

market of significant size, and that on the whole the manipulation concerns previously articulated by the Commission are sufficiently mitigated to the point that they are outweighed by investor protection issues that would be resolved by approving this proposal.

The Exchange believes that the proposal is, in particular, designed to protect investors and the public interest. The investor protection issues for U.S. investors has grown significantly over the last several years, through roll costs for ether Futures ETFs and premium/discount volatility and management fees for OTC Ether Funds. As discussed throughout, this growth investor protection concerns need to be re-evaluated and rebalanced with the prevention of fraudulent and manipulative acts and practices concerns that previous disapproval orders have relied upon. Finally, the Exchange notes that in addition to all of the arguments herein which it believes sufficiently establish the CME Ether Futures market as a regulated market of significant size, it is logically inconsistent to find that the CME Ether Futures market is a significant market as it relates to the CME Ether Futures market, but not a significant market as it relates to the ether spot market for the numerous reasons laid out above.

For the above reasons, the Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b)(5) of the Act.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purpose of the Act. The Exchange notes that the proposed rule change, rather will facilitate the listing and trading of an additional exchange-traded product that will enhance competition among both market participants and listing venues, to the benefit of investors and the marketplace.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may

designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be disapproved.

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

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

##### *Electronic Comments*

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-CboeBZX-2023-070 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-CboeBZX-2023-070. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or

subject to copyright protection. All submissions should refer to file number SR-CboeBZX-2023-070 and should be submitted on or before October 18, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>54</sup>

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

[FR Doc. 2023-20959 Filed 9-26-23; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-98474; File No. SR-CBOE-2023-048]**

### **Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rules 5.87 and 8.21**

September 21, 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 September 14, 2023, Cboe Exchange, Inc. ("Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Cboe Exchange, Inc. (the "Exchange" or "Cboe Options") proposes to amend Rules 5.87 and 8.21. 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

<sup>54</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.

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 is proposing to amend certain open outcry trading procedures, set forth in the Exchange Rulebook.

Rule 8.21 (Multiple Representation Prohibited) generally prohibits multiple representation in open outcry trading crowds by a Trading Permit Holder ("TPH") for any account in which a TPH has an interest or on behalf of a customer. The rule provides in relevant part that, except in accordance with procedures established by the Exchange or with the Exchange's permission in individual cases, no individual Market-Maker shall enter or be present in a trading crowd while a Floor Broker present in the trading crowd is holding an order on behalf of the Market-Maker's individual account or an order initiated by the Market-Maker for an account in which the Market-Maker has an interest.<sup>3</sup> Further, the rule provides that no TPH, for any account in which the TPH has an interest or on behalf of a customer, shall maintain with more than one broker orders for the purchase or sale of the same option contract or other security, or the same combination of option contracts or other securities, with the knowledge that such orders are for the account of the same principal.<sup>4</sup>

Interpretations and Policies .01 and .02 to Rule 8.21 set forth exception procedures that would permit multiple representation for individual Market-Makers in certain circumstances, with Interpretation .01 including exception procedures related to an individual Market-Maker placing orders with a Floor Broker and Interpretation .02 including exception procedures related to the simultaneous representation of Market-Maker joint accounts.

Specifically, Interpretation and Policy .02 to Rule 8.21 sets out various procedures that, if followed, would permit the simultaneous presence in a trading crowd of participants in and orders for the same Market-Maker joint account. These procedures are intended

to ensure that Market-Makers who choose to employ a joint account for their Exchange trading are not disadvantaged in participating in trades versus those Market-Makers that choose to employ individual accounts.<sup>5</sup> These exception procedures apply only to individual Market-Makers. Currently, the Exchange has interpreted the term "individual Market-Maker" to mean a person who is registered with the Exchange as an individual TPH and holds a Market-Maker Floor Permit, which entitles the holder to act as a Market-Maker on the floor of the Exchange.<sup>6</sup> The current exception procedures and requirements are as follows:

- Joint accounts may be simultaneously represented in a trading crowd by participants trading in-person for the joint account. (See Rule 8.21.02(a).)
- Joint account participants who are not trading in-person in a trading crowd may enter orders for the joint account with Floor Brokers even if other participants are trading the same joint account in-person. (See Rule 8.21.02(b).)
- When series are simultaneously opened during rotation, joint account participants trading the joint account in-person may enter orders for the joint account with Floor Brokers in series where they are unable to trade the joint account in-person. (See Rule 8.21.02(c).)
- There is no restriction on the number of joint account participants that may participate on behalf of the joint account on the same trade. (See Rule 8.21.02(d).)
- When joint account participants are trading in-person in a trading crowd for their individual account or as a Floor Broker, another participant of the joint account may trade for the joint account in-person or enter orders for the joint account with Floor Brokers. (See Rule 8.21.02(e).)
- Except as otherwise permitted under this Rule 8.21, TPHs are prohibited from entering orders for their individual or joint accounts while they are trading in-person in a trading crowd even if the orders are for an account they are not then actively trading. (See Rule 8.21.02(f).)
- TPHs must ensure that they do not trade in-person or by orders such that (1) a trade occurs between a joint account participant's individual market-maker account and the joint account of which he or she is a participant, or (2) a trade occurs in which the buyer and seller are representing the same joint account and are on opposite sides of a transaction. It is the responsibility of a joint account participant to ascertain whether joint account orders have been entered in a crowd prior to trading the joint account in-person. (See Rule 8.21.02(g).)
- Joint account participants may not act as a Floor Broker for the joint account of which they are a participant. (See Rule 8.21.02(h).)

