

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-100438; File No. SR-ISE-2024-12)

June 26, 2024

Self-Regulatory Organizations; Nasdaq ISE, LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change to Adopt Rules to List and Trade FLEX Options

I. Introduction

On March 11, 2024, Nasdaq ISE, LLC (“ISE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to adopt rules that will govern the listing and trading of flexible exchange options (“FLEX Options”). The proposed rule change was published for comment in the Federal Register on March 21, 2024.<sup>3</sup> On May 9, 2024, pursuant to Section 19(b)(2) of the Act,<sup>4</sup> the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.<sup>5</sup> The Commission has received no comment letters on the proposed rule change. The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>6</sup> to determine whether to approve or disapprove the proposed rule change.

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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> See Securities Exchange Act Release No. 99825 (March 21, 2024), 89 FR 22294 (March 29, 2024) (SR-ISE-2024-12) (Notice of Filing of Proposed Rule Change To Adopt Rules to List and Trade FLEX Options) (“Notice”).

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

<sup>5</sup> See Securities Exchange Act Release No. 100086, 86 FR 42528 (May 15, 2024). The Commission designated June 27, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

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

## II. Description of the Proposed Rule Change<sup>7</sup>

The Exchange has proposed to adopt rules in new Options 3A that will govern the listing and trading of FLEX Options on the Exchange's electronic market.<sup>8</sup> The proposed electronic trading of FLEX Options will allow investors to tailor certain contract terms of exchange-listed equity and index options, and, as stated by the Exchange, are designed to provide investors with greater flexibility in selecting the terms of options within the parameters of the Exchange's proposed rules.<sup>9</sup>

The Exchange states in its proposal that it will allow for the trading of FLEX Options on its electronic market in a substantially similar manner as Cboe Exchange, Inc.'s ("Cboe") electronic trading of FLEX Options<sup>10</sup> with certain intended differences to align its proposal with its current electronic system ("System")<sup>11</sup> and auction behavior, as well as to provide increased consistency for members trading FLEX Options and non-FLEX Options on the Exchange and to account for differences in the proposed scope and operation of FLEX trading on the Exchange as compared to Cboe FLEX options trading.<sup>12</sup>

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<sup>7</sup> For a complete description of the Exchange's proposal, see the Notice, supra note 3.

<sup>8</sup> See note 3, supra.

<sup>9</sup> Id.

<sup>10</sup> Cboe offers both electronic and open outcry FLEX Options. See Notice, 89 FR at 22295.

<sup>11</sup> The term "System" under the Exchange rules is defined as the electronic system operated by the Exchange that receives and disseminates quotes, executes orders, and reports transactions. See Options 1, Section 1(a)(50).

<sup>12</sup> See Cboe Rules 4.20-4.22 and 5.70-5.75. As described in more detail in the Notice, the Commission first approved trading of FLEX Options based on the Standard and Poor's Corporation 500 and 100 Stock Indexes on Cboe's predecessor, the Chicago Board Options Exchange, Inc., in February 1993. See Notice, 89 FR at 22294, see also Securities Exchange Act Release No. 31920 (February 24, 1993), 58 FR 12280 (March 3, 1993) (SR-CBOE-92-17) (Order Approving and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 1, 2, 3, and 4 to Proposed Rule Changes by the Chicago Board Options Exchange, Inc., Relating to FLEX Options) ("FLEX Options Approval Order"). In 1996, the Commission approved the trading of additional FLEX Options on specified equity securities. See Notice, 89 FR at 22294, see also Securities Exchange Act Release No. 36841 (February 14, 1996), 61 FR 6666 (February 21, 1996) (SR-CBOE-95-43) (SR-PSE-95-24) (Order Approving Proposed Rule Changes and

The Exchange states that to provide investors with the flexibility to designate certain of the terms of the options, and to accommodate other distinct features of FLEX Options and the way in which they are traded, the Exchange has proposed new rules Options 3A, Sections 1 through 19 that will only be applicable to the trading of FLEX Options.<sup>13</sup> The proposed rules also make clear that unless otherwise provided in Options 3A, the trading of FLEX Options will also be subject to all other Exchange rules applicable to the trading of options on the Exchange.<sup>14</sup> The Exchange states that proposed Options 3A, Section 1(a) setting forth the applicability of Exchange Rules will make clear that unless otherwise provided in proposed Options 3A, the Exchange's existing rules will continue to apply to FLEX Options, and this will provide consistency for Members<sup>15</sup> trading both FLEX Options and non-FLEX Options on the Exchange.<sup>16</sup> Proposed Options 3A, Section 1(b) also contains the definitions that will apply to the proposed FLEX Option rules.<sup>17</sup>

