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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-89468; File No. SR-NYSECHX-2020-24]

### **Self-Regulatory Organizations; NYSE Chicago, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Governing Liability of Directors and of the Exchange**

August 4, 2020.

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on July 30, 2020, the NYSE Chicago, Inc. (“NYSE Chicago” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to rules governing liability of directors and of the Exchange, including the limits on liability for specified circumstances, that would harmonize such rules with those of the Exchange’s affiliates NYSE Arca, Inc. (“NYSE Arca”) and NYSE National, Inc. (“NYSE National”). The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

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

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

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The purpose of this proposed rule change is to change the rules governing liability of directors and of the Exchange, including the limits on liability for specified circumstances. Specifically, the Exchange proposes to replace Article 3, Rule 19 with new Rules 13.1 (Liability of Directors), 13.2 (Liability of Exchange), 13.3 (Legal Proceedings Against Exchange Directors, Officers, Employees or Agents) and 13.4 (Exchange’s Costs of Defending Legal Proceedings). Proposed Rules 13.1 through 13.4 are based on the rules set forth in NYSE Arca Rule 14 and NYSE National Rule 13, with non-substantive differences to use the term “Participant”<sup>4</sup> rather than the terms “ETP Holders,” “OTP Holders” or “OTP Firms,” which terms are not used on the Exchange.<sup>5</sup> The Exchange also proposes to delete Article 3, Rule 19, which is the Exchange’s current rule related to liability of the Exchange.

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<sup>4</sup> The term “Participant” is defined in Article 1, Rule 1(s) to mean, among other things, any Participant Firm that holds a valid Trading Permit and that a Participant shall be considered a “member” of the Exchange for purposes of the Act. If a Participant is not a natural person, the Participant may also be referred to as a Participant Firm, but unless the context requires otherwise, the term Participant shall refer to an individual Participant and/or a Participant Firm.

<sup>5</sup> See NYSE Arca Rules 14.1 through 14.4 and NYSE National Rules 13.1 through 13.4.

In July 2018, the Exchange and its direct parent company were acquired by NYSE Group, Inc. (“Transaction”).<sup>6</sup> As a result of the Transaction, the Exchange became part of a corporate family including five separate registered national securities exchanges.<sup>7</sup> Following the Transaction, the Exchange continued to operate as a separate self-regulatory organization and with rules, membership rosters and listings distinct from the rules, membership rosters and listings of the other NYSE Exchanges.

Following the Transaction, the Exchange established a rule numbering framework in connection with the migration of the Exchange to the NYSE Pillar platform<sup>8</sup> and has aligned its trading rules with the rules of its affiliated NYSE Exchanges in order to provide consistent standards while operating on the Pillar platform.<sup>9</sup> As part of this effort, the proposal set forth below further harmonizes the Exchange’s rules governing liability of directors and of the Exchange, including liability caps and related reimbursement requirements, with those of NYSE Arca and NYSE National in order to provide uniform standards and requirements.

Currently, Article 3, Rule 19 (Limitation of Liability), generally states that neither the Exchange, nor its affiliates, nor any of the directors, officers, committee members, officials,

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<sup>6</sup> See Securities Exchange Act Release No. 83635 (July 13, 2018), 83 FR 34182 (July 19, 2018) (SR-CHX-2018-004); see also Securities Exchange Act Release No. 83303 (May 22, 2018), 83 FR 24517 (May 29, 2018) (SR-CHX-2018-004).

<sup>7</sup> In addition to NYSE Arca and NYSE National, the Exchange has two other registered national securities exchange affiliates: New York Stock Exchange LLC (“NYSE”) and NYSE American LLC (“NYSE American”) (collectively, the Exchange, NYSE, NYSE Arca, NYSE National, and NYSE American, the “NYSE Exchanges”).

<sup>8</sup> See Securities Exchange Act Release No. 85297 (March 12, 2019), 84 FR 9854 (March 18, 2019) (SR-NYSECHX-2019-03) (Notice of filing and immediate effectiveness of proposed rule change to establish a rule numbering framework).

<sup>9</sup> See Securities Exchange Act Release No. 87264 (October 9, 2019), 84 FR 55345 (October 16, 2019) (SR-NYSECHX-2019-08) (Approval Order of proposal to add rules to support the transition of trading to the Pillar Trading Platform).

