37.02 and 5.38.02 to make it clear that Initiating TPHs also may not break up an Agency Order into separate orders for the purpose of circumventing the maximum quantity requirement pursuant to subparagraph(s) (a)(3). The Exchange notes that its surveillance program will monitor for such violations in the same manner in which it currently monitors for allocation-related break up violations.

### III. Summary of Comment Letters Received

To date the Commission has received six comment letters on the proposal.<sup>20</sup> The Exchange also submitted a letter responding to the comments.<sup>21</sup> Two commenters supported

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<sup>19</sup> Amendment No. 1 adds additional detail and bolsters the explanation regarding the reasons why the trading floor is better suited for the execution of the generally larger, more complicated orders in SPX, including providing additional data regarding SPX order flow to the floor when operable and to AIM/C-AIM when the floor was not operable.

<sup>20</sup> See letters to Vanessa Countryman, Secretary, Commission, from Michael Golding, Head of Trading, Optiver US LLC, and Rutger Brinkhuis, Head of Trading, AMS Derivatives B.V., dated July 8, 2020 (“Optiver Letter”); Richard J. McDonald, Susquehanna International Group, LLP, dated July 8, 2020 (“SIG Letter”); Ellen Greene, Managing

imposing a maximum size limitation on SPX agency orders in AIM and C-AIM auctions, agreeing with Cboe's assertions that it would incentivize increased retail customer participation in SPX auctions and provide increased execution and price improvement opportunities for retail customers in SPX.<sup>22</sup> One of these commenters further agreed with Cboe's assertions that allowing Cboe to determine a maximum size for SPX orders in AIM and C-AIM auctions would enhance execution quality for smaller orders while maintaining liquidity on the trading floor for larger complex orders.<sup>23</sup> The other commenter claimed its clients recognized significant price improvement opportunities in AIM auctions of SPX orders from 1-100 contracts, but saw mixed results on orders greater than 100 contracts.<sup>24</sup>

Three commenters opposed Cboe's proposal.<sup>25</sup> One of these commenters opposed activating AIM and C-AIM auctions for orders in SPX generally, regardless of size,<sup>26</sup> while the other two commenters opposed Cboe's proposal to impose any degree of maximum size

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Director, Equities & Options Market Structure, The Securities Industry and Financial Markets Association, dated July 9, 2020 ("SIFMA Letter"); John S. Markle, Interim General Counsel, TD Ameritrade, Inc., dated July 9, 2020 ("TD Ameritrade Letter"); Stephen John Berger, Managing Director and Global Head of Government & Regulatory Policy, Citadel Securities, dated July 9, 2020 ("Citadel Letter I"); and Stephen John Berger, Managing Director and Global Head of Government & Regulatory Policy, Citadel Securities, dated August 12, 2020 ("Citadel Letter II").

<sup>21</sup> See letter to Vanessa Countryman, Secretary, Commission, from Rebecca Tenuta, Counsel, Cboe Global Markets, dated July 31, 2020 ("Cboe Response Letter").

<sup>22</sup> See SIFMA Letter, supra note 20, at 2; TD Ameritrade Letter, supra note 20, at 1. The SIFMA Letter and TD Ameritrade Letter commented on Cboe's original proposal, which would have given Cboe the ability to determine a maximum size of up to 100 contracts, prior to Amendment No. 1, which proposed a set maximum size of ten contracts.

<sup>23</sup> See SIFMA Letter, supra note 20, at 2.

<sup>24</sup> See TD Ameritrade Letter, supra note 20, at 1.

<sup>25</sup> See Optiver Letter, supra note 20, at 1-2; SIG Letter, supra note 20, at 3-4; Citadel Letter I, supra note 20, at 1; Citadel Letter II, supra note 20, at 1.