Proposed Options 3A, Section 2 sets forth the trading hours for FLEX Options, which will be the same as the trading hours for corresponding non-FLEX Options, as set forth in Options 3, Section 1, except the Exchange may determine to narrow or otherwise restrict the trading hours for FLEX Options.<sup>18</sup> As such, the Exchange states that the trading hours for FLEX Options would be 9:30 a.m. to 4:00 p.m. Eastern time ("ET"), except for FLEX Options on fund

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Notice of Filing and Order Granting Accelerated Approval of Amendments by the Chicago Board Options Exchange, Inc. and the Pacific Stock Exchange, Inc., Relating to the Listing of Flexible Exchange Options on Specified Equity Securities).

<sup>13</sup> See Notice, 89 FR at 22295.

<sup>14</sup> See Notice, 89 FR at 22295.

<sup>15</sup> See ISE General 1, Section 1(a)(13) (defining "Member" as "an organization that has been approved to exercise trading rights associated with Exchange Rights.").

<sup>16</sup> See Notice, 89 FR at 22314.

<sup>17</sup> See Notice, 89 FR at 22295.

<sup>18</sup> See id.

shares, index-linked securities and certain broad based indexes, as each are defined under Exchange rules, that will be able to trade until 4:15 p.m. ET.<sup>19</sup> The Exchange states that specifying the trading hours for FLEX Options in proposed Options 3A, Section 2(a) will provide increased clarity that the trading hours for FLEX Options will generally be the same as the trading hours for corresponding non-FLEX Options as set forth in Options 3, Section 1.<sup>20</sup>

As set forth more fully in the Notice, proposed Options 3A, Section 3 provides the classes, permissible series, terms, and fungibility of a FLEX Option on the Exchange.<sup>21</sup> Specifically, the Exchange sets forth provisions that would allow it to authorize for trading a FLEX Option class on any equity security or index if the Exchange may authorize for trading a non-FLEX Option class on that equity security or index, even if the Exchange does not list that non-FLEX Option class.<sup>22</sup> Additionally, the Exchange may approve a FLEX Option series for trading in any such authorized FLEX Option class.<sup>23</sup> However, the following stipulations would apply: (1) the Exchange will only permit trading in a put or call FLEX Option series that does not have the same exercise style, same expiration date, and same exercise price as a non-FLEX Option series on the same underlying security or index that is already available for trading; and (2) a FLEX Order for a FLEX Option series may be submitted on any trading day prior to the expiration date.<sup>24</sup>

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<sup>19</sup> See id.

<sup>20</sup> See Notice, 89 FR at 22314.

<sup>21</sup> See Notice, 89 FR at 22295-22296.

<sup>22</sup> See Notice, 89 FR at 22295. See also proposed Options 3A, Section 3(a).

<sup>23</sup> See Notice, 89 FR at 22295. See also proposed Options 3A, Section 3(b).

<sup>24</sup> See Notice, 89 FR at 22295. See also proposed Options 3A, Section 3(b). The Exchange also clarifies that FLEX Options series are not pre-established. See Notice, 89 FR at 22295.

Proposed Options 3A, Section 3(c) further specifies the terms that must be included in a FLEX Order: (1) underlying equity security or index, as applicable (the index multiplier for FLEX Index Options is 100); (2) type of option (i.e., put or call); (3) exercise style, which may be American-style or European-style; (4) expiration date, which may be any business day (specified to the day, month, and year) no more than 15 years from the date on which a Member submits a FLEX Order to the System; (5) settlement type for the FLEX Equity Option<sup>25</sup> or FLEX Index Option, as applicable; and (6) exercise price, which may be in increments no smaller than \$0.01.<sup>26</sup>

As described in more detail in the notice, the Exchange is also proposing to allow for cash settlement of certain qualifying FLEX Equity Options with an underlying security that is an ETF.<sup>27</sup> The Exchange states that cash-settled FLEX ETF Options will be subject to the same trading rules and procedures that govern the trading of other FLEX Options on the Exchange and that both NYSE American LLC (“NYSE American”) and Cboe allow for cash-settled ETF Options.<sup>28</sup> The Exchange states that introducing cash-settled FLEX ETF Options will increase order flow to the Exchange, increase the variety of options products available for trading, and provide a valuable tool for investors to manage risk.<sup>29</sup> Additionally, the Exchange is proposing to allow for FLEX Index Options to be settled in U.S. dollars, and may be either a.m.-settled

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<sup>25</sup> As proposed, FLEX Equity Options can only be physically settled except for a small subset of FLEX Equity Options with an underlying security that is an exchange trade fund (“ETF”) that meets certain criteria and can also be cash settled. See proposed Options 3A, Section 3(c)(5)(A)(ii). See also notes 27-29, infra and accompanying text.

