

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

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

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act³² and Rule 19b-4(f)(6) thereunder.³³ 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)(iii) of the Act³⁴ and subparagraph (f)(6) of Rule 19b-4 thereunder.³⁵

A proposed rule change filed under Rule 19b-4(f)(6)³⁶ normally does not become operative prior to 30 days after the date of the filing. However, Rule 19b-4(f)(6)(iii)³⁷ 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 proposed rule change may become operative on October 1, 2022. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest, as it will allow the Exchange to coordinate its implementation of the revised clearly erroneous execution rules with the other national securities exchanges and FINRA, and will help ensure consistency across the SROs.³⁸ For this reason, the Commission hereby waives the 30-day operative delay and designates the proposed rule change as operative upon filing.³⁹

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 should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-CboeEDGA-2022-015 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-CboeEDGA-2022-015. 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 such 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-CboeEDGA-2022-015 and should be submitted on or before October 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁰

J. Matthew DeLesDernier,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-95870; File No. SR-CBOE-2022-046]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend Rule 5.34 Concerning Drill-Through Protection and Fat Finger Check

September 22, 2022.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on September 15, 2022, Cboe Exchange, Inc. ("Exchange" or "Cboe Options") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

Cboe Exchange, Inc. (the "Exchange" or "Cboe Options") proposes to amend Rule 5.34. 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,

⁴⁰ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³² 15 U.S.C. 78s(b)(3)(A)(iii).

³³ 17 CFR 240.19b-4(f)(6).

³⁴ 15 U.S.C. 78s(b)(3)(A)(iii).

³⁵ 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.

³⁶ 17 CFR 240.19b-4(f)(6).

³⁷ 17 CFR 240.19b-4(f)(6)(iii).

³⁸ See SR-CboeBZX-2022-37 (July 8, 2022).

³⁹ 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).

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 Rule 5.34. Specifically, the Exchange proposes to amend its drill-through protection mechanism for both simple and complex orders and its limit order fat finger check.

The Exchange proposes to amend Rule 5.34(a)(4) and (b)(6) to update the drill-through protection mechanism for simple and complex orders, respectively, to provide orders with additional execution opportunities. Pursuant to the current simple drill-through protection, if a buy (sell) order enters the Book at the conclusion of the opening auction process or would execute or post to the Book at the time of order entry, the System executes the order up to a buffer amount (the Exchange determines the buffer amount on a class and premium basis) above (below) the offer (bid) limit of the opening collar³ or the national best bid ("NBO") (national best offer ("NBB")) that existed at the time of order entry, respectively (the "drill-through price").⁴ The System enters a limit order (as long as it has a Time-in-Force of Day, Good-til-Cancelled or Good-til-Day) (or unexecuted portion) not executed pursuant to the provision in the immediately preceding sentence in the Book with a displayed equal to the drill-through price.⁵ The order (or unexecuted portion) rests in the Book at the drill-through price⁶ until the earlier

to occur of its full execution and the end of the duration of a number of consecutive time periods (the Exchange determines on a class-by-class basis the number of periods, which may not exceed five, and the length of the time period in milliseconds, which may not exceed three seconds).⁷

The proposed rule change amends Rule 5.34(a)(4)(C)(i) to eliminate the concept that there will be a maximum number of time periods and proposes that the order (or unexecuted portion) will rest in the Book at the drill-through price for the duration of consecutive time periods.⁸ The proposed rule change makes conforming changes to subparagraph (ii) by deleting references to "the final period" and subparagraph (iv) by deleting the reference to "any remaining time period(s)," as there will no longer be an Exchange-determined limited number of time periods. Currently, as set forth in current subparagraph (i), the drill-through mechanism will continue until the earlier to occur of the order's full execution and the end of the duration of the Exchange-determined number of time periods. The Exchange proposes to amend subparagraph (iv) to describe when the drill-through process will conclude. Specifically, proposed Rule 5.34(a)(4)(C)(iv) provides that the order continues through the process described in subparagraph (ii) (as proposed to be amended) until the earliest of the following to occur: (a) the order fully executes; (b) the User cancels the order; and (c) the order's limit price equals or is less than (if a buy order) or greater than (if a sell order) the drill-through price at any time during application of the drill-through mechanism, in which case the order rests in the Book at its limit price, subject to a User's instructions. In other words, the order will continue through consecutive time periods until it fully executes (unless it is cancelled by the User or reaches its limit price prior to full execution), compared to today when the order will continue through consecutive time periods until it fully executes or reaches the Exchange-determined final time period, at which time the order would route to PAR for manual handling (unless it is cancelled by the User or reaches its limit price prior to full execution). The Exchange believes

reflects current functionality and is stated in the introductory paragraph to Rule 5.34(a)(1)(C). The proposed rule change merely includes this detail in the next portion of the rule for additional clarity.

