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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-85727; File No. SR-CBOE-2019-025]

Self-Regulatory Organizations; Cboe Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Chapter 17 of the Cboe Options Rules

April 26, 2019

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 17, 2019, Cboe Exchange, Inc. (“Cboe Options” or the “Exchange”) 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 Exchange filed the proposal as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> 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 Chapter 17 of the Cboe Options Rules. The text of the proposed rule change is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange’s website (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange’s Office of the Secretary, and at the Commission’s Public Reference Room.

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

<sup>2</sup> 17 CFR 240.19b-4.

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

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

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 is proposing to update processes and related rules concerning investigative and disciplinary matters involving Exchange Trading Permit Holders ("TPHs")<sup>5</sup> and persons associated with Trading Permit Holders ("associated persons").<sup>6</sup> Specifically, the Exchange is

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<sup>5</sup> Pursuant to the Tenth Amended and Restated Bylaws of the Exchange "Trading Permit Holder" means any individual, corporation, partnership, limited liability company or other entity authorized by the Rules that holds a Trading Permit. If a Trading Permit Holder is an individual, the Trading Permit Holder may also be referred to as an "individual Trading Permit Holder." If a Trading Permit Holder is not an individual, the Trading Permit Holder may also be referred to as a "TPH organization." A Trading Permit Holder is a "member" solely for purposes of the Securities and Exchange Act of 1934 (the "Act"); however, one's status as a Trading Permit Holder does not confer on that Person any ownership interest in the Exchange.

Pursuant to Cboe Options Rule 1.1(hhh), the term "Trading Permit" means a license issued by the Exchange that grants the holder or the holder's nominee the right to access one or more of the facilities of the Exchange for the purpose of effecting transactions in securities traded on the Exchange without the services of another person acting as broker, and otherwise to access the facilities of the Exchange for purposes of trading or reporting transactions or transmitting orders or quotations in securities traded on the Exchange, or to engage in other activities that, under the Rules, may only be engaged in by Trading Permit Holders, provided that the holder or the holder's nominee, as applicable, satisfies any applicable qualification requirements to exercise those rights.

<sup>6</sup> Pursuant to Cboe Options Rule 1.1(qq), the "associated person" or "person associated with a Trading Permit Holder" means any partner, officer, director, or branch manager of

updating its rules and processes related to 1) complaints and investigations; 2) expedited proceedings; 3) the issuance of charges (and answers thereto); 4) hearings (including decisions made pursuant to a hearing and the review of decisions); 5) summary proceedings; 6) settlements; 7) judgment and sanctions; 8) service of notice; 9) reporting to the Central Registration Depository; and 10) imposition of fines for minor rule violations. The Exchange is making these updates in an effort to adopt new roles for the Exchange's Business Conduct Committee ("BCC")<sup>7</sup> and Chief Regulatory Officer ("CRO")<sup>8</sup> and to increase efficiency and fairness in the Exchange's disciplinary process. The Exchange proposes updates to Chapter 17 to reflect the new roles of the CRO and the Hearing Panel in the disciplinary process, which are consistent with that of the Exchange's affiliate exchanges: Cboe BZX Exchange, Inc. ("Cboe BZX"),<sup>9</sup> Cboe BYX Exchange, Inc. ("Cboe BYX"),<sup>10</sup> Cboe EDGX Exchange, Inc. ("Cboe EDGX"),<sup>11</sup> and Cboe EDGA Exchange, Inc. ("Cboe EDGA")<sup>12</sup> (collectively, and hereinafter,

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a Trading Permit Holder (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with a Trading Permit Holder, or any employee of a Trading Permit Holder.

<sup>7</sup> The BCC has decision-making authority concerning possible violations within the disciplinary jurisdiction of the Exchange. The BCC is comprised of one or more TPHs or associated persons, one or more public representatives, and may also include other individuals affiliated with the securities, futures or derivatives industry, all as appointed by the Exchange's Nominating and Governance Committee with the approval of the Exchange's Board of Directors.

<sup>8</sup> The CRO has general supervisory authority over the Exchange's regulatory operations, including the responsibility for overseeing its surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another self-regulatory organization to which the Exchange is a party.

<sup>9</sup> See Rules of Cboe BZX Exchange, Inc., specifically Rules 8.2, 8.3, 8.4, 8.6, 8.7, and 8.8.

<sup>10</sup> See Rules of Cboe BYX Exchange, Inc., specifically Rules 8.2, 8.3, 8.4, 8.6, 8.7, and 8.8.

<sup>11</sup> See Rules of Cboe EDGA Exchange, Inc., specifically Rules 8.2, 8.3, 8.4, 8.6, 8.7, and 8.8.

<sup>12</sup> See Rules of Cboe EDGX Exchange, Inc., specifically Rules 8.2, 8.3, 8.4, 8.6, 8.7, and 8.8.

referred to as the “Affiliated Exchanges”).<sup>13</sup> The Exchange also proposes additional changes to reflect certain other language and provisions of the Affiliated Exchanges, particularly regarding ex parte communications<sup>14</sup> and impartiality of Hearing Panel members.<sup>15</sup> In addition, the Exchange is making technical and conforming updates to its minor rule violation rules.<sup>16</sup> The updates reflecting the rules of the Affiliated Exchanges contain some nuance. The most notable difference that will remain at this time between Exchange rules and the rules of the Affiliated Exchanges is that BCC members will be selected by the Chairperson of the BCC to comprise Hearing Panels, whereas the Chief Executive Officer (“CEO”) appoints members of the Hearing Panels on the Affiliated Exchanges. Moreover, the Exchange proposes timing and tolling of certain periods in connection with various stages of the proceedings under Chapter 17 that are different from the timing in the Affiliated Exchanges’ corresponding rules. The Exchange also proposes updates to certain aspects of the review process intended to streamline the overall disciplinary process. Finally, the Exchange is updating certain rules to correct minor errors or update obsolete/outdated language as needed.

## **CURRENT EXCHANGE RULES AND ADJUDICATORY PROCESS**

The Exchange rules currently divided responsibility for the adjudication of its rules into two categories: 1) rules for which the BCC and BCC Hearing Panels are responsible for adjudicating formal disciplinary proceedings; and 2) rules under which fines may be assessed in lieu of formal disciplinary action. With respect to violations that are adjudicated by the BCC and

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<sup>13</sup> The rules under Chapter 8 of each of the Affiliated Exchanges are the same in number, form and substance. Therefore, the Exchange refers singularly to the corresponding rule of the “Affiliated Exchanges” throughout this proposed rule filing.

<sup>14</sup> See the Affiliated Exchanges’ Rule 8.16.

<sup>15</sup> See the Affiliated Exchanges’ Rule 8.6.

<sup>16</sup> See the Affiliated Exchanges’ Rule 8.15.

Hearing Panels, Rule 17.4(b) requires the BCC to direct Regulatory staff (“Staff”)<sup>17</sup> to prepare a statement of charges whenever it appears that there is probable cause for finding a violation within the disciplinary jurisdiction of the Exchange has occurred and formal disciplinary action is warranted. Alternatively, in lieu of conducting a formal disciplinary proceeding, Rule 17.50 (Imposition of Fines for Minor Rule Violations) provides for disposition of specific violations through assessment of fines.<sup>18</sup>

### **Current Rule 17.2 Complaint and Investigation**

Staff investigates and examines possible violations within the disciplinary jurisdiction of the Exchange (“violations”) whenever Staff determines in its sole discretion that there is reasonable basis for it to do so.<sup>19</sup> TPHs and associated persons are required to cooperate with Staff inquiries and to furnish information requested in connection with investigations and examinations.<sup>20</sup>

Staff have [sic] the sole discretion to determine whether to request the BCC authorize the issuance of a statement of charges.<sup>21</sup> When Staff finds that a violation has occurred and formal regulatory action is warranted, Staff submits a written report (“report”) of the investigation to the

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<sup>17</sup> See Cboe Options Rule 17.2 Interpretation and Policy .05. References to “Regulatory staff” mean the Exchange’s employees in the Regulatory Division, and, as applicable, may also mean employees of the Financial Industry Regulatory Authority, Inc. (“FINRA”) who are performing regulatory services to the Exchange in accordance with the regulatory services agreement entered into between the Exchange and FINRA.

<sup>18</sup> None of the fines assessed in lieu of formal disciplinary action exceed \$5000. Under Rule 17.50(f), the Exchange may refer matters covered under Rule 17.50 for formal disciplinary action whenever it determines that any violation is intentional, egregious or otherwise not minor in nature.

<sup>19</sup> See Cboe Options Rule 17.2(a).

<sup>20</sup> See Cboe Options Rule 17.2(b).

<sup>21</sup> See Cboe Options Rule 17.2(c).

BCC.<sup>22</sup> When Staff finds that a violation has occurred but non-formal disciplinary action is warranted (e.g. cautionary letters) Staff may, in its sole discretion, impose non-formal disciplinary action without submitting a report to the BCC.<sup>23</sup> If Staff finds that there are not reasonable grounds to determine a violation has been committed Staff may, in its sole discretion, close the investigation without submitting a report to the BCC.<sup>24</sup>

Prior to submitting a report to the BCC, Staff must notify the subject of the report (“Subject”) of the nature of the alleged violations.<sup>25</sup> Unless the BCC decides expeditious action is required, the Subject has 15 days to submit a written statement to the BCC concerning why no disciplinary action should be taken.<sup>26</sup> The Subject may request access to documents in the investigative file, furnished by the Subject or the Subject’s agents, to assist the Subject in preparing such a written statement.<sup>27</sup> The Subject may also submit a videotaped response in lieu of a written statement, the length and format of which is decided by the Exchange.<sup>28</sup>

**Current Rule 17.3 Expedited Proceeding**

When the Subject receives notice of the report, the Subject may seek to dispose of the matter through a letter of consent.<sup>29</sup> The Subject submits notice to Staff electing to proceed in an expedited manner.<sup>30</sup> The Subject and Staff may then negotiate a letter of consent outlining

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22 Id.