<sup>26</sup> See Notice, 89 FR at 22295, 22296. See also proposed Options 3A, Section 3(c).

<sup>27</sup> See Notice, 89 FR at 22296, 22309-22313, and proposed Options 3A, Section 3(c)(5)(A)(ii).

<sup>28</sup> See Notice, 89 FR at 22309. See NYSE American Rule 903G and Cboe Rule 4.21(b)(5)(A). Proposed Options 3A, Section 3(c)(5)(A)(i) provides that other than as allowed under proposed Options 3A, Section 3(c)(5)(A)(ii) and (iii), FLEX Options are settled with physical delivery of the underlying security.

<sup>29</sup> See Notice, 88 FR at 22320.

(with exercise settlement value determined by reference to the reported level of the index derived from the reported opening prices of the component securities) or p.m.-settled (with exercise settlement value determined by reference to the reported level of the index derived from the reported closing prices of the component securities).<sup>30</sup>

Furthermore, proposed Options 3A, Section 3(d) covers fungibility of FLEX Options and provides that if the Exchange lists for trading a non-FLEX Option series with identical terms as a FLEX Option series, all existing open positions established under the FLEX trading procedures will become fully fungible with transactions in the identical non-FLEX Options series and the FLEX Option would from then on trade under the non-FLEX Option rules and procedures.<sup>31</sup> The Exchange states that it believes these provisions will provide greater transparency around the Exchange’s listing standards for FLEX Option classes and FLEX Option series, and remain consistent with the Act by preventing new FLEX Option positions from being opened when a non-FLEX Option with the same terms is listed for trading.<sup>32</sup> However, the Exchange, unlike Cboe, will not permit intraday additions of a non-FLEX Options series with identical terms to that of an already-listed FLEX Options series for the remainder of the trading day.<sup>33</sup> The Exchange notes, in its proposal, that the non-FLEX Options series could be added overnight and begin trading the next trading day at which time all identical FLEX Options would become fully

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<sup>30</sup> See Notice, 89 FR at 22296 and proposed Options 3A, Section 3(c)(5)(B). The Exchange notes that Cboe recently received approval of a pilot program to list p.m.-settled FLEX Index Options whose exercise settlement value is derived from closing prices on the last trading day prior to expiration that expire on or within two business days of a third Friday-of-the-month expiration day for a non-FLEX Option (“FLEX PM Third Friday Options”), and the Exchange is proposing to do the same. See also Securities Exchange Act Release No. 99222 (December 21, 2023), 88 FR 89771 (December 28, 2023) (SR-CBOE-2023-018).

<sup>31</sup> See Notice, 89 FR at 22296. See also proposed Options 3A, Section 3(d).

<sup>32</sup> See Notice, 89 FR at 22314.

<sup>33</sup> See Notice, 89 FR at 22296. See also proposed Options 3A, Section 3(d)(2).

fungible with the non-FLEX Option and any further trading would be under non-FLEX Option trading rules.<sup>34</sup>

As proposed, bids and offers for FLEX Options must be expressed in U.S. dollars and decimals in the minimum increments as set forth in proposed Options 3A, Section 5.<sup>35</sup> Proposed Options 3A, Section 5 provides that the Exchange will determine the minimum increment for bids and offers on FLEX Options on a class-by-class basis, which may not be smaller than \$0.01.<sup>36</sup> The Exchange states this requirement will provide clear, transparent language regarding how bids and offers for FLEX Options must be expressed and will provide clarity to market participants regarding how the Exchange will determine the minimum increments for bids and offers on FLEX Options.<sup>37</sup>

As described in more detail in the Notice and in proposed Options 3A, Section 6(a), the Exchange may determine to make the order types and times-in-force, respectively, in Options 3, Section 7 available on a class or System basis for FLEX Orders.<sup>38</sup> This would provide the Exchange with the authority to make certain order types and times-in-force available on a class or System basis for FLEX Options, similar to its ability to do so for non-FLEX Options pursuant to Options 3, Section 7.<sup>39</sup> Additionally, the following order and quote protocols will be available for FLEX Orders, FLEX auction notifications, and FLEX auction responses: Financial

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<sup>34</sup> See Notice, 89 FR at 22296 n.38.

