consistent with the protection of investors and the public interest, and the other requirements of Section 6(b)(5) of the Act.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization ['SRO'] that proposed the rule change.'' [18] The description of a proposed 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, and any failure of an SRO 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 Exchange Act and the applicable rules and regulations.[19]

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Act to determine whether the proposal should be approved or disapproved.

IV. 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 Section 6(b)(5) 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 by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b–4, any request for an opportunity to make an oral presentation.[20]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by March 12, 2021. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by March 26, 2021. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–NYSE–2020–90 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–NYSE–2020–90. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–NYSE–2020–90 and should be submitted by March 12, 2021. Rebuttal comments should be submitted by March 26, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[21]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021–03337 Filed 2–18–21; 8:45 am]

BILLING CODE 8011–01–P

[18] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[19] *See id.*

[20] Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Public Law 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).

[21] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91119; File No. SR–CBOE–2020–051]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, To Amend the Automated Price Improvement Auction Rules in Connection With Agency Order Size Requirements

February 12, 2021.

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'') [1] and Rule 19b–4 thereunder,[2] 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'') and the Complex Automated Price Improvement Mechanism (''C–AIM'') in S&P 500® Index Options (''SPX''). The proposed rule change was published for comment in the **Federal Register** on June 18, 2020.[3] 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.[4] On July 27, 2020,

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

[2] 17 CFR 240.19b–4.

[3] *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.*

[4] 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 Commission's

Continued

pursuant to Section 19(b)(2) of the Act,[5] 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.[6] On August 21, 2020, the Commission published notice of Amendment No. 1 and instituted proceedings under Section 19(b)(2)(B) of the Act[7] to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[8] On December 8, 2020, pursuant to Section 19(b)(2) of the Act,[9] the Commission designated a longer period within which to approve or disapprove the proposed rule change, as modified by Amendment No. 1.[10] On December 11, 2020, the Exchange submitted Amendment No. 2 to the proposed rule change.[11] This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

II. Description of the Proposal, as Modified by Amendment Nos. 1 and 2

The AIM and C–AIM are electronic auctions intended to provide an agency order with the opportunity to receive price improvement (over the National Best Bid or Offer in AIM, or the synthetic best bid or offer on the Exchange in C–AIM).[12] Upon submitting an agency order into one of these auctions, the initiating Trading Permit Holder (''TPH'') must also submit a contra-side second order (the ''initiating order'') for the same size as the agency order. The initiating order guarantees that the agency order will receive an execution. Upon commencement of an auction, market participants submit responses to trade against the agency order. At the conclusion of the auction, depending on the contra-side interest available, the initiating order may be allocated a certain percentage of the agency order.[13]

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 as the agency order. The Exchange proposes to amend Rule 5.37(a)(3) to provide that the Exchange may determine, per trading session,[14] that the maximum size for all agency orders in SPX is ten contracts, and to amend Rule 5.38(a)(3) to provide that the Exchange may determine, per trading session, that the maximum size for the smallest leg of all complex agency orders in SPX is ten contracts.[15] The Exchange states that it will announce any determination it makes in connection with the application of the maximum size requirement of ten contracts for agency orders in SPX to a trading session via Exchange notice pursuant to Rule 1.5.[16] The Exchange further states that it initially intends to establish the maximum size requirement of ten contracts for agency orders in SPX during RTH and not impose any maximum size requirement for agency orders in SPX during GTH.[17] The Exchange states that the proposed maximum size requirement for agency orders in SPX would apply to all agency orders in the entire SPX class (including SPX Weeklys).[18]

