

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-89541; File No. SR-CboeEDGA-2020-021)

August 13, 2020

Self-Regulatory Organizations; Cboe EDGA Exchange, Inc.; Notice of Filing of a Proposed Rule Change to Amend the Fifth Amended and Restated Bylaws of the Exchange's Parent Corporation, Cboe Global Markets, Inc.

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

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

Cboe EDGA Exchange, Inc. (the "Exchange" or "EDGA") proposes to amend the Fifth Amended and Restated Bylaws (the "Parent Bylaws") of its parent corporation, Cboe Global Markets, Inc. ("Cboe" or the "Parent"). The text of the proposed amendments to the Parent Bylaws is provided in Exhibit 5.

The text of the proposed rule change is also available on the Exchange's website ([http://markets.cboe.com/us/equities/regulation/rule\\_filings/edga/](http://markets.cboe.com/us/equities/regulation/rule_filings/edga/)), 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.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The proposed rule change amends the Parent Bylaws to improve the governance processes of Cboe, which is organized under the laws of the State of Delaware, and to make certain provisions more consistent with the Delaware General Corporation Law (“DGCL”). The proposed rule change also makes clarifying and cleanup changes to the Parent Bylaws.

Proposed Changes to Article 2 - Stockholders

The majority of the proposed changes are being made to amend Section 2.11 (Nomination of Directors) and Section 2.12 (Notice of Business at Annual Meetings) and are generally designed to provide the Board with the most information and advance notice possible in connection with business and nominations at annual and special meetings. Additionally, the Exchange notes the proposed changes reflect the most up-to-date disclosure requirement practices. The proposed changes also combine the existing separate provisions for director nominations and stockholder proposals into one provision. Particularly, the proposed rule change combines current Sections 2.11 and 2.12 into one provision: proposed Section 2.11 titled “Notice of Business and Nomination of

Directors at Meetings of Stockholders.”<sup>3</sup> Specifically, the proposed rule change delineates proposed Section 2.11 into paragraph (a) governing notice requirements for annual meetings, paragraph (b) governing notice requirements for special meetings<sup>4</sup>, and paragraph (c), which provides for other general procedures and practices in connection with notices. The proposed delineation does not alter the process or definition of either type of meeting, but instead provides for significantly more detailed written notice requirements as well as updates to the manner and timeliness of notices.

First, the proposed change to Section 2.11(a)(i) relocates the provisions regarding “properly brought” business from current Section 2.12, and streamlines such provisions to clearly state that the only business that will be conducted at an annual meeting of the stockholders is business that has properly been brought before the meeting and specifies to be “properly brought” such business must be included in the Corporation’s notice of the meeting and brought pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, (the “Exchange Act”) (or any successor provision of law) and included in the Corporation’s properly brought business. It also proposes to specify the a precise time that the notices must be made by (i.e., delivered to or mailed and received by the Secretary of the Corporation), which is not later than 5:00 p.m. Eastern Time on the 90<sup>th</sup> day nor earlier than the 120<sup>th</sup> day (which are the time frames currently in place) prior to such annual meeting.

Next, the proposed rule change adds greater detail regarding the requirements for proper written notice. Particularly, for notice for stockholder proposals for business other than nominations, (proposed Section 2.11(a)(iii)(A)), the proposed rule change provides that such notice must essentially set forth the same information that would be disclosed in a proxy statement, including:

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<sup>3</sup> The proposed rule change also updates the subsequent section numbering (current 2.13 through 2.16) to reflect this change (proposed 2.12 through 2.15).

<sup>4</sup> See Section 2.3 of the Parent Bylaws for a description of Special Meetings.

- a reasonably brief description of the business desired to be brought before the meeting; the text of the proposal or business (including the text of any resolutions proposed for consideration and, in the event that such business includes a proposal to amend the Certificate of Incorporation or the Bylaws of the Corporation, the language of the proposed amendment);
- the reasons for conducting such business at the meeting; a complete and accurate description of any material interest in such business of such stockholder and any Stockholder Associated Person, individually or in the aggregate, including any anticipated benefit to the stockholder and any Stockholder Associated Person therefrom; and
- all other information relating to such proposed business that would be required to be disclosed in a proxy statement or other filing required to be made by the stockholder or any Stockholder Associated Person in connection with the solicitation of proxies in support of such proposed business pursuant to Regulation 14A under the Exchange Act.

