

amendment adds LTSE as a Participant<sup>4</sup> to the LULD Plan. The Commission is publishing this notice to solicit comments on the amendment from interested persons.

### I. Description and Purpose of the Amendment

On May 10, 2019, the Commission issued an order granting LTSE's application for registration as a national securities exchange.<sup>5</sup> As noted above, the proposed amendment adds LTSE as a Participant to the LULD Plan.

Under Section II(C) of the LULD Plan, any entity registered as a national securities exchange or national securities association under the Exchange Act may become a Participant by: (1) Becoming a participant in the applicable Market Data Plans; (2) executing a copy of the Plan, as then in effect; (3) providing each then-current Participant with a copy of such executed Plan; and (4) effecting an amendment to the Plan as specified in Section III (B) of the Plan. Section III(B) of the LULD Plan sets forth the process for a prospective new Participant to effect an amendment of the Plan. Specifically, the LULD Plan provides that such an amendment to the Plan may be effected by the new national securities exchange or national securities association by executing a copy of the Plan as then in effect (with the only changes being the addition of the new Participant's name in Section II(A) of the Plan); and submitting such executed Plan to the Commission. The amendment will be effective when it is approved by the Commission in accordance with Rule 608 of Regulation NMS, or otherwise becomes effective pursuant to Rule 608 of Regulation NMS.

LTSE has become a participant in the applicable Market Data Plans,<sup>6</sup> executed

a copy of the Plan currently in effect, with the only change being the addition of its name in Section II(A) of the Plan, and has provided a copy of the Plan executed by LTSE to each of the other Participants. LTSE has also submitted the executed Plan to the Commission. Accordingly, all of the Plan requirements for effecting an amendment to the Plan to add LTSE as a Participant have been satisfied.

### II. Effectiveness of the Proposed Amendment

The foregoing Plan amendment has become effective pursuant to Rule 608(b)(3)(iii)<sup>7</sup> because it involves solely technical or ministerial matters.

### III. Solicitation of Comments

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

#### Electronic Comments

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number 4–631 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 4–631. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed plan amendment that are filed with the Commission, and all written communications relating to the proposed plan amendment 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 20549–1090 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 4–631 and should be submitted on or before March 3, 2020.

By the Commission.

**J. Matthew DeLesDernier,**  
Assistant Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–88131; File No. SR–NYSEAMER–2019–38]

### Self-Regulatory Organizations; NYSE American LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Allow Certain Flexible Equity Options To Be Cash Settled

February 5, 2020.

#### I. Introduction

On October 17, 2019, NYSE American LLC (“NYSE American” or “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 amend Rules 903G and 906G to allow certain Flexible Exchange (“FLEX”) Equity Options to be cash settled.<sup>3</sup> The proposal, as modified by Amendment No. 1, would allow FLEX Equity Options to be cash settled where the underlying security is an Exchange-Traded Fund (“ETF”) that meets prescribed criteria (“FLEX ETF Option”).

The proposed rule change was published for comment in the **Federal Register** on November 7, 2019.<sup>4</sup> On December 18, 2019, the Commission extended the time period within which to approve the proposed rule changes, disapprove the proposed rule changes,

Order”). See Securities Exchange Act Release No. 67091 (May 31, 2012), 77 FR 33498 (June 6, 2012). The Commission approved the LULD Plan on a permanent basis on April 11, 2019. See Securities Exchange Act Release No. 85623, 84 FR 16079 (April 17, 2019).

<sup>4</sup> Defined in Section I(K) of the Plan as follows: “Participant” means a Party to the Plan.

<sup>5</sup> See Securities Exchange Act Release No. 85828 (May 10, 2019), 84 FR 21841 (May 15, 2019).

<sup>6</sup> See Letter from Robert Books, Chairman, Operating Committee, CTA/CQ Plans, to Vanessa Countryman, Secretary, Commission, dated October 23, 2018 [sic] to Vanessa Countryman, Secretary, SEC, from Robert Books (relating to Thirty-Second Substantive Amendment to the Second Restatement of the CTA Plan and Twenty-Third Substantive Amendment to the Restated CQ Plan adding LTSE as a participant) and letter from Robert Books, Chairman, Operating Committee, UTP Plan, to Vanessa Countryman, Secretary, Commission, dated October 23, 2019 (relating to Forty-Sixth Amendment to the UTP Plan adding LTSE as a participant).