⁷ See Rule 5.34(a)(4)(C)(i).

⁸ The Exchange will continue to determine on a class-by-class basis the length of the time periods in milliseconds, which may continue to not exceed three seconds.

eliminating the limit on the number of time periods may increase execution opportunities for limit orders, which will still continue to be bound by their limit prices and protected by the limit order fat finger check.⁹

The proposed rule change makes a similar change to the drill-through protection mechanism for complex orders. Specifically, the proposed rule change eliminates the concept that, for complex orders for which the user does not establish a buffer amount (and instead the Exchange-determined default buffer amount applies),¹⁰ there will be a maximum number of time periods and proposes that the complex order (or unexecuted portion) will rest in the Book at the drill-through price for the duration of consecutive time periods.¹¹ Currently, similar to the drill-through protection mechanism for simple orders (as described above), if a user enters a buy (sell) complex order into the System (and does not enter its own buffer amount), the System executes the order¹² up to a buffer amount above (below) the Synthetic National Best Offer ("SNBO") (Synthetic National Best Bid ("SNBB")) that existed at the time of entry (the "drill-through price") or initiates a complex order auction ("COA") at the drill-through price if the order would initiate a COA.¹³ For complex orders for which the user did not establish a buffer amount, the complex order (or unexecuted portion) rests in the COB with a displayed price equal to the drill-through price until the earlier to occur of the complex order's full execution and the end of the duration of a number of time periods (the Exchange determines on a class-by-class basis the number of periods, which may not exceed five, and the length of the time period in milliseconds, which may not exceed three seconds). Following the end of each period prior to the final period, the System adds (if a buy order)

⁹ If a limit price is "too far away" from the market, the order will continue to be subject to the limit order fat finger protection set forth in Rule 5.34(c)(1) and thus will still be subject to protection against a potentially erroneous execution due to an order pricing error upon submission.

¹⁰ See Rule 5.34(b)(6)(A).

¹¹ See proposed Rule 5.34(b)(6)(B). The proposed rule change has no impact on how the drill-through protection mechanism applies to a complex order for which the inputting user establishes a buffer amount, as in that situation, there is only a single time period pursuant to the current rule (which will continue to be the case).

¹² Executions occur pursuant to Rule 5.33(e).

¹³ Unlike the simple order drill-through protection mechanism, the complex order drill-through protection mechanism permits users to establish a buffer amount different than the Exchange-determined default buffer amount. See Rule 5.34(b)(6)(A). A description of COAs is located in Rule 5.33(d).

³ See Rule 5.31(a) for the definition of Opening Collars.

⁴ See Rule 5.34(a)(4)(A).

⁵ See Rule 5.34(a)(4)(C).

⁶ The proposed rule change adds "at the drill-through price" in the first sentence of subparagraph (a)(1)(C)(i), which is a nonsubstantive change, as it

or subtracts (if a sell order) one buffer amount to the drill-through price displayed during the immediately preceding period (each new price becomes the “drill-through price”). The complex order (or unexecuted portion) rests in the COB at that new drill-through price during the subsequent period. Following the end of the final period, the System cancels or routes to PAR for manual handling, subject to a User’s instructions (such as to cancel the order), the complex order (or unexecuted portion) not executed during any time period.¹⁴

The proposed rule change amends Rule 5.34(b)(6)(B)(i) and (ii) to eliminate the concept that there will be a maximum number of time periods and proposes that the order (or unexecuted portion) will rest in the COB at the drill-through price for the duration of consecutive time periods when a User does not establish its own buffer amount.¹⁵ The proposed rule change makes conforming changes to current subparagraphs (i), (ii), and (iv) (proposed subparagraphs (ii) and (iii)) by deleting references to “the final period” and deleting the reference to “any remaining time period(s),” as there will no longer be an Exchange-determined limited number of time periods. Currently, as set forth in current subparagraphs (i), (ii), and (iv), if the inputting User does not establish a buffer amount for the complex order, the drill-through mechanism will continue until the earlier to occur of the order’s full execution and the end of the duration of the Exchange-determined number of time periods (unless it is cancelled by the User or reaches its limit price prior to full execution), at which time the order would route to PAR for manual handling. The Exchange proposes to add to the end of proposed subparagraph (ii) when the drill-through process will conclude and what happens at that time for complex orders for which the user did not establish a buffer amount. Specifically, proposed Rule 5.34(b)(6)(B)(ii) provides that the complex order continues through the process described in proposed subparagraph (ii) until the earliest of the following to occur: (a) the complex order fully executes; (b) the User cancels the order; and (c) the complex order’s limit price equals or is