<sup>5</sup> See Securities Exchange Act Release No. 34-61715 (May 16, 2010), 75 FR 13626 (March 22, 2010) (SR-CBOE-2010-028).

<sup>6</sup> See Cboe Regulatory Circular 23-006, dated July 21, 2023.

- TPHs may alternate trading in-person for their individual account and their joint account while in a trading crowd. (See Rule 8.21.02(i).<sup>7</sup>)

- When completing a trade ticket for Market-Maker joint account transactions, it must contain such information as may be required by the Exchange under Rule 6.1(e).

All procedures and requirements contained in Interpretation and Policy .02 must be satisfied, and each individual Market-Maker must also separately satisfy the procedures and requirements of Interpretation and Policy .01. These joint account requirements also remain subject to other applicable open outcry trading procedures, such as open outcry priority and facilitation/solicitation requirements, including Rule 5.86 (Facilitated and Solicited Transactions) and Rule 5.87 (Crossing Orders), as applicable.

Since the enactment of these rules, changes have occurred in the trading environment. First, the Exchange migrated from a floor-based market, where individuals traded in-person as a Floor Broker or a Market-Maker, to a hybrid environment, whereby individuals can trade in-person on the floor, or remotely. Further, the capacity in which individual Market-Makers trade has shifted. Historically, Trading Permits were most commonly held by individuals. While current Exchange rules still allow for an individual to be an individual Trading Permit Holder, it has become far more common for a Trading Permit Holder organization to become a Trading Permit Holder, purchase Trading Permits, and, under Rule 3.9(b), designate individual nominees to represent the organization with respect to each Floor Broker Trading Permit or Market-Maker Floor Trading Permit or, under Rule 3.9(a), designate at least one individual as the Responsible Person for that TPH organization, with respect to the TPH organization's electronic Trading Permit(s). Thus, it is common practice that a TPH organization has, at any given time, designated numerous individuals to be nominees and perform trading functions on behalf of the TPH organization, either on the floor or electronically, with respect to any Trading Permit which the organization holds. As a result, instead of participating in joint accounts, Market-Makers often trade for the accounts of those TPH organizations.

Under the current exception procedures in Interpretation and Policy

<sup>7</sup> Current Rule 8.21.02(j) erroneously refers to Rule 6.1(d); as part of the proposed rule change, the Exchange proposes to update the rule to refer to Rule 6.1(e).

<sup>3</sup> See Rule 8.21(b).

<sup>4</sup> See Rule 8.21(a).

.02, because an individual Market-Maker only contemplates an individual with a Market-Maker Floor Permit, an individual Market-Maker trading in-person on the trading floor may participate on the same trade as a Floor Broker who holds a solicited order from the same TPH organization only if initiated by someone who also meets the definition of an individual Market-Maker (*i.e.*, an individual with a Market-Maker Floor Permit). As noted above, Market-Makers are currently nominees of TPH organizations as opposed to individual TPHs and trade for the accounts of their TPH organizations as opposed to joint accounts. Therefore, few Market-Makers may take advantage of the current exception procedures intended to not disadvantage Market-Makers from participating in trades versus those Market-Makers that choose to employ individual accounts, because many individuals trading off the floor (who may solicited) likely no longer have floor permits. Currently, there are no exceptions to the multiple representation prohibition for TPH organizations' associated persons who are not registered as individual Market-Makers (and thus do not have a Market-Maker Floor Trading Permit) and place solicited orders on behalf of their associated TPH organizations with Floor Brokers. Therefore, an individual Market-Maker trading in-person on the trading floor currently may not participate on the same trade as a Floor Broker who holds a solicited order initiated by an associated person of the same TPH organization (that is not also an individual Market-Maker) as the individual Market-Maker.

The Exchange now proposes changes to Rules 8.21 and 5.87.

First, the Exchange proposes to amend Rule 8.21(b) to the definition of "individual Market-Maker" and update this definition in the Rules. The Exchange proposes to add a parenthetical to the rule to define explicitly an individual Market-Maker as an individual nominee<sup>8</sup> of a TPH organization or an individual Trading Permit Holder, either of which holds a Market-Maker Floor Trading Permit.<sup>9</sup>

<sup>8</sup> The term "nominee" means an individual who is authorized by a TPH organization, in accordance with Rule 3.9, to represent such TPH organization in all matters relating to the Exchange with respect to a Floor Broker or Market-Maker Floor Trading Permit. See Rule 1.1 (definition of "nominee"). Pursuant to Rule 3.9, each TPH organization must designate an individual nominee to represent the organization with respect to each Market-Maker Floor Trading Permit in all matters relating to the Exchange.