Regarding proposed proper written notice for director nominations (proposed Section 2.11(a)(iii)(B)), the notice must include:

- the name, age, business address and residence address of such nominee, (“Proposed Nominee”) (which, the Exchange notes is currently the case);
- the principal occupation or employment of such nominee (which, the Exchange notes is currently the case)
- a completed written questionnaire with respect to the background and qualifications of such Proposed Nominee, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request;
- the Proposed Nominee’s executed written consent to being named in the proxy statement for the meeting as a director nominee;

- the Proposed Nominee’s completed written representation and agreement, which must be completed in a form required by the Corporation and provided to such stockholder within ten days of receiving such request. Importantly, the Proposed Nominee must represent and agree (1) to a “Voting Commitment” that the Proposed Nominee is not and will not become party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity as to how such Proposed Nominee, if elected as a director, will act or vote on any issue or question (that has not been disclosed to the Corporation). or any Voting Commitment that could limit or interfere with the Proposed Nominee’s ability to comply with fiduciary duties under applicable law, (2) that the Proposed Nominee is not and will not become a party to any agreement, arrangement, or understanding with any person or entity other than the Corporation with respect to any direct or indirect compensation, reimbursement, or indemnification in connection with service or action as a director that has not been disclosed to the Corporation, (3) would comply with all applicable rules of the exchange and Corporation and fiduciary duties under state law, (4) would comply with certain Articles of Incorporation with respect to activities related to any of the Exchanges, (5) intends to serve a full term if elected, and (6) will provide true and correct information in communications to the Corporation and its stockholders and will not omit material information or provide misleading information;
- a description of all direct and indirect compensation and other material monetary agreements, arrangements and understandings during the past three years, and any other material relationships; and
- any other information that would be required to be disclosed statement or other filing required to be made in connection with solicitations of proxies for election of directors in a contested

election pursuant to Section 14 of the Exchange Act (which, the Exchange notes is currently the case).

As to the stockholder providing notice, any Stockholder Associated Person and any Proposed Nominee, (proposed Section 2.11(a)(iii)(C)) the proposed proper written notice must provide:

- name and address of such person (as they appear on the Corporation's books, if applicable) (which, the Exchange notes is currently the case);
- class (which is currently the case) or series and number of shares of capital stock of the Corporation ("Shares") which are, directly or indirectly, owned beneficially and/or of record by such person, the dates such shares were acquired and the investment intent of such acquisition;
- the name of each nominee holder for, and any pledge by such person or any number of, securities of the Corporation owned beneficially, but not of record;
- short interest, including a definition of what constitutes short interest, wherein a person shall be deemed to have a short interest in a security if such person, directly or indirectly, through any contract, arrangement, understanding, or relationship or otherwise has an opportunity to profit or share in profit derived from decreased value of the subject security;
- a description of any agreement, arrangement or understanding, whether written or oral, (including any derivative or short positions, profit interests, options, warrants, convertible securities, stock appreciation or similar rights, hedging transactions, and borrowed or loaned shares (which, the Exchange notes, is currently the case) or similar rights with an exercise or conversion privilege or a settlement payment or mechanism at a price related to any class or series of capital stock of the Corporation or with a value derived in whole or in part from the value of any class or series of capital stock of the Corporation (a "Derivative Instrument")),

in order to mitigate loss to, manage risk or benefit of share price changes for, or increase or decrease voting power with respect to Shares;

- any rights to dividends on the Shares owned beneficially by such person;
- any proportionate interest<sup>5</sup> in Shares or Derivative Instruments by a general or limited partnership or similar entity in which such person (1) is a general partner or beneficially owns an interest in a general partner, or (2) is the manager, managing member, or beneficially owns an interest in such management, of a limited liability company or similar entity;
- any substantial interest (including, without limitation, any existing or prospective commercial, business or contractual relationship with the Corporation), by security holdings or otherwise, in the Corporation or any of its affiliates;
- a complete and accurate description of all agreements, arrangements or understandings, written or oral, and formal or informal, between or among the stockholder providing notice and any of the Stockholder Associated Persons (collectively, the “Stockholders”), or the Stockholders with any Proposed Nominee and any other person in connection with (1) any proxy, contract, arrangement, understanding or relationship where either of the Stockholders have the right to vote any Shares, (2) that such individuals may have reached with any stockholder of the Corporation regarding how such stockholder will vote its shares, take other action in support of any Proposed Nominee, or other action by either of the Stockholders, and (3) any other agreements that would be required to be disclosed by either of the Stockholders or any other person or entity pursuant to a Schedule 13D filed pursuant to the Exchange Act

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<sup>5</sup> Interest referred to throughout the proposed stockholder proper written notice may be direct or indirect.