According to the Exchange, SPX options have a different and more complicated market model than other options classes, involve taking on greater risk than in other options classes, have a significantly higher notional value than options in other classes (*e.g.,* they are ten times the notional size of SPY options), trade in much larger size than other options classes, have a larger percentage of volume executed in open outcry than options in other classes, and effect increasingly more complex strategies than executed in other options classes (*e.g.,* SPX combo orders are more frequently submitted).[19] Accordingly, given the nature of SPX options the Exchange retail customer participation in SPX is concentrated in simpler strategies and smaller-sized orders.[20] The Exchange further states that smaller-sized orders in SPX are not commonly executed on the floor and, without an opportunity to execute in AIM and C–AIM, are primarily submitted to the book and trade at the market, whereas, with AIM and C–AIM, smaller-sized orders may receive price improvement.[21] The Exchange provides data demonstrating that, when AIM and C–AIM were activated for SPX, there was a greater number of SPX orders (and resulting number of contracts) containing quantities of one to ten contracts submitted through the electronic auctions than any other order size category.[22] After its trading floor reopened in June 2020 and AIM and C–AIM were again deactivated for SPX, the Exchange observed a decreased volume of customer orders in SPX for one to ten contracts submitted to the trading floor (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.[23] In further support of its proposal, the Exchange measured price improvement statistics for a sample of SPX orders submitted into simple AIM auctions during a one-week period of trading in

website at: *https://www.sec.gov/comments/sr-cboe-2020-051/srcboe2020051-7470738-221292.pdf.*

[5] 15 U.S.C. 78s(b)(2).

[6] *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.

[7] 15 U.S.C. 78s(b)(2)(B).

[8] *See* Securities Exchange Act Release No. 89636, 85 FR 53029 (August 27, 2020).

[9] 15 U.S.C. 78s(b)(2).

[10] *See* Securities Exchange Act Release No. 90594, 85 FR 80853 (December 14, 2020). The Commission designated February 13, 2021 as the date by which the Commission shall approve or disapprove the proposed rule change, as modified by Amendment No. 1.

[11] In Amendment No. 2, the Exchange amended the proposal to specify that it may determine, per trading session, to establish the proposed maximum size of ten contracts for AIM and C–AIM agency orders in SPX. The full text of Amendment No. 2 is available on the Commission's website at: *https://www.sec.gov/comments/sr-cboe-2020-051/srcboe2020051-8135058-226517.pdf.*

[12] *See* Rules 5.38 (AIM) and 5.38 (C–AIM).

[13] *See* Rules 5.37(e) and 5.38(e).

[14] The term ''trading session'' means the hours during which the Exchange is open for trading for Regular Trading Hours (''RTH'') or Global Trading Hours (''GTH'') (each of which may referred to as a trading session), each as set forth in Rule 5.1. *See* Rule 1.1.

[15] Pursuant to Rule 1.5, the Exchange may, to the extent the Rules allow the Exchange to make a determination, including on a class-by-class basis, make a determination for GTH that differs from the determination it makes for RTH. In Amendment No. 2, Cboe indicated it would exercise its authority and establish a maximum size of ten SPX contracts for AIM during RTH but would continue to impose no maximum size during GTH, as it does today and as it did prior to the March floor closure, due to differences in the nature of the markets.

[16] *See* Amendment No. 2, *supra* note 11, at 6. The Exchange states that this distinction is due to the different trading characteristics between RTH and GTH, such as lower trading levels, reduced liquidity, fewer participants, higher volatility, and changing prices. *See id.* at 3. The Exchange further states that it has historically activated AIM and C–AIM in SPX during GTH (without any maximum size requirement for agency orders), but has not historically activated AIM and C–AIM in SPX during RTH. *See id.* at 4.

[17] *See id.* at 6.

[18] *See* Amendment No. 1, *supra* note 4, at 4.

[19] *See id.* at 5.

[20] *See id.* at 5.

[21] *See id.* at 6.

[22] *See id.* at 6–7 (providing more detailed data showing the number of SPX agency orders and contracts for various order sizes in AIM and C–AIM observed by the Exchange during April 2020 and May 2020 while the trading floor was inoperable and AIM and C–AIM were activated for SPX, as compared to the number of simple and complex customer orders and contracts executed on the reopened trading floor from June 15, 2020 to July 16, 2020).