<sup>35</sup> See Notice, 89 FR at 22297. See also proposed Options 3A, Section 4.

<sup>36</sup> See Notice, 89 FR at 22297. See also proposed Options 3A, Section 5.

<sup>37</sup> See Notice, 89 FR at 22315.

<sup>38</sup> See Notice, 89 FR at 22297. See also proposed Options 3A, Section 6(a).

<sup>39</sup> See Notice, 89 FR at 22297.

Information eXchange (“FIX”),<sup>40</sup> Ouch to Trade Options (“OTTO”),<sup>41</sup> and Specialized Quote Feed (“SQF”).<sup>42</sup> The Exchange states that this is consistent with the Exchange’s existing authority to designate the availability of order types and times-in-force for non-FLEX Orders and will provide greater transparency as to which existing order and quote protocols would be available for FLEX Orders, FLEX auction notifications, and FLEX auction responses.<sup>43</sup>

Regarding complex orders for FLEX Options, proposed Options 3A, Section 7 provides the Exchange with the ability to make complex orders, including a Complex Options Order, Stock-Options Order, and Stock-Complex Orders available for FLEX trading.<sup>44</sup> The Exchange further notes that it is not proposing to change the complex ratio requirements for non-FLEX complex orders; instead, it is proposing to offer this feature only for complex FLEX Orders so that Members may submit complex FLEX Orders with any ratio.<sup>45</sup> The Exchange states it believes this proposed rule will provide investors with additional transparency regarding order entry requirements for complex FLEX Options.<sup>46</sup> The Exchange also believes that allowing the submission of complex FLEX Orders with any ratio will remove impediments to and perfect the mechanism of a free and open market and benefit investors, because it will provide Members with additional flexibility and precision in their investment strategies.<sup>47</sup>

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<sup>40</sup> See Notice, 89 FR at 22297 n.44 (describing the FIX interface).

<sup>41</sup> See Notice, 89 FR at 22297 n.45 (describe the OTTO interface).

<sup>42</sup> See Notice, 89 FR at 22297 n.46 (describing the SQF interface).

<sup>43</sup> See Notice, 89 FR at 22316.

<sup>44</sup> See Notice, 89 FR at 22297. See also proposed Options 3A, Section 7.

<sup>45</sup> See Notice, 89 FR at 22297. The Exchange also notes that Cboe currently permits complex FLEX Orders to be submitted with any ratio. See Cboe US Options Complex Book Process, Section 2.1 (Ratios) and Section 3 (Complex FLEX Order Functionality), available at <https://cdn.cboe.com/resources/membership/US-Options-Complex-Book-Process.pdf>.

<sup>46</sup> See Notice, 89 FR at 22316.

<sup>47</sup> See id.



In lieu of an Opening Process in FLEX Options, Members may begin submitting FLEX Orders into an electronic FLEX Auction pursuant to proposed Options 3A, Section 11(b), a FLEX Price Improvement Mechanism (“FLEX PIM”) pursuant to proposed Options 3A, Section 12, or a FLEX Solicited Order Mechanism (“FLEX SOM”) pursuant to proposed Options 3A, Section 13 when the underlying security is open for trading.<sup>48</sup> The Exchange states that since FLEX Options are created with terms unique to individual investment objectives, and these individually defined FLEX Options are customized for each investor, the opening process for non-FLEX Options, which is designed in part to determine a single opening price based on orders and quotes from multiple members, may not be useful for FLEX Options investors.<sup>49</sup> The Exchange states that this proposed rule change will provide clarity to market participants regarding the mechanisms available for FLEX trading.<sup>50</sup> The Exchange also believes that allowing Member to begin submitting FLEX Orders once the underlying security is open is appropriate, since the Exchange believes it will benefit investors for FLEX Options trading to not be available until information regarding transaction prices of underlying securities or the values of underlying indexes has begun to be disseminated in the market.<sup>51</sup>

The Exchange proposes to halt trading in a FLEX Option class pursuant to Options 3A, Section 9, and to always halts trading in a FLEX Option class when trading in a non-FLEX Options class with the same underlying equity security or index is halted on the Exchange.<sup>52</sup> The System will not accept a FLEX Order for a FLEX Option series while trading in a FLEX Option

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<sup>48</sup> See Notice, 89 FR at 22297. See also proposed Options 3A, Section 8.