<sup>9</sup> The Exchange currently maintains five types of Trading Permits: a Market-Maker Electronic Access Permit, an Electronic Access Permit, a Clearing TPH

This change merely updates this definition to reflect current rule terminology and industry changes, pursuant to which most (if not all) individual Market-Makers are part of larger TPH organizations.

Similarly, the Exchange proposes to amend Rule 8.21, Interpretation and Policy .02 to clarify the applicability of the exception procedures. As noted above, Rule 8.21.02 provides exception procedures related to the simultaneous representation of Market-Maker joint accounts. The Exchange proposes to delete reference to "participants" from the introduction in Interpretation .02, as well as Interpretation .02(a), (b), (c), and (d), and proposes to instead refer to an "individual Market-Maker." Likewise, the Exchange proposes to delete references to "joint account participants" from Interpretation .02(b), (e), and (h), and proposes to instead refer to an "individual Market-Maker." Finally, the Exchange proposes to delete "Trading Permit Holders" from Interpretation Rule .02(i) and (f) and replace with "Individual Market-Makers."<sup>10</sup> The Exchange notes that the application of the rule is not changing per these proposed replacements, but rather the Exchange seeks to simplify the multiple representation rule using clearer and more unified terminology. These terminology changes are consistent with who may participate in joint accounts (and thus who may take advantage of the exception procedures in this rule).

The Exchange also proposes to add a new Interpretation .03 to Rule 8.21 to provide an additional exception to the prohibition on multiple representation to incorporate the market changes described above to, similar to the exception in Interpretation and Policy .02, ensure that Market-Makers on the floor who choose to be part of a larger TPH organization and trade for the account of that TPH organization (similar to the concept of trading for a joint account) are not disadvantaged in participating in trades versus those Market-Makers that choose to employ individual accounts. Under the current exception, as noted above, while a Floor Broker may represent an order initiated by a nominee of a TPH organization who is not an individual Market-Maker (and thus has a Trading Permit other than a Market-Maker Floor Permit), the in-crowd Market-Makers from the same TPH organization are unable to

Permit, a Market-Maker Floor Trading Permit and a Floor Broker Trading Permit.

<sup>10</sup> There are no changes to Rule 8.21(g) as part of the proposed rule change, as the provision, and responsibilities described therein, continue to apply to Trading Permit Holders.

participate on the trade.<sup>11</sup> The Exchange proposes to add Interpretation .03 to provide that, subject to the requirements of Rule 5.87(f), as applicable, an individual Market-Maker trading in-person in a trading crowd and not through orders placed with a Floor Broker may participate on the same trade as a Floor Broker who holds a solicited order on behalf of the same TPH Organization, provided the individual Market-Maker did not initiate the solicited order. As individual Market-Makers are generally part of larger TPH organizations and trade for the accounts of those organizations, which have multiple individuals functioning as Market-Makers on the trading floor (*i.e.*, with Market-Maker Floor Permits) or through electronic trading from off the trading floor (*i.e.*, with Electronic Access Permits), the Exchange believes this proposed exception is appropriate to reflect current organizational structures within the industry. This proposed exception aligns in purpose with the current exception in Interpretation and Policy .02 and will further ensure that Market-Makers trading on the Exchange's floor are not prevented from participating in trades that include solicited interest merely because the solicited party happens to be trading for the same account (TPH organization account instead of joint account).

The proposed Rule 8.21.03 also provides that the last sentence of Interpretation .02(g) to this Rule 8.21, which states that it is the responsibility of a joint account participant to ascertain whether joint account orders have been entered in a crowd prior to trading the joint account in-person, does not apply to this new Interpretation .03.<sup>12</sup> Under the proposed changes, as further detailed below, there would be no obligation on behalf of the individual Market-Maker to ascertain whether someone from his or her firm initiated the solicited order or had knowledge of the solicited order, prior to trading in-person in a trading crowd.<sup>13</sup>

<sup>11</sup> As noted above, the current exception procedures would permit in-crowd Market-Makers to participate on a trade only if the Floor Broker was representing an order initiated by another individual Market-Maker from the same TPH organization.

<sup>12</sup> For the avoidance of doubt, all other procedures and requirements contained in Interpretation and Policy .02, including all provisions in Interpretation .02(g) except the last sentence, must be satisfied and each individual Market-Maker must also separately satisfy the procedures and requirements of Interpretation and Policy .01.

