

### 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 proposed rule change is not intended to address competitive issues but is designed to modernize the service and filing process in harmonization with the approved FINRA Rules.

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

No written comments were solicited or received with respect to 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 Act<sup>32</sup> and Rule 19b-4(f)(6) thereunder.<sup>33</sup> Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>34</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>35</sup> the Commission may 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 proposal may become operative immediately upon filing. The Exchange states that this filing is non-controversial and eligible to become effective immediately because the proposal promotes uniformity in disciplinary rules across self-regulatory organizations and thereby enables the Exchange to modernize the service and filing process related to the conduct of disciplinary hearings.<sup>36</sup> The Exchange

further states that the proposed rule change would not significantly affect the protection of investors or the public interest or impose any significant burden on competition because the proposed rule change is based on the approved FINRA Rules. After reviewing the filing, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>37</sup>

At any time within 60 days of the filing of such 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 under section 19(b)(2)(B)<sup>38</sup> of the Act 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 to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2023-04 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-NYSEAMER-2023-04. 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/>

<sup>37</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>38</sup> 15 U.S.C. 78s(b)(2)(B).

[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-NYSEAMER-2023-04 and should be submitted on or before February 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

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

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96688; File No. SR-NYSE-2023-04]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend Rules 9132, 9133, 9135, 9146, 9522, 9524, 9559 and 9630

January 18, 2023.

Pursuant to section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 ("Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on January 4, 2023, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have

<sup>39</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>32</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>33</sup> 17 CFR 240.19b-4(f)(6).

<sup>34</sup> 17 CFR 240.19b-4(f)(6).

<sup>35</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>36</sup> See *supra* Item II.

been prepared by the self-regulatory organization. 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 proposes to amend Rules 9132, 9133, 9135, 9146, 9522, 9524, 9559 and 9630 to permit, and in some instances require, electronic service and filing of documents in disciplinary and other proceedings and appeals, in conformity with recent changes by the Financial Industry Regulatory Authority, Inc. ("FINRA"). The proposed rule change is available on the Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, 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 self-regulatory organization 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 those 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 parts of such statements.

#### A. Self-Regulatory Organization's Statement of the Purpose of, and the Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to amend Rules 9132, 9133, 9135, 9146, 9522, 9524, 9559 and 9630 to permit, and in some instances require, electronic service and filing of documents in disciplinary and other proceedings, in conformity with recent changes by FINRA.

In 2020, following the outbreak of the Coronavirus Disease ("COVID-19"), FINRA temporarily amended certain of its rules, including related to the method of service and filing in disciplinary proceedings before the Office of Hearing Officers (OHO) and appeals before the National Adjudicatory Council (NAC), among other types of administrative proceedings (the "temporary amendments").<sup>4</sup> The temporary

amendments allowed, and in some instances required, FINRA (in its capacity as an Adjudicator per Rule 9120) to serve certain documents on parties by electronic mail ("email") and required parties to file or serve documents by email, unless the parties agreed to an alternative method of service.<sup>5</sup> Earlier this year, FINRA made permanent the temporary amendments to its rules regarding electronic service and filing permanent, with some modifications.<sup>6</sup>

In support of its filing, FINRA noted that advances in technology and its availability made filing and service permitted by the temporary amendments more efficient than under FINRA's "original" (non-amended) rules.<sup>7</sup> Moreover, FINRA determined that electronic service and filing is beneficial for parties, panelists and FINRA staff.<sup>8</sup> FINRA also noted that the Commission likewise amended its rules in November 2020 to require electronic filing and service of documents in its administrative proceedings.<sup>9</sup> For these reasons, FINRA determined that making permanent the temporary amendments would similarly improve and modernize FINRA's operations.<sup>10</sup>

To likewise improve and modernize Exchange rules, the Exchange proposes to modify certain of its disciplinary rules to allow for electronic service and filing of documents in disciplinary and

(SR-FINRA-2020-015) (Notice and immediate effectiveness of filing to temporarily amend certain timing, method of service and other procedural requirements in FINRA Rules during the outbreak of COVID-19). FINRA extended the temporary amendments several times before filing to make certain of the aforementioned amendments permanent. The temporary amendments included rule changes to permit the conduct of virtual hearings (*i.e.*, Rules 9261 and 9830), which rule changes are not being included in this proposal. Rather, the Exchange is solely copying a subset of rules covered by the temporary amendments as discussed herein.