<sup>49</sup> See Notice, 89 FR at 22298.

<sup>50</sup> See Notice, 89 FR at 22316. The Exchange also notes that Cboe likewise does not hold an opening trading rotation in FLEX Options. See Cboe Rule 5.71.

<sup>51</sup> See Notice, 89 FR at 22316.

<sup>52</sup> See Notice, 89 FR at 22298. See also proposed Options 3A, Section 9.

class is halted.<sup>53</sup> The Exchange states that proposed Options 3A, Section 9 will provide clarity as to when the Exchange would halt trading in FLEX Options.<sup>54</sup> Proposed Options 3A, Section 9 also provides the Exchange with authority to halt trading in a FLEX Option pursuant to Options 3, Section 9 even if trading in a non-FLEX Option with the same underlying is not halted. The Exchange states while such a situation would be rare there may be unusual situations that would cause it to halt trading in a FLEX Option.<sup>55</sup> Additionally, the Exchange's simple and complex order books will not be available for transactions in FLEX Options, and accordingly, FLEX Options may only be traded on the Exchange by submitting FLEX Orders into a FLEX Electronic Auction, FLEX PIM, and FLEX SOM.<sup>56</sup> The Exchange states that it believes this proposed rule will make clear what mechanisms would and would not be available for FLEX trading: FLEX Orders may only be submitted into a FLEX Auction, FLEX PIM, or FLEX SOM.<sup>57</sup>

As explained in more detail in the Notice, proposed Options 3A, Section 11 specifies the requirements and describes the procedures for submitting FLEX Orders for trading on the Exchange for simple and complex FLEX Orders and for the electronic FLEX Auction.<sup>58</sup>

Specifically, a FLEX Option series will only be eligible for trading if a Member submits a FLEX

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<sup>53</sup> See Notice, 89 FR at 22298.

<sup>54</sup> See Notice, 89 FR at 22316.

<sup>55</sup> See id.

<sup>56</sup> See Notice, 89 FR at 22298. See also proposed Options 3A, Section 10. The Exchange also notes that its proposal is in line with other options exchanges' FLEX rules that do not contemplate the interaction of their respective order books with FLEX transactions.

<sup>57</sup> See Notice, 89 FR at 22316.

<sup>58</sup> See Notice, 89 FR at 22298. See also proposed Options 3A, Section 11. Proposed Options 3A, Section 11(b)(1)(F) also provides that an exposure must be between three seconds to five minutes for electronic FLEX auctions. The Exchange notes that a submitting Member must designate the length of the exposure interval and there is no default setting to the FLEX Auction exposure interval. See Notice, 89 FR at 22298 and n.67. FLEX PIM and FLEX SOM have the same auction periods as FLEX Auctions. See proposed Options 3A, Section 12(c)(3) (for FLEX PIM) and Section 13(c)(3).

Order for that series into an electronic FLEX Auction or submits the FLEX Order to a FLEX PIM or FLEX SOM Auction.<sup>59</sup> Among other things, the provisions of Options 3A, Section 11 state that the System will not accept a FLEX Order with identical terms as a non-FLEX Option series that is already listed. Similarly, for complex FLEX orders the System will not accept a FLEX complex strategy if any leg in the FLEX Order has identical terms as a non-FLEX Option series that is listed for trading. The Exchange states that the features of this proposed rule are harmonized with the Exchange's current auction functionality for non-FLEX Orders, including PIM and SOM, so the Exchange believes this will promote consistency for Members participating across different auctions on ISE.<sup>60</sup>

Additionally, in proposed Options 3A, Section 12, the Exchange proposes to establish PIM auction functionality for FLEX Options and sets forth the FLEX PIM auction eligibility requirements.<sup>61</sup> Pursuant to proposed Options 3A, Section 12, a Member may electronically submit for execution an order (which may be a simple or complex order) it represents as agent against principal interest or a solicited order(s) (except, if such order is a simple order, for an order for the account of any FLEX Market Maker with an appointment in the applicable FLEX Option class on the Exchange), provided it submits such order for electronic execution into a FLEX PIM auction pursuant to this proposed rule.<sup>62</sup> Similarly, in proposed Options 3A, Section 13, the Exchange proposes to establish SOM auction functionality for FLEX Options.<sup>63</sup> Pursuant

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<sup>59</sup> See Notice, 89 FR at 22298.