<sup>13</sup> If a TPH organization were to enter an order with a Floor Broker, in addition to the solicited order, then the TPH organization (not the Floor

The Exchange proposes to amend Rule 5.87(f), which contains procedures and requirements related to open outcry crossing entitlement for solicitations and facilitations.<sup>14</sup> Under current rules, in the event a Floor Broker represents an order that is of the eligible order size or greater (“original order”) and is also holding a facilitation order or a solicited order, the Floor Broker may proceed under the provisions of Rule 5.87(f) to obtain a crossing participation entitlement.<sup>15</sup> The crossing participation entitlement permits the Floor Broker to transact either 20% or 40% (currently 40% for all classes), of the remainder of the original order against the facilitation or solicited order. Further, if an On-Floor DPM or On-Floor LMM is granted participation rights under Rule 5.85, Rule 5.87(f)(5) provides that the On-Floor DPM or On-Floor LMM participation entitlement is applied if the trade occurs at the On-Floor DPM’s/LMM’s principal bid or offer, provided that the On-Floor DPM/LMM participation entitlement will be limited to a percentage of contracts that, when combined with the percentage the originating firm crossed, may not exceed 40% of the original order size. After the applicable public customer orders and participation entitlements have been satisfied, Rule 5.87(f)(6) provides that the remaining balance of the order will be allocated among the In-Crowd Market Participants (“ICMPs”) <sup>16</sup> who established the market.<sup>17</sup> Rule 5.87(f)(6)(B) further provides that priority to trade the remaining portion of the order shall be afforded to bids (offers) made by ICMPs in the sequence in which they are made. If bids (offers) were made at the same time, or in the event that the sequence cannot be reasonably determined, priority shall be apportioned equally among the ICMPs who established the market.

In light of the proposed changes to Rule 8.21, the Exchange proposes to

Broker) would be in violation of the multiple representation rule.

<sup>14</sup> As part of this proposed rule change, the Exchange proposes to make a non-substantive change to correct the cross-reference in Rule 5.87(f)(4), to refer to paragraph (f) of the Rule rather than paragraph (d).

<sup>15</sup> Pursuant to Rule 5.87(f)(2), the Floor Broker crossing entitlement takes effect after all public customer orders that were on the limit order book and then represented in the trading crowd at the time the market was established have been satisfied.

<sup>16</sup> See Rule 1.1 for definition of In-Crowd Market Participant.

<sup>17</sup> Rule 5.87(f)(6) currently provides in relevant part that the “the ICMPs who established the market will have priority over all other orders that were not represented in the trading crowd at the time the market was established (but not over Priority Customer orders on the Book) and will maintain priority over such orders except for orders that improve upon the market.”

update Rule 5.87(f) to modify the priority of members in the trading crowd after the crossing participation entitlement and other applicable participation entitlements have been satisfied. Specifically, the Exchange proposes to update Rule 5.87(f)(6) <sup>18</sup> to state that priority to trade the remaining portion of the order shall be apportioned equally among ICMPs who established the market, as is the case currently if bid (offers) were made at the same time, or in the event that the sequence cannot be reasonably determined. As under the current rule, in the event an ICMP declines to accept any portion of the available contracts, any remaining contracts shall be apportioned equally among the other ICMPs who established the market until all contracts have been apportioned. The Exchange also proposes to amend Rule 5.87(f)(7). Current Rule 5.87(f)(7) states nothing in that paragraph is intended to prohibit a Floor Broker, an On-Floor DPM, or an On-Floor LMM from trading more than his or her percentage entitlement if the other ICMPs do not choose to trade the remaining portion of the order. The Exchange proposes to add that it is also not intended to prohibit these parties from trading more than his or her percentage entitlement if such trades are permissible under the proposed Interpretation .03 of Rule 8.21. This is consistent with the proposed rule change above, which would make it possible for the TPH organization of which the applicable party is a part to, as a whole, trade more than 40% participation entitlement).

Finally, the Exchange proposes to amend Interpretation .06 to Rule 5.87, which currently provides that Rule 5.87(f) supersedes the priority provision of Rule 5.86(d) in those situations where the Floor Broker representing an eligible order determines to take advantage of the crossing provisions of paragraph (f) of this Rule. The Exchange proposes adding language regarding an order being represented by the Floor Broker using the crossing provision, to clarify that paragraph (f) of Rule 5.87 provides the solicited person or order being represented by the Floor Broker using the crossing provision with priority over all other parties (other than certain Public Customer orders) for either 20% or 40% of the contracts remaining in the order, as determined by the Exchange, after those certain Public Customer orders have been satisfied. This is

<sup>18</sup> The proposed rule change deletes Rule 5.87(f)(6)(A) and (B), as they are no longer applicable, and moves language from current 5.87(f)(6)(C) to be included in 5.87(f)(6).

merely a clarifying change and has no impact on what orders may be eligible for the entitlement pursuant to Rule 5.87(f).