[23] *See id.*

April 2020. Specifically, the Exchange observed that orders for one to ten contracts received an average price improvement of approximately $0.34 over their limit prices, whereas orders for 11 to 50 contracts received an average price improvement of approximately $0.22, orders for 51 to 250 contracts received an average price improvement of $0.08, and orders for 251 to 500 contracts received an average price improvement of approximately $0.15.[24]

Finally, the Exchange states that, pursuant to Rules 5.37.02 and 5.38.02, it is deemed conduct inconsistent with just and equitable principles of trade and a violation of 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 connection with the proposed maximum quantity requirements, 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 Rules 5.37(a)(3) and 5.38(a)(3), as applicable. The Exchange represents that its surveillance program will monitor for such violations in the same manner in which it currently monitors for allocation-related break-up violations.[25]

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[26] In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with Section 6(b)(5) of the Act,[27] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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. The Commission also finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with Section 6(b)(8) of the Act,[28] which requires that the rules of a national securities exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

As described above, to support its proposal, Cboe provided the Commission with data demonstrating that, during the time period when AIM and C–AIM were temporarily activated for SPX, a greater number of SPX orders containing quantities of one to ten contracts were executed through the electronic auctions than were executed on the trading floor when the auctions were again deactivated for SPX.[29] The Exchange also provided data demonstrating that SPX orders containing quantities of one to ten contracts received higher levels of price improvement than other order size categories submitted to the electronic auctions.[30] Based on these observations, the Exchange believes AIM and C–AIM would provide opportunities for smaller-sized orders that are not being traded on the floor to be crossed in the electronic auction mechanisms and, specifically, that orders with sizes up to ten contracts generally represent the most volume and receive the most beneficial price improvement when AIM and C–AIM are activated for SPX.[31]

Two commenters supported the imposition of 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.[32] One of these commenters stated 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.[33] In contrast, two commenters questioned whether a maximum size limitation on orders in SPX entered in AIM and C–AIM auctions is necessary.[34] In its response to these comments, Cboe stated that the proposed maximum size for SPX orders in AIM and C–AIM is necessary to provide limited electronic auction functionality that customers found beneficial during the period when open outcry trading on the floor was closed and AIM and C–AIM auctions for orders in SPX were available.[35] Cboe stated that if market participants could submit SPX orders of all sizes into electronic crossing auctions, it could have a significant negative impact on the quality of the SPX market, which could reduce overall liquidity in the SPX market and harm all SPX investors.[36] Cboe further stated that it sought a balance between preserving open outcry liquidity while offering limited electronic auction functionality that some customers found beneficial.[37]

These commenters also suggested that Cboe's data analysis may be insufficient to support Cboe's proposal to impose a maximum size on agency orders in SPX.[38] Commenters stated that the data does not measure a time period during which both electronic auctions and floor-based liquidity are available,[39] and

[24] *See id.* at 8. The Exchange states that, although it did not observe as significant an increase in price improvement for complex orders from one to ten contracts in the sample it collected of SPX orders submitted to C–AIM, it did generally observe greater price improvement for smaller-sized complex orders as compared to larger-sized complex orders. *See id.*

[25] *See id.* at 11.

[26] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f). Please see the discussion at *infra* notes 49–66 and accompanying text.

[27] 15 U.S.C. 78f(b)(5).

[28] 15 U.S.C. 78f(b)(8).

[29] *See supra* note 23 and accompanying text.

[30] *See supra* note 24 and accompanying text.

[31] *See* Amendment No. 1, *supra* note 4, at 7, 9 n.10.

[32] *See* letters to Vanessa Countryman, Secretary, Commission, dated July 9, 2020 from Ellen Greene, Managing Director, Equities & Options Market Structure, The Securities Industry and Financial Markets Association, at 2 (''SIFMA Letter''); John S. Markle, Interim General Counsel, TD Ameritrade, Inc., at 1 (''TD Ameritrade Letter''). 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.

[33] *See* TD Ameritrade Letter, *supra* note 32, at 1.

[34] *See* letters to Vanessa Countryman, Secretary, Commission, from Richard J. McDonald, Susquehanna International Group, LLP, dated July 8, 2020, at 3–4 (''SIG Letter''); Stephen John Berger, Managing Director and Global Head of Government & Regulatory Policy, Citadel Securities, dated July 9, 2020, at 1 (''Citadel Letter I''); and Stephen John Berger, Managing Director and Global Head of Government & Regulatory Policy, Citadel Securities, dated August 12, 2020, at 1 (''Citadel Letter II'').