- a complete and accurate description of any performance-related fees to which such person may be entitled as a result of any increase or decrease in the value of Shares or any Derivative Instruments;
- any investment strategy or objective of those who are not an individual and a copy of the prospectus (and other like documents);
- a complete and accurate description of any pending or threatened legal proceeding in which such person is a party or participant involving the Corporation;
- if any agreement, arrangement or understanding has been made to increase or decrease the voting power of such person with respect to any Shares; and
- any other information relating to such person that would be required to be disclosed in a proxy statement or other filing required to be made in connection with solicitations of proxies for such business or the election of any Proposed Nominee, or is otherwise required, pursuant to Section 14 of the Exchange Act.

Further, regarding proposed proper written notice, proposed Section 2.11(a)(iii)(D) simplifies the language in connection with the current requirement that the Stockholders must represent if they intend to deliver a proxy statement and/or form of proxy to holders to approve or adopt the proposed business, elect the Proposed Nominee, and/or otherwise solicit proxies or votes from stockholders in support of such proposed business or Proposed Nominee, making it easier to understand.

Proposed Section 2.11(a)(iii)(E) provides for the current requirement that the stockholder providing notice must represent that it is a holder of record of stock of the Corporation entitled to vote at such meeting and intends to appear in person, and adds that “in person” may be virtually, in



the case of a meeting held solely by means of remote communication) or by proxy at the meeting to bring such proposed business and/or nominate one or more Proposed Nominee.

Proposed Section 2.11(a)(iii)(F) requires that proper written notice include an acknowledgment that the Corporation does not have to present the business or nomination being brought at the meeting by the stockholder proposing such, if such stockholder does not appear. The proposed rule change also adds that, in addition to the proper written notice information, the Corporation may require any Proposed Nominee to furnish certain other information as the Corporation may reasonably require to determine the eligibility or independence of a Proposed Nominee.

Proposed Section 2.11(b), which, as stated, delineates the provisions governing special meetings of stockholders, amends the procedures governing advance notice of director nominations at a special meeting called by the Board for the election of directors. Currently, notices of a special meeting must be made not less than ninety (90) days nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of stockholders; provided, however, that if the annual meeting is not held within thirty (30) days before or more than seventy (70) days after such anniversary date, then such nomination shall have been delivered to or mailed and received by the Secretary not later than the close of business on the 10th day following the date on which public announcement of the annual meeting date was made. The proposed rule change updates this notice procedure to mirror the same procedural language in proposed Section 2.11(a)(ii) (maintaining the same 90- to 120-day notice requirement), but updates the timing requirements to remove the language regarding the 30-day and 70-day time frames around the anniversary date and provides that, if public announcement of the special meeting and the nominees proposed by the Board of Directors to be elected at such meeting is first made less than ninety (90)

days prior to the date of the special meeting, notice must be made the tenth (10th) day following the day on which such public announcement is first made. The Exchange believes this proposed timing provision simplifies the timing requirement, making it easier to understand and follow, and also provides ample time to provide notice in advance to stockholders of any scheduled special meeting. Proposed Section 2.11(b) also provides that proper written notice of a special meeting must comply with the requirements, as proposed, laid out in Section 2.11(a)(iii).