<sup>5</sup> See *id.*

<sup>6</sup> See Securities Exchange Act Release Nos. 95147 (June 23, 2022), 87 FR 38803 (June 29, 2022) (order approving change to certain FINRA rules to permit, and in some instances require, electronic service and filing of documents in disciplinary and other proceedings and appeals) ("Approval Order of FINRA Rules"); 94654 (April 8, 2022), 87 FR 22264 (April 14, 2022) (SR-FINRA-2022-009) ("FINRA Notice"). The Approval Order of FINRA Rules related to FINRA Rules 1012, 1015, 6490, 9132, 9133, 9135, 9146, 9321, 9341, 9349, 9351, 9522, 9524, 9559 and 9630 (collectively, "the approved FINRA Rules").

<sup>7</sup> See FINRA Notice, 87 FR at 22267.

<sup>8</sup> See FINRA Notice, 87 FR at 22267.

<sup>9</sup> See Amendments to the Commission's Rules of Practice, Securities Exchange Act Release No. 90442 (November 17, 2020), 85 FR 86464 (File No. S7-18-15) (December 30, 2020) (codified at 17 CFR 201 (2020)).

<sup>10</sup> See FINRA Notice, 87 FR at 22266-67.

other proceedings in conformity with the approved FINRA Rules.<sup>11</sup>

#### Background

In 2013, the NYSE adopted disciplinary rules that are, with certain exceptions, substantially the same as the FINRA Rule 8000 Series and Rule 9000 Series, and which set forth rules for conducting investigations and enforcement actions.<sup>12</sup> The NYSE disciplinary rules were implemented on July 1, 2013.<sup>13</sup> The Exchange notes that FINRA and OHO administers disciplinary hearings on the Exchange's behalf.

In adopting disciplinary rules modeled on FINRA's rules, the NYSE adopted the filing, service and other procedural requirements as contained in the FINRA Rule 9100, 9500, and 9600 Series. As adopted, the text of Exchange Rules 9132, 9133, 9135, 9146, 9522, 9524, 9559 and 9630 are based on, and are substantially the same as, their counterpart FINRA rules.<sup>14</sup>

#### Proposed Rule Change

Consistent with FINRA's recent proposal, the Exchange proposes to amend certain of its disciplinary rules related to filing, service and other procedural requirements and appeals. The proposed rule change includes provisions to allow, and in some instances require, FINRA (in its capacity as an Adjudicator per Rule 9120) to serve certain documents on parties by email and require parties to file or serve documents by email, unless another method of service is ordered by the Adjudicator.<sup>15</sup> In addition, to support the transition to email service and filing, the Exchange proposes to require parties in OHO proceedings to file and serve all

<sup>11</sup> Consistent with the Approval Order of FINRA Rules, the Exchange is not proposing to permit electronic service of an initial complaint on a respondent due to heightened fair process concerns. As is the case today, the only permissible methods of serving the initial complaint are by hand, mail or courier. See Rule 9131(b) (requiring that service be pursuant to Rule 9134(a)).

<sup>12</sup> See Securities Exchange Act Release No. 68678 (January 16, 2013), 78 FR 5213 (January 24, 2013) (SR-NYSE-2013-02), 69045 (March 5, 2013), 78 FR 15394 (March 11, 2013) (SR-NYSE-2013-02), and 69963 (July 10, 2013), 78 FR 42573 (July 16, 2013) (SR-NYSE-2013-49).