<sup>26</sup> See Optiver Letter, supra note 20, at 1-2.

limitation on these orders, arguing instead that the auctions should be made available in SPX for agency orders of all sizes.<sup>27</sup> One of these commenters argued that if retail order flow in SPX is in fact limited to smaller-sized orders, there is no need to impose a size limitation in order to provide increased price improvement opportunities in the AIM and C-AIM mechanisms for these orders.<sup>28</sup> This commenter further argued that, if larger-sized orders are better suited for the trading floor, as Cboe suggests, such orders would naturally gravitate towards the floor and obviate the need for any size limitations in the electronic mechanisms.<sup>29</sup> Two commenters argued that market participants should have the choice of whether to direct their orders to the trading floor or an electronic auction, with one suggesting that brokers would have best execution obligations to monitor price improvement and route their orders in the most favorable manner.<sup>30</sup> Three commenters suggested that Cboe's data analysis may be insufficient to support its proposal.<sup>31</sup> Two of these commenters noted that the data does not measure a time period during which both electronic auctions and floor-based liquidity are available.<sup>32</sup> One of these commenters and a separate commenter noted that Cboe's own data demonstrated that price improvement opportunities were observed for orders of all sizes in the electronic auction

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<sup>27</sup> See SIG Letter, supra note 20, at 3-4; Citadel Letter I, supra note 20, at 1; Citadel Letter II, supra note 20, at 1.

<sup>28</sup> See SIG Letter, supra note 20, at 3.

<sup>29</sup> See id.

<sup>30</sup> See id. at 3; Citadel Letter I, supra note 20, at 1.

<sup>31</sup> See SIG Letter, supra note 20, at 3; Optiver Letter, supra note 20, at 2; Citadel Letter I, supra note 20, at 1.

<sup>32</sup> See SIG Letter, supra note 20, at 3; Optiver Letter, supra note 20, at 2. One of these commenters further questioned the validity of the data given the extreme volatility observed during the time period of the data. See Optiver Letter, supra note 20, at 2.

mechanisms during the trading floor closure.<sup>33</sup> One commenter argued that allowing SPX market makers to provide electronic price improvement for SPX orders of all sizes would not discourage market makers from also providing price improvement for open outcry orders in SPX.<sup>34</sup>

In its response to comments, Cboe noted that its current rules already allow it to use AIM and C-AIM for all options classes, and therefore it may activate AIM and C-AIM in SPX without a proposed rule change.<sup>35</sup> Cboe further stated that the proposed maximum size for SPX orders in AIM and C-AIM is necessary in order to provide limited electronic auction functionality that some customers found beneficial when available, while mitigating any negative impact on the larger SPX market that Cboe claimed may result from the auctions, including decreased quoting liquidity on the book, wider quotes, and reduced participation by options market makers.<sup>36</sup> In addition, Cboe reiterated its argument that the unique characteristics of SPX options warrant imposing a maximum size to SPX orders submitted through the AIM and C-AIM auctions.<sup>37</sup>

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<sup>33</sup> See SIG Letter, supra note 20, at 3 & n.9; Citadel Letter I, supra note 20, at 1. As noted above, however, a separate commenter suggested price improvement opportunities were mixed for SPX orders greater than 100 contracts. See TD Ameritrade Letter, supra note 20, at 1.

<sup>34</sup> See SIG Letter, supra note 20, at 4.

<sup>35</sup> See Cboe Response Letter, supra note 21, at 2 n.9.

<sup>36</sup> See id. at 2-3. Cboe also argued in its response to comments that the trading floor may be better for crosses in SPX, based on Cboe's observation that the number of larger and more complicated orders that are crossed on the Exchange was significantly lower when the trading floor was closed than when it was open. See id. at 3 & n.13 (finding that, from January 2, 2020 through March 13, 2020, complex orders for SPX options with more than six legs represented approximately 5.3% of the total SPX complex order average daily volume, whereas from March 16, 2020 through April 30, 2020 while the floor was closed and C-AIM was activated in SPX, complex orders for SPX options with more than six legs represented only approximately 2.2% of the total SPX complex order average daily volume).

<sup>37</sup> See id. at 3-4.

Cboe also argued that the proposal would not unfairly discriminate against any market participants, as it imposes no restrictions on any market participant's ability to utilize the AIM and C-AIM auctions for SPX options (i.e., any market participant would retain the ability to submit an SPX agency order of ten contracts or fewer in an AIM or C-AIM auction, respond to an AIM or C-AIM auction, and, to the extent permitted by Exchange Rules, be solicited for the initiating order).<sup>38</sup> Finally, Cboe stated that it has provided sufficient additional data in the amended proposal to support the proposed maximum size of ten contracts, and argued that its data measuring price improvement for AIM and C-AIM SPX orders of various sizes is sufficiently representative because all order sizes reflected in the data sample were subject to the same market conditions.<sup>39</sup> Cboe also stated that it is unable to provide comparable price improvement statistics for orders executed on the trading floor due to the nature of their execution as compared to electronically executed orders.<sup>40</sup>