## 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>19</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5) <sup>20</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 the Section 6(b)(5) <sup>21</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

In particular, the Exchange believes the proposed rule change to add an exception to the multiple representation prohibition will promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors. The purpose of this proposed change, similar to the purpose of the current exception to the multiple representation prohibition in Rule 8.21, Interpretation and Policy .02, is to ensure that an individual Market-Maker trading in-person on behalf of the TPH organization is not disadvantaged in participating in a solicited trade solely because the trade was initiated off the floor by an individual trading for the same account. This proposed exception expands the current exception to permit Market-Makers to participate in trades if they are for TPH organization accounts (as is current common practice) instead of joint accounts and if the solicited party is from his or her same TPH organization, regardless of the type of trading permit the solicited party is using (as opposed to the current exception that permits this only if the

<sup>19</sup> 15 U.S.C. 78f(b).

<sup>20</sup> 15 U.S.C. 78f(b)(5).

<sup>21</sup> *Id.*

solicited party has a Market-Maker Floor Trading Permit, which is uncommon in current practice).

Specifically, under the current rules, an individual Market-Maker trading in-person on the trading floor may participate on the same trade as a Floor Broker who holds a solicited order from the same TPH organization, but only if initiated by another individual Market-Maker. However, currently, there are no exceptions to the multiple representation prohibition for TPH organizations' associated persons who are not registered as individual Market-Makers (and thus do not have a Market-Maker Floor Trading Permit) and place solicited orders for joint accounts with Floor Brokers. Therefore, an individual Market-Maker trading in-person on the trading floor currently may not participate on the same trade as a Floor Broker who holds a solicited order initiated by an associated person of the same TPH organization as the individual Market-Maker.

As discussed above, since the enactment of these rules, changes have occurred in the trading environment. As a result of those changes, it is common practice that a TPH organization has, at any given time, designated numerous individuals to perform trading functions on behalf of the TPH organization, either on the floor or electronically, with respect to any Trading Permit which the organization holds. As a result, instead of participating in joint accounts, Market-Makers trade for the accounts of those TPH organizations.

The proposed rule changes incorporate these advancements in the modern trading environment into the current exceptions to Rule 8.21 by expanding on the current exception procedures in current Interpretation and Policy .02 to permit an individual Market-Maker trading in-person may participate on a solicited trade that is initiated by an individual from the same TPH organization, regardless of whether the individual initiating the solicited trade is an individual Market-Maker. The proposed exception essentially permits Market-Makers trading in person on the floor on behalf of a TPH organization (as opposed to for a joint account) to participate on a trade if solicited interest was initiated by another Market-Maker from that TPH organization (for the same account). Like the current exception in Interpretation and Policy .02, the purpose of this exception is to ensure that Market-Makers on the floor who choose to be part of a larger TPH organization and trade for an account of that TPH organization (similar to the concept of a joint account) are not

disadvantaged in participating in trades versus those Market-Makers that choose to employ individual accounts. It is common practice for off-floor liquidity providers, including Market-Makers with Electronic Access Permits, to be solicited to provide liquidity to trade against customer orders that are ultimately crossed on the Exchange's trading floor. Therefore, given the changes to the market as described above, the Exchange believes the proposed rule change further removes impediments to and perfects the mechanism of a free and open market and a national market system, as the proposed changes ensure that an individual Market-Maker that trading in-person that chooses to be part of a larger TPH organization and trade for an account of that TPH organization (similar to the concept of a joint account) is not disadvantaged in participating in a solicited trade versus a Market-Maker that chooses to employ an individual account.

The Exchange further believes the proposed rule change will not permit unfair discrimination between customers, issuers, brokers, or dealers, because it will eliminate a disparity that exists under current Rules. As noted above, because it is common for Market-Makers to trade on behalf of TPH organizations as opposed to trade as individual TPHs, and thus trade for TPH organization accounts as opposed to for joint accounts, there are few Market-Makers on the trading floor that can take advantage of the current exception to the multiple representation prohibition in current Rule 8.21, Interpretation and Policy .02. The Exchange believes this may disadvantage Market-Makers from participating in trades versus those that choose to employ individual accounts, because Market-Makers trading on behalf of TPH organizations (as most do) are not permitted to take advantage of the current exception if the solicited interested was initiated off the floor by an individual who does not hold a Market-Maker Floor Trading Permit, but rather another eligible trading permit offered by the Exchange (for example, acting as a Market-Maker with an Electronic Access Permit), thus removing a potential disparity that exists under current Rules. Therefore, these Market-Makers are losing trading opportunities because of the type of permit held by the solicited party.