¹⁴ See current Rule 5.34(b)(6)(B)(i) and (ii). As set forth in current subparagraph (iv), if the complex order’s limit price is reached during the application of the drill-through mechanism, the order will rest in the COB at its limit price.

¹⁵ The Exchange will continue to determine on a class-by-class basis the length of the time periods in milliseconds, which may continue to not exceed three seconds.

less than (if a buy order) or greater than (if a sell order) the drill-through price at any time during application of the drill-through mechanism, in which case the complex order rests in the COB at its limit price, subject to a User’s instructions.¹⁶ In other words, a complex order for which the User did not establish a buffer amount will continue through consecutive time periods until it fully executes (or is cancelled or reaches its limit price), compared to today when the complex order will continue through consecutive time periods until it fully executes or reaches the Exchange-determined final time period, at which time the order would route to PAR for manual handling (unless otherwise cancelled by the User or reaches its limit price, as described in current subparagraph (iv)). The Exchange believes eliminating the limit on the number of time periods may increase execution opportunities for limit orders, which will still continue to be bound by their limit prices and protected by the limit order fat finger check.¹⁷

The proposed rule change also makes certain nonsubstantive changes to Rule 5.34(b)(6). Specifically, the proposed rule change moves all provisions specific to the application of the drill-through mechanism if the user establishes a buffer amount into Rule 5.34(b)(6)(B)(i) and moves all provisions specific to the application of the drill-through mechanism if the user does not establish a buffer amount into Rule 5.34(b)(6)(B)(ii). This includes incorporating into each of proposed subparagraphs (i) and (ii) how the System handles a complex order if its limit price equals or less than (if a buy order) or greater than (if a sell order) the drill-through price, as described in current subparagraph (iv). As a result, the proposed rule change deletes current subparagraph (iv). Additionally, the proposed rule change moves certain language regarding what happens if the SBBO changes during any period, which applies to all complex orders subject to the drill-through protection mechanism, regardless of whether the user input its own buffer amount, to proposed subparagraph (iii) from current subparagraph (ii) and correspondingly changes current subparagraph (iii) to

¹⁶ Proposed clause (c) is applicable today and located in current subparagraph (iv). As described below, the proposed rule change merely moves this provision from current subparagraph (iv) to proposed subparagraph (ii).

¹⁷ If a limit price is “too far away” from the market, the order will continue to be subject to the limit order fat finger protection set forth in Rule 5.34(c)(1) and thus will still be subject to protection against a potentially erroneous execution due to an order pricing error upon submission.

proposed subparagraph (iv). The proposed rule change makes a nonsubstantive change to the beginning of proposed subparagraph (iii) by changing “However” to “Notwithstanding the above,” as the Exchange believes that phrase is more appropriate.

In addition, the Exchange proposes to amend Rule 5.34(c)(1)(D) to add Limit-on-Close orders¹⁸ to the list of orders to which the limit order fat finger check does not apply. Pursuant to the limit order fat finger check, if a User submits a buy (sell) limit order to the System with a price that is more than a buffer amount¹⁹ above (below) the NBO (NBB) for simple orders or the SNBO (SNBB) for complex orders, the System cancels or rejects the order.²⁰ Currently, the limit order fat finger check does not apply to bulk messages, stop-limit orders, or Multi-Class Spread Orders.²¹ The Exchange proposes to also not apply the limit order fat finger check to Limit-on-Close orders. The limit order fat finger check applies to orders upon entry to the System. However, the limit price of a Limit-on-Close order is intended to relate to the price at the RTH market close, and thus may intentionally be further away from the NBBO or SNBBO, as applicable, at the time the order is entered. This may cause the order to be inadvertently rejected pursuant to this check. The Exchange believes it is not appropriate for this limit order to be subject to the fat finger check, as the check may inadvertently cause rejections for orders with limit prices that are intentionally “far away” from the market at the time of order entry.