<sup>60</sup> See Notice, 89 FR at 22316.

<sup>61</sup> See Notice, 89 FR at 22302. The Exchange notes that the proposed FLEX PIM auction eligibility requirements will be substantially similar to Cboe's FLEX AIM eligibility requirements in Cboe Rule 5.73, except for certain intended differences. See Cboe Rule 5.73.

<sup>62</sup> See Notice, 89 FR at 22302.

<sup>63</sup> See Notice, 89 FR at 22304. The Exchange notes that the proposed FLEX SOM auction eligibility requirements will be substantially similar to Cboe's FLEX SAM eligibility requirements in Cboe Rule 5.74, except for certain intended differences. See Cboe Rule 5.74.

to proposed Options 3A, Section 13, a Member may electronically submit for execution an order (which may be a simple or complex order) it represents as agent against a solicited order if it submits such order for electronic execution into a FLEX SOM auction pursuant to this proposed rule.<sup>64</sup> The Exchange states that it believes the proposed FLEX PIM and FLEX SOM Auctions will remove impediments to and perfect the mechanism of a free and open market, and protect investors and the public interest, by offering market participants with auction mechanisms for the execution of FLEX Options at potentially improved prices.<sup>65</sup> The Exchange also states that it will align certain aspects of the proposed FLEX PIM allocation methodology with its current non-FLEX PIM allocation methodology.<sup>66</sup>

The Exchange proposes to apply the Market Wide Risk Protection and Size Limitation as simple order risk protections<sup>67</sup> and Strategy Protection and Size Limitation as complex order risk protections.<sup>68</sup> The Exchange states that it believes that specifying the risk protections will benefit investors with additional transparency regarding which of the Exchange's risk protections would apply to FLEX trading.<sup>69</sup> The Exchange also believes that applying these risk protections to FLEX Options will protect investors and the public interest, and maintain fair and orderly markets, by providing market participants with more tools to manage their risk.<sup>70</sup> In addition, the

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<sup>64</sup> See Notice, 89 FR at 22301.

<sup>65</sup> See Notice, 89 FR at 22317. The Exchange states that there are certain intended differences with CBOE rules "to align to current [ ] auction functionality" in order to allow the proposed FLEX Auction "to fit more seamlessly into the Exchange's market . . . [f]or instance, the Exchange will not allow prices to be expressed as percentages in [the electronic FLEX Auction] as it does not have this capability today." Id.

<sup>66</sup> See Notice, 89 FR at 22318.

<sup>67</sup> See Notice, 89 FR at 22306 and proposed Options 3A, Section 14(a).

<sup>68</sup> See Notice, 89 FR at 22307 and proposed Options 3A, Section 14(b). Proposed Options 3A, Section 14(c) provide that the optional risk protections from Options 3, Section 28, are available to FLEX Options also.

<sup>69</sup> See Notice, 89 FR at 22319.

<sup>70</sup> See id.

Exchange believes that applying these risk protections has the potential to promote just and equitable principles of trade by providing Members with more tools for managing risk facilitates transactions in FLEX Options.<sup>71</sup>

Proposed Options 3A, Section 15, specified the data feeds the Exchange will disseminate auction notifications for simple and complex FLEX Orders.<sup>72</sup> Specifically, auction notifications for simple FLEX orders will be disseminated through the Nasdaq ISE Order Feed,<sup>73</sup> and the Nasdaq ISE Spread Feed for complex FLEX orders.<sup>74</sup> The Exchange states that specifying the data feeds will benefit investors with additional transparency regarding which data feeds it will disseminate auction notifications for simple and complex FLEX Orders.<sup>75</sup>

Pursuant to proposed Options 3A, Section 16, which governs FLEX Market Makers on the Exchange, a FLEX Market Maker will automatically receive an appointment in the same FLEX option class(es) as its non-FLEX class appointments selected pursuant to Options 2, Section 3.<sup>76</sup> In addition, each FLEX Market Maker would be required to fulfill all the obligations of a Market Maker under Options 2 and comply with the applicable provisions, except FLEX Market Makers would not need to provide continuous quotes in FLEX Options.<sup>77</sup> The Exchange states that the proposed FLEX Market Maker provisions will provide clarity and transparency as to how FLEX Market Makers are appointed and their related obligations.<sup>78</sup>

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<sup>71</sup> See id.