Additionally, the Exchange believes the proposed rule change is consistent with the requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers, as the Exchange believes the proposed

rule change may reduce any inadvertent unfair discrimination to which current individual Market-Makers are subject. As discussed above, the Exchange believes many individual Market-Makers on the trading floor that trade for the account of the TPH organizations on behalf of which they trade may be at a disadvantage compared to individual Market-Makers that trade for an individual account. This is due to the fact that currently Market-Makers act as nominees of TPH organizations, trading for the accounts of those TPH organizations, and trade upstairs with EAPs rather than Market-Maker Floor Permits, as opposed to being and individual TPH as was the case historically. Under the proposed rule change, a Market-Maker acting as nominee of a TPH organization would have the opportunity to participate in trades for which members of their TPH organizations provide solicited liquidity, regardless of the type of trading permit those members have. Currently, individual Market-Makers have this opportunity only if that other member of the same TPH organization happens to have a Market-Maker Floor Trading Permit. As proposed, no ICMP would be prohibited from participating on a trade solely because he or she is from the same TPH organization as the individual that initiated the solicited order. The Exchange believes that the changes will create an opportunity for increased participation on such open outcry trades, which could potentially lead to increased execution opportunities. The Exchange believes that this in turn may lead to greater competition and price improvement for orders, thus creating a more robust open outcry market, which may ultimately benefit investors who choose to send orders to the Exchange.

Further, the Exchange believes the proposed rule changes promote just and equitable principles of trade, as the amended rule preserves the intended prohibitions around multiple representation,<sup>22</sup> while ensuring that Market-Makers who are employed by TPH organizations represented by multiple individuals (as is generally the case in today's trading environment) trading on and off the floor under a variety of eligible trading permits are not unfairly disadvantaged from participating in trades. As noted above, there is a current exception to the multiple representation prohibition that permits a Market-Maker on the trading floor to participate on a trade for which

<sup>22</sup> Rule 8.21 is designed to ensure that a Market-Maker present in the trading crowd is not disproportionately represented.

another Market-Maker with a Market-Maker Floor Trading Permit from the same TPH organization was solicited. The proposed exception essentially just expands this exception to permit Market-Makers on the trading floor to participate in trades for which any other individual trading on behalf of the same TPH organization provided liquidity in the form of a solicited order, regardless of the type of permit such individual holds. Like the current exceptions, the proposed Rule 8.21, Interpretation .03 requires an individual Market-Maker participating on a trade for which the solicited order was initiated by another individual from the same TPH organization to be trading in-person in a trading crowd and not through orders placed with a Floor Broker. Additionally, the proposed exception would not apply if the individual Market-Maker trading in-person initiated the solicited order. Finally, all requirements set forth in Rule 8.21 and its Interpretations and Policies, with the exception of the last sentence of Interpretation .02(g) (as discussed below), continue to apply with respect to multiple representation prohibitions and solicited orders. Thus, the proposed changes continue to preserve the intent of the multiple representation rule to ensure that a Market-Maker present in the trading crowd is not disproportionately represented, and just expands exceptions under the current rule to permit Market-Makers on the trading floor to participate in trades for which any other individual trading on behalf of the same TPH organization provided liquidity in the form of a solicited order, regardless of the type of permit such individual holds.

Similarly, the Exchange believes the proposed changes to exclude the last sentence of Rule 8.21.02(g) from the proposed exception and to Rule 5.87(f) to revise the priority afforded to in-crowd participants with respect to facilitated and solicited orders in open outcry trading, after the crossing participation entitlement and other applicable participation entitlements have been satisfied, are consistent with the Act and promote just and equitable principles of trade. In today's hybrid trading environment, it may be difficult and unduly onerous for individuals on the trading floor to ascertain (at all or in a timely manner) which TPH organization has been solicited on an initiating trade, and thus, difficult, under current rules, to determine which ICMP(s) would have priority. Further, the Exchange believes the current rules may discourage a TPH organization from submitting solicited orders to trade

against customer orders in open outcry, as the TPH that submitted a solicited order may ultimately end up trading against a lesser portion of the initiating order if there are a small number of ICMPs who want to trade against the order, as such ICMPs would have priority over any ICMP from the same TPH organization that submitted the solicited order. This may reduce execution opportunities or competition for customer orders. Under the proposed changes, priority to trade the remaining portion of the solicited order shall be apportioned equally among ICMPs who established the market; this would include ICMPs from all TPH organizations, including the one on behalf of which the solicited order was submitted. The Exchange notes that the proposed changes align with current floor behavior, since, as stated above, in today's trading environment it is difficult to reasonably determine which ICMP(s) have priority. The Exchange further notes that priority is not always time determinative (*e.g.*, pro rata),<sup>23</sup> and believes the proposed rules will streamline the open outcry execution process for crossing transactions, while continuing to provide such solicited orders with meaningful execution and price improvement opportunities.

Further, under the proposed rules, an individual Market-Maker would not be required to ascertain whether the solicited order was initiated on behalf of the same TPH organization, nor would the TPH organization firm be required to inform their Market-Makers trading in person if a solicited order had been initiated. The Exchange believes the proposed changes will reduce unnecessary complexity and confusion in its open outcry procedures, and simplify handling of solicited orders on the Exchange's trading floor, to the benefit and protection of investors.