<sup>7</sup> 17 CFR 242.608(b)(3)(iii).

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

<sup>2</sup> 17 CFR 240.19b–4.

<sup>3</sup> For the definition of “FLEX Equity Option,” see *infra* note 7.

<sup>4</sup> See Securities Exchange Act Release No. 87444 (November 1, 2019), 84 FR 60120 (November 7, 2019) (“Notice”).

or institute proceedings to determine whether to approve or disapprove the proposed rule changes, to February 5, 2020.<sup>5</sup> On February 4, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which supersedes the original filing in its entirety.<sup>6</sup> The Commission has received no comments on the proposed rule change. The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

## II. Description of the Proposal, as Modified by Amendment No. 1

The Exchange has proposed to amend NYSE American Rule 903G(c) to allow for cash settlement of certain FLEX Equity Options.<sup>7</sup> FLEX Equity Options permit investors to specify certain options contract terms, within parameters set forth in the Exchange's FLEX rules, such as exercise style, expiration date, and exercise prices.<sup>8</sup> Currently, FLEX Equity Options are settled by physical delivery of the underlying security.<sup>9</sup> The Exchange proposed, in the case of a FLEX Equity Option with an underlying security that is an Exchange-Traded Fund (*i.e.*, a FLEX ETF Option) and that meets prescribed criteria, to allow settlement either by delivery in cash or, as currently permitted under the Exchange

rules, by physical delivery of the underlying security.<sup>10</sup>

As proposed, the Exchange would allow for the cash settlement of a FLEX ETF Option if the underlying ETF, measured over the prior six-month period, has (1) an average daily notional value of at least \$500 Million; and (2) a national average daily volume ("ADV") of at least 4,680,000 shares.<sup>11</sup> The Exchange proposed to determine bi-annually the underlying ETFs that satisfy these notional value and trading volume requirements by using trading statistics for the previous six-months.<sup>12</sup> The Exchange also proposed to permit cash settlement as a contract term on no more than 50 underlying ETFs, and that if more than 50 underlying ETFs satisfy the notional value and trading volume requirements, to select the top 50 securities based on the ETFs with the highest ADV after meeting the initial requirements.<sup>13</sup> Further, the Exchange's proposed rule states that if the Exchange determines pursuant to the bi-annual review that an underlying ETF ceases to satisfy the specified criteria, any new position overlying such security entered into would be required to have exercise settlement by physical delivery and any open positions overlying such security would be able to be traded only to close the position.<sup>14</sup>

<sup>10</sup> See proposed NYSE American Rule 903G(c)(3)(ii). The Exchange proposed conforming changes to NYSE American Rule 903G(c)(3) to reflect that the proposed rule change would add a second exception to the general requirement for physical settlement for FLEX Equity Options on an eligible ETF. See proposed NYSE American Rule 903G(c)(3)(i) and (iii).

<sup>11</sup> See proposed NYSE American Rule 903G(c)(3)(ii).

<sup>12</sup> See proposed NYSE American Rule 903G(c)(3)(ii)(A). The Exchange stated that it plans to conduct the bi-annual review on January 1 and July 1 of each year, announce the results via a Trader Update, and permit FLEX ETF Options any new ETFs that qualify to have cash settlement as a contract term beginning on February 1 and August 1 of each year. See Amendment No. 1, *supra* note 6, at n.8.

<sup>13</sup> See proposed NYSE American Rule 903G(c)(3)(ii)(A).

<sup>14</sup> See proposed NYSE American Rule 903G(c)(3)(ii)(B). The Exchange represented that it will provide guidance to reflect that an Exchange member acting as a market maker in cash-settled FLEX ETF Options can enter into an opening transaction to facilitate closing only transactions of another market participant when such orders are restricted to closing only transactions. See Amendment No. 1, *supra* note 6, at 5. The Exchange noted in its proposal that this is consistent with how it addresses other situations when transactions in certain options series are restricted to closing-only transactions and represented that this interpretation is consistent with a market maker's duty to maintain fair and orderly markets as set forth in NYSE American Rule 920NY. See Amendment No. 1, *supra* note 6, at n.10 (citing <https://www.nyse.com/publicdocs/nyse/markets/arca-options/rule-interpretations/2017/NYSE%20Arca%20Options%20RB%2017-01.pdf>).