Proposed Section 2.11(c) provides, generally, for other procedures and practices in connection with notices, as well as certain defined terms. Proposed Section 2.11(c)(i) provides that a stockholder providing notice must update any notice, if necessary, so that the information provided or required to be provided in a notice is true and correct (A) as of the record date for determining the stockholders entitled to receive notice of the meeting and (B) as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof). If an update is required to be made as of the record date for determining the stockholders entitled to receive notice of the meeting then the notice of update must be made not later than five business days after the record date for determining the stockholders entitled to receive notice of such meeting. If an update is required to be made as of the date that is ten business days prior to the meeting (or any postponement, adjournment or recess thereof), then the notice of update must be made no later than seven business days prior to the date for the meeting, if practicable, or, if not practicable, on the first practicable date prior to the meeting or any adjournment, recess or postponement thereof. Proposed Section 2.11(c)(ii) provides that if any information submitted pursuant to Section 2.11 is inaccurate in any respect, such information may be deemed not to have been provided in accordance with the Parent Bylaws. As proposed, the stockholder providing the notice has an obligation to notify the Secretary in writing at the principal executive offices of the Corporation of any inaccuracy or

change in any such information within two business days of becoming aware of such inaccuracy or change. Additionally, within seven days upon delivery of a written request by the Secretary, the Board of Directors (or a duly authorized committee thereof), any such stockholder is obliged to provide: (A) written verification, reasonably satisfactory to the Board of Directors, any committee thereof or any authorized officer of the Corporation, to demonstrate the accuracy of any information submitted by the stockholder pursuant to Section 2.11, and (B) a written update of any information pursuant to Section 2.11 as of an earlier date. If the stockholder fails to provide such written verification within such period, the information as to which written verification was requested may be deemed not to have been provided in accordance with Section 2.11. Proposed Section 2.11(c)(iii) provides that a stockholder providing notice must also comply with all applicable requirements of state law and all applicable requirements of the Exchange Act and the rules and regulations thereunder, however, references to the Exchange Act and its rules and regulations will not limit the requirements applicable to stockholder proposals or director nominations pursuant to Section 2.11. Proposed Section 2.11(c)(iv) updates current language governing failure for the proposing stockholder to appear by adding that virtual appearances are acceptable when such meeting is being held remotely, as well as the flexibility for the Corporation to waive the appearance requirement. The rule change updates this provision and adds this flexibility in light of the ongoing Covid-19 pandemic and the consequential remote working status for many companies, including Cboe. Proposed Section 2.11(c)(v) adds the definition of key terms, along with current definitions, for clarity. Specifically, the proposed rule change defines an “affiliate” and “associate” as having the respective meanings set forth in Rule 12b-2 under the Exchange Act and “Stockholder Associated Person” to mean: any person who is a member of a “group” (used in Rule 13d-5 under the Exchange Act) with or otherwise acting in concert with such stockholder providing notice; any

beneficial owner of shares of stock of the Corporation owned of record or beneficially by such stockholder (other than a stockholder that is a depository); any person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, such stockholder or such Stockholder Associated Person and beneficially owns, directly or indirectly, shares of stock of the Corporation; any person that directly, or indirectly through one or more intermediaries, controls such stockholder or any Stockholder Associated Person; and any participant (as defined in paragraphs (a)(ii)-(vi) of Instruction 3 to Item 4 of Schedule 14A, or any successor instructions) with such stockholder or other Stockholder Associated Person in respect of any proposals or nominations, as applicable.

The Exchange notes that many of the proposed rule changes to proposed Section 2.11 are consistent with the bylaws of Cboe's peer financial market/services corporations, Nasdaq, Inc ("Nasdaq"),<sup>6</sup> Intercontinental Exchange ("ICE"),<sup>7</sup> and/or the CME Group, Inc. ("CME"),<sup>8</sup> including:

- the proposed disclosures required under Regulation 14A for proposed business other than director nominations; director questionnaires;
- consent to be named in the proxy statement as a director nominee;
- a Voting Commitment;

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<sup>6</sup> See By-laws of Nasdaq, Inc., available at [https://listingcenter.nasdaq.com/assets/RuleBook/NASDAQ/rules/Nasdaq\\_Inc\\_Corporate\\_Organization\\_Nasdaq\\_Inc.pdf](https://listingcenter.nasdaq.com/assets/RuleBook/NASDAQ/rules/Nasdaq_Inc_Corporate_Organization_Nasdaq_Inc.pdf).

<sup>7</sup> See Eighth Amended and Restated Bylaws of Intercontinental Exchange, Inc., available at [https://s2.q4cdn.com/154085107/files/doc\\_downloads/intercontinental\\_exchange/bylaws-eighth-amended.pdf](https://s2.q4cdn.com/154085107/files/doc_downloads/intercontinental_exchange/bylaws-eighth-amended.pdf).