<sup>72</sup> See Notice, 89 FR at 22307.

<sup>73</sup> See id. and proposed Options 3A, Section 15(a).

<sup>74</sup> See Notice, 89 FR at 22307 and proposed Options 3A, Section 15(b).

<sup>75</sup> See Notice, 89 FR at 22319.

<sup>76</sup> See Notice, 89 FR at 22307.

<sup>77</sup> See id. See also proposed Options 3A, Section 16(b).

<sup>78</sup> See Notice, 89 FR at 22319. The Exchange also notes that these provisions are substantially similar to other options exchanges, notably Cboe and Nasdaq PHLX LLC (“Phlx”). See Cboe Rules 3.58(c) and 5.57 and Phlx Options 8, Section 34(d)(1) for materially identical provisions.

Additionally, proposed Options 3A, Section 17 sets forth the requirement that, in order to a FLEX Market Maker to effect any transaction in FLEX Options, one or more effective Letter(s) of Guarantee must be issued by a Clearing Member and filed with the Exchange accepting financial responsibility for all FLEX transactions made by the FLEX Market Maker pursuant to Options 6, Section 4.<sup>79</sup> The Exchange states that it believes that the existing Letter of Guarantee continues to protect investors and the public interest because it signifies that the clearing member has accepted financial responsibility for transactions in all options entered into by the Market Maker, which will protect the counterparties of those trades and such protections will flow to other clearing members and ultimately to the OCC as the central counterparty and guarantor of both FLEX and non-FLEX Option transactions.<sup>80</sup>

Proposed Options 3A, Section 18, provides detail on the position limits for FLEX Options, including for FLEX Index Options and for FLEX Equity Options.<sup>81</sup> Additionally, proposed Options 3A, Section 19 details the exercise limits for FLEX Options, which shall be equivalent to the FLEX position limits prescribed in proposed Options 3A, Section 18 above.<sup>82</sup> The Exchange states that it believes these proposed position and exercise limits are reasonably designed to prevent a Member from using FLEX Index Options to evade the position limits applicable to comparable non-FLEX Index Options.<sup>83</sup> Additionally, by establishing the proposed position and exercise limits for FLEX Index Options and, importantly, aggregating such

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<sup>79</sup> See Notice, 89 FR at 22307.

<sup>80</sup> See Notice, 89 FR at 22319.

<sup>81</sup> See Notice, 89 FR at 22307. The Exchange also notes that proposed Options 3A, Section 18 will be based on the FLEX Options position limit rules on Cboe and Phlx.

<sup>82</sup> See Notice, 89 FR at 22308. The Exchange also notes that proposed Options 3A, Section 18 will be based on the FLEX Options exercise limit rules on Cboe and Phlx.

<sup>83</sup> See Notice, 89 FR at 22319. The Exchange also notes that proposed position and exercise limits are consistent with the rules of other options exchanges that offer FLEX Index Options, and therefore, from their perspective, should raise no novel issues for the Commission.

positions in the manner described in the proposal,<sup>84</sup> the Exchange believes that the position and exercise limit requirements for FLEX Index Options should help to ensure that the trading of FLEX Index Options would not increase the potential for manipulation or market disruption and could help to minimize such incentives.<sup>85</sup>

Further, the Exchange noted that it has analyzed its capacity and represents that it believes the Exchange and the Options Price Reporting Authority (“OPRA”) has the necessary systems capacity to handle the additional message traffic associated with the listing of new series that may result from the introduction of FLEX Options.<sup>86</sup> The Exchange stated, in its proposal, that, it believes any additional traffic that would be generated from the introduction of cash-settled FLEX ETF Options would be manageable, and it expects members will not have a capacity issue as a result of this proposed rule change.<sup>87</sup> In addition, the Exchange stated that it