23 Id.

24 Id.

25 See Cboe Options Rule 17.2(d).

26 Id.

27 Id.

28 See Cboe Options Interpretation and Policy .02 to Rule 17.2.

29 See Cboe Options Rule 17.3.

30 Id.

stipulations and findings regarding the violation(s) and the sanctions therefore.<sup>31</sup> Disposing of the matter via letter of consent occurs only if the Subject and Staff agree on the terms and it is signed by the Subject.<sup>32</sup> At any time, the Subject or Staff may terminate the negotiations.<sup>33</sup> Following termination of the negotiations, the Subject has 15 days to submit a written statement to the BCC, pursuant to Rule 17.2, concerning why no disciplinary action should be taken.<sup>34</sup> The BCC may accept or reject the letter of consent.<sup>35</sup> If the BCC accepts the letter, it may adopt the letter as its decision.<sup>36</sup> If the BCC rejects the letter, the matter proceeds as if the letter had not been submitted. The BCC's decision to accept or reject the letter is final.<sup>37</sup>

#### **Current Rule 17.4 Charges**

When it appears to the BCC from the Staff's report pursuant to Rule 17.2(c) that no probable cause exists for finding a violation occurred or if the BCC otherwise determines that no further action is warranted, the BCC issues a written statement setting out its reasons for that finding.<sup>38</sup> When the BCC determines probable cause exists for finding a violation occurred and further proceedings are warranted, the BCC directs Staff to prepare a statement of charges against the Subject (thereafter a "Respondent") specifying the acts for which the Respondent is charged and setting forth the specific violations.<sup>39</sup> A Respondent may request access to the

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31 Id.

32 Id.

33 Id.

34 Id.

35 Id.

36 Id.

37 Id.

38 See Cboe Options Rule 17.4(a).

39 See Cboe Options Rule 17.4(b).

investigative file within 60 calendar days of receiving notice of a statement of charges.<sup>40</sup> The Staff, however, may protect the identity of a Complainant in providing such documents.

Additionally, ex parte communications are prohibited between a TPH or person associated with a TPH and members of the BCC or Board (and vice versa) concerning the merits of any matter pending under Chapter 17.<sup>41</sup>

**Current Rule 17.5 Answer**

The Respondent has 15 days after service of the statement of charges to file a written answer to the statement of charges (“Answer”).<sup>42</sup> The Answer specifically admits or denies any allegation contained in the statement of charges and may be accompanied by supporting documentation.<sup>43</sup>

**Current Rule 17.6 Hearing**

Subject to Rule 17.7 regarding summary proceedings (described below), hearings on charges are held before one or more members of the BCC.<sup>44</sup> The person or persons conducting the hearing exercise [sic] the authority of the BCC and are [sic] referred to as the “Panel.”<sup>45</sup> The Exchange and the Respondent are parties to the hearing.<sup>46</sup> Where a TPH organization (as opposed to a TPH who is an individual or an associated person) is a party, it is represented by one of its TPHs (including nominees).<sup>47</sup> The parties are given at least 15 days’ notice of the time

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<sup>40</sup> See Cboe Options Rule 17.4(c).

<sup>41</sup> See Cboe Options Rule 17.4(d) and Interpretations and Policies .01-.03 to Rule 17.4.

<sup>42</sup> See Cboe Options Rule 17.5.

<sup>43</sup> Id.

<sup>44</sup> See Cboe Options Rule 17.6(a).

<sup>45</sup> Id.

<sup>46</sup> Id.

<sup>47</sup> Id.

and place of the hearing.<sup>48</sup> Not less than five days in advance of the hearing date, the parties must furnish copies of all documentary evidence they wish to present at the hearing and a list of witnesses they intend to present at the hearing.<sup>49</sup> If the time and nature of the proceedings permit, the parties meet in a pre-hearing conference in order to clarify and simplify issues, and otherwise expedite the proceeding. At the pre-hearing conference, the parties must attempt to reach agreement respecting authenticity of documents, facts not in dispute, and any other items in order to expedite the hearing. At the request of any party, the Panel or Panel Chairperson hears and decides the pre-hearing issues not resolved among the parties. Generally, interlocutory Board review of any decision made by the Panel prior to hearing completion is prohibited, and permitted only if the Panel agrees to such review after determining that the issue is a controlling issue of rule or policy and that immediate Board review would materially advance the ultimate resolution of the case. The Panel has the authority to regulate the conduct of the hearing and shall determine all questions concerning the admissibility of evidence.<sup>50</sup> Persons who are not parties to the hearing may intervene as a party, provided that person can demonstrate an interest in the subject of the hearing to the satisfaction of the Panel.<sup>51</sup>

### **Current Rule 17.7 Summary Proceedings**

Notwithstanding Rule 17.6 regarding hearings (described above), the BCC may make a determination without a hearing and impose a penalty as to violations which the Respondent has admitted or failed to Answer or which otherwise do not appear to be in dispute.<sup>52</sup> The

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<sup>48</sup> See Cboe Options Rule 17.6(b).

<sup>49</sup> Id.

<sup>50</sup> See Cboe Options Rule 17.6(c).

<sup>51</sup> See Cboe Options Interpretation and Policy .01 to Rule 17.6.

<sup>52</sup> See Cboe Options Rule 17.7.

Respondent is served with notice of summary determination, after which the Respondent may notify the BCC that they [sic] would like a hearing on one or more of the charges.<sup>53</sup> A Respondent's failure to notify the BCC that they [sic] desire a hearing constitutes an admission of the violations and an acceptance of the penalty.<sup>54</sup>

### **Current Rule 17.8 Offers of Settlement**

The Respondent may submit an offer of settlement ("offer") to the BCC up to 120 days following service of the statement of charges.<sup>55</sup> If the BCC accepts the offer, it issues a decision consistent with the terms of the offer.<sup>56</sup> If the BCC rejects the offer, it notifies the Respondent and the matter proceeds as if the offer had not been made.<sup>57</sup> The Respondent may submit a written statement in support of an offer.<sup>58</sup> In addition, the Respondent is notified if Staff will not recommend acceptance of an offer, and the Respondent may then appear before the BCC to make an oral statement in support of the offer.<sup>59</sup> If the BCC rejects an offer that the Staff supports the Respondent may also appear before the BCC to make an oral statement concerning why the BCC should consider changing its decision.<sup>60</sup>

Subject to certain conditions, the Respondent is limited to two offers in connection with a statement of charges.<sup>61</sup> The BCC, in its discretion, may permit the Respondent to submit an

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Id.

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Id.

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See Cboe Options Rule 17.8(a).

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Id.

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Id.

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See Cboe Options Rule 17.8(b)

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Id.

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Id.

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See Cboe Options Interpretation and Policy .01(a) to Rule 17.8.

additional offer during the applicable time period, provided the stipulation of facts and sanction contained in the offer are consistent with what is deemed acceptable by the BCC.<sup>62</sup>

Further, there are certain situations where the 120-day period during which the Respondent may submit an offer may be reduced and/or extended. If the Respondent elects to proceed in an expedited manner pursuant to Rule 17.3 and is unable to reach a consent agreement with Staff, then any period in excess of 30 days from when the Respondent elected to proceed in an expedited manner to the end of consent negotiations (by either Staff or the Respondent's declaration) is deducted from the 120-day period.<sup>63</sup> If the Respondent requests access to the investigative file pursuant to Rule 17.4, the 120-day period is tolled during the number of days in excess of 30 days that it takes Staff to provide access to the investigative file.<sup>64</sup>

Finally, at the end of the 120-day period, or after the BCC rejects the Respondent's second offer a hearing is scheduled and the hearing proceeds in accordance with the provisions of Rule 17.6.<sup>65</sup>

### **Current Rule 17.9 Decision**

Following a hearing, the Panel issues a decision (the "decision") determining whether the Respondent has committed a violation.<sup>66</sup> The decision must also include sanctions in cases where sanctions have been imposed. In instances in which the Panel is not composed of at least a majority of the BCC, a majority of the BCC automatically reviews the decision. The majority

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<sup>62</sup> See Cboe Options Interpretation and Policy .01(c) to Rule 17.8.

<sup>63</sup> See Cboe Options Interpretation and Policy .01(b) to Rule 17.8.

<sup>64</sup> See Cboe Options Interpretation and Policy .01(d) to Rule 17.8.

<sup>65</sup> See Cboe Options Interpretation and Policy .02 to Rule 17.8.

<sup>66</sup> See Cboe Options Rule 17.9.

may affirm, reverse, or modify the decision or remand the matter for additional findings or supplemental proceedings.<sup>67</sup>

### **Current Rule 17.10 Review**

The Respondent and/or the Regulatory Division has 15 days after service of the decision to petition for review of the decision by filing a copy of the petition with the Secretary of the Exchange and with all other parties.<sup>68</sup> Parties other than the petitioner may submit written responses to the petition.<sup>69</sup> The Board or a committee of the Board, whose decisions must be ratified by the Board, conducts the review.<sup>70</sup> The Board may affirm, reverse or modify a decision of the BCC and the decision of the Board is final.<sup>71</sup> In addition, the Board may review a decision on its own motion.<sup>72</sup> Finally, the Exchange's Regulatory Oversight and Compliance Committee may apply to the Board to have the BCC's decision not to initiate charges that were recommended by Staff, reviewed by the Board.<sup>73</sup>

### **Current Rule 17.11 Judgment and Sanction**

The BCC, in part, appropriately disciplines TPHs and associated persons for violations by expulsion, suspension, limitation of activities, fine, censure, suspension of Trading Permits, or any other fitting sanction.<sup>74</sup> Under this Rule, the BCC considers several factors when

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<sup>67</sup> Id.

<sup>68</sup> See Cboe Options Rule 17.10(a)(1).

<sup>69</sup> See Cboe Options Rule 17.10(a)(2).

<sup>70</sup> See Cboe Options Rule 17.10(b).

<sup>71</sup> Id.

<sup>72</sup> See Cboe Options Rule 17.10(c).

<sup>73</sup> See Cboe Options Rule 17.10(d).

<sup>74</sup> See Cboe Options Rule 17.11(a).

determining sanctions including, but not limited to, deterrence, remediation, precedent and the appropriateness of disgorgement and/or restitution.<sup>75</sup>

#### **Current Rule 17.12 Service of Notice**

Service of charges, notices and other documents upon the Respondent are made personally, by leaving the same at the Respondent's place of business or by deposit in the US post office via registered or certified mail addressed to the Respondent at the Respondent's address as it appears on the books and records of the Exchange.<sup>76</sup>

#### **Current Rule 17.14 Reporting the Central Registration Depository**

The Exchange reports the issuance of a statement of charges and significant changes to the status of disciplinary proceedings to the Central Registration Depository ("CRD").<sup>77</sup>

#### **Current Rule 17.50 Imposition of Fines for Minor Rule Violations**

In lieu of commencing disciplinary proceedings, the Exchange may impose fines, not to exceed \$5000, on TPHs and associated persons for specified Rule violations.<sup>78</sup> Any person against whom a fine is imposed pursuant to Rule 17.50 may contest the fine by filing an Answer, pursuant to Rule 17.5, at which point the matter is subject to review by the BCC.<sup>79</sup> The Answer may request a hearing if desired. Review and hearing related to violations outlined in Rule 17.50 are handled in the same fashion as any other matter for which a statement of charges has been issued.<sup>80</sup> However, subject to certain conditions, the BCC may impose certain forum fees for review and hearing if the BCC determines that the conduct serving as the basis of the action

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<sup>75</sup> See Cboe Options Interpretation and Policy .01 to Rule 17.11.