<sup>13</sup> See NYSE Information Memorandum 13-8 (May 24, 2013).

<sup>14</sup> The Exchange notes that this proposal adopts a subset of the approved FINRA Rules, which subset are applicable to the Exchange rules. As noted herein, this proposal does not extend to the temporary amendments related to the conduct of virtual hearings (*i.e.*, Rules 9261 and 9830).

<sup>15</sup> To the extent that a party lacks the ability to use or access technology needed to file, serve or accept service by email, FINRA, as adjudicator, may order an alternative method of service upon a showing of good cause. See FINRA Notice, 87 FR at 22265.

<sup>4</sup> See, e.g., Securities Exchange Act Release No. 88917 (May 20, 2020), 85 FR 31832 (May 27, 2020)

parties with their current email address and contact information at the time of their first appearance, and to file and serve any change in email address or contact information during the course of the proceeding.

The proposed rule change would permit service of documents other than the initial complaint by email among various other methods of service, such as personal service, mail and courier, and to provide that service by email is deemed complete upon sending. The Exchange intends to elect email service whenever possible. If the Exchange has knowledge that the address used for service is not current or not functional (*i.e.*, the Exchange receives a bounce back or other message indicating that there was a failure to deliver the email), the Exchange will use other permissible methods of service until it can verify the party's email address.<sup>16</sup> The Exchange notes that, in most cases, the Exchange and the relevant party, or their counsel, will have already engaged in communications prior to the service of documents or other information. Accordingly, in most cases, the Exchange will already have information regarding the relevant party, or their counsel's, preferred method of service.

The Rule 9000 Series, among other things, sets forth the procedure for disciplinary proceedings concerning a member, associated person or formerly associated person. The Rule 9100 Series is of general applicability to all proceedings set forth in the Rule 9000 Series, unless a rule specifically provides otherwise. Rules 9132(b),<sup>17</sup> 9133(b),<sup>18</sup> and 9146(l)<sup>19</sup> provide that the documents and other information governed by those rules be served pursuant to Rule 9134, which permits service on the parties using the following methods: (1) personal service, (2) mail, or (3) courier. Rule 9134 does not permit service by email. The proposed rule change would amend Rule 9132(b) to allow service of the relevant documents or information by email, and Rules 9133(b) and 9146(l) to require parties to serve documents by email, unless an alternative method of service is ordered by the Adjudicator.

In addition, to support the transition to email service and filing, the Exchange

<sup>16</sup> As indicated in the proposed rule text, the Exchange will consider service by email complete upon sending of the relevant document or other information. This is consistent with service by mail under the current rules.

<sup>17</sup> Rule 9132(b) (Service of Orders, Notices, and Decisions by Adjudicator; How Served).

<sup>18</sup> Rule 9133(b) (Service of Papers Other Than Complaints, Orders, Notices or Decisions; How Served).

<sup>19</sup> Rule 9146(l) (Motions; General).

proposes to amend Rule 9135 to add paragraph (d), which would require parties in OHO proceedings to file and serve the parties with their current email address and contact information at the time of their first appearance, and to file and serve any change in email address or contact information during the course of the proceeding.<sup>20</sup> The Exchange believes this proposed rule change will help ensure that documents are successfully sent from and received at a valid email address. It will also ensure that all participants, including the Exchange, applicants, respondents and any other parties, have accurate contact information for all parties.

The Rule 9520 Series sets forth the procedures for eligibility proceedings and review of those proceedings by the Exchange Board. Because the applicable rules in this series do not allow for email as a method of service, the Exchange proposes to modify Rule 9522(a)(4)<sup>21</sup> and to add new paragraph (d) to Rule 9524<sup>22</sup> to permit effective service by email.