Three commenters recommended that, to the extent any maximum size is established for SPX orders in AIM and C-AIM auctions, the level of the maximum size should be clearly stated in the proposed rule, with any future modifications subject to a separate proposed rule change.<sup>41</sup> Two of these commenters suggested that, when proposing any modification to the maximum size threshold, Cboe should provide sufficient supporting information, including, for example, data showing price improvement and internalization statistics, and any information necessary to

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<sup>38</sup> See id. at 5.

<sup>39</sup> See id. at 6.

<sup>40</sup> See id.

<sup>41</sup> See TD Ameritrade Letter, supra note 20, at 2; Citadel Letter I, supra note 20, at 2; Optiver Letter, supra note 20, at 2. The TD Ameritrade Letter and Citadel Letter I, commenting on Cboe's initial proposal, both suggested that Cboe commit to allowing orders of up to 100 contracts to participate in the electronic auctions. See TD Ameritrade Letter, supra note 20, at 2; Citadel Letter I, supra note 20, at 2.

clearly demonstrate how the threshold amount accurately captures retail investor activity in SPX and does not exclude a significant amount of retail activity.<sup>42</sup> In response to these comments, as described above, Cboe amended its initial proposal to establish a set maximum size of ten contracts for AIM and C-AIM agency orders in SPX and provided additional data and analysis to support this proposed threshold.<sup>43</sup> In response to the amended proposal, one commenter argued that the proposed ten contract maximum size is without a rational basis and will result in unfair discrimination that would deny significant price improvement to many retail investors.<sup>44</sup> This commenter claimed that retail investors commonly submit orders of more than ten contracts and provided data showing that more than fifty percent of the AIM-eligible retail simple marketable SPX orders that it routed to Cboe from mid-March 2020 to mid-May 2020 were larger than ten contracts.<sup>45</sup> This commenter also argues that its data demonstrates that retail orders of up to 100 contracts received significant price improvement in the AIM auction and requests that Cboe either eliminate the proposed maximum size threshold or, at a minimum, set the threshold at 100 contracts.<sup>46</sup>

IV. Proceedings to Determine Whether to Approve or Disapprove SR-CBOE-2020-051, as Modified by Amendment No. 1, and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>47</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the

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<sup>42</sup> See Citadel Letter I, supra note 20, at 2; Optiver Letter, supra note 20, at 2.

<sup>43</sup> See Cboe Response Letter, supra note 21, at 2.

<sup>44</sup> See Citadel Letter II, supra note 20, at 1.

<sup>45</sup> See id. at 1-2.

<sup>46</sup> See id. at 2.

<sup>47</sup> 15 U.S.C. 78s(b)(2)(B).

proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as stated below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change, as modified by Amendment No. 1, to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>48</sup> the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulate 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 to protect investors and the public interest, and not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers;<sup>49</sup> and Section 6(b)(8) of the Act, which requires that the rules of the Exchange do not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.<sup>50</sup>

Under the Commission's Rules of Practice, the "burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change."<sup>51</sup> The description of a proposed

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<sup>48</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>49</sup> 15 U.S.C. 78f(b)(5).

<sup>50</sup> 15 U.S.C. 89f(b)(8).

<sup>51</sup> Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>52</sup> and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.<sup>53</sup>

The Commission is instituting proceedings to allow for additional consideration and comment on the issues raised herein, including as to whether the proposal is consistent with the Act.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Sections 6(b)(5) and 6(b)(8), or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated

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<sup>52</sup> See id.

<sup>53</sup> See id.

by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>54</sup> any request for an opportunity to make an oral presentation.<sup>55</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. Commission 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 Number SR-CBOE-2020-051 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-2020-051. This file number should be included on the subject line if e-mail 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

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<sup>54</sup> 17 CFR 240.19b-4.

<sup>55</sup> Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

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-2020-051, and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from the date of publication in the Federal Register].

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

J. Matthew DeLesDernier,  
Assistant Secretary.

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<sup>56</sup> 17 CFR 200.30-3(a)(57).