In support of its proposal, the Exchange stated that it believes it is appropriate to introduce cash settlement as an alternative contract term to the select group of ETFs because they are "among the most highly liquid and actively-traded securities,"<sup>15</sup> and that the deep liquidity and robust trading activity in these ETFs, in the Exchange's view, mitigate against historic concerns regarding susceptibility to manipulation.<sup>16</sup> The Exchange stated that it believes that average daily notional value is an appropriate proxy for selecting underlying ETFs that are not readily susceptible to manipulation because it believes that as a general matter, the more expensive an underlying ETF's price, the less cost-effective manipulation could become, and that manipulation of the price of an ETF encounters greater difficulty the more volume that is traded.<sup>17</sup> In addition, the Exchange stated that it believes an ADV requirement of 4,680,000 shares a day is appropriate because it represents average trading in the underlying ETF of 200 shares per second.<sup>18</sup> The Exchange stated that it believes that while no security is immune from all manipulation, the combination of average daily notional value and ADV as prerequisite requirements would limit cash settlement of FLEX ETF Options to those underlying securities that would be less susceptible to manipulation in order to establish a settlement price.<sup>19</sup> The Exchange further stated that it believes that permitting cash settlement as a contract term for FLEX ETF Options would broaden the base of investors that use FLEX Options to manage their trading and investment risk, including investors that currently trade in the OTC market for customized options, where settlement restrictions do not apply.<sup>20</sup>

The Exchange represented that the table below provides the list of the 26 securities that, as of December 31, 2019, would be eligible to have cash settlement as a contract term.<sup>21</sup>

<sup>15</sup> See Amendment No. 1, *supra* note 6, at 5.

<sup>16</sup> See Amendment No. 1, *supra* note 6, at 5.

<sup>17</sup> See Notice, *supra* note 4, 84 FR at 60120. See also Amendment No. 1, *supra* note 6, at 6–7. To calculate average daily notional value, the Exchange summed the notional value of each trade for each symbol (*i.e.*, the number of shares times the price for each execution in the security) and divided that total by the number of trading days in the six-month period (from July 1, 2019 through December 31, 2019) reviewed by the Exchange. See Amendment No. 1, *supra* note 6, at 6–7.

<sup>18</sup> See Notice, *supra* note 4, 84 FR at 60120. See also Amendment No. 1, *supra* note 6, at 7.

<sup>19</sup> See Amendment No. 1, *supra* note 6, at 7.

<sup>20</sup> See Amendment No. 1, *supra* note 6, at 8.

<sup>21</sup> See Amendment No. 1, *supra* note 6, at 7–8.

<sup>5</sup> See Securities Exchange Act Release No. 87792 (December 18, 2019), 84 FR 71053 (December 26, 2019).

<sup>6</sup> In Amendment No. 1, the Exchange: (1) Limited cash settlement as a contract term to those FLEX Equity Options whose underlying security is an ETF; (ii) proposed to aggregate positions in cash-settled FLEX ETF Options with positions in physically-settled options on the same underlying ETF for purposes of position and exercise limits; (3) proposed to limit the number of ETFs that could underlie cash-settled FLEX ETF Options to no more than 50 underlying ETFs and set a tiebreaker if there are more than 50; (4) specified that the Exchange will provide the Commission with annual reports for five years that include, at a minimum, certain trading information and analysis, and, if any, recommendations, regarding the trading of cash-settled FLEX ETF Options; and (5) proposed some clarifying changes to its original proposal. Amendment No. 1 replaces and supersedes the original filing in its entirety and is available at: <https://www.nyse.com/publicdocs/nyse/markets/nyse-american/rule-filings/filings/2020/NYSEAmex-2019-38,%20Am.%201.pdf>.

<sup>7</sup> A "FLEX Option" is a customized options contract that is subject to the rules of Section 15, Flexible Exchange Options. See NYSE American Rule 900G(b)(1). A "FLEX Equity Option" is an option on a specified underlying equity security that is subject to the rules of Section 15. See NYSE American Rule 900G(b)(10).

<sup>8</sup> See NYSE American Rule 903G.

<sup>9</sup> See NYSE American Rule 903G(c)(3)(i). There is one exception for a specific type of option called FLEX Binary Return Derivatives ("ByRDs"). See NYSE American Rules 900G(b)(17), 903G(c)(3)(ii), and 910ByRDs.