The Rule 9550 Series sets forth the procedures for expedited proceedings and the ability of the Exchange Board to call for review a proposed decision prepared under the Rule 9550 Series. Rule 9559(h)<sup>23</sup> sets forth the timing and method of service requirements for the parties' exchange of proposed exhibit and witness lists in advance of an expedited proceeding, but do not allow for email as a method of service. The Exchange proposes to amend Rule 9559(h)(2) to require service of exhibit and witness lists by email, unless an alternative method of service is ordered by the Adjudicator and to remove text from Rule 9559(h)(1) that requires that documents served by email must also be served by overnight courier or personal service.<sup>24</sup> Finally, the Exchange proposes to add new paragraph (s) to Rule 9559 to provide that, for purposes of proposed Rule 9559(h), service by email is complete upon sending the documents or decision.<sup>25</sup>

<sup>20</sup> See proposed Rule 9135(d) (Filing of Papers with Adjudicator: Procedure; Party Contact Information).

<sup>21</sup> See proposed Rule 9522(a)(4) (Initiation of Eligibility Proceeding; Member Regulation Consideration; Service).

<sup>22</sup> See proposed Rule 9524(d) (Exchange Board of Directors Consideration; Service by Electronic Mail; When Service is Complete).

<sup>23</sup> Rule 9559(h) (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series). Rule 9559(h) currently permits email as a method of service.

<sup>24</sup> See proposed Rule 9559(h)(1), (2) (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series; Transmission of Documents).

<sup>25</sup> See proposed Rule 9559(s) (Hearing Procedures for Expedited Proceedings Under the Rule 9550 Series; Service by Email; When Service is

The Rule 9600 Series sets forth the procedures for members to seek exemptive relief from a variety of Exchange rules. Rule 9630(e)<sup>26</sup> requires the Exchange (via the Chief Regulatory Officer) to serve its decision pursuant to Rules 9132 and 9134, which do not allow for email as a method of service. The proposed rule change would amend Rule 9630 to add new paragraph (d) to allow for email as a method of service.<sup>27</sup>

The Exchange believes that this proposal, like the approved FINRA Rules, will modernize the rules and make service and filing more efficient and effective. Email technology is widely available, and use of electronic methods of service and filing is common practice in the courts and other regulatory agencies, including the Commission.<sup>28</sup>

As noted below, the Exchange has filed the proposed rule change for immediate effectiveness and has requested that the Commission waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, so the Exchange can implement the proposed rule change immediately.

## 2. Statutory Basis

The proposed rule change is consistent with section 6(b) of the Act,<sup>29</sup> in general, and furthers the objectives of section 6(b)(5),<sup>30</sup> in particular, because it is 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 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 designed to provide a fair procedure for the disciplining of members and persons associated with members, consistent with sections 6(b)(7) and 6(d) of the Act.<sup>31</sup>

The Exchange believes that the proposed rule change protects investors and the public interest by requiring use of broadly available technology to make service and filing processes more

Complete). Rule 9559(h) currently permits email as a method of service.

<sup>26</sup> See Rule 9630 (Procedures for Exemptions; Appeal).

<sup>27</sup> See proposed Rule 9630(f) (Appeal; Service by Electronic Mail; When Service is Complete).

<sup>28</sup> See *supra* note 9 (regarding Amendments to the Commission's Rules of Practice).

<sup>29</sup> 15 U.S.C. 78f(b).

<sup>30</sup> 15 U.S.C. 78f(b)(5).

<sup>31</sup> 15 U.S.C. 78f(b)(7) & 78f(d).

efficient and effective. The Exchange's disciplinary and eligibility proceedings and other review processes serve a critical role in providing investor protection and maintaining fair and orderly markets by, for example, sanctioning misconduct and preventing further customer harm by members and associated persons.

The proposed rule change promotes efficiency in these processes by permitting electronic service and filing in most instances. To ensure that documents are effectively sent and received, the Exchange is proposing to require parties to provide and update their contact information, including their email address, during the course of a proceeding. These amendments reduce the reliance on paper documents in favor of more efficient electronic formats. The Exchange believes that the proposed rule change regarding electronic service and filing is especially important as hybrid and remote work become more common.