<sup>8</sup> See Fifteenth Amended and Restated Bylaws of CME Group Inc., available at <https://www.cmegroup.com/rulebook/files/CME-Bylaws.pdf>.

- disclosure of compensation arrangements in connection with service as a director;
- agreement to comply with applicable regulations, organizational documents and policies;
- representation of intent to serve a full term; commitment to provide true and correct facts and to not omit material facts;
- nominee disclosures for contested elections under Section 14;
- required disclosure by a proposing stockholder's 13D group members and related parties;
- disclosure of rights to dividends, short interest, interests held through controlled partnerships or LLCs, and in the Company other than Company common stock;
- disclosure of agreements/arrangements in connection with conferring proxy authority, with any other stockholder regarding voting or supporting the proposal/nominee, with increasing or decreasing voting power, and agreements required to be disclosed on Schedule 13D;
- disclosure of performance-related fees related to the Company's performance;
- disclosure of investment strategy and inclusion of prospectus/offering memorandum;
- disclosure of pending or threatened litigation;
- Special meeting provisions;
- Obligation to update and correct disclosures; and
- Express obligation to appear to present the proposal/nominee.

Additionally, the proposed rule change moves language currently in Section 2.10 providing that the number of nominees for director may not exceed the number of directors to be elected at any meeting to proposed Section 2.11(a) (annual meetings) and Section 2.11(b) (special meetings), therefore adding clarity to the updated Section 2.11 format that this provision continues to apply for both annual and special meetings. The proposed rule change to Section 2.10 also simplifies current language that provides an election may proceed if proper notice is made and received and adds

language that nominations may be withdrawn on or prior to the tenth day before the date the Corporation first mails its notice of meeting for such election.

The proposed rule change also amends Section 2.1 (Place of Meetings) by removing language that requires stockholder meetings to be held at the principal place of business of the Company if no location is designated. The Exchange believes that it is appropriate for the Board to retain both control and flexibility over the location and timing of stockholder meetings. The proposed rule change amends Section 2.2 (Annual Meeting) and Section 2.3 (Special Meeting) to provide that the Board may postpone, reschedule or cancel any previously-scheduled annual meeting or special meeting, respectively. The proposed rule change also updates Section 2.7 (Adjournments) to provide that only the presiding person of a stockholder meeting can adjourn the meeting in the absence of a quorum. The proposed changes are intended to provide the Board the flexibility to postpone, recess, reschedule or cancel a stockholder meeting. The Exchange also notes that the proposed rule changes to Sections 2.2, 2.3, and 2.7 are consistent with the bylaws of Cboe's peer corporation, Nasdaq.<sup>9</sup>

The proposed rule change also makes updates to reflect the current best corporate governance practices to certain Sections under Article 2. In particular, it updates the language in Section 2.5 (Voting List) regarding who is required to prepare the voting list. Section 2.5 currently provides that officer who has charge of the stock ledger prepares the voting list and the proposed rule change updates this to provide that the Corporation prepares the voting list. The proposed rule change is consistent with the DGCL and reflects current best practice. The proposed rule change also amends current Section 2.13 (Organization) (proposed Section 2.12), which currently states that that the Board of Directors may appoint any stockholder to act as chairman of any meeting in the

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<sup>9</sup> See supra note 6.

absence of the Chairman of the Board, to instead provide that that the Board of Directors may appoint any director of the Corporation to act as chairman of any meeting in the absence of the Chairman of the Board. Also, current Section 2.16 (Conduct of Meetings) (proposed Section 2.15) makes certain changes to expand the procedural authority of the presiding officer of any stockholder meeting, including the right to recess and/or adjourn meetings for any or no reason, and the determination of when the polls will open and close for any given matter to be voted on at the meeting, the removal of any stockholder or individual who refuses to comply with meeting procedures, rules, or guidelines, the restrictions on the use of audio and/or video recording devices and cell phones. This is consistent with best practice and ensures that the presiding officer has the flexibility to take measures, as needed, that ensure meetings are conducted in the most appropriate manner.