Finally, the Exchange believes the proposed changes to clarify certain Rules will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, will protect investors and the public interest. Specifically, by amending Rule 8.21(b) and Interpretation and Policies .02 to clarify the definition of "individual Market-Maker" and the applicability of the current exception procedures, the proposed rule change may mitigate any potential confusion for TPHs. Further, the Exchange believes the proposed change to Interpretation .06 to Rule 5.87 to add language to clarify that paragraph (f) of Rule 5.87 provides the solicited person or order being represented by the

Floor Broker using the crossing provision with priority over all other parties (other than certain Public Customer orders) for either 20% or 40% of the contracts remaining in the order, as determined by the Exchange, after those certain Public Customer orders have been satisfied may mitigate any potential confusion as a result of the proposed rule changes, which protects investors and perfects the mechanism of a free and open market. Such changes are not unfairly discriminatory as they are not instituting a new policy, but rather providing clarification as to a current rule, which provides for participation entitlement consistent with other exchanges.<sup>24</sup>

Additionally, the Exchange believes the proposed change to Rule 5.87(f) to state that nothing in the rule paragraph is intended to prohibit an Floor Broker, an On-Floor DPM, or an On-Floor LMM from trading more than his or her percentage entitlement if such trades are permissible under proposed Interpretation .03 of Rule 8.21 (as under proposed rule a TPH organization as a whole may trade more than 40% participation entitlement) provides further transparency into the potential allocations as related to solicited orders, which protects investors and perfects the mechanism of a free and open market by eliminating any potential confusion as a result of the proposed rule changes.

The Exchange also believes the proposed changes to clarify certain Rules is consistent with Section 6(b)(1) of the Act,<sup>25</sup> which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange. As noted above, the Exchange believes the proposed changes to Rule 8.21(b) and Interpretation and Policies .02 to clarify the definition of "individual Market-Maker" and the applicability of the current exception procedures, as well as the proposed change to Interpretation .06 to Rule 5.87, may mitigate any potential confusion for TPHs and thus facilitate compliance with Exchange rules. Similarly, the proposed change to Rule 5.87(f) provides further transparency into the potential allocations as related to solicited orders. The Exchange believes these changes and transparency

<sup>24</sup> See, *e.g.*, NYSE American Rule 934.1NY (Facilitation Cross Transactions).

<sup>25</sup> 15 U.S.C. 78f(b)(1).

<sup>23</sup> See, *e.g.*, Rule 5.32(a)(1)(B).

will protect investors and assist TPHs in complying with Exchange rules, as they provide more clarity and reduce complexity within the rules.

#### *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 Exchange does not believe that the proposed rule change will impose any burden on intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act because it will apply in the same manner to all TPH organizations. The proposed exception to the multiple representation prohibition is similar to exceptions currently in place today. The Exchange believes the proposed rule change will put all individual Market-Makers on equal footing with respect to the ability to participate on crossing transactions. As discussed, above, the Exchange believes the proposed exception removes a potential disparity under current Rules that may disadvantage an individual Market-Maker trading in-person from participating in trades solely because the trade was initiated off the floor by an individual from his or her same TPH organization who holds a permit other than a Market-Maker Floor Trading Permit. Further, the proposed changes to the priority afforded to ICMPs with respect to facilitated and solicited orders in open outcry trading, after the crossing participation entitlement and other applicable participation entitlements have been satisfied, will apply equally to all ICMPs.

The Exchange does not believe that the proposed change will impose an unnecessary or inappropriate burden on intermarket competition because it only applies to the execution of orders on the Exchange's trading floor. As discussed above, the proposed rule change is intended to modernize and streamline the Exchange's open outcry procedures regarding crossing transactions, which changes the Exchange believes may lead to greater competition and price improvement for orders, thus creating a more robust open outcry market.

Finally, the proposed clarifying changes are not intended to have any impact on competition, but rather add transparency to the Rules and eliminate potential confusion of investors.

#### *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**

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>26</sup> and Rule 19b-4(f)(6) thereunder.<sup>27</sup>

A proposed rule change filed under Rule 19b-4(f)(6)<sup>28</sup> normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)<sup>29</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay so that the Exchange may implement the proposed change as soon as possible. The Exchange states that waiver of the operative delay will protect investors by ensuring that an individual Market-Maker trading in-person is not disadvantaged in participating in a solicited trade solely because the trade was initiated off the floor by an individual from his or her same TPH organization who does not hold a Market-Maker Floor Trading Permit, thus removing a potential disparity that exists under current Rules. With respect to the proposed changes to exclude the last sentence of Rule 8.21.02(g) from the proposed exception and to revise the priority described in Rule 5.87(f), the Exchange states that waiver of the operative delay will promptly reduce unnecessary complexity and confusion regarding open outcry procedures, and simplify handling of solicited orders on the trading floor. Additionally, the

<sup>26</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>27</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>28</sup> 17 CFR 240.19b-4(f)(6).

<sup>29</sup> 17 CFR 240.19b-4(f)(6)(iii).