Symbol	Security name	Average daily notional value (7/1/19–12/31/19)	Average daily volume (7/1/19–12/31/19)
SPY .....	SPDR S&P 500 ETF Trust .....	\$19,348,446,943	64,473,579
GDX .....	VanEck Vectors Gold Miners ETF .....	1,642,832,369	59,224,665
EEM .....	iShares MSCI Emerging Markets ETF .....	2,452,054,515	58,392,976
XLF .....	Financial Select Sector SPDR Fund .....	1,326,369,702	51,114,805
VXX .....	iPath Series B S&P 500 VIX Short-Term Futures ETN .....	771,760,803	34,481,358
XOP .....	SPDR S&P Oil & Gas Exploration & Production ETF .....	634,221,618	28,045,372
QQQ .....	Invesco QQQ Trust .....	4,881,991,635	25,290,206
EWZ .....	iShares MSCI Brazil ETF .....	1,021,953,287	23,573,072
EFA .....	iShares MSCI EAFE ETF .....	1,547,095,600	23,547,995
FXI .....	iShares China Large-Cap ETF .....	962,138,508	23,499,870
IWM .....	iShares Russell 2000 ETF .....	2,850,264,638	18,418,308
HYG .....	iShares iBoxx High Yield Corporate Bond ETF .....	1,596,947,580	18,385,570
GDXJ .....	VanEck Vectors Junior Gold Miners ETF .....	644,620,425	16,792,343
TQQQ .....	ProShares UltraPro QQQ .....	1,107,279,835	16,739,207
XLU .....	Utilities Select Sector SPDR Fund .....	1,037,188,333	16,587,526
XLE .....	Energy Select Sector SPDR Fund .....	857,120,647	14,338,385
IEMG .....	iShares Core MSCI Emerging Markets ETF .....	690,635,496	13,711,914
XLP .....	Consumer Staples Select Sector SPDR Fund .....	740,499,207	12,203,155
TLT .....	iShares 20+ Year Treasury Bond ETF .....	1,482,683,513	10,608,009
XLK .....	Technology Select Sector SPDR Fund .....	846,007,077	10,319,276
XLI .....	Industrial Select Sector SPDR Fund .....	771,117,183	9,884,799
LQD .....	iShares iBoxx Investment Grade Corporate Bond ETF .....	1,215,543,560	9,602,402
GLD .....	SPDR Gold Trust .....	1,335,356,112	9,569,458
XLV .....	Health Care Select Sector SPDR Fund .....	776,822,924	8,333,845
IYR .....	iShares U.S. Real Estate ETF .....	641,445,902	6,981,265
JNK .....	SPDR Bloomberg Barclays High Yield Bond ETF .....	632,969,484	5,845,332

The Exchange proposed that cash-settled FLEX ETF Options would be subject to the position limits set forth in NYSE American Rule 904 and the exercise limits set forth in NYSE American Rule 905, which rules also apply to the standardized options market.<sup>22</sup> In addition, the Exchange proposed that positions in cash-settled options will be aggregated with all positions in physically-settled options on the same underlying ETF for the purpose of calculating the position limits set forth in Rule 904, and the exercise limits set forth in Rule 905.<sup>23</sup>

<sup>22</sup> See proposed NYSE American Rule 906G(b)(ii). The Exchange represented that, out of the 26 underlying ETFs that would currently be eligible to have cash settlement as a contract term, 18 would have a position limit of 250,000 contracts (see NYSE American Rule 904, Commentary .07(a)) and the position limit for the other eight underlying securities would be as follows: For QQQ and SPY, 1,800,000 contracts; for IWM and EEM, 1,000,000 contracts; and for FXI, EFA, EWZ and TLT, 500,000 contracts (see NYSE American Rule 904, Commentary .07(f)). See Amendment No. 1, *supra* note 6, at 9–10. The Commission notes that, under the Exchange's rules, the applicable exercise limits will be the same as the position limits.

<sup>23</sup> See proposed NYSE American Rule 906G(b)(ii). The Exchange also proposes a non-substantive amendment to Rule 906G to renumber current NYSE American Rule 906G(b)(ii) as new NYSE American Rule 906G(b)(iii). The Exchange stated that, given that each of the underlying securities that would currently be eligible to have cash-settlement as a contract term have established position and exercise limits applicable to physically-settled options, the Exchange believes it is appropriate for the same position and exercise limits to also apply to cash-settled options. See Notice, *supra* note 4, 84 FR at 60122. See also Amendment No. 1, *supra* note 6, at 9.