The Exchange notes that, per the approved FINRA Rules, there are procedures in place for persons who lack the ability to use or access technology necessary to send or receive documents electronically to request relief from FINRA (as the Adjudicator) to file or serve documents by another method. Per FINRA, requests to use non-electronic methods of service were rare during the approximately two year period that it operated under the temporary amendments and, as such, FINRA anticipates that such requests under the approved FINRA Rules will be rare.

In addition, the proposed rule change balances the interests of fairness and efficiency. As discussed, service of the initial complaint will continue to occur by hand, mail or courier, rather than by electronic means, thus ensuring there is satisfactory notice and fair process.

Thus, the proposed rule change represents a significant step toward modernizing the service and filing processes in a manner that will protect investors and the public interest by promoting efficiency while preserving fair process.

The Exchange believes that the proposed rule change supports the objectives of the Act by providing greater harmonization between Exchange rules and FINRA rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance. As such, the proposed rule change will foster cooperation and coordination with persons engaged in facilitating transactions in securities and will remove impediments to and perfect the

mechanism of a free and open market and a national market system.

#### *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 proposed rule change is not intended to address competitive issues but is designed to modernize the service and filing process in harmonization with the approved FINRA Rules.

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

No written comments were solicited or received with respect to 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 Act<sup>32</sup> and Rule 19b-4(f)(6) thereunder.<sup>33</sup> Because the 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 prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>34</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),<sup>35</sup> the Commission may 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 proposal may become operative immediately upon filing. The Exchange states that this filing is non-controversial and eligible to become effective immediately because the proposal promotes uniformity in disciplinary rules across self-regulatory organizations and thereby enables the Exchange to modernize the service and

filing process related to the conduct of disciplinary hearings.<sup>36</sup> The Exchange further states that the proposed rule change would not significantly affect the protection of investors or the public interest or impose any significant burden on competition because the proposed rule change is based on the approved FINRA Rules. After reviewing the filing, the Commission believes that waiver of the 30-day operative delay for this proposal is consistent with the protection of investors and the public interest. Accordingly, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.<sup>37</sup>

At any time within 60 days of the filing of such 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 under section 19(b)(2)(B)<sup>38</sup> of the Act 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 to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2023-04 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-2023-04. 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

<sup>36</sup> See *supra* Item II.

<sup>37</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>38</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>32</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>33</sup> 17 CFR 240.19b-4(f)(6).

<sup>34</sup> 17 CFR 240.19b-4(f)(6).

<sup>35</sup> 17 CFR 240.19b-4(f)(6)(iii).

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-2023-04 and should be submitted on or before February 14, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>39</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-96684; File No. SR-CBOE-2022-051]

### Self-Regulatory Organizations; Cboe Exchange, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Rules Relating to the Processing of Auction Responses

January 18, 2023.

On October 3, 2022, Cboe Exchange, Inc. ("the Exchange" or "Cboe Options") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to

amend its rules relating to the processing of auction responses. The proposed rule change was published for comment in the **Federal Register** on October 20, 2022.<sup>3</sup> On November 23, 2022, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> The Commission has received no comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

#### I. Summary of the Proposed Rule Change<sup>7</sup>

The Exchange proposes to adopt new functionality that would be applicable to all of its auction mechanisms, to increase the likelihood that timely submitted auction responses may participate in the applicable auction, even during periods of high message traffic. The affected auctions are the Complex Order Auction,<sup>8</sup> Step Up Mechanism,<sup>9</sup> Automated Improvement Mechanism,<sup>10</sup> Complex AIM,<sup>11</sup> Solicitation Auction Mechanism,<sup>12</sup> Complex SAM,<sup>13</sup> FLEX Auction Process,<sup>14</sup> FLEX AIM<sup>15</sup> and FLEX SAM.<sup>16</sup> The Exchange also proposes to amend its current rule relating to Priority Queue<sup>17</sup> functionality to provide itself with discretion on whether or not to implement Priority Queue<sup>18</sup> functionality for responses to the auction mechanisms.