Exchange states that, with respect to proposed changes to clarify definitions and the applicability of current exception procedures, waiver of the operative delay will allow the Exchange to provide further transparency as soon as possible. The Commission believes that waiver of the 30-day operative delay is consistent with the protection of investors and the public interest because the proposed rule change does not raise any new or novel issues. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.<sup>30</sup>

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 shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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

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

#### *Electronic Comments*

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-CBOE-2023-048 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-2023-048. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent

<sup>30</sup> For purposes only of waiving the 30-day operative delay, the Commission has also considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-CBOE-2023-048 and should be submitted on or before October 18, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>31</sup>

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

[FR Doc. 2023-20961 Filed 9-26-23; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98472; File No. SR-PEARL-2023-45]

### Self-Regulatory Organizations; MIA X PEARL, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the MIA X Pearl Equities Fee Schedule To Adopt the NBBO Setter Plus Program and Eliminate Certain Other Rebates

September 21, 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 September 11, 2023, MIA X PEARL, LLC ("MIA X Pearl" or "Exchange") filed with the Securities and Exchange Commission ("Commission") a 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 is filing a proposal to amend the fee schedule (the "Fee Schedule") applicable to MIA X Pearl Equities, an equities trading facility of the Exchange.

The text of the proposed rule change is available on the Exchange's website at <https://www.miaxglobal.com/markets/us-equities/pearl-equities/rule-filings>, at MIA X Pearl's principal office, 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 Fee Schedule to: (i) adopt a new incentive program called the "NBBO Setter Plus Program" (referred to in this filing as the "NBBO Program") that, in general, provides enhanced rebates for Equity Members' <sup>3</sup> added displayed liquidity ("Added Displayed Volume") in securities priced at or above \$1.00 per share in all Tapes based on increasing volume thresholds and increasing market quality levels (described below), as well as an additive rebate applied to orders that set the NBBO <sup>4</sup> upon entry; (ii) reduce the standard rebate for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume in all Tapes and make the corresponding changes to the Liquidity Indicator Codes and

<sup>3</sup> The term "Equity Member" is a Member authorized by the Exchange to transact business on MIA X Pearl Equities. See Exchange Rule 1901.

<sup>4</sup> With respect to the trading of equity securities, the term "NB" shall mean the national best bid, the term "NBO" shall mean the national best offer, and the term "NBBO" shall mean the national best bid and offer. See Exchange Rule 1901.

Associated Fees table <sup>5</sup>; (iii) eliminate the Add Volume Tiers table <sup>6</sup> and associated rebates and make corresponding changes to rename Section 1)c) to now be titled "NBBO Setter Plus Program"; (iv) eliminate the Market Quality Tiers table <sup>7</sup> and associated rebates; (v) renumber Section 1)g), Step-Up Added Liquidity Rebate, to now be Section 1)f), Step-Up Added Liquidity Rebate; and (vi) amend the Definitions section to include a definition for the term "NBBO Set Volume" (described below). All of the proposed changes relate to the adoption of the proposed NBBO Program, which incorporates certain concepts from the current Add Volume Tiers and Market Quality Tiers programs.

The Exchange originally filed this proposal on August 31, 2023 (SR-PEARL-2023-42). On September 11, 2023, the Exchange withdrew SR-PEARL-2023-42 and refiled this proposal.

##### Background of Current Rebate Programs Impacted by This Proposal

Section 1)a) of the Fee Schedule sets forth the Exchange's standard rebates and fees for adding, removing or routing orders (displayed and non-displayed) in all Tapes. The Exchange provides different rebates and fees depending on whether (i) the execution is for an order where the securities are priced at or above \$1.00 per share, or (ii) the execution is for an order where the securities are priced below \$1.00 per share. Relevant for the purposes of this proposal, the Exchange currently provides a standard rebate of (\$0.0027) <sup>8</sup> per share for executions of orders in securities priced at or above \$1.00 per share for Added Displayed Volume across all Tapes.<sup>9</sup>

Section 1)b) of the Fee Schedules provides a list of the liquidity indicator codes and associated rebates or fees that are applied to a transaction so that each Equity Member that enters an order is able to understand the fee or rebate that is applied to the execution. Each side of a trade is assigned a liquidity indicator code in order to identify the scenario under which the trade occurred.

Section 1)c) of the Fee Schedule provides a volume-based tier structure, referred to as the Add Volume Tiers, in

<sup>5</sup> See Fee Schedule, Section 1)b), Liquidity Indicator Codes AA, AB and AC.

<sup>6</sup> See Fee Schedule, Section 1)c).

<sup>7</sup> See Fee Schedule, Section 1)f).

<sup>8</sup> The Exchange indicates rebates in parentheses in the Fee Schedule. See the General Notes Section of the Fee Schedule.

<sup>9</sup> See Fee Schedule, Section 1)a). See also Fee Schedule, Section 1)b), Liquidity Indicator Codes AA, AB, and AC.

<sup>31</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.