employees, contractors or agents of the Exchange or its affiliates would be liable to Participants or persons associated with Participants for any loss arising out of the use of the facilities, systems, services or equipment provided by the Exchange or for any loss associated with an interruption in, or in a failure or unavailability of any such facilities, systems, services or equipment, whether or not the loss resulted from negligence or other unintentional errors omissions or from any other cause within or without the Exchange's control.<sup>10</sup> The rule also states that the Exchange makes no warranty as to results that might be obtained by persons using the Exchange's facilities or services or any data transmitted by or on behalf of the Exchange.<sup>11</sup> Further, the rule bars a Participant from instituting a legal proceeding against the Exchange, its affiliates or their directors, officer, committee members, officials, employees, contractors or agents for actions taken or omitted in connection with the official business of the Exchange, except to the extent that such actions or omissions constitute violations of the Federal securities laws for which a private right of action exists.<sup>12</sup> Finally, the rule provides that any Participant who fails to prevail in a lawsuit or administrative adjudicative proceeding against the Exchange or any of its officers, directors, committee members, employees or agents, shall pay to the Exchange all reasonable expenses, including attorneys' fees, incurred by the Exchange in the defense of such proceeding if such expenses exceed \$50,000.00.<sup>13</sup>

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<sup>10</sup> See Article 3, Rule 19(a).

<sup>11</sup> See Article 3, Rule 19(b).

<sup>12</sup> See Article 3, Rule 19(c).

<sup>13</sup> See Article 3, Rule 19(e).

The Exchange now proposes to replace Article 3, Rule 19 with Rules 13.1 through 13.4 to add rules related to liability of directors and of the Exchange, including the liability caps and reimbursement requirements that are based on the rules of NYSE Arca and NYSE National.<sup>14</sup>

Proposed Rule 13.1 would provide that any provision of the Certificate of Incorporation, Bylaws or the Rules of the Exchange that provides or purports to provide that the members of the Board of Directors shall not be liable to the Exchange or its Participants for monetary damages for breach of fiduciary duty as a Manager shall not be applied in any instance in which such liability arises directly or indirectly as a result of a violation of federal securities laws.<sup>15</sup> The Exchange does not currently have a rule that is analogous to proposed Rule 13.1.

Proposed Rule 13.2(a)<sup>16</sup> would provide that except as otherwise expressly provided in the Exchange's rules, neither the Exchange nor its Directors, officers, committee members, employees or agents shall be liable to the Participants of the Exchange, or successors, representatives or customers thereof, or to persons associated therewith for any loss, expense, damages or claims that arise out of the use or enjoyment of the facilities or services afforded by the Exchange, any interruption in or failure or unavailability of any such facilities or services, or any action taken or omitted to be taken in respect to the business of the Exchange except to the extent such loss, expense, damages or claims are attributable to the willful misconduct, gross negligence, bad faith or fraudulent or criminal acts of the Exchange or its officers, employees or

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<sup>14</sup> See note 5, *supra*.

<sup>15</sup> Proposed Rule 13.1 is substantively identical to NYSE Arca Rule 14.1 and NYSE National 13.1.

<sup>16</sup> Proposed Rule 13.2(a) is substantively identical to NYSE Arca Rule 14.2(a) and NYSE National Rule 13.2(a).

agents acting within the scope of their authority. The limitation of liability set forth in proposed Rule 13.2(a) would not apply to violations of federal securities laws.

Proposed Rule 13.2(a) would further provide that subject to certain exceptions, the Exchange would have no liability to any person for any loss, expense, damages or claims that result from any error, omission or delay in calculating or disseminating any current or closing index value, or any reports of transactions in or quotations for securities traded on the Exchange. The first two paragraphs of proposed Rule 13.2(a) replace Article 3, Rule 19(a) and are based on the first two paragraphs of NYSE Arca Rule 14.2(a) and NYSE National Rule 13.2(a) without any substantive differences. Additionally, proposed Rule 13.2(a) would provide that the Exchange makes no warranty as to results that might be obtained by any person or entity from the use of any data transmitted to disseminated by or on behalf of the Exchange or any reporting authority designated by the Exchange. This paragraph of proposed Rule 13.2(a) replaces Article 3, Rule 19(b), and is based on the third paragraph of NYSE Arca Rule 14.2(a) and NYSE National Rule 13.2(a) without any substantive differences.

Proposed Rule 13.2(b)<sup>17</sup> would provide that the Exchange would compensate Participants for losses whenever custody of an unexecuted order is transmitted by a Participant to or through the Exchange's order routing systems, electronic book or automatic executions systems or to any other automated facility of the Exchange. Under proposed Rule 13.2(b)(1), the Exchange would cap its liability to all Participants at the greater of \$500,000 or the amount recovered under any applicable insurance policy in a single calendar month. The Exchange does not currently have a rule that is analogous to proposed Rule 13.2(b).

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<sup>17</sup> Proposed Rule 13.2(b) is substantively identical to NYSE Arca Rule 14.2(b) and NYSE National Rule 13.2(b).

Proposed Rule 13.2(c)<sup>18</sup> would provide that to the extent that all claims arising out of the use or enjoyment of the facilities afforded by the Exchange cannot be fully satisfied because in the aggregate they exceed the applicable maximum amount of liability provided for, then the Exchange would allocate the maximum amount among all such claims arising during a single calendar month based on the proportion that each such claim bears to the sum of all such claims. The Exchange does not currently have a rule that is analogous to proposed Rule 13.2(c).