<sup>76</sup> See Cboe Options Rule 17.12.

<sup>77</sup> See Cboe Options Rule 17.14.

<sup>78</sup> See Cboe Options Rule 17.50(a).

<sup>79</sup> See Cboe Options Rule 17.50(c)(1).

<sup>80</sup> Id.

under review is in violation of Exchange Rules.<sup>81</sup> The Exchange lists the rules as to which the Exchange may impose fines within Rule 17.50 itself and in regulatory circulars and notices.<sup>82</sup> Nothing in Rule 17.50 requires the Exchange to impose a fine pursuant to Rule 17.50 with respect to the violation of any rule listed.<sup>83</sup> For a violation that the Exchange determines is minor in nature and falls within the scope of the minor rule plan, it may proceed under Rule 17.50.<sup>84</sup> A number of listed rules within Rule 17.50 indicate that violations above a specified threshold or a specified number of repeat violations will result in referral to the BCC.<sup>85</sup>

### **PROPOSED UPDATES TO EXCHANGE RULES**

As mentioned above, the current application of the rules provides for the BCC to determine whether to initiate charges in a regulatory matter and to determine appropriate sanctions for rule violations. Under the proposed change to Rule 17.4, the CRO will replace the BCC and accordingly, the CRO will have the authority to initiate charges. Under the proposed changes to Rule 17.11, the CRO or a Hearing Panel, as applicable, may impose disciplinary sanctions. The Exchange proposes corresponding changes elsewhere in Chapter 17 to reflect the CRO's authority to initiate charges and impose disciplinary sanctions. These changes harmonize the CRO's authority under Chapter 17 with the CRO's authority under corresponding Chapter 8 of the Affiliated Exchanges. The Exchange believes that this transfer of authority to the CRO maintains the independence of the regulatory functions of the Exchange as the CRO supervises

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<sup>81</sup> See Cboe Options Rule 17.50(c)(2).

<sup>82</sup> See Cboe Options Rule 17.50(f)

<sup>83</sup> Id.

<sup>84</sup> Id.

<sup>85</sup> See Cboe Options Rule 17.50(g)(2)-(5),(7),(9)-(19).

the regulatory functions of the Exchange, separate from that of its business interest, reporting directly to the Regulatory Oversight Committee of the Board of Directors (“ROC”).

The Exchange recommends additional changes, including amendments to:

- 1) Increase the amount of time the Subject of a regulatory report has to submit a written statement (from 15 days to 25).
- 2) Increase the amount of time a Respondent has to file an Answer (from 15 days to 25). This change is based on the Rules of the New York Stock Exchange (“NYSE”),<sup>86</sup> the Financial Industry Regulatory Authority (“FINRA”),<sup>87</sup> and NASDAQ PHLX, LLC (“PHLX”).<sup>88</sup>
- 3) Update Interpretation and Policy .02 to Rule 17.2 by specifying standards for videotaped responses.
- 4) Relocate provisions related to ex parte communications currently contained in Rule 17.4 (Charges) to Rule 17.15 (Ex Parte Communications). This change is consistent with the ex parte provisions under the Affiliated Exchanges’ Rule 8.16.
- 5) Update Rule 17.6 (Hearing) to:
  - a. Specify that hearings on charges shall be held before a Hearing Panel comprised of three or five members of the BCC;
  - b. Specify impartiality requirements for members of the Hearing Panel and procedures for removal of members of the Hearing Panel on the grounds of bias or conflict of interest. This is based on the Affiliated Exchanges’ Rule 8.6(b) as well as FINRA Rule 9233(a);

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<sup>86</sup> See NYSE Rule 9215.

<sup>87</sup> See FINRA Rule 9215.

<sup>88</sup> See PHLX Rule 9215.

c. Increase the amount of time prior to a hearing date the parties to a hearing must furnish documentary evidence (from 5 days to 10); and

d. Specify that the CRO has the authority to direct that a hearing be scheduled at any time after the period to submit an answer to Charges pursuant to Rule 17.5 has elapsed.

6) Update Rule 17.8 (Settlement) to:

a. Eliminate the 120-day period during which a Respondent may submit an offer of settlement (and make corresponding changes reflecting the removal of this time period). This removal comports with the Affiliated Exchanges' Rule 8.8;

b. Specify that offers of settlement will be considered by the CRO for acceptance or rejection (as opposed to the BCC). This is a harmonizing change reflecting that of the Affiliated Exchanges' Rule 8.8(b) ;

c. Specify that the CRO has the discretion to grant a Respondent more than two written offers of settlement. This is a harmonizing change reflecting that of the Affiliated Exchanges' Rule 8.8(c); and

d. Specify that a Hearing Panel will grant the parties leave to present an offer of settlement to the CRO.

7) Remove the requirement that a majority of the BCC automatically review decisions of a Hearing Panel. This is a harmonizing change reflecting that of the Affiliated Exchanges' Rule 8.9.

8) Remove the provision that the Board may review the decision not to initiate charges upon application by the Regulatory Oversight and Compliance Committee.

- 9) Specify that if service of notice pursuant to Chapter 17 is made by registered or certified mail, three days shall be added to the prescribed period for response.
- 10) Add Rule 17.15 for ex parte communications.
- 11) Update the rules related to Minor Rule Violations to reflect changes elsewhere in Chapter 17 and to remove any required referral to the BCC for repeat violations.
- 12) Update certain other outdated language within Chapter 17.

Detailed descriptions of the changes to specific Rules within Chapter 17 are outlined below.

### **Updates to Rule 17.2 Complaint and Investigation**

The Exchange replaces references to the BCC with references to the CRO within Rule 17.2, which conforms to the Affiliated Exchanges' Rule 8.2. Under updated Rule 17.2(c), Staff will request the CRO to authorize the issuance of a statement of charges when Staff finds there are reasonable grounds to believe a violation has been committed and formal regulatory action is required. Additionally, the proposed change requires the Staff to submit a written report to the CRO of each investigation instituted as a result of a complaint, along with the current requirement that Staff submit reports where Staff finds reasonable grounds that a violation has occurred and formal regulatory action is warranted. The Exchange notes that under the Affiliated Exchange's current rules, Staff are to submit written reports to the CRO when an investigation has been initiated as a result of a complaint, as well as when an investigation results in a finding that there are reasonable grounds to believe that a violation has been committed. The Exchange notes that, unlike the Affiliated Exchanges, Staff maintains the authority to impose non-formal disciplinary action or determine to close an investigation without the submission of a report to

the CRO.<sup>89</sup> The Exchange also notes that, as it does today, Staff will retain information and/or summaries regarding an action or an investigation closed in this manner. Such information and/or summaries are [sic] available to the CRO upon request and included in regulatory updates to the CRO when necessary.

Under updated Rule 17.2(d), except when the CRO determines that expeditious action is required, the Subject may submit a written statement to the CRO concerning why no disciplinary action should be taken. In addition, the Exchange proposes to extend the time period the Subject has to submit a written statement from 15 days, the period currently provided for in the Affiliated Exchanges' Rule 8.2(d), from the date of the notice to 25 days. The Exchange further proposes to specify that this 25-day period to submit a written statement to the CRO will toll while a request for access to the investigative file pursuant to Rule 17.2(d) is pending. The Exchange also proposes to update Rule 17.2(d) to eliminate any gender-specific pronouns (i.e. "he", "him", or "his").<sup>90</sup> Finally, the Exchange makes corresponding updates to Interpretation and Policy .02 to Rule 17.2 to reflect the aforementioned changes to Rule 17.2(d) and to set forth standards for videotaped responses. Such responses are consistent with current Securities and Exchange Commission ("Commission") enforcement guidelines, specifically the requirements that videotaped responses are limited to 12 minutes or less.<sup>91</sup> The Exchange additionally proposes

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<sup>89</sup> See Securities Exchange Act Release No. 71371 (January 23, 2014), 79 FR 4779 (January 29, 2014) (Notice of Filing and Immediate Effectiveness of Proposed Rule To Amend CBOE's Rules To Enhance the Independence and Integrity of the Regulatory Functions of the Exchange) (SR-CBOE-2014-001).

<sup>90</sup> The Exchange is also updating Rules 17.5, 17.6, 17.7, 17.8, 17.12, and 17.50 to eliminate gender-specific pronouns. Additionally, in instances in which the Exchange harmonizes its rule language with that of the Affiliated Exchanges, the Exchange eliminates gender-specific pronouns.

<sup>91</sup> See Securities and Exchange Commission Division of Enforcement, Enforcement Manual (Nov. 28, 2017), available at: <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

that a written transcript accompany a videotaped response. The submission of videotaped responses falls within the proposed 25-day submission period and, when applicable, proposed tolling period.

### **Purpose of updates to Rule 17.2**

The Exchange believes the CRO is best suited to review reports from Staff and responses to alleged violations from Subjects. The CRO has general supervisory authority over the Exchange's regulatory operations, including the responsibility for overseeing surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another self-regulatory organization to which the Exchange is a party. The Exchange notes that the CRO functions to serve the regulatory functions of the Exchange, separate from that of its business interest, reporting directly to the ROC. Therefore, the Exchange believes that allowing the CRO to authorize the issuance of charges maintains the autonomy and independence of the Exchange's regulatory functions, as well as helps to ensure that decisions regarding the resolution of investigations are made without regard to the actual or perceived business interests of the Exchange or any of TPHs. As a result, the submission of written reports to the CRO will help expedite the disciplinary process while still providing TPH and associated persons with a fair and efficient process. The Exchange also notes that the added submission of written reports where an investigation has been instituted as a result of a complaint serves to make the Exchange's complaint process consistent with that of the Affiliated Exchanges. The Exchange believes that keeping the Staff's authority in place to find reasonable grounds that formal regulatory action is or is not warranted and to impose the appropriate non-formal or closing actions where warranted without providing a formal report to the CRO will continue to

support the independence and integrity of the regulatory functions of the Exchange, as Staff, like the CRO, functions independently from the business interests of the Exchange.<sup>92</sup>

Additionally, the Exchange believes that due to the increased complexity of Exchange trading activity (and the resulting regulatory investigations and examinations) that increasing the time period from 15 days to 25 days is reasonable. The additional time will enhance the regulatory process by allowing subjects to prepare more comprehensive and effective written statements.<sup>93</sup> The Exchange notes that the Subject's access to "other materials" includes any non-privileged exculpatory documents that the Exchange may have in the investigative file. Finally, tolling that same period while Staff prepares an investigative file when requested by the Subject is necessary in the interest of fairness. The Exchange notes that Staff is often able to provide an investigative file in one week or less and that the Exchange makes every effort to provide such files promptly upon request. However, to the extent an investigative file is voluminous or otherwise complicated to provide, were that period not tolled, the Subject could be left with insufficient time to prepare an effective written statement following receipt of the investigative file. Though the rules of the Affiliated Exchanges do not provide for tolling of this time period, the Exchange notes that its current Interpretation and Policy .01(d) to Rule 17.8 (discussed below) already allows for tolling to extent it takes Staff more than 30 calendar days (in the context of a total 120-day time period) to produce documents to a Respondent. Therefore, as proposed, tolling is not novel within the Exchange's disciplinary process. The Exchange believes that the proposed 25 day time period should be completely tolled while Regulatory staff

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<sup>92</sup> See supra note 88 [sic].