#### Proposed Changes to Article 3 - Directors

The proposed rule change amends Section 3.5 (Vacancies) to provide that that vacancies on the Board may be filled exclusively by a majority of the directors. The Exchange notes that stockholders have a common law right under Delaware law to fill director vacancies, unless the Company's Charter or Bylaws explicitly give the Board exclusive authority, therefore, the proposed change is designed to make this right exclusive to the Board. The proposed rule change is consistent with the bylaws of Cboe's peer corporations, Nasdaq and ICE.<sup>10</sup> The proposed rule change to Section 3.10 (Special Meetings) would allow special meetings of the Board to be called with less than 24 hours' notice. Currently, Section 3.10 requires at least 24 hours' notice to directors of special Board meetings. However, there may be circumstances that necessitate an emergency meeting of the Board with less than 24 hours' notice (e.g., in relation to a pending transaction), and

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<sup>10</sup> See supra notes 6 and 7.

therefore, the proposed changes would allow notice on a shorter time frame if necessary and appropriate under the circumstances. The proposed changes to Section 3.13 (Action by Consent) updates language regarding routine filing of consents following an action by the Board. Specifically, the proposed change updates the consents to reflect the same electronic form as minutes are maintained, which is consistent with recent amendments to the DGCL, reflects current best practice.

The proposed change also adds Section 3.15 (Emergency Bylaws). Specifically, the proposed Section 3.15 provides that, notwithstanding anything to the contrary in the Certificate of Incorporation or these Bylaws, in the event there is any emergency, disaster or catastrophe, as referred to in Section 110 of the DGCL, or other similar emergency condition (each, an “emergency”), and a quorum of the Board of Directors cannot readily be convened for action, this Section 3.15 shall apply., including:

- Any director or Chief Executive Officer, President, Chief Operating Officer, Chief Financial Officer, Treasurer or Secretary of the Corporation may call a meeting of the Board of Directors by any feasible means and with such advance notice as circumstances permit in the judgment of the person calling the meeting. Neither the business to be transacted nor the purpose of any such meeting need be specified in the notice thereof.
- One-third (1/3) of the directors shall constitute a quorum, which may in all cases act by majority vote.
- Directors may take action to appoint one or more of the director or directors to membership on any standing or temporary committees of the Board of Directors as they deem advisable. Directors may also take action to designate one or more of the officers of the Corporation to serve as directors of the Corporation while this Section 3.15 applies.



- To the extent that it considers it practical to do so, the Board of Directors shall manage the business of the Corporation during an emergency in a manner that is consistent with the Certificate of Incorporation and Bylaws. It is recognized, however, that in an emergency it may not always be practical to act in this manner and this Section 3.15 is intended to and does hereby empower the Board of Directors with the maximum authority possible under the DGCL, and all other applicable law, to conduct the interim management of the affairs of the Corporation in an emergency in what it considers to be in the best interests of the Corporation.
- No director, officer or employee acting in good faith in accordance with this Section 3.15 or otherwise pursuant to Section 110 of the DGCL shall be liable except for willful misconduct.
- This Section 3.15 shall continue to apply until such time following the emergency when it is feasible for at least a majority of the directors of the Corporation immediately prior to the emergency to resume management of the business of the Corporation.
- The Board of Directors may modify, amend or add to the provisions of this Section 3.15 in order to make any provision that may be practical or necessary given the circumstances of the emergency.
- The provisions of this Section 3.15 shall be subject to repeal or change by further action of the Board of Directors or by action of the stockholders, but no such repeal or change shall modify the provisions of paragraph (e) of this Section 3.15 with regard to action taken prior to the time of such repeal or change.

The Exchange notes that these proposed changes are largely consistent with the DGCL and are designed to allow the Board and the Corporation to continue to function in the case of an

emergency, such as a pandemic or an act of terrorism. The Exchange believes the ongoing COVID-19 pandemic, as well as similar potential events, demonstrate the need for Emergency Bylaws and notes that a number of companies are adopting (or at least considering) emergency bylaws to relax Board requirements when directors may be unavailable due to emergency conditions, such as the pandemic.

#### Proposed Changes to Article 4 – Committees

The proposed rule change to Section 4.1 (Designation of Committees) adds language that provides the Board with additional rights in their ability to designate committees and committee alternates and specifies that such committees may exercise all powers and authority of the Board in the management of the business. Specifically, the proposed language provides that the Board of Directors may designate one or more committees, each committee to consist of one or more of the directors of the Corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of the committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he, she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in place of any such absent or disqualified member. Any such committee, to the extent permitted by law and to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the Corporation, and may authorize the seal of the Corporation, if any, to be affixed to all papers which may require it. The proposed rule change provides additional detail regarding the specific authority of the Board to designate members of the committees and their general powers and authority to manage the Corporation, as well as the power

invested in the voting members regarding the appointment of a member of the Board to act in a circumstance of disqualification. The proposed language is consistent with the DGCL and reflects current best practice.