The Exchange represents that the above-referenced auction mechanisms provide price improvement opportunities for an eligible order. Within each auction mechanism, the

eligible order is electronically exposed for an Exchange-determined period of time ("auction response period") in accordance with the applicable Exchange Rule.<sup>19</sup> After the Exchange disseminates an auction notification message, Users<sup>20</sup> may submit responses ("auction responses" or "auction response messages") during the auction response period.<sup>21</sup> An auction response may only execute in the applicable auction mechanism, and the auction response is cancelled if it does not execute during an auction.<sup>22</sup>

The Exchange states that auction response messages historically have waited in the same System<sup>23</sup> queue as all other order and quote message traffic.<sup>24</sup> According to the Exchange, if an auction response is submitted when there is a deep queue of other unprocessed message traffic (such as mass cancellation messages or other orders and quotes), it is possible that the auction response may not be "processed" by the System prior to the end of the auction response period.<sup>25</sup> The Exchange states that in such an instance, the queued auction response may not be able to participate in the applicable auction mechanism because the System had unprocessed (queued) messages at the time of the auction execution, despite the fact that the User submitted the auction response prior to the end of the auction response period.<sup>26</sup> The Exchange believes that

<sup>19</sup> See Notice, *supra* note 3, at 63831.

<sup>20</sup> The term "User" means any Trading Permit Holder or Sponsored User who is authorized to obtain access to the System pursuant to Cboe Rule 5.5. See Cboe Rule 1.1.

<sup>21</sup> See Notice, *supra* note 3, at 63831.

<sup>22</sup> See *id.*

<sup>23</sup> The term "System" means the Exchange's hybrid trading platform that integrates electronic and open outcry trading of option contracts on the Exchange, and includes any connectivity to the foregoing trading platform that is administered by or on behalf of the Exchange, such as a communications hub. See Cboe Rule 1.1.

<sup>24</sup> Although the Exchange previously adopted Priority Queue functionality, which provides that auction response messages may be processed through a Priority Queue, and all remaining messages would be processed through a General Queue, the Exchange never implemented use of the functionality. See Notice, *supra* note 3 at 63832. The Exchange states that, should it decide to implement use of a Priority Queue in the future, it would provide notice to all TPHs. *Id.*

<sup>25</sup> For example, the Exchange states that it takes the System approximately 10 microseconds to process a single order/quote or auction response message and, on average, approximately 190 microseconds to process a mass cancel message. As such, under the current System, an auction response that is entered after a mass cancel message is more likely to be detrimentally delayed as compared to a mass cancel message that is entered after an auction response (*i.e.*, a 190 microsecond "wait time" versus a 10 microsecond "wait time"). See *id.*

<sup>26</sup> See *id.*

<sup>3</sup> See Securities Exchange Act Release No. 96081 (Oct. 14, 2022), 87 FR 63830 ("Notice").

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 96380, 87 FR 73366 (Nov. 29, 2022). The Commission designated January 18, 2023 as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to disapprove, the proposed rule change.

<sup>6</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>7</sup> For a full description of all aspects of the proposed rule change, please see the Notice, *supra* note 3.

<sup>8</sup> See Cboe Rule 5.33(d).

<sup>9</sup> See Cboe Rule 5.35.

<sup>10</sup> See Cboe Rule 5.37.

<sup>11</sup> See Cboe Rule 5.38.

<sup>12</sup> See Cboe Rule 5.39.

<sup>13</sup> See Cboe Rule 5.40.

<sup>14</sup> See Cboe Rule 5.72(c).

<sup>15</sup> See Cboe Rule 5.73.

<sup>16</sup> See Cboe Rule 5.74.

<sup>17</sup> See Cboe Rule 5.25(c).

<sup>18</sup> See Cboe Rule 5.25(c).

<sup>39</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.