<sup>93</sup> The Exchange notes that under current Rule 17.13 time limits imposed under Chapter 17 may be extended. Where the exchange is extending certain time limits within this filing, it also does so to reduce the number of extension requests processed by Staff and thereby enhance the efficiency of the regulatory process.

prepares an investigative file for review in order to provide sufficient time for a Subject to compose a response. The Exchange also notes that this will limit the need for the Exchange to provide extensions when the Subject requests more time to respond. Finally, the Exchange notes that the addition of a time limit of videotaped responses, consistent with current Commission enforcement guidelines,<sup>94</sup> and the accompaniment by a written transcript serves the interest of expediency.

### **Updates to Rule 17.3 Expedited Proceeding**

The Exchange proposes to replace references to the BCC with references to the CRO within Rule 17.3, thus making the CRO's role consistent with that of corresponding Rule 8.3 of the Affiliated Exchanges. The Exchange also proposes to update certain verbiage as needed resulting from those replacements. The Exchange makes corresponding updates to reflect changes to the 17.2(d) processes referenced in Rule 17.3. Under updated Rule 17.3, if Staff and the Subject are able to agree on the terms of a letter of consent, Staff will submit the letter to the CRO for consideration. If the CRO accepts the letter of consent, the Exchange shall adopt the letter of consent as its decision and no further action shall be taken against the Subject respecting the matters that are the subject of the letter of consent, which is consistent with the practices set forth in the Affiliated Exchanges' Rule 8.3. If the CRO rejects the letter of consent, the matter shall proceed as though the letter of consent had not been submitted. The CRO's decisions regarding letters of consent are final. The Exchange also makes non-substantive, clarifying additions qualifying the letter as the "letter of consent" throughout this rule.

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<sup>94</sup> See supra note 91.

### **Purpose of updates to Rule 17.3**

The CRO replaces the BCC as the deciding body related to expedited proceedings. The Exchange believes the CRO is best suited to review letters of consent and determine whether to reject or accept such letters. The CRO is better suited to resolve procedural matters like expedited proceedings and the approval or disapproval of letters of consent because the CRO has greater subject matter and procedural expertise based on his role in directly overseeing the regulatory programs and processes on a day to day basis. Additionally, the Exchange notes that the CRO is required to report periodically to the ROC on all regulatory matters and issues, thus, keeping the ROC apprised of, and allowing for its review of expedited proceedings. As a result, the Exchange believes that this proposed rule change further supports and provides for the autonomy and independence of the Exchanges' regulatory functions.

### **Updates to Rule 17.4 Charges**

The Exchange proposes to replace references to the BCC with references to the CRO within Rule 17.4(a) and 17.4(b), which conforms to the Affiliated Exchanges' references within their corresponding Rule 8.4. The Exchange also proposes to add clarification that a determination not to initiate charges pursuant to Rule 17.4(a) only occurs in those cases where a Subject has been provided notice of violations pursuant to Rule 17.2(d). Under updated Rule 17.4(a), in those cases where notice has been provide pursuant to Rule 17.2(d) and when it appears to the CRO from the report of Regulatory staff that no probable cause exists for finding that a violation occurred or if the CRO otherwise determines that no further action is warranted, the CRO shall direct Staff to prepare and issue a statement to the Subject (and Complainant if any) outlining the reasons for such finding. The proposed language stating that the CRO shall direct Staff to prepare and issue the written statement related to such a determination is a

clarifying addition to Rule 17.4(a) that is intended to add detail regarding the process through which such a statement is issued.

Similarly, under updated Rule 17.4(b), whenever it shall appear to the CRO that there is probable cause for finding a violation occurred and further proceedings are warranted, the CRO shall direct Staff to prepare and issue a statement of charges against the Respondent. The proposed addition of the term “and issue” clarifies Staff’s responsibilities under the Rule, serves to mirror the Staff’s responsibilities for an issuance pursuant to 17.4(a), and modifies the Rule to be substantially similar to the Affiliated Exchanges’ Rule 8.4(b).

The Exchange also modifies the requirement in Rule 17.4(c) that a Respondent request access to documents within 60 calendar days after receiving service of charges, to 25 days after receiving such notice. This change serves to harmonize a Respondent’s time to request documents with their [sic] time to file a written answer under proposed Rule 17.5 (described below), and the tolling of such period while access to the investigative file is pending. Lastly, the Exchange proposes to relocate Rule 17.4(d) and its Interpretations and Policies .01-.03 (along with the amendments proposed, as described below), which concern ex parte communications, to proposed additional Rule 17.15. This change is in line with the Affiliated Exchanges’ Rule 8.16 that specifically covers ex parte communications for disciplinary procedures.

#### **Purpose of updates to Rule 17.4**

The Exchange believes the CRO is best suited to determine whether to initiate charges after reviewing a Staff report. Allowing the CRO to initiate charges (or elect not to initiate charges) will significantly expedite the disciplinary process, as well as serve to conform this rule to the Affiliated Exchanges’ Rule 8.4. Specifically, Staff and Subjects will not have to wait until the BCC meets to learn whether a regulatory matter will result in charges and the matter can

move on to answer, hearing, settlement, and/or summary disposition. In the CRO's capacity as supervisor of the Exchange's regulatory operations, the CRO maintains the subject matter and procedural expertise that is necessary to review and consider regulatory issues and the accompanying facts and circumstances in consideration of issuing charges. For example, the CRO is best suited to determine when a pattern or practice of violative conduct exists, where certain conduct might have been willful in nature or whether other aggravating (or mitigating) circumstances exist (considerations that may be important in considering charges). As stated, the Exchange believes that under the current practice of Rule 17.4(a) and (b), by having the CRO direct Staff to prepare and issue subsequent statements after the CRO's review is clarifying and in line with such current practices with the BCC. Additionally, the Exchange believes that allowing a Respondent 25 days from receiving service of charges to request access to documents serves to harmonize this process with the proposed time for which a Respondent may file an answer under Rule 17.5, and the proposed tolling requirements thereunder.

#### **Updates to Rule 17.5 Answer**

Under updated Rule 17.5, the Exchange extends the time period the Respondent has to submit an Answer from 15 days after the service of charges, which is currently provided for under the Affiliated Exchanges' corresponding Rule 8.5, to 25 days.<sup>95</sup> The Exchange proposes to specify that this 25-day period to submit an Answer will toll, like that of proposed 17.2(d), while a request for access to the investigative file pursuant to Rule 17.4(c) is pending.

#### **Purpose of updates to Rule 17.5**

The Exchange believes that due to the increased complexity of Exchange trading activity (and the resulting regulatory investigations and examinations) that increasing the time period

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<sup>95</sup> This change is based on the rules of NYSE, FINRA and PHLX. See supra notes 86-88.

from 15 to 25 days is reasonable. The additional time will allow Respondents to prepare more comprehensive and effective Answers. Finally, similar to the proposal to toll the time period in the context of a written response to a notification of pending allegations from Staff, the Exchange believes that tolling the time period for an Answer pursuant to Rule 17.5 while Staff prepares investigative file for the Respondent's review is necessary in the interest of fairness. For the same reasons described above, were that period not tolled, the Respondent could be left with insufficient time to prepare an effective Answer following receipt of the investigative file and limits the Exchange having to grant an extension. The Exchange again notes that Staff can often provide an investigative file in one week or less and that the Exchange makes every effort to provide such files promptly upon request.

#### **Updates to Rule 17.6 Hearing**

Under updated Rule 17.6(a), the Exchange proposes that hearings on the charges be held by a panel of either three or five members of the BCC selected by the Chairperson of the BCC. In addition, the Exchange updates Rule 17.6(a) to clarify that where a TPH organization is a party to the hearing, it shall be represented by one of its nominees, who is properly authorized by a TPH organization pursuant to Rule 3.8 (Nominees).<sup>96</sup> The Exchange also proposes language within 17.6(a) that states BCC Counsel may assist the Hearing Panel in preparing its written recommendations or judgments, a practice already in place within the hearing process.

Importantly, the Exchange proposes to add subparagraphs (a)(1) through (a)(3) to Rule 17.6 which requires that Hearing Panel members must function impartially and independently of the involved Exchange staff members, provides a recusal process for Hearing Panel members, as

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<sup>96</sup> See Cboe Options Rule 1.1(pp). The term "nominee" means an individual who is authorized by a TPH organization, in accordance with Rule 3.8, to represent such TPH organization in all matters relating to the Exchange.

well as a process in which a Respondent may motion for removal of Hearing Panel members who may have bias or a conflict of interest. Proposed subparagraph (a)(1) provides that Hearing Members are expected to function impartially and independently of the staff members who prepared and prosecuted the charges. This language is based on language in the Affiliated Exchange's Rule 8.6. Proposed subparagraph (a)(1) then states that if a Hearing Panel member determines they [sic] have a conflict of interest or bias or other circumstances exists where their [sic] fairness might be reasonably questioned, then such Hearing Panel member should withdraw from the matter and the Chairperson of the BCC may then appoint a replacement. This provision is based on FINRA Rule 9233(a).<sup>97</sup> Proposed subparagraphs (a)(2) and (a)(3), like that of the Affiliated Exchanges, provide for the process in which a Respondent may motion for disqualification of a Hearing Panel member on the grounds of bias or conflict of interest, along with the procedure for ruling upon such motions for disqualification. The Exchange incorporates additional language that the Hearing Panel member subject to a Respondent's motion for removal is excluded from rulings on such motion. Subparagraphs (a)(2) and (a)(3) are consistent with that of the Affiliated Exchanges' Rule 8.6(b), and differ only where necessary to conform to the Exchange's existing Rule 17.6 text or to account for details or descriptions included in the Exchange's rules but not in the applicable rules of the Affiliated Exchanges.