¹⁸ A “Limit-on-Close” or “LOC” order is a limit order that may not execute on the Exchange until three minutes prior to Regular Trading Hours (“RTH”) market close. At that time, the System enters LOC orders into the Book in time sequence (based on the times at which the System initially received them), where they may be processed in accordance with Rule 5.32. The System cancels an LOC order (or unexecuted portion) that does not execute by the RTH market close. Users may not designate an LOC order as All Sessions or RTH and Curb. Users may not designate bulk messages as LOC. A User may not designate an LOC order as Direct to PAR. See Rule 5.6(d) (definition of “Limit-on-Close” and “LOC” order).

¹⁹ The Exchange determines a default buffer amount on a class-by-class basis; however, a User may establish a higher or lower amount than the Exchange default for a class.

²⁰ Rule 5.34(c)(1).

²¹ Rule 5.34(c)(1)(D) and (E). The proposed rule change deletes subparagraph (E) and moves Multi-Class Spread Orders to the list of orders to which the check does not apply in subparagraph (D). This is a nonsubstantive change and merely combines two current provisions that exclude certain order types from the fat finger check into a single provision.

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.²² Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)²³ 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)²⁴ 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 eliminate the maximum number of time periods for which a simple or complex order will rest in the Book or COB, respectively, during application of the drill-through protection mechanism will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it will provide simple and complex orders with additional execution opportunities. These orders may continue to be available on the Book or COB, as applicable, for execution, at a wider range of prices, as opposed to today when such orders are cancelled or routed to PAR for manual handling after a specified number of time periods (depending on the User's instructions and if the order does not reach its limit price prior to the end of those time periods). The Exchange believes these additional execution opportunities will benefit investors that submit such orders and believes such orders will continue to receive protection against potentially erroneous executions, as the limit order fat finger check will continue to apply to them.

The Exchange believes the proposed nonsubstantive rule changes to the complex order drill-through protection mechanism will protect investors and

the public interest, because these changes improve the organization of this rule's provisions by grouping all provisions that apply when a User establishes its own buffer and all provisions that apply when a User does not establish its own buffer, eliminating potential confusion.

Finally, the Exchange believes excluding Limit-on-Close orders from the limit order fat finger check will remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors, because it may reduce inadvertent rejections of Limit-on-Close orders, which may be purposely priced further away from the NBBO or SNBBO, as applicable, at the time of entry, as their limit prices are intended to relate to price at the RTH market close. Therefore, this proposed rule change may increase execution opportunities for Users that submit Limit-on-Close orders.

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 the amended drill-through protection mechanism (for both simple and complex orders) and limit order fat finger check will continue to apply in the same manner to orders of all Users and may lead to increased execution opportunities. The Exchange does not believe that the proposed rule change will impose any burden on intermarket competition that is not necessary or appropriate in furtherance of purposes of the Act, because the proposed rule change relates solely to Exchange risk controls and how the Exchange handles orders subject to those risk controls.

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:

A. significantly affect the protection of investors or the public interest;

B. impose any significant burden on competition; and

C. 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 Act²⁵ and Rule 19b-4(f)(6)²⁶ thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission will institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

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

Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email torule-comments@sec.gov. Please include File Number SR-CBOE-2022-046 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-2022-046. 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

²² 15 U.S.C. 78f(b).

²³ 15 U.S.C. 78f(b)(5).

²⁴ *Id.*

²⁵ 15 U.S.C. 78s(b)(3)(A).

²⁶ 17 CFR 240.19b-4(f)(6).

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-CBOE-2022-046 and should be submitted on or before October 19, 2022.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

J. Matthew DeLesDernier,
Deputy Secretary.

[FR Doc. 2022-20944 Filed 9-27-22; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-95874; File No. 4-698]

Joint Industry Plan; Notice of Filing of Amendment to the National Market System Plan Governing the Consolidated Audit Trail by BOX Exchange LLC; Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc. and Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc.

September 22, 2022.