Proposed Rule 13.2(d)<sup>19</sup> would provide that in order for a Participant to be eligible to receive compensation, claims must be made in writing and must be submitted no later than 12pm Eastern Time on the next business day following the day on which the use or enjoyment of the Exchange's facilities gave rise to such claims. The Exchange does not currently have a rule that is analogous to proposed Rule 13.2(d).

Proposed Rule 13.3 would establish requirements relating to legal proceedings against directors, officers, employees, agents, or other officials of the Exchange. This proposed rule replaces Article 3, Rule 19(c), and is based on NYSE Arca Rule 14.3 and NYSE National Rule 13.3 without any substantive differences.

Proposed Rule 13.4 would establish the circumstances regarding who is responsible for the Exchange's costs in defending a legal proceeding brought against the Exchange. This proposed rule replaces Article 3, Rule 19(e), and is based on NYSE Arca Rule 14.3 and NYSE National Rule 13.3 without any substantive differences.

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<sup>18</sup> Proposed Rule 13.2(c) is substantively identical to NYSE Arca Rule 14.2(c) and NYSE National Rule 13.2(c).

<sup>19</sup> Proposed Rule 13.2(d) is substantively identical to NYSE Arca Rule 14.2(d) and NYSE National Rule 13.2(d).

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>20</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>21</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest.

The Exchange believes that proposed Rule 13 would remove impediments to and perfect the mechanism of a free and open market and a national market system by harmonizing the Exchange’s rules governing liability of directors, liability of exchange, legal proceedings against Exchange directors, officers, employees, or agents, and Exchange’s costs of defending legal proceedings with the approved rules of its affiliated exchanges, NYSE Arca and NYSE National. The Exchange believes that the proposed rules would further promote just and equitable principles of trade by providing for consistent methodology relating to liability for trading on affiliated exchanges that use the same trading platform. The proposed rule change would therefore promote consistency among the Exchange and its affiliates and make its rules easier to navigate for the public, the Commission, and Participants.

The proposed rule change is also intended to align the liability caps and compensation claims requirements with the caps and requirements currently provided by the Exchange’s affiliates, NYSE Arca and NYSE National, and would therefore provide consistent rules across

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<sup>20</sup> 15 U.S.C. 78f(b).

<sup>21</sup> 15 U.S.C. 78f(b)(5).

those exchanges.<sup>22</sup> Consistent rules, in turn, would simplify the regulatory requirements for Participants of the Exchange that are also members on those affiliated exchanges. The Exchange believes that the proposed rule change would provide greater harmonization among similar rules of NYSE Arca and NYSE National, resulting in greater uniformity and more efficient regulatory compliance. As such, the proposed rule change would 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.

Lastly, the Exchange notes that the proposal to adopt provisions governing liability of directors, liability of exchange, legal proceedings against Exchange directors, officers, employees, or agents, and Exchange's costs of defending legal proceedings are similar to those approved by the Commission for a number of self-regulatory organizations. More specifically, the Commission recently approved the Members Exchange Form 1 application which includes Rule 11.14 (Limitation of Liability),<sup>23</sup> the Long-Term Stock Exchange Form 1 application which includes Rule 11.260 (Limitation of Liability),<sup>24</sup> and the Investors Exchange Form 1 application which includes Rule 11.260 (Limitation of Liability).<sup>25</sup>

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<sup>22</sup> See note 5, supra.

<sup>23</sup> See Securities Exchange Act Release No. 88806 (May 4, 2020), 85 FR 27451 (May 8, 2020) (In the Matter of the Application of MEMX LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission).

<sup>24</sup> See Securities Exchange Act Release No. 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019) (In the Matter of the Application of Long-Term Stock Exchange, Inc.; for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission).

<sup>25</sup> See Securities Exchange Act Release No. 78101 (June 17, 2016), 81 FR 41142 (June 23, 2016) (In the Matter of the Application of: Investors' Exchange, LLC for Registration as a National Securities Exchange; Findings, Opinion, and Order of the Commission).

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because all Participants would be subject to the same limits on liability, liability caps and reimbursement requirements. The proposed rule change is designed to provide greater harmonization among similar rules across the Exchange's affiliates, NYSE Arca and NYSE National, resulting in more efficient regulatory compliance for common members.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>26</sup> and Rule 19b-4(f)(6) thereunder.<sup>27</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such

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<sup>26</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>27</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)<sup>28</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

#### IV. Solicitation of Comments

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

##### Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSECHX-2020-24 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-NYSECHX-2020-24. 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

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<sup>28</sup> 15 U.S.C. 78s(b)(2)(B).

withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSECHX-2020-24, 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>29</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

[FR Doc. 2020-17349 Filed: 8/7/2020 8:45 am; Publication Date: 8/10/2020]

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<sup>29</sup> 17 CFR 200.30-3(a)(12).