Under updated prehearing procedures in Rule 17.6(b), parties to a hearing must furnish copies of all documentary evidence to be presented at the hearing and a list of witnesses ten business days (as opposed to five business days under current Rule 17.6(b)) in advance of the

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<sup>97</sup> The Exchange notes that its Rule language differs from that of FINRA's where necessary to maintain terminology particular to its Rules and disciplinary procedures. The Exchange also notes that in this subparagraph it incorporates language specifying that members of the Hearing Panel are expected to function impartially, which is unlike the FINRA rule, but rather mirrors the Affiliated Exchanges' rule language.

scheduled hearing date. The Exchange also proposes to modify the notice of the time and place of the hearing given to the Parties to 15 business days from 15 calendar days to conform to the Affiliated Exchanges' corresponding rule.

The Exchange proposed to add Interpretation and Policy .03 to Rule 17.6 that states, "Subject to Rule 17.7, the CRO shall have the authority to direct that a hearing be scheduled at any time, after the period to answer pursuant to Rule 17.5 has elapsed."

The Exchange also updates Rule 17.6 throughout to reference the panel selected for the Hearing as the "Hearing Panel", which comports with the terminology in the Affiliated Exchanges' corresponding Rule 8.6.<sup>98</sup>

#### **Purpose of updates to Rule 17.6**

The Exchange believes the updates to Rule 17.6 will expedite and provide greater clarity around the Exchange's hearing process. Under the updated Rule 17.6, the BCC still serves as the pool from which hearing panelists are selected, however, the Hearing Panel is limited to either three or five members selected by the BCC Chairperson. This update will clarify the selection process and prevent interlocutory issues that may arise in having an even number of members on a Hearing Panel. Furthermore, limiting the size of the Hearing Panel helps to streamline the hearing process while still providing a sufficient number of panelists to adjudicate the hearing effectively. The Exchange notes that it expects that most Hearing Panels will be comprised of three members, but that five members may be necessary at times to hear particularly complex matters. Clarifying that where a TPH organization is a party to the hearing it shall be represented by one of its nominees ensures that an authorized person consistent with existing Rule 3.8 represents a TPH organization.

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<sup>98</sup> The Exchange also updates references to the Hearing Panel within Rules 17.9, 17.10, 17.11 and 17.50.

The Exchange believes that proposed Rule 17.6(a)(1) through (a)(3) providing for Hearing Panel member impartiality and recusal and removal processes serve in the interest of fairness to the Respondent. Allowing a Respondent to move for disqualification of any member of the Hearing Panel selected by the BCC Chairperson based upon bias or conflict of interest and providing for a ruling process on motions for disqualification conforms to the Affiliated Exchanges' Rule 8.6. As stated, the Exchange proposes to maintain language necessary to account for different text and procedures between the Exchange's rules and those of the Affiliated Exchanges. Notably, the proposed language incorporates that a motion shall be filed with the BCC Chairperson. This is a logistical difference that accounts for the BCC's role in the Exchange's process, which is not present within the Affiliated Exchanges' processes. Like that of the Affiliated Exchanges, the Hearing Panel will hear such motions. The Exchange explicitly adds that a Hearing Panel member subject to a Respondent's motion for disqualification is excluded from ruling on such motions, a best-practice currently in place. The Exchange also proposes moving the provision stating that counsel may assist the Hearing Panel in preparing its written recommendations, currently found within the Affiliated Exchange's corresponding impartiality provision, to Rule 17.6(a). The Exchange believes that this serves to codify a practice already in place; specifying that BCC Counsel assists the Hearing Panel throughout the hearing, not only during impartiality rulings. The Exchange also believes that adding substantially similar language to that of FINRA Rule 9233(a), which provides that a Hearing Panel member shall recuse themselves [sic] when they determine they have a conflict of interest, bias, or other circumstance which might call into question their fairness, is an additional safeguard to protect the integrity of the hearing process and the interests of the Respondent.

Requiring that the parties provide documentary evidence and witness lists ten business days in advance of a scheduled hearing will give all parties more time to review materials that will be presented at hearing. This extended time period is necessary given the increased complexity of modern trading activity on the Exchange and the resulting complexity of disciplinary matters. Additionally, incorporating that the parties receive 15 business days' notice (as opposed to the current 15 days' notice) harmonizes the business day timing requirements throughout paragraph (b) and ensures that the parties have ample time from the notice of the scheduled hearing to furnish copies of documentary evidence.

Furthermore, vesting authority in the CRO to direct the scheduling of hearings is a necessary update given that the Exchange proposes to remove the time limit under which Respondents must submit offers of settlement under updated Rule 17.8. Under current rules, the end of the settlement period functions as the primary trigger for the scheduling of a hearing (hearings are scheduled when the settlement period ends and the parties have not reached settlement). Under updated Rule 17.6, the CRO can direct the scheduling of a hearing when the CRO believes the nature of matter at hand requires a hearing, when the Respondent has exhausted his offers of settlement, or when the CRO believes that good faith settlement negotiations have ended. As stated above, the CRO is required to meet regularly with the ROC to report on regulatory performance and status of regulatory matters, including caseloads and aging. The Exchange thus believes the CRO's requirement to report to the ROC will ensure continued timeliness in the processing of a regulatory matter. Interpretation and Policy .03 to Rule 17.6 will also greatly expedite the hearing process where the prospective parties agree a hearing is required.

### **Updated Rule 17.7 Summary Proceedings**

The Exchange proposes to replace references to the BCC with references to the CRO within Rule 17.7. Under updated Rule 17.7, analogous with the Affiliated Exchanges' Rule 8.7, the CRO may make a determination without a hearing and may impose a penalty as to violations which the Respondent has admitted or has failed to answer or which otherwise do not appear to be in dispute. Under updated Rule 17.7, the Respondent may notify the CRO if they desire a hearing on any of the charges not previously admitted or upon the penalty, and that the Respondent's failure to notify the CRO constitutes an admission of the violations and acceptance of the penalty determined by the CRO. The Exchange also amends the 10 day period in which the Respondent may notify the CRO that the Respondent desires a hearing to 10 *business* days, which is consistent with the Affiliated Exchanges' corresponding rule.

### **Purpose of updates to Rule 17.7**

The Exchange proposes to replace the BCC with the CRO as the body that will make determinations related to summary proceedings, thus harmonizing the determining body with that of corresponding Rule 8.7 of the Affiliated Exchanges. The Exchange believes the CRO is best suited to address uncontested charges against Respondents and impose penalties related to those charges. The CRO is better suited to resolve matters like summary proceedings because the CRO has greater familiarity with Exchange rules and subject matter/procedural expertise. The Exchange notes that the principal considerations in determining sanctions outlined in Rule 17.11 Interpretation and Policy .01 are not changing and accordingly the considerations weighed by the CRO will be the same as those currently weighed by the BCC. Additionally, the Exchange notes that the Board may on its own initiative order review of a determination of summary proceedings pursuant to 17.10(c). The proposed change from 10 days to 10 business days from the date of

service for a Respondent to notify the CRO that the Respondent desires a hearing is consistent with the corresponding time period in Rule 8.7 of the Affiliated Exchanges.

### **Updates to Rule 17.8 Offers of Settlement**

The Exchange replaces references to the BCC with references to the CRO within Rule 17.8, consistent with the proposed replacements throughout Chapter 17. Under updated Rule 17.8(a), the Respondent submits an offer of settlement to the CRO and the CRO determines whether to accept or reject an offer. The CRO issues a decision accepting an offer and imposes sanctions consistent with the offer. Under updated Rule 17.8(b), where Staff will not recommend acceptance of an offer to the CRO, the Respondent may appear before the CRO to make an oral statement concerning why the offer should be accepted. If the CRO rejects an offer Staff supports, the Respondent can appear before the CRO to make an oral statement concerning why the CRO should reconsider acceptance of the offer.

The Exchange also removes the 120-day period following service of a statement of charges during which a Respondent may submit an offer under updated Rule 17.8(a) and specifies that offers can be made at any time following the date of service of a statement of charges upon the Respondent in accordance with 17.12 (Service of Notice). Removal of the 120-day time period is consistent with current Rule 8.8 of the Affiliated Exchanges. The Exchange also specifies within updated Interpretation and Policy .01 to Rule 17.8 that the Respondent may submit a maximum of two offers to the CRO unless the CRO orders otherwise. As a result of these changes, the Exchange proposes to remove Interpretations and Policies .01 (b)-(d) and .02 to Rule 17.8 in their entirety as they relate specifically to the 120-period and/or the number of offers that may be submitted to the BCC.

The Exchange adds new Interpretation and Policy .02 to Rule 17.8 to specify that if an offer is submitted subsequent to a hearing being scheduled, the Hearing Panel shall grant the parties leave from the hearing so the offer can be presented to the CRO for consideration.

### **Purpose of updates to Rule 17.8**

The Exchange believes the CRO is best suited to determine whether to accept an offer of settlement from a Respondent, even after the hearing procedures have commenced. The Exchange believes the CRO has greater familiarity with the Securities Exchange Act of 1934 (the “Act”) and Exchange rules, and what constitutes a fair and reasonable offer related to violations of such. The Exchange also notes that allowing the CRO to determine offers of settlement mirrors the Affiliated Exchanges’ corresponding rules. Further, allowing the CRO to accept or reject offers of settlement will significantly expedite the settlement process while ensuring that the independence and integrity of the regulatory process is maintained, as the CRO’s regulatory decision-making responsibilities are entirely separate from those responsible for the Exchange’s business interests. Specifically, the CRO can facilitate more expedient and independent review of offers. A Respondent will not have to wait until a regularly scheduled BCC meeting to determine whether their [sic] offer has been accepted or rejected nor will they have to wait until the BCC meets to make oral statements in support of their offers.

The Exchange also believes that removing the 120-day period during which a Respondent may submit an offer and allowing offers to be submitted at any time following the date of service of a statement of charges upon the Respondent pursuant to Rule 17.12 will improve the settlement process and allow matters to be more efficiently resolved when all parties agree that a matter can be settled without further disciplinary proceedings. The Exchange believes there is no need to prevent settlement negotiations during any period where they are

proceeding in good faith. As mentioned above, this will align the Exchange's Rule with that of the Affiliated Exchanges' Rule 8.8, which does not prohibit settlement offers at a particular point in time after a statement of charges. Further, under updated Rule 17.6, the CRO has authority to schedule a hearing in the event settlement negotiations have broken down.