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<sup>84</sup> See Notice, 89 FR at 22308. Proposed Options 3A, Section 18(c) governs the aggregation of FLEX positions and provides that for purposes of the position limits and reporting requirements for FLEX Options, FLEX Option positions will not be aggregated with positions in non-FLEX Options other than in specific circumstances. One such circumstance is that commencing at the close of trading two business days prior to the last trading day of the calendar quarter, positions in P.M.-settled FLEX Index Options shall be aggregated with positions in Quarterly Options Series on the same index with the same expiration and shall be subject to the position limits set forth in Options 4A, Section 6 or Section 7, as applicable. See proposed Options 3A, Section 18(c)(1). Additionally, commencing at the close of trading two business days prior to the last trading day of the week, positions in FLEX Index Options that are cash settled shall be aggregated with positions in Short Term Option Series on the same underlying (e.g., same underlying index as a FLEX Index Option) with the same means for determining exercise settlement value (e.g., opening or closing prices of the underlying index) and same expiration, and shall be subject to the position limits set forth in Options 4A, Section 6 or Section 7, as applicable. See proposed Options 3A, Section 18(c)(2). Finally, as long as the options positions remain open, positions in FLEX Options that expire on a third Friday-of-the-month expiration day shall be aggregated with positions in non-FLEX Options on the same underlying, and shall be subject to the position limits set forth in Options 4A, Section 6, Options 4A, Section 7, or Options 9, Section 13, as applicable, and the exercise limits set forth in Options 9, Section 15, as applicable. See proposed Options 3A, Section 18(c)(3). Cash-settled ETF FLEX Options would be subject to the aggregated with positions in physically settled options on the same underlying ETF for the purpose of calculating the position limits set forth in Options 9, Section 13 and the exercise limits set forth in Options 9, Section 15. See proposed Options 3A, Section 18(b)(1)(B). Furthermore, FLEX Index Options on a given index shall not be aggregated with options on any stocks included in the index or with FLEX Index Option positions on another index. See proposed Options 3A, Section 18(a).

<sup>85</sup> See Notice, 89 FR at 22319.

<sup>86</sup> See Notice, 88 FR at 22308.

<sup>87</sup> See Notice, 88 FR at 22312.

will monitor the trading volume associated with the additional options series listed as a result of the proposed rule change and the effect (if any) of these additional series on market fragmentation and on the capacity of the Exchange's automated systems.<sup>88</sup>

The Exchange also intends to integrate FLEX Option products and their respective symbols into the Exchange's existing surveillance system architecture, within which they will be subject to the relevant surveillance processes.<sup>89</sup> The Exchange stated, in its proposal, that it implements procedures to detect potential market manipulation and unusual activity, and that it also works with other SROs and exchanges on intermarket surveillance related issues.<sup>90</sup>

### III. Proceedings to Determine Whether to Approve or Disapprove SR-ISE-2024-12 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act<sup>91</sup> to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change to inform the Commission's analysis of whether to approve or disapprove the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,<sup>92</sup> the Commission is providing notice of the grounds for disapproval under consideration. As described above, the Exchange has proposed to

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<sup>88</sup> See Notice, 88 FR at 22312.

<sup>89</sup> See Notice, 88 FR at 22308.

<sup>90</sup> See Notice, 88 FR at 22320.

<sup>91</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>92</sup> Id.



adopt rules that will govern the listing and trading of FLEX Options. The Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule change’s consistency with the Act, and in particular, Section 6(b)(5) of the Act, which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.<sup>93</sup>

Under the Commission’s Rules of Practice, the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder ... is on the self-regulatory organization [‘SRO’] that proposed the rule change.”<sup>94</sup> The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding,<sup>95</sup> and any failure of an SRO to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Exchange Act and the applicable rules and regulations.<sup>96</sup>

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<sup>93</sup> 15 U.S.C. 78f(b)(5).

<sup>94</sup> Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

<sup>95</sup> Id.

<sup>96</sup> Id.

For these reasons, the Commission believes it is appropriate to institute proceedings pursuant to Section 19(b)(2)(B) of the Exchange Act<sup>97</sup> to determine whether the proposal should be approved or disapproved.

#### IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5) of the Act<sup>98</sup> or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,<sup>99</sup> any request for an opportunity to make an oral presentation.<sup>100</sup>

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. The

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<sup>97</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>98</sup> 15 U.S.C. 78f(b)(5).

<sup>99</sup> 17 CFR 240.19b-4.

<sup>100</sup> Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, in addition to any other comments they may wish to submit about the proposed rule change. Comments may be submitted by any of the following methods:

Electronic Comments:

- Use the Commission's internet comment form (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include file number SR-ISE-2024-12 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-ISE-2024-12. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<https://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 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should

submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-ISE-2024-12 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Rebuttal comments should be submitted by [INSERT DATE 35 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>101</sup>

**Sherry R. Haywood,**

*Assistant Secretary.*

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<sup>101</sup> 17 CFR 200.30-3(a)(57).