The Exchange noted in its filing that cash-settled FLEX ETF Options would not be available for trading until The Options Clearing Corporation (“OCC”) represents to the Exchange that it is fully able to clear and settle such options.<sup>24</sup> The Exchange stated that it represents that it and The Options Price Reporting Authority (“OPRA”) have the necessary systems capacity to handle the additional traffic associated with the listing of cash-settled FLEX ETF Options, and that it believes that its members will not have a capacity issue as a result of the proposed rule change.<sup>25</sup> The Exchange also represented that it does not believe the proposed rule change will cause fragmentation of liquidity.<sup>26</sup> The Exchange further represented that it will monitor for any effects additional trading volume from the proposal may have on both market fragmentation and capacity of the Exchange's automated systems.<sup>27</sup>

The Exchange stated that it believes that it has an adequate surveillance program in place for cash-settled FLEX ETF Options and intends to apply the same program procedures that it applies to the Exchange's other options

<sup>24</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 10.

<sup>25</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 10.

<sup>26</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 10.

<sup>27</sup> See Notice, *supra* note 4, 84 FR at 60123. See also, Amendment No. 1, *supra* note 6, at 10.

products.<sup>28</sup> The Exchange represented, among other things, that its existing trading surveillances are adequate to monitor the trading in the underlying securities and subsequent trading of options on those securities on the Exchange, including cash-settled FLEX ETF Options.<sup>29</sup> The Exchange noted that the regulatory program operated by and overseen by NYSE Regulation includes cross-market surveillance designed to identify manipulative and other improper trading that may occur on the Exchange and other markets.<sup>30</sup> The Exchange also represented, among other things, that it believes its existing surveillance technologies and procedures adequately address potential concerns regarding possible manipulation of the settlement value at or near the close of the market.<sup>31</sup> In addition, the Exchange stated that it believes that improvements in audit trails, recordkeeping practices, and inter-exchange cooperation over the last two decades have greatly increased the

<sup>28</sup> See Amendment No. 1, *supra* note 6, at 11.

<sup>29</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 11.

<sup>30</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 11.

<sup>31</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 11. The Commission notes that the Exchange's surveillance procedures are described in more detail in the Notice and in Amendment No. 1 and that these descriptions are substantively identical. See Notice, *supra* note 4, 84 FR 60123–24; Amendment No. 1, *supra* note 6, at 11–12.

Exchange's ability to detect and punish attempted manipulative activities.<sup>32</sup>

The Exchange represented that it is a member of the Intermarket Surveillance Group ("ISG") under the Intermarket Surveillance Group Agreement dated June 20, 1994.<sup>33</sup> The ISG members work together to coordinate surveillance and investigative information sharing in the stock and options markets.<sup>34</sup> For surveillance purposes, the Exchange stated that it would have access to information regarding trading activity in the pertinent underlying securities.<sup>35</sup>

Finally, the Exchange represented that, given the novel characteristics of cash-settled FLEX ETF Options, the Exchange will conduct a review of the trading in cash-settled FLEX ETF Options over an initial five-year period and furnish annual reports to the SEC based on this review.<sup>36</sup> At a minimum, the reports will provide a comparison between the trading volume of all cash-settled FLEX ETF Options listed under the proposed rule and physically-settled options on the same underlying security, the liquidity of the market for such options products and the underlying ETFs, and any manipulation concerns arising in connection with the trading of cash-settled FLEX ETF Options under the proposed rule, and will also discuss any recommendations the Exchange may have for enhancements to the listing standards based on its review.<sup>37</sup>

### III. Discussion and Commission Findings

After careful review of the proposal, as modified by Amendment No. 1, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>38</sup> In particular, the Commission finds that the proposed rule change, as modified

by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,<sup>39</sup> 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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission notes that the Exchange's modified proposal would allow cash settlement for FLEX Equity Options only on ETFs, and only where the underlying ETF, as measured over the prior six-month period, has (1) an average daily notional value of at least \$500 Million; and (2) a national ADV of at least 4,680,000 shares.<sup>40</sup> The Commission notes, and the Exchange has represented, that the 26 ETFs currently eligible using the proposed criteria appear to be among some of the most liquid and actively-traded ETFs based on their average daily volume and average notional value. The Commission believes that, by limiting the trading of options permitted to have cash settlement to those with underlying ETFs and only where these ETFs are liquid and actively traded, along with the other proposed requirements, appears to be reasonably designed to mitigate concerns about the susceptibility to manipulation of such cash-settled FLEX ETF Options and their underlying ETFs and the potential for market disruption. Additionally, the proposed aggregated position and exercise limits and surveillance procedures discussed below, taken together with the liquid and active markets in the underlying eligible ETFs, also appears reasonably designed to address and mitigate concerns about the potential for manipulation and market disruption in markets for the options and the underlying securities.