Moreover, the Exchange believes it is appropriate for the CRO to exercise discretion to allow a Respondent to submit more than two offers of settlement. The Exchange notes that a Respondent will be allowed to submit at least two offers (assuming that the offers are made in the course of good-faith negotiations). This change conforms to the same discretion given to the CRO under the Affiliated Exchanges' corresponding Rule 8.8. The maximum allowance of two offers remains in place, like that of the Affiliated Exchanges' rule, in order to prevent abuses, such as delay tactics, of the disciplinary procedures. However, the Exchange believes the CRO may consider additional offers of settlement if the CRO feels good faith negotiations continue with a Respondent and accordingly additional offers are appropriate. Additionally, the Exchange notes that the CRO is best suited to accept or reject offers of settlement. The CRO's capacity as supervisor of investigative matters provides the CRO case-by-case subject matter expertise. The Exchange also notes that the CRO may take into account the principle considerations under Rule 17.11 in weighing whether or not acceptance or rejection of an offer is appropriate. As a result, the Exchange believes that the CRO is the most appropriate determining body for reviewing settlement offers and that review of offers of settlement by the BCC or other determinative body is not necessary (the Exchange notes that, unlike the Affiliated Exchanges, its current Rule 17.10(c) (Review on Motion of the Board) does not provide that the Board may review on its own initiative order an offer of settlement). Maintaining acceptance and rejection of such offers

with the CRO provides for consistent practice throughout the proceedings, as well as regulatory independence and integrity.

### **Updates to Rule 17.9 Decision**

The Exchange removes the requirement that decisions of a Hearing Panel be subject to automatic review when the Hearing Panel is not comprised of a majority of the BCC. The Exchange also adds a cross reference to Rule 17.11 (Judgment and Sanction) and incorporates the requirement that the contents of a decision where sanctions are imposed include language that is substantially similar to the requirements under the Act.

### **Purpose of updates to Rule 17.9**

Updated Rule 17.9 corresponds to the update in Rule 17.6 limiting the size of a hearing panel to either three or five members of the BCC. Due to the size limitation in updated Rule 17.6, most Hearing Panels following the operative date of this filing would not be comprised of a majority of the BCC.<sup>99</sup> Removing this stage of review will further streamline the hearing process by putting the ultimate decision making power squarely on the shoulders of the Hearing Panel. The Exchange believes this is appropriate as the Hearing Panel members are the individuals that participate in the hearing, hear all of the evidence firsthand, and are able to consummate a verdict based on that firsthand knowledge. The Exchange also notes that removing this review process will not unfairly prejudice any party to a hearing as the parties may petition for removal of a Hearing Panel member for impartiality under proposed Rule 17.8 and for a review of the decision by the Board or a Board Committee, whose decision is ratified by the Board, under Rule 17.10. As such, updated Rule 17.9 eliminates an unnecessary redundancy in the Exchange's disciplinary process. Finally, the Exchange believes the cross-reference to its existing sanctions

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<sup>99</sup> The BCC is typically composed of 10-12 members.

rule, Rule 17.11, and the additional instruction regarding the contents of a decision where a sanction is imposed is appropriate in order to provide clarity regarding statements of sanctions within a decision.

### **Updates to Rule 17.10 Review**

The Exchange proposes to replace references to the BCC with references to the Hearing Panel where applicable within Rule 17.10. Additionally, the Exchange proposes to make a clarifying change to harmonize the language referring to the decision with Rule 17.9 and proposes to remove Rule 17.10(d), which currently provides that the ROC may apply for the Board to review a decision not to initiate charges.

### **Purpose of updates to Rule 17.10**

Updates to reference the Hearing Panel in lieu of the BCC in Rule 17.10 reflect updates elsewhere in Chapter 17. The Exchange also proposes to delete Rule 17.10(d). Specifically the Exchange updates 17.10(b) to reflect that decisions under review will be decisions of a Hearing Panel. Furthermore, a Hearing Panel (and not the full BCC) will have heard a matter under review. The Exchange changes the qualification of “any” decision to “the” decision, which is in line with language referring to “the” decision throughout Rule 17.9. The Exchange removes Rule 17.10(d) as there is no longer the need for a special provision for review of BCC determinations not to initiate charges pursuant to Rule 17.4(a). As stated, the Exchange believes the CRO is best suited to determine whether to initiate charges under Rule 17.4, rather than the BCC, as the CRO directly oversees all regulatory activities, including general reports on the status of regulatory matters. Unlike the BCC, the CRO reports and responds directly to the ROC, keeping the ROC apprised of the status of regulatory matters, including reports regarding open investigations and disciplinary matters, and decisions regarding such matters. Because there is a direct line of

reporting between the CRO and the ROC, and the ROC may direct the CRO to take certain regulatory actions where they [sic] see fit, the Exchange believes that the ROC's application to the Board to review the CRO's decision not to initiate charges is not essential to the disciplinary process. As a result, the Exchange believes removing the ROC's application of review to the Board of such decisions provides for a more efficient, streamlined disciplinary process. Furthermore, the Exchange believes that this change is in line with maintaining enhanced autonomy and independence of the Exchange's regulatory functions.

#### **Updates to Rule 17.11 Judgment and Sanction**

Under updated Rule 17.11, the Exchange replaces references to the BCC with references to the "Hearing Panel or the CRO, as applicable".

#### **Purpose of updates to Rule 17.11**

Updated Rule 17.11 reflects the new roles of the CRO and Hearing Panels. Specifically, the CRO will issue sanctions that result from summary proceedings outlined in Rule 17.7. The Hearing Panel will issue sanctions that result from decisions outlined in Rule 17.9. As mentioned above, the principal considerations for determining sanctions outlined in Interpretation and Policy .01 to Rule 17.11 have not changed. The Hearing Panel or the CRO, as applicable, weigh [sic] the same considerations in determining sanctions under updated Rule 17.11 as the BCC weighs under current Rule 17.11.<sup>100</sup> The Exchange notes that the CRO would also weigh the principal considerations under 17.11 in determining whether to accept or reject a letter of consent under Rule 17.3 or offer under Rule 17.8. Additionally, the Exchange believes that in the CRO's capacity as supervisor of the Exchange's regulatory operations, the CRO possesses the subject

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<sup>100</sup> The Exchange notes that the Board also weighs these considerations when determining sanctions, and that Staff considers similar factors in determining whether formal, non-formal, or no further regulatory action is warranted.

matter expertise, as well as the accompanying facts and circumstances, including knowledge of a TPHs' or associated persons' disciplinary history, to consider and determine appropriate sanctions. The CRO's capacity as supervisor of the Exchange's regulatory operations also ensures that regulatory independence is provided for during the judgment and sanction process under Rule 17.11.

#### **Updates to Rule 17.12 Service of Notice**

Updated Rule 17.12 specifies that service of charges, notices or other documents, may continue to be made upon a Respondent by registered or certified mail but if this method of service is used, that three days shall be added to the prescribed period for response.

#### **Purpose of updates to Rule 17.12**

The Exchange updates Rule 17.12 to provide clarity in the Rule and in the interest of fairness to Respondents. Many of the time periods outlined in Chapter 17 begin upon service of notice, charges or other documentation (i.e. the proposed 25 days to submit an Answer to charges under Rule 17.5 or the 15 days to petition for review of a decision under rule 17.10). Updated Rule 17.12 provides three additional days when calculating the time for response to the extent service is made by registered or certified mail. Updated Rule 17.12 ensures that a Respondent is not penalized any time to respond to notices, charges or other documentation while such documentation is in transit. The Exchange notes that this update is not based on corresponding rules of the Affiliated Exchanges, but is rather based on FINRA Rule 9138(c).

#### **Updates to Rule 17.14 Reporting to the Central Registration Depository**

The Exchange removes a reference to the National Association of Securities Dealers, Inc. ("NASD") within Rule 17.14. The Exchange also updates references to the BCC with references to the Hearing Panel or the CRO where applicable.

### **Purpose of updates to Rule 17.14**

On July 30, 2007, The National Association of Security [sic] Dealers, Inc., The New York Stock Exchange, LLC (“NYSE”) and NYSE Regulation, Inc. consolidated their member firm regulation operations into a combined organization FINRA. After the consolidation, FINRA became operator of the CRD. Rather than update the reference to FINRA, however, the Exchange proposes to simply remove the reference to NASD as the CRD system is widely known as such in the industry and the description of its operator is no longer necessary.

### **Proposed Rule 17.15 Ex Parte Communications**

The Exchange proposes to relocate 17.4(d) and its Interpretations and Policies .01 through .03, which concern ex parte communications, to proposed additional Rule 17.15. This conforms to the Affiliated Exchanges’ Rule 8.16, which prohibits ex parte communications on the merits of a proceeding. The Exchange has made changes to its current ex parte rule language to be substantially similar to that of the Affiliated Exchanges’ ex parte rule. Where possible, the Exchange has mirrored its Affiliated Exchanges’ Rule 8.16 in substance and form. This includes: the addition of Exchange staff among those persons prohibited in making ex parte communications; the definition of members of the Hearing Panel, BCC, Board or committee of the Board who participate in a decision with respect to that proceeding as “Adjudicators”; the addition of a procedure for which an Adjudicator must place any prohibited ex parte communications into the record; the authority for the Board or committee of the Board to take necessary action if an ex parte communication arises; and, importantly, the application of the prohibition of ex parte communications beginning with the initiation of an investigation under Rule 17.2(a) or when a person has knowledge that an investigation will be initiated. The proposed change to the Exchange’s ex parte communication rule is based on the Affiliated

Exchanges' existing Rule 8.16. The Exchange notes that the language of the proposed rule and the Affiliated Exchanges' rule may differ to extent necessary to conform to the Exchanges' existing ex parte rule text or to account for details or descriptions included in the Exchange's rules but not in the applicable rules of the Affiliated Exchanges. The Exchange proposes to maintain its provision applicable to the definition of ex parte communications, as well as its provisions for actions that will not be considered violations of the ex parte rules.

### **Purpose of proposed Rule 17.15**

Where possible, the Exchange has substantively mirrored its proposed Rule 17.15 to the Affiliated Exchange's Rule 8.16. The Exchange believes that this proposed change provides consistency in the disciplinary procedures across the multiple exchanges. Specifically, the Exchange believes that proposed Rule 17.15(d), which comports with the Affiliated Exchanges' Rule 8.16(d) and provides that prohibition on ex parte communications begins upon the initiation of an investigation, serves to protect the interests of fairness for all Subjects and Respondents, as well as for the Exchange. The Exchange also believes this same purpose is served by expanding the prohibition of ex parte communications to Exchange staff during matters pending.