[35] *See* letter to Vanessa Countryman, Secretary, Commission, from Rebecca Tenuta, Counsel, Cboe Global Markets, dated July 31, 2020, at 2–3 (''Cboe Response Letter'').

[36] *See id.* at 2–3.

[37] *See id.* at 3.

[38] *See* SIG Letter, *supra* note 34, at 3; Citadel Letter I, *supra* note 34, at 1. *See also* letter 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, at 2 (''Optiver Letter'').

[39] *See* SIG Letter, *supra* note 34, at 3; Optiver Letter, *supra* note 38, at 2. SIG argued that Cboe's assertion that the trading floor may be better for larger-sized orders could not be proven because there has been no side-by-side comparison with AIM and C–AIM, adding that if larger-sized orders

Continued

pointed out that Cboe's own data demonstrated that orders of all sizes in the electronic auction mechanisms received price improvement during the trading floor closure.[40] In response, Cboe stated that it provided sufficient additional data in the amended proposal to justify the proposed maximum size of ten contracts.[41] Cboe stated that the sample data was from a randomly selected time period when SPX AIM and C–AIM were activated [42] and further argued that all order sizes submitted into AIM and C–AIM during that time period would have been similarly impacted by any then-existing volatility, making the data sample an accurate comparison of price improvement opportunities for orders of all sizes executed in those auctions during that time.[43] While acknowledging that it could not provide an ''apples-to-apples'' comparison of price improvement for SPX orders executed on the trading floor versus orders executed in the AIM auction,[44] Cboe argued that smaller orders in general received more improvement when AIM and C–AIM were activated than when they are not activated.[45] Cboe also argued that its data [46] showed that once the trading floor became operable on June 15, 2020, and the Exchange disabled AIM and C–AIM for SPX, the volume of customer orders in SPX for ten or fewer contracts submitted into crossing auctions (on the trading floor) decreased significantly compared to the volume previously submitted into the electronic auctions, while larger order sizes experienced a notable increase in crossed volume compared to volume submitted into electronic auctions.[47] Cboe stated that when the electronic auctions are not available, brokers do not cross smaller-sized orders on the trading floor, but instead submit these orders for electronic execution in the book.[48]

The Commission believes that the data provided by the Exchange, including the data provided in Amendment No. 1, support the Exchange's conclusion that the proposal could provide additional execution and price improvement opportunities for smaller-sized customer orders in SPX options submitted through the Exchange's AIM or C–AIM auctions. With respect to commenters that favored allowing all SPX orders into AIM and C–AIM auctions, the Commission believes it is reasonable for the Exchange to set a maximum size for SPX orders in AIM and C–AIM auctions. Specifically, smaller-sized orders, as demonstrated in Cboe's data, are not regularly crossed on the trading floor and are sent to the electronic order book.[49] Thus, these smaller-sized orders may experience the most benefit from participation in the AIM and C–AIM auction mechanisms.[50] In addition, an agency order for less than 50 contracts is guaranteed price improvement in the AIM auction of at least one minimum increment better than the then-current National Best Bid or National Best Offer.[51] The Commission believes this requirement is based on an underlying assumption that price improvement auctions for multi-list options of fewer than 50 contracts are more likely to be retail customer orders. Although, as discussed below, the Exchange is proposing to adopt a maximum size for SPX AIM and C–AIM auctions of ten contracts rather than 50, the average notional size of SPX options is much greater than that of the average multi-list options contract, which thereby implies that a retail customer order in SPX is more likely to be fewer than 50 contracts.[52]

Because SPX has not traded concurrently on the trading floor and in the AIM and C–AIM electronic auctions during RTH, the data provided by the Exchange does not provide a comparison of price improvement between the electronic auctions and the trading floor in simultaneous operation. Nevertheless, the data does indicate that price improvement opportunities were available to orders in SPX submitted to the electronic auctions. The data provided by the Exchange shows that price improvement opportunities were observed for orders of all sizes in the electronic auction mechanisms during the trading floor closure. However, according to data provided by Cboe, significantly more orders for 1–10 contracts were entered into the AIM and C–AIM than larger-sized orders,[53] and orders for 1–10 contracts received greater average price improvement than larger-sized orders.[54] For example, Cboe stated that the average price improvement of approximately $0.34 for orders for 1–10 contracts submitted through AIM was approximately a 55% larger average price improvement than orders for 11–50 contracts, a 325% larger average price improvement than orders for 51–250 contracts and approximately 127% larger average price improvement than orders for 251–500 contracts.[55] The Commission believes that it is reasonable for Cboe to conclude from its data that a maximum size of ten contracts is appropriate.