The proposed rule changes to Section 4.2 (The Executive Committee) removes language that lists out specific actions or matters that are not to be handled by the Executive Committee under Delaware law, including amending the Certificate of Incorporation, adopting an agreement of merger or consolidation, approving a sale, lease or exchange of all or substantially all of the Corporation's property and assets, or approval of a dissolution of the Corporation or revocation of a dissolution. The proposed change, instead, replaces this list with reference to matters under the DGCL to be submitted to stockholders for approval. The Exchange believes that the proposed change, while being consistent with the DGCL, removes ambiguous and potentially unnecessarily limiting language that lists the circumstances that could not be handled by the Executive Committee that required stockholder approval and replaces it with broader reference to the DGCL.

The proposed change to Section 4.5 (The Nominating and Governance Committee) reduces the minimum size requirement of the Nominating and Governance Committee ("N&G Committee") from a minimum of five members to three members. This proposed rule change is intended to provide the Board additional flexibility when populating the N&G Committee and is consistent with the minimum number of members required on other Board committees.<sup>11</sup>

#### Proposed Changes to Article 8 – Notices

The proposed rule change in Section 8.1 (Notices) replaces language in paragraph (e) that requires that stockholders opt-in to email notice with language that instead allows stockholders to opt-out of email notice or not receive email notice if such notice is prohibited by the DGCL. The

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<sup>11</sup> See e.g., Sections 4.3 and 4.4 of the Parent Bylaws.

proposed rule change also updates Section 8.2 (Electronic Notice) to reflect this change. The proposed rule change also removes the provision in Section 8.1 paragraph (c) which provides that notice may be given by messenger or overnight courier service if the delivery method does not require payment of the messenger or courier service fee to deliver the notice by the person to whom the notice is addressed. The proposed rule change then adds to paragraph (c) that notice is deemed to have been given via this method at the earlier of when the notice is received or left at the stockholder's or director's address. The proposed change is consistent with the DGCL.

#### Proposed Rule Changes to Article 11 (Forum for Adjudication of Disputes)

The proposed rule changes to Article 11 add clarifying provisions and additional detail regarding the exclusive forum. The proposed changes are designed to update the exclusive forum bylaw to reflect current best practices. Specifically, the proposed rule change adds that, among the existing actions listed, the Court of Chancery of the State of Delaware will be the sole and exclusive forum for any action asserting an "internal corporate claim" (defined in the DGCL). The proposed rule change also provides that, in the event that the Delaware Court of Chancery lacks subject matter jurisdiction over any such action or proceeding, the sole and exclusive forum for such action or proceeding shall be another state or federal court located within the State of Delaware. The proposed rule change provides that any person or entity purchasing or otherwise acquiring any interest in shares of capital stock of the Corporation is deemed to have notice of and consented to the provisions of Article 1, including exclusive personal jurisdiction in the Delaware Court or Chancery and having service of process made, even if an action (within the scope of Article 11) is filed in a court other than a court located within the State of Delaware. Additionally, the proposed rule change makes clear that the existence of any prior consent to, or selection of, an alternative forum by the Corporation shall not act as a waiver of the Corporation's ongoing consent right in

Article 11 and that failure to enforce the foregoing provisions would cause the Corporation irreparable harm and the Corporation is entitled to equitable relief, including injunctive relief and specific performance, to enforce Article 11. It also clarifies that a claim may be made against the Corporation or any current or former director, officer, other employee, agent or stockholder of the Corporation, and may arise pursuant to the Certificate of Incorporation or these Bylaws, in addition to the DCGL. The proposed rule change is in line with current best practice, and, additionally, the bylaws of Cboe's peer, CME,<sup>12</sup> currently provide for similar language related to foreign actions and specific performance.

Finally, the proposed rule change makes non-substantive edits throughout the above listed Articles of the Parent Bylaws, including updating paragraph lettering and numbering, simplifying language in order to better align it with plain English, update the terms Board of Directors and Exchange Act to be uniform throughout the bylaws (e.g., as opposed to just "Board", or "Securities and Exchange Act", and the other versions of the Act's name).