As stated, the Exchanges' [sic] proposed Rule 17.15 differs from the Affiliated Exchanges' Rule 8.16 to the extent necessary to conform to the existing ex parte rule text or to account for details or descriptions included in the Exchange's rules but not in the Affiliated Exchanges rules. For example, the Exchange has kept its existing provisions that define ex parte communications and actions that constitute non-violations of the rule. While the Affiliated Exchanges use the term "Respondent", the Exchange uses "Trading Permit Holder" and "person associated with a Trading Permit Holder" because such terminology encompasses Respondents as well as Subjects of investigations or examinations who would be subject to ex parte

communication restrictions. The Exchange notes that it has proposed to add reference to a member of a Hearing Panel as a party with whom ex parte communications are prohibited even though this appears duplicative because a Hearing Panel is comprised of members of the BCC. The Exchange believes that inclusion of the Hearing Panel and the BCC ensures that BCC members who may ultimately serve on a Hearing Panel for a matter are subject to the ex parte rules from the initiation of an investigation of that matter. Additionally, the Exchange notes that it proposes to maintain its provision for the definition of ex parte communication (proposed subparagraph (e)) and provisions stating in what circumstances a violation of ex parte communications is not deemed to have occurred (proposed subparagraphs (f) and (g)). The Exchange believes that maintaining these portions of its ex parte rules will continue to provide clarity for all parties regarding what constitutes an ex parte communication, what circumstances are not deemed a violation of the ex parte rules, and what steps a party must take in order to avoid violation of such rules.

#### **Updates to Rule 17.50 Imposition of Fines for Minor Rule Violations**

The Exchange proposes to replace references to the BCC with references to a Hearing Panel within Rule 17.50. Within the list of violations outlined in Rule 17.50(g), the Exchange removes references to matters referred to the BCC at specified thresholds after a specified number of repeat violations (i.e. “subsequent offenses”). References of referrals to the BCC have been removed from Rules 17.50(g)(2)-(5),(7),(9)-(19). Given the proposed removal of referrals to the BCC, the Exchange accordingly proposes to incorporate “subsequent” offenses under the fine schedules that that [sic] correspond to the last monetary range listed. The Exchange also proposes to change language within Rule 17.50(c)(2) to reflect findings of a person’s rule violations. The Exchange amends Interpretation and Policy .01 to Rule 17.50 to incorporate the

CRO in lieu of the BCC, where applicable. It also deletes the term “together” from the phrase “aggregated together” in paragraphs 1 and 2, as this term is superfluous within this context, and changes “than” to “that” in paragraph 1 to correct an existing grammatical error. The Exchange also updates the heading to the fine schedule under Rule 17.50(g)(7) and (g)(9) to reflect the term “violations”, as opposed to “infractions”, as this is more consistent with the terminology used throughout Rule 17.50.

#### **Purpose of updates to Rule 17.50**

In the interest of increasing efficiency surrounding the Exchange’s disciplinary process, a Hearing Panel, as opposed to the full BCC, reviews contested fines levied under updated Rule 17.50 and determines the manner of the review. As stated above, the Exchange believes a Hearing Panel is most appropriately situated to review fines due to a Hearing Panel’s direct and in-depth involvement in the hearing process. Further, the changes reflect updates to Rule 17.6 in that when a person against whom a fine is imposed pursuant to Rule 17.50(g) requests a hearing, a Hearing Panel will hear and decide such matter. The Exchange also modifies language to reflect that the Exchange makes findings that a person has committed acts in violation of its rules, rather than findings of guilt.

The Exchange believes that removing any of the referenced referrals to the BCC outlined in Rule 17.50(g) is consistent with CRO’s authority to initiate charges under updated Rule 17.4. The Exchange also notes that removal of referenced referrals to the BCC comports with the Affiliated Exchanges’ corresponding rules imposing fines for minor violations, including Rule 8.15 and Rule 25.3, which do not reference referrals to their Hearing Panels. Specifically, the Exchange believes that a Respondent will continue to receive appropriate discipline for repetitive or aggregate offenses because, pursuant to Rule 17.50(a) and (f), the Exchange has the discretion

to impose a fine in lieu of commencing a disciplinary proceeding for a violation that is minor in nature. These provisions will continue to limit any risk that a repeat offender of minor violations continue [sic] to pay fines under Rule 17.50, and rather, is disciplined via sanctions that are more appropriate. Under current Chapter 17 rules, addressing 17.50(g) rule violation through formal disciplinary proceedings requires Staff to investigate the matter and then, if necessary, refer the matter to the BCC with a recommendation to initiate charges. This recommendation includes a report indicating why formal disciplinary action is necessary (repeat violations, not minor, egregious, etc.). Under updated Rule 17.4, however, the CRO directs the initiation of charges thus eliminating the need for this referral process. As the CRO receives reports from Staff pursuant to Rule 17.2(c), as well as general reports regarding the status of regulatory matters, the CRO has on-going knowledge of non-formal regulatory actions and minor rule violations. The CRO works directly with Staff to address those violations covered under Rule 17.50(g). Accordingly, the CRO is in the best possible position to determine whether to impose a fine or initiate formal disciplinary proceedings.

### **TRANSITION PROCESS**

The Exchange intends to announce the operative date of the updates to Chapter 17 at least 30 days in advance via a regulatory notice. To facilitate an orderly transition from the current rules to the new rules, the Exchange proposes to apply the current rules to all matters where a subject has received notice of a statement of charges pursuant to Rule 17.2(d) prior to the operative date. In terms of Rule 17.50, any fine that [sic] imposed prior to the operative date that is contested will continue under the existing rules. As a consequence of this transition process, the Exchange will retain the existing processes during the transition period until such time that there are no longer any matters proceeding under the current rules.

To facilitate this transition process, the Exchange will retain a transitional Chapter 17 that will contain the Exchange's rules, as they are at the time this proposal is filed with the Commission. This transitional Chapter 17 will apply only to matters initiated prior to the operational date of the changes proposed herein and it will be posted to the Exchange's public rules website. When the transition is complete and there are no longer any TPHs or associated persons subject to current Chapter 17, the Exchange will remove the transitional Chapter 17 from its public rules website.

## 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>101</sup> Specifically, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>102</sup> requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. Additionally, the Exchange believes the proposed rule change is consistent with the Section 6(b)(5)<sup>103</sup> requirement that the rules of an exchange not be designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

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<sup>101</sup> 15 U.S.C. 78f(b).

<sup>102</sup> 15 U.S.C. 78f(b)(5).

<sup>103</sup> Id.

The Exchange also believes that the proposed rule is consistent with Section 6(b)(6) of the Act,<sup>104</sup> which requires the rules of an exchange provide that its members be appropriately disciplined for violations of the Act as well as the rules and regulations thereunder, or the rules of the Exchange, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

In addition, the Exchange believes that the proposed rule change furthers the objectives of Section 6(b)(7) of the Act,<sup>105</sup> in that it provides fair procedures for the disciplining of Trading Permit Holders and persons associated with Trading Permit Holders, the denial of Trading Permit Holder status to any person seeking a Trading Permit therein, the barring of any person from becoming associated with a Trading Permit Holder thereof, and the prohibition or limitation by the Exchange of any person with respect to access to services offered by the Exchange or a Trading Permit Holder thereof.

#### **Updates to the Role of the CRO, Hearing Panel and BCC**

Specifically, the Exchange believes that updating and reducing the BCC's role in disciplinary matters to reflect that of the Affiliated Exchanges' rules is consistent with Sections 6(b)(5) and 6(b)(6) of the Act.<sup>106</sup> The Exchange believes that replacing the BCC with groups and processes like those of the Affiliated Exchanges will continue to provide TPHs and associated persons with a fair investigative and adjudicatory process. As stated, the functions currently handled collectively by the BCC will be split between the Exchange's CRO and a Hearing Panel, comprised of BCC members and selected by the BCC Chairperson, creating greater autonomy

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<sup>104</sup> 15 U.S.C. 78f(b)(6).

<sup>105</sup> 15 U.S.C. 78f(b)(7).

<sup>106</sup> 15 U.S.C. 78f(b)(5) and (6).

between the charging and adjudicatory aspects of the regulatory process. The Exchange believes that the CRO is best suited to manage certain responsibilities related to complaint and investigation, expedited proceedings, charges, summary proceedings and judgment and sanctions. The Exchange notes that the CRO has general supervisory responsibility over the Exchange's regulatory operations, including the responsibility for overseeing its surveillance, examination, and enforcement functions and for administering any regulatory services agreements with another self-regulatory organization to which the Exchange is a party. Further, as stated above, the CRO regularly meets with the ROC. As such, the Board will remain apprised of any regulatory decisions made by the CRO. The BCC via a Hearing Panel (selected from BCC members) will continue to manage the hearing process, as well as decisions and sanctions arising out of the hearing process, independently from the CRO and the Exchange's regulatory program. The Exchange also believes the proposed changes will collectively enhance the independence and impartiality of the overall regulatory process, which serves to protect investors and the public interest, protect customers, issuers, brokers, or dealers from unfair discrimination, and ensure that TPHs and associated persons are appropriately disciplined. First, the Exchange notes that the CRO reports directly to the ROC, remaining independent from business-side interests of the Exchange. Second, the Exchange notes its incorporation of Rule 17.6(a)(1) which, as proposed, requires that Hearing Panel members function impartially and allow [sic] for their removal if a conflict of interest arises. As a result, the Exchange believes these changes enhance the independence and impartiality of the overall regulatory process.

As stated above, where a proposed change to the rules regarding the BCC's role is based on an existing rule of the Affiliated Exchanges, the language of the Exchange's rules may differ from the Affiliated Exchanges' rules to the extent necessary to conform with existing Exchange

rule text or to account for details or descriptions included in the Exchange's rules but not in the applicable rules of the Affiliated Exchanges. For example, the Exchange proposes to maintain a process where the BCC Chairperson selects Hearing Panel members from a pool of BCC members, whereas the CEO selects Hearing Panel members on the Affiliated Exchanges. The Exchange has thus maintained differences in its rules that account for or relate to this process. Where possible, the Exchange has substantively mirrored the CRO's role and the Hearing Panel's role within Affiliated Exchange rules, because consistency across the rules will increase the understanding of the Exchange's disciplinary process for TPHs that are also participants on the Affiliated Exchanges, as well as result in greater uniformity, less burdensome and more efficient regulatory processes, and appropriate, non-discriminatory discipline. As such, the proposed rule changes will foster cooperation and coordination with persons engaged in facilitating transactions in securities and would remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange also believes that the proposed amendments will contribute to the protection of investors and the public interest, as well as provide appropriate discipline and fair procedures for such discipline, by streamlining the disciplinary process through the CRO, who is best suited to address regulatory matters without any conflicting business interests given the nature of the CRO's position.