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.[56] In response to these comments, and as described above, Cboe amended its 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.[57]

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 investors.[58] This commenter provided

are better suited for the trading floor, such orders would naturally gravitate towards the floor and obviate the need for any size limitations in the electronic mechanisms. *See* SIG Letter, *supra* note 34, at 3. Optiver questioned the validity of the data given the extreme volatility observed during the time period of the data. *See* Optiver Letter, *supra* note 38, at 2.

[40] *See* SIG Letter, *supra* note 34, at 3 & n.9; Citadel Letter I, *supra* note 34, 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 32, at 1.

[41] *See* Cboe Response Letter, *supra* note 35, at 6.

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See id. See also* TD Ameritrade Letter, *supra* note 32, at 1; SIFMA Letter, *supra* note 32, at 2.

[46] Cboe's data covered the period from June 15, 2020 through July 16, 2020. *See* Amendment No. 1, *supra* note 4, at 7.

[47] *See* Cboe Response Letter, *supra* note 35, at 6. *See also* Amendment No. 1, *supra* note 4, at 7–8.

[48] *See* Amendment No. 1, *supra* note 4, at 8. *See also* CBOE Response Letter, *supra* note 35, at 5.

[49] *See* Amendment No. 1, *supra* note 4, at 8. *See also* CBOE Response Letter, *supra* note 35, at 5.

[50] In Amendment No. 1, the Exchange stated that it observed a decreased volume of customer orders in SPX for one to ten contracts submitted to the trading floor compared to the volume that had previously been submitted to the electronic auctions while the trading floor was closed. *See* Amendment No. 1, *supra* note 4, at 7–8.

[51] *See* Rule 5.37(b).

[52] For example, on January 28, 2021, an SPX options expiring on January 29, 2021 was valued at $31.00. Thus, purchasing 10 SPX options contracts would require a $31,000 investment ($31.00 per option contract × 100 × 10 contracts = $31,000). In comparison, a similar SPY option would require a $3,120 investment ($3.12 per option contract × 100 × 10 contracts = $3,120).

[53] *See* Amendment No. 1, *supra* note 4, at 6.

[54] *See id.* at 8.

[55] *See id.*

[56] *See* TD Ameritrade Letter, *supra* note 32, at 2; Citadel Letter I, *supra* note 34, at 2; Optiver Letter, *supra* note 38, 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 32, at 2; Citadel Letter I, *supra* note 34, at 2.

[57] *See* Cboe Response Letter, *supra* note 35, at 2.

[58] *See* Citadel Letter I, *supra* note 34, at 2; Citadel Letter II, *supra* note 34, at 1.

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.[59] This commenter also argued that its data demonstrates that retail orders of more than ten contracts and up to 100 contracts received price improvement in the AIM auction and requested that Cboe either eliminate the proposed maximum size threshold or increase the threshold from ten to 100 contracts.[60]

Based on the Exchange's data, as specifically discussed above, the Commission believes that Cboe has reasonably set a maximum size for SPX orders in AIM or C–AIM auctions and that ten contracts is a reasonable maximum, as an initial step to benefit investors, because this level is commensurate with the greatest amount of volume representative of retail investors and corresponding price improvement.[61] The Commission also believes that the proposal is not unfairly discriminatory, because market participants may execute agency orders in SPX of greater than ten contracts on the trading floor and the electronic order book, as they do today.