The Commission also notes that the Exchange has proposed to use the same position limits and exercise limits for cash-settled FLEX ETF Options that are applicable to the non-FLEX standardized options market, and to aggregate the positions in cash-settled FLEX ETF Options with all positions in physically-settled options on the same underlying ETF for purposes of calculating the position and exercise limits.<sup>41</sup> The Commission has

previously recognized that position and exercise limits serve as a regulatory tool designed to address manipulative schemes and adverse market impact surrounding the use of options and that the limits can be useful to prevent investors from disrupting the market in securities underlying the options as well as the options market itself.<sup>42</sup> The Commission believes therefore that establishing position and exercise limits at the same levels as those in the non-FLEX standardized options market and aggregating those positions with all physically-settled options on the same underlying ETFs<sup>43</sup> can further help mitigate the concerns that the limits are designed to address about the potential for manipulation and market disruption in the options and the underlying securities.

The Commission notes that the Exchange will conduct a biannual review of the underlying ETFs to determine whether they no longer meet the requirements for cash-settled FLEX ETF Options on those ETFs.<sup>44</sup> The Commission believes that this requirement is a reasonable means to limit cash settlement to those FLEX ETF Options that only overlie ETFs that continue to meet the specified liquidity and trading volume standards. The Commission also believes that while, as part of the biannual review, the Exchange can identify new underlying ETFs that meet the requirements and are thus eligible for cash-settled FLEX ETF Options, limiting the number of qualifying underlying ETFs to 50 will prevent the scope of cash settlement on FLEX ETF Options from growing considerably without an evaluation about whether the level of the requirements remains reasonable.<sup>45</sup> The Commission further believes that selecting the top 50 securities based on ETFs with the highest ADV, if more than 50 ETFs otherwise meet the requirements in Rule 903(G)(c)(3)(ii), appears to be a reasonable tiebreaker. In addition, the Commission notes that, should the Exchange determine, pursuant to the bi-annual review that an underlying ETF ceases to satisfy the

<sup>32</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 12.

<sup>33</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 12.

<sup>34</sup> See Notice, *supra* note 4, 84 FR at 60123. See also Amendment No. 1, *supra* note 6, at 12.

<sup>35</sup> See Notice, *supra* note 4, 84 FR at 60124. See also Amendment No. 1, *supra* note 6, at 12.

<sup>36</sup> See Amendment No. 1, *supra* note 6, at 13. The Exchange stated that it would provide the first report within 60 days after the first anniversary of the initial listing date of the first cash-settled FLEX ETF Option under the proposal and that each subsequent report will be provided within 60 days of the anniversary of the initial listing date on an annual basis up until and including year five. *Id.*

<sup>37</sup> See Amendment No. 1, *supra* note 6, at 13.

<sup>38</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>39</sup> 15 U.S.C. 78f(b)(5).

<sup>40</sup> See *supra* note 11 and accompanying text.

<sup>41</sup> See *supra* notes 22–23 and accompanying text.

<sup>42</sup> See Securities Exchange Act Release No. 82770 (February 23, 2018), 83 FR 8907, 8910 (March 1, 2018) (SR-CBOE-2017-057).

<sup>43</sup> The aggregation of position and exercise limits would include all positions on physically-settled FLEX and non-FLEX options on the same underlying ETFs.

<sup>44</sup> See *supra* note 12 and accompanying text.

<sup>45</sup> See *supra* note 13 and accompanying text. At the same time, the overall limit of 50 ETFs that can underlie cash settled FLEX ETF Options should also provide the Exchange with flexibility to add additional ETFs that meet the Exchange's requirements given that the current eligible list of ETFs as of December 31, 2019 contains 26 ETFs.

requirements under Rule 903(G)(c)(3)(ii), any new options position overlying such ETF would be required to have exercise settlement by physical delivery and any open cash-settled FLEX ETF Option positions