#### **Other Updates Based on the Affiliated Exchanges' Rules**

The proposed amendments to update the Exchange as the adopting body for letters of consent as its decision under Rule 17.3, the ten business days from the receipt of summary determination that a Respondent may notify the CRO that the Respondent desires a hearing under Rule 17.7, the 15 business days' notice of the time and place of a hearing under Rule 17.6, the CRO's discretion to allow for more than two offers of settlement under Rule 17.8, and the

removal of the referral to the hearing body under the fine schedule for minor rule violations in Rule 17.50 are substantially identical to the relevant language and/or provisions within the corresponding rules of the Affiliated Exchanges. The Exchange believes that these updates provide consistency between its rules and that of the Affiliated Exchanges, aligns certain aspects of the disciplinary processes, which protects investors and the public interest by making it easier for participants across the Exchange and its Affiliated Exchanges to understand the disciplinary processes. Particularly regarding the removal of referrals to the BCC under Rule 17.50, the Exchange believes this change is not only consistent with the Affiliated Exchanges' minor rule violation schedules but maintains fairness and protection of investors. As stated, Rule 17.50 states that the Exchange *may* impose a fine when a rule is minor in nature but is never required to do so, regardless of the number of offenses by a participant. This discretion, paired with the fact that the CRO has in-depth understanding of regulatory issues and takes deference to the principle considerations under Rule 17.11 when determining if fines are the appropriate disciplinary mechanism, will serve to ensure that the Exchange provides appropriate discipline and fair procedures to do so.

The Exchange notes that in some instances the rule change does not completely mirror its rules with that of the Affiliated Exchanges or proposes additional language/provisions to that of the Affiliated Exchange's existing rule language/provisions. The Exchange notes that although in these instances it has chosen to maintain its existing provisions or modify language of the Affiliated Exchanges' rules, it still provides for fair disciplinary procedures or the most appropriate discipline for violations to continue to protect investors and the public interest. For instance, the Exchange incorporates the Affiliated Exchange's formal reports regarding complaints into Rule 17.2(c), but maintains that Staff submit a written report when it finds that

formal regulatory action is warranted, as well as the Staff's authority to find that non-formal regulatory action is warranted and to impose non-formal regulatory action, or to close a matter, without submission of a report. The Exchange believes that maintaining Staff's discretion in this manner continues to provide for the autonomy and independence of the Exchanges' regulatory functions, which enhances the fairness of its disciplinary procedures and appropriate discipline and thereby enhancing protection of investors and the public interest.<sup>107</sup> The Exchange copies the description of counsel's role (and refers specifically to BCC Counsel as a clarification), not into its impartiality provisions like that of the Affiliated Exchanges, but into its general provision for parties to a hearing. The Exchange believes this is a clarifying change as the BCC Counsel assists the Hearing Panel throughout the hearing process. The Exchange also adds language to make explicit that the Hearing Panel member who is the subject of the motion is excluded from the ruling on such motion, and adds a provision for recusal of a Hearing Panel member when they determine that they have a conflict or bias. The Exchange believes that such additional language enhances the procedural fairness of the current impartiality rules copied from the Affiliated Exchanges, thereby protecting investors and the public interest. Additionally, the Exchange incorporates the Affiliated Exchange's ex parte rules, while maintaining its provisions defining ex parte communications and "no violations" of the ex parte rules. The Exchange believes these provisions will continue to provide better understanding for all parties regarding ex parte communications, thereby protecting investors and the public interest and ensuring fair disciplinary proceedings throughout.

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<sup>107</sup> Additionally, the CRO directly oversees and manages Staff, therefore, the CRO will maintain general supervision over this process.

### **Additional Proposed Changes**

The Exchange believes that extending the time periods associated with submitting a written response to allegations of rule violations, submitting an Answer in response to formal charges, and extending the time period prior to a hearing parties are required to submit documentary evidence is consistent with the protection of investors. The proposed time extensions are also consistent in providing fair procedures for disciplining TPHs and persons associated with TPHs, as well as ensuring that the Exchange administers appropriate discipline. The Exchange believes that due to the increased complexity of Exchange trading activity and the regulatory investigations and examinations surrounding such activity, extending the time period from 15 days to 25 days for a Subject's response to a notification of alleged violations and for a Respondent's answer to charges, as well as extending time for parties to furnish evidence prior to a hearing from five to 10 business days, serves to protect investors by allowing more time for these parties to respond during various phases of the proceedings. The additional time will also serve to ensure fair procedures, that the Exchange administers appropriate discipline by allowing subjects to prepare more comprehensive and effective written statements in their defense, and better Subject and/or Respondent cooperation with the Exchange. As stated, this changed is based on the Rules of NYSE,<sup>108</sup> FINRA,<sup>109</sup> and PHLX.<sup>110</sup>

Further, the Exchange believes tolling the applicable periods while a Subject or a Respondent's request for access to the investigative file similarly serves to protect investors and ensure fair disciplinary procedures and the administration of appropriate discipline. As with the extension of time periods, the Exchange believes tolling those same periods while access to

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<sup>108</sup> See supra note 86.

<sup>109</sup> See supra note 87.

<sup>110</sup> See supra note 88.

relevant information in the investigative file is pending will provide TPHs and associated persons with adequate time to craft reasoned and complete responses to regulatory inquiries. As a result, this serves to foster cooperation and coordination with persons engaged in regulating securities, protect investors by serving in the interest of fairness to Subjects and Respondents, and provide for appropriate discipline for violations of the Act and Exchange rules. Any delay to the regulatory process caused by extending the applicable time periods is mitigated by the increased efficiency resulting from the other rule updates and the fact that Staff no longer needs to process extensive extension requests under Rule 17.13.

The Exchange believes that the proposed removal of automatic review of a Hearing Panel's decision by the majority of the BCC and of the Board's review of a decision not to initiate charges will streamline the various stages of the proceedings under Chapter 17, while ensuring that the decision as a result of a hearing and the decision not to initiate charges is determined by the persons best suited to make such decisions. The Exchange believes the Hearing Panel members are best suited to make a final hearing decision as those individuals participate directly in the hearing, hear all of the evidence firsthand, and are able to consummate a verdict based on that firsthand knowledge. The Exchange also believes that proposed Rule 17.6(a)(1)-(a)(3) guarantees impartiality of Hearing Panel members. As a result, the decision by the Hearing Panel of either three or five members will be the best-informed and most impartial decision, thus eliminating need for review by a majority of the BCC while providing adequate procedural protections. Likewise, the Exchange believes the CRO is best suited to determine whether to initiate charges when recommended by Staff, as the CRO directly oversees all regulatory activities and receives periodic updates regarding investigative matters. Unlike the current role of the BCC, the CRO reports and responds directly to the ROC. The Exchange

believes that because the CRO provides regular reports as to the status of regulatory matters and decisions pertaining to such matters to the ROC and, in turn, because the ROC may direct the CRO to take certain regulatory action if they deem necessary, the ROC's application to the Board for review of the CRO's decision not to initiate charges is not essential to the disciplinary process. Rather, the Exchange believes that removing the ROC's application for Board review of such decisions will provide for a more efficient, streamlined disciplinary process, while ensuring a fair process through the CRO and the direct reporting line between the CRO and the ROC. As a result, the Exchange believes that removing these review processes will not unfairly prejudice any party during these proceedings, which will protect investors throughout the disciplinary process and allow the Exchange to determine the most appropriate sanctions. Removing these processes will eliminate unnecessary redundancies in the disciplinary process, which will also protect investors and foster cooperation and coordination with persons engaged in regulating securities.

The Exchange also believes that certain changes and updates to its disciplinary rules serve specifically in the interest of fairness and expediency. For example, the proposed videotaped responses protect investors by allowing Subjects to respond more easily to notice of an initiated investigation, especially in such a globalized, technology-centric industry. Similarly, changes such as allowing the Hearing Panel the discretion to grant leave to the parties to a hearing in order to present an offer of settlement also protects investors and public interest, while reducing the burden that once a hearing is scheduled the parties may no longer present offers of settlement to the CRO.

The Exchange believes that the proposed change providing that a Hearing Panel be comprised of three or five BCC members protects investors and ensures procedural fairness

because it will safeguard against interlocutory decisions and also allow for more (five) Hearing Panel members when necessary to hear complex matters. The Exchange also believes that the proposed changes to the service of notice provision that adds three days when calculating the time for response to the extent service is made by registered or certified mail protects investors and provides adequate procedural protections by ensuring that a Respondent is not penalized in responding to notices, charges or other documentation while such documentation is in transit. Additionally, the Exchange updates language throughout Chapter 17 and makes other clarifying changes. For example, incorporating that the CRO direct Staff to prepare and issue statements of charges or decisions not to initiate charges [sic]; a practice currently in place between the Staff and the BCC. Also, for example, incorporating that a decision containing sanctions shall include a statement of the sanctions imposed and the reasons therefor will enable better understanding for all parties of sanctions and why such sanctions are imposed. Such updates and clarifications will serve to reduce confusion and provide a better understanding to TPHs, associated persons, and the Exchange staff of the regulatory processes.

Finally, the Exchange believes that its proposed transition plan would allow for a more orderly and less burdensome transition for the Exchange's TPHs. The proposed application of current rules to all matters where a subject has received notice of a statement of charges pursuant to Rule 17.2(d) prior to the operative date provides a clear demarcation between matters that would proceed under the new rules and those that would be completed under the current rules.

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

The Exchange does not believe that the proposed rule changes will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. The proposed rule changes are not intended to address competitive issues, but rather,

are concerned with facilitating less burdensome regulatory compliance and processes and enhancing the quality of the regulatory processes. The Exchange believes the proposed rule changes reduce the burdens within the disciplinary process equally on all market participants.

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 Act<sup>111</sup> and Rule 19b-4(f)(6)<sup>112</sup> 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:

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<sup>111</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>112</sup> 17 CFR 240.19b-4(f)(6).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2019-025 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-2019-025. This file number should be included on the subject line if e-mail 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-CBOE-2019-025, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>113</sup>

Jill M. Peterson,  
Assistant Secretary.

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<sup>113</sup> 17 CFR 200.30-3(a)(12).

[FR Doc. 2019-08912 Filed: 5/1/2019 8:45 am; Publication Date: 5/2/2019]