The Commission acknowledges a commenter that supports allowing SPX options in AIM auctions has provided data indicating that there also was price improvement for SPX orders of more than ten contracts and up to 100 contracts in the AIM auction during the period of Cboe's floor closure. As described above, however, Cboe's data compiled during a week of trading in April 2020 showed that SPX orders containing quantities of one to ten contracts represented more executed volume and received higher levels of price improvement than other order size categories submitted to the electronic auctions.[62] This is consistent with the data provided by the commenter, which finds greater executed volume and price improvement for SPX orders containing quantities of one to ten contracts than for other order size categories.[63] In addition, as stated above, a retail customer order in SPX is more likely to be a smaller-sized order because the notional size of an SPX options contract is much greater than that of other contracts, including the average multi-list options contract. Furthermore, smaller-sized SPX orders, as demonstrated in Cboe's data, are not regularly crossed on the trading floor and may therefore experience the most benefit from participation in the electronic auction mechanisms.[64] The Commission believes if Cboe were to activate these auctions for SPX orders of one to ten contracts following approval of this proposal, it would provide a substantial benefit to the smaller-sized orders, which are more likely to be retail orders.[65] The Commission therefore believes Cboe's proposed maximum size of ten contracts is consistent with the requirements of the Act. While Cboe could have proposed a different maximum size limit, Cboe's decision not to propose a different or higher maximum size limit does not render the proposed rule change unfairly discriminatory or without a rational basis.[66]

Another commenter opposed activating AIM and C–AIM auctions for orders in SPX, regardless of size, arguing that price discovery is best served when orders are exposed to all market participants simultaneously, such that no one participant has a distinct advantage over another.[67] The commenter argued that firms initiating an AIM auction have a competitive advantage. First, the initiator is able to gain insight into the order prior to the auction and then determine its participation level based on characteristics that are not known to the rest of the market. The commenter also argued that only an initiator can use AIM's auto-match functionality[68] to match a competitor's best price.[69] Although the initiator's use of auto-match may result in a responder sharing a percentage of the execution with the initiator, the Commission believes that this allocation process is very similar to the pro rata allocation for orders on the Cboe floor,[70] except that in the AIM and C–AIM, the customer may receive price improvement relative to the displayed market. Finally, the commenter is concerned that after the proposed rule change is implemented, too much order flow will be controlled by too few market participants, to the detriment of market makers who do not have client order flow.[71] Based on its knowledge of the relevant market, the Commission believes that these initiators already control this order flow. Under the proposed rule change, these initiators will now have a new venue to execute orders with a maximum size of ten contracts, where other market participants can compete to try to provide price improvement.

Accordingly, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the requirements of the Act.

IV. Solicitation of Comments on Amendment No. 2 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning whether Amendment No. 2 is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. 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 email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public

[59] *See* Citadel Letter II, *supra* note 34, at 1–2.

[60] *See id.* at 2.

[61] *See supra* notes 49–55 and accompanying text.

[62] *See supra* note 24 and accompanying text.

[63] *See* Citadel Letter II, *supra* note 34, at 1–2.

[64] *See supra* note 47.

[65] *See supra* note 20.

[66] The Commission expects Cboe to monitor trading in SPX and after gaining experience, including a review of relevant data, to consider whether any adjustments such as increasing the maximum order size may be necessary to maximize the benefit to investors that trade SPX options. During discussions with Cboe staff, Cboe staff communicated its intention to review and evaluate, in the ordinary course, the trading of SPX options in AIM and C–AIM, and to consider proposing any changes as may be appropriate in the future.

[67] *See* Optiver Letter, *supra* note 38, at 1.

[68] *See* Rules 5.37(b)(5) (AIM) and 5.38(b)(4) (C–AIM). An initiating TPH that utilizes auto-match will automatically match the price and size of all AIM or C–AIM responses and other contra-side trading interest at each price up to a designated limit price (or match all prices).

[69] *See* Optiver Letter, *supra* note 38, at 2.

[70] *See* Rule 5.85(a).

[71] *See* Optiver Letter, *supra* note 38, at 2.

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 March 12, 2021.

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendment Nos. 1 and 2

The Commission finds good cause to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 2 in the **Federal Register**. As discussed above, in Amendment No. 2, the Exchange amended the proposal to specify that it may determine, per trading session, to establish the proposed maximum size of ten contracts for AIM and C–AIM agency orders in SPX. The Commission believes that Amendment No. 2 provides additional specificity to the proposal that would allow the Exchange to make a determination, pursuant to Rule 1.5, to establish the proposed maximum size requirement of ten contracts for agency orders in SPX during RTH, while not imposing any maximum size requirement for agency orders in SPX during GTH, as it does today. Consequently, the Commission believes Amendment No. 2 does not raise any novel regulatory issues. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[72] to approve the proposed rule change, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[73] that the proposed rule change, as modified by Amendment Nos. 1 and 2 (SR–CBOE–2020–051), be, and hereby is, approved on an accelerated basis.

[72] 15 U.S.C. 78s(b)(2).

[73] *Id.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[74]

Jill M. Peterson,

Assistant Secretary.

[FR Doc. 2021–03336 Filed 2–18–21; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–91121; File No. SR–NYSE–2020–93]

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Rules 7.35 and 7.35A

February 12, 2021.

I. Introduction

On November 3, 2020, New York Stock Exchange LLC (''Exchange'' or ''NYSE'') filed with the Securities and Exchange Commission (''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend Rule 7.35 regarding dissemination of Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction, and Rule 7.35A regarding DMM consultations in connection with an IPO or Direct Listing. The proposed rule change was published for comment in the **Federal Register** on November 17, 2020.[3]

On December 18, 2020, the Commission extended to February 15, 2020, the time period in which to approve the proposal, disapprove the proposal, or institute proceedings to determine whether to approve or disapprove the proposal.[4] The Commission has received no comments on the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposal.

II. Description of the Proposal

Rule 7.35—Auction Imbalance Information

The Exchange proposes to amend Rule 7.35 to eliminate, on a permanent basis, the restriction on the Exchange disseminating Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction.[5] The Exchange asserts that disseminating Auction Imbalance Information in advance of an IPO Auction or Direct Listing Auction would promote transparency in advance of these Auctions, which would benefit investors and other market participants.[6]

As part of the proposed change, the Exchange proposes that the Imbalance Reference Price for determining the Auction Imbalance Information for either an IPO Auction or a Direct Listing Auction would be determined in the same manner as currently provided for under the temporary Commentaries .01 and .02 to Rule 7.35, respectively.[7] Specifically, the Imbalance Reference Price for determining the Auction Imbalance Information for a Core Open Auction under Rule 7.35A(e)(3) is the Consolidated Last Sale Price, bound by the bid and offer of any published pre-opening indication.[8] Because this definition of Imbalance Reference Price does not currently specify what the Consolidated Last Sale Price would be for an IPO Auction or Direct Listing Auction (which does not exist because the security has not been previously listed on an exchange), the Exchange proposes to amend the definition of Consolidated Last Sale Price in Rule 7.35(a)(11)(A) to provide that: (i) For an IPO that has not had its IPO Auction, the Consolidated Last Sale Price would mean the security's offering price; and (ii) for a Direct Listing that has not had its Direct Listing Auction, the Consolidated Last Sale Price would mean the Indication Reference Price for such security.[9]

Rule 7.35A—DMM Consultations

The Exchange proposes to amend Rule 7.35A(g)(1) to provide for DMM consultations with an underwriter or financial advisor for initial listings and follow-on offerings.[10] The Exchange represents that the proposed rule text reflects long-standing practice relating to the type of consultations that a DMM

[74] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 90387 (Nov. 10, 2020), 85 FR 73322 (Nov. 17, 2020) (''Notice'').

[4] *See* Securities Exchange Act Release No. 90723 (Dec. 18, 2020), 85 FR 84446 (Dec. 28, 2020).

[5] *See* Notice, *supra* note 3, at 73323. Commentaries .01 and .02 to Rule 7.35, currently in effect on a temporary basis through April 30, 2021, provide for the dissemination of Auction Imbalance Information if a security is an IPO or Direct Listing and has not had its IPO Auction or Direct Listing Auction. *See* Securities Exchange Act Release No. 90795 (Dec. 23, 2020), 85 FR 86608 (Dec. 30, 2020).

[6] *See id.*

[7] *See id.*

[8] *See id.*

[9] *See id.*

[10] *See* Notice, *supra* note 3, 85 FR at 73324.