for substantial and repeated failures to submit trade data on the trade date. The Exchange also proposes that the as-ofadd fee pilot program ("Pilot Program"), as proposed to be amended herein, be made permanent. The text of the proposed rule change is available at the Office of the Secretary, CBOE, and at the Commission.

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 CBOE 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

The purpose of the proposed rule change is to amend the as-of-add fee Pilot Program in three ways and to have the Pilot Program, as amended, made permanent. The proposed changes would: (1) Place a ceiling on the monthly as-of-add fee to be paid under Rule 2.26; (2) establish a fine schedule under Rule 17.50(g) for substantial and repeated failures to submit trade data on the trade data; and (3) incorporate into Rule 2.26 provisions like those currently included in Rule 2.30(g) ("Fee for Delayed Submission of Trade Information") that would authorize the Exchange to suspend Rule 2.26 (and thereby waive the fees that would otherwise be due) in exigent circumstances. The Exchange believes these amendments to the Pilot Program are fully responsive to the concerns the Commission has previously identified with respect to the Pilot Program.5

Under the Pilot Program in its present form, the fee, if any, to an individual member is \$10.00 for each as-of-add submitted during a given month in excess of the percentage of such submissions considered "nominal"

under paragraph (a) of Rule 2.26.6 The fee to any clearing firm under paragraph (b) of that rule is \$3.00 for each as-of-add submitted in excess of the "nominal" percentage. In addition, any member assessed an as-of-add fee may request verification from the Exchange pursuant to Part B of Chapter XIX of CBOE's Rules and may appeal the fee assessment pursuant to Part A thereof.

The CBOE believes that the as-of-add fees assessed pursuant to the Pilot Program recognize that late trade submissions impose special processing costs on the Exchange and require significant effort by clearing firms and executing brokers to check and resolve late trade reports. The Exchange represents that late trade submissions are especially likely to burden the Exchange's operations during periods of high volume and heightened volatility, when added stress is least tolerable, thereby adding financial risk to members during these already difficult periods.

The as-of-add fees, according to the Exchange, respond to these problems in two ways. First, the as-of-add fees help to reimburse the Exchange for the administrative burdens and costs of processing post-trade date submissions, and impose the obligation to make such reimbursement on those members who account for an inordinate number of as-of-add submissions and who are thus most responsible for these added costs in the first place (*i.e.*, individual members).

Second, the Pilot Program creates what the Exchange believes to be reasonable economic incentives for members to submit trade data on the trade date, thereby relieving the Exchange and Exchange members of high levels of special handling associated with processing as-of-adds. The Exchange continues to believe, for the reasons set forth in previous filings and supplemental correspondence,8 that the particular fees included in the Pilot Program are equitably allocated among individual members and clearing member organizations.

In the last extension of the Pilot Program, the Commission approved the proposed rule change as a fair and equitable allocation of reasonable fees, but asked the Exchange, in connection with any request to make the Pilot Program permanent, to consider ways to incorporate the Pilot Program into Exchange Rule 17.50(g), under which the Exchange imposes fines for minor rule violations ("Minor Rule Plan").⁹ The Commission also required the CBOE to submit a report setting forth particular statistics about the Pilot Program.¹⁰

The first proposed amendment to Rule 2.26 would place a cap on the monthly fee that any individual member or clearing firm would pay under that rule. The monthly fee to individual members under Rule 2.26(a) would be capped at \$500.00, and the monthly fee to clearing firms under Rule 2.26(b) would be capped at \$1,000.00. The Exchange believes that the caps, when set at the levels proposed, will enable the Exchange to recover its costs for asof-add processing while ensuring that no individual member or clearing member organization pays an inappropriately high, or punitive, fee. 11 In addition, although the proposed cap levels are different for individual members as compared to clearing firms, the Exchange believes that the structure and size of the fee caps are equitable and appropriate. Clearing firms pay, on average, substantially higher aggregate as-of-add fees than do individual members, and the fee cap to clearing firms accordingly, in the Exchange's opinion, should be set at a higher level.

The second proposed amendment to Rule 2.26 would incorporate in a new paragraph (d), provisions authorizing the Clearing Procedures Committee, with the approval of the President of the Exchange, or his designee, to suspend application of the rule, and thereby waive the assessment of as-of-add fees, for periods no greater than seven calendar days, plus extensions, whenever unusual circumstances so dictate. This new paragraph corresponds to the similar suspension provisions contained in Rule 2.30(g).12 In the proposal, as in Rule 2.30(g), the term "unusual circumstances" refers to

⁵ See Securities Exchange Act Release Nos. 32999 (October 1, 1993), 58 FR 53003 (October 13, 1993) (Order approving the as-of-add fee Pilot Program on a six-month pilot basis), 33855 (April 4, 1994), 59 FR 17128 (April 11, 1994) (order extending the Pilot Program until September 30, 1994), and 34783 (October 3, 1994), 59 FR 51459 (October 11, 1994) (order extending the Pilot Program until December 31, 1994) ("Pilot Extension Approval Order").

⁶ The current "nominal" maximum allowable monthly number of as of adds for individual members is 2.4% of an individual member's monthly trades.

 $^{^7{\}rm The}$ current "nominal" maximum allowable monthly number of as of adds for clearing members is 1.2% of clearing members' monthly trades.

⁸ See supra note 5 and infra note 10.

⁹ See Pilot Extension Approval Order, *supra* note 5. In the Pilot Extension Approval Order the Commission stated that it would not be inclined to grant a further extension of the as-of-add fee Pilot Program until the concerns of the Commission expressed therein had been addressed by the CBOE. *Id.*

¹⁰ See Letter from Joanne Moffic-Silver, Associate General Counsel, CBOE, to Sharon Lawson, Assistant Director, OMS, Division, Commission, dated November 29, 1994 ("Pilot Report").

¹¹The CBOE notes that the use of fee caps will limit the incentive effect of the Pilot Program, but that result will, in its opinion, be offset in part by the introduction of the proposed fine schedule under Rule 17.50(g).

¹² Rule 2.30 provides for fees to be assessed against market makers and clearing members for failing to submit trade information required by Rule 6.51 within two hours after execution of a trade.