I. Introduction

On September 8, 2022, the Operating Committee for Consolidated Audit Trail, LLC ("CAT LLC"), on behalf of the following parties to the National Market System Plan Governing the Consolidated Audit Trail (the "CAT

NMS Plan" or "Plan");¹ BOX Exchange LLC, Cboe BYX Exchange, Inc., Cboe BZX Exchange, Inc., Cboe EDGA Exchange, Inc., Cboe EDGX Exchange, Inc., Cboe C2 Exchange, Inc., Cboe Exchange, Inc., Financial Industry Regulatory Authority, Inc., Investors Exchange LLC, Long-Term Stock Exchange, Inc., Miami International Securities Exchange LLC, MEMX, LLC, MIAX Emerald, LLC, MIAX PEARL, LLC, Nasdaq BX, Inc., Nasdaq GEMX, LLC, Nasdaq ISE, LLC, Nasdaq MRX, LLC, Nasdaq PHLX LLC, The NASDAQ Stock Market LLC; and New York Stock Exchange LLC, NYSE American LLC, NYSE Arca, Inc., NYSE Chicago, Inc., and NYSE National, Inc. (collectively, the "Participants," "self-regulatory organizations," or "SROs") filed with the Securities and Exchange Commission ("SEC" or "Commission") pursuant to Section 11A(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act"),² and Rule 608 thereunder,³ a proposed amendment to the CAT NMS Plan that would authorize CAT LLC to revise the Consolidated Audit Trail Reporter Agreement (the "Reporter Agreement") and the Consolidated Audit Trail Reporting Agent Agreement (the "Reporting Agent Agreement") as contained in *Appendix A*, attached hereto by: (1) removing the arbitration provision from each agreement and replacing it with a forum selection provision (the "Forum Selection Provision") which would require that any dispute regarding CAT reporting be filed in a United States District Court for the Southern District of New York (the "SDNY"), or, in the absence of federal subject matter jurisdiction, a New York State Supreme Court within the First Judicial Department; and (2) revising the existing choice of law clause to provide that any dispute will be governed by federal law (in addition to New York law).⁴ The Commission is publishing this notice to solicit comments from interested persons on the amendment.⁵

II. Description of the Plan

Set forth in this Section II is the statement of the purpose and summary

¹ The CAT NMS Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Exchange Act and the rules and regulations thereunder. See Securities Exchange Act Release No. 79318 (Nov. 15, 2016), 81 FR 84696 (Nov. 23, 2016) ("Order Approving CAT NMS Plan").

² 15 U.S.C 78k-1(a)(3).

³ 17 CFR 242.608.

⁴ See Letter from Michael Simon, Chair, CAT NMS Plan Operating Committee, to Vanessa Countryman, Secretary, Commission, dated September 8, 2022.

⁵ 17 CFR 242.608.

of the amendment, along with information required by Rule 608(a)(4) and (5) under the Exchange Act,⁶ substantially as prepared and submitted by the Participants to the Commission.⁷

A. Statement of Purpose of the Amendment to the CAT NMS Plan

The Proposed Amendment would ensure that a dispute arising out of CAT reporting would be addressed by either the SDNY or the New York State Supreme Court. Designating an Article III court and a sophisticated state court as potential forums for dispute resolution is plainly consistent with the Exchange Act.

Courts offer important substantive expertise and procedural mechanisms that would facilitate the fair and efficient resolution of claims in relation to CAT reporting. As an example, because a CAT technical issue, system failure, or data breach may impact thousands of potential parties, the ability of courts to consolidate and join claims and certify class actions would minimize costs of litigation for all potential parties (including Industry Members), which, in turn, furthers the market efficiency and fair competition objectives of the Exchange Act.

The importance of a court resolving claims regarding CAT reporting is underscored by the regulatory nature of the CAT. The Participants are implementing the requirements of Rule 613 and the CAT NMS Plan in their regulatory capacities. While cyber litigation frequently presents complex questions, the CAT's regulatory nature adds a further layer of complexity to any potential dispute. Among other issues, a tribunal would have to evaluate the relationships between the Commission, the Participants, and Industry Members and determine the applicability of any immunity claims. In connection with the Participants' limitation of liability proposal, both the Commission and the Securities Industry and Financial Markets Association ("SIFMA") recognized that regulatory immunity may be at issue in a dispute regarding CAT reporting. Utilizing courts to resolve such disputes will ensure that bedrock principles of the self-regulatory framework are adjudicated based on decades of binding precedent (often developed through the Commission's feedback via amicus briefs) and afford the parties critical appellate rights.

Notwithstanding the benefits of litigation, an arbitration provision was

⁶ See 17 CFR 242.608(a)(4) and (a)(5).

⁷ See *supra* note 4. Unless otherwise defined herein, capitalized terms used herein are defined as set forth in the CAT NMS Plan.

²⁷ 17 CFR 200.30-3(a)(12).