## 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>13</sup> Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(1) of the Act,<sup>14</sup> which provides that the Exchange be organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by

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<sup>12</sup> See supra note 8.

<sup>13</sup> 15 U.S.C. 78f(b).

<sup>14</sup> 15 U.S.C. 78f(b)(1).

the Exchange's Trading Permit Holders and persons associated with its Trading Permit Holders with the Act, the rules and regulations thereunder, and the rules of the Exchange.

In particular, the Exchange believes the proposed changes overall are designed to improve the governance process of Cboe, as well as update the Parent Bylaws, where applicable, to reflect and track the DCGL and current best practices. Moreover, the Exchange does not believe the proposed rule changes are controversial and indeed are common among public companies, including its peers, Nasdaq, ICE and CME.

Particularly, the proposed rule changes to proposed Section 2.11 in connection with providing notice regarding business and director nominations at annual and special meetings, will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act, because such proposed changes are generally designed to strengthen these provisions by requiring notices (including updates to notices) to disclose to the Board more detailed information than currently required. In this manner, the proposed detailed disclosure requirements would provide the Board with substantially more information by which they may make complete and informed decisions and most appropriately address business before the Board. The Exchange also believes that the proposed rule changes in connection with timely notice, including the 10 days' advanced notice of director nominations (via the required director questionnaire), procedures governing advance notice of director nominations at a special meeting, an obligation to update and correct the notice up to 7 days prior to a meeting, and updated timing regarding the 10-day notice of a special meeting less than 90 days from the scheduled meeting, will allow the Board the appropriate time needed to consider and prepare to address all business, nominations, and other issues to be presented before it. As such, the proposed rule changes will ensure that the Board is able to continue to oversee the orderly

operation of the corporation, including the Exchange, in a manner the it deems most appropriate. Additionally, and as listed in detail above, the vast majority of the proposed notice requirements are consistent with the bylaws of Cboe's peer corporations, CME, ICE, and/or Nasdaq, as well as in line with current best practices. The proposed changes are also all consistent with the DCGL.

Moreover, the proposed changes are intended to provide the Board with additional flexibility and more appropriate governance procedures in addressing various circumstances, which will enable the Exchange to continue to be organized and have the capacity to be able to carry out the purposes of the Act. In particular, the proposed rule changes would allow the Board to retain both control and flexibility over the location and timing of stockholder meetings, would allow the Board to postpone, recess, reschedule or cancel a stockholder meeting, would allow only the presiding person of a stockholder meeting to adjourn and reset a stockholder meeting date in the absence of quorum, would allow for shorter notice in order for the Board to call a special meeting, would allow the Board and the Corporation to continue to function (including remotely) in the case of an emergency, such as the ongoing COVID-19 pandemic, and would provide the Board with increased flexibility in populating the Nomination and Governance Committee. Each of these proposed changes is designed to assist the Exchange in most effectively and efficiently managing evolving corporate matters as they arise, many of which are highly complex and may be time sensitive. Additionally, as indicated above, a majority of the proposed changes align certain Sections in the Parent Bylaws with current best practices and with the DCGL (as well as a change in accordance with Delaware common law) and are also consistent with bylaw provisions of Cboe's peer corporations. Accordingly, the Exchange believes the proposed changes are widely accepted as appropriate governance measures.

Lastly, the proposed nonsubstantive changes to the Parent Bylaws provide additional clarity within the Parent Bylaws and make them easier to understand. By making certain provisions read more in plain English, updating paragraph lettering and numbering, making certain terms uniform and simplifying language throughout, the proposed nonsubstantive changes benefit investors by providing more clarity and reduced complexity within the Parent Bylaws and making the Parent Bylaw [sic] better organized and easier to follow thus reducing potential investor confusion.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed rule change is not intended to address competitive issues but rather is concerned solely with updating the Parent Bylaws to reflect the changes described above.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- A. by order approve or disapprove such proposed rule change, or
- B. institute proceedings to determine whether the proposed rule change should be 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-CboeEDGA-2020-021 on the subject line.

##### Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-CboeEDGA-2020-021. 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 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-CboeEDGA-2020-021 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>15</sup>

J. Matthew DeLesDernier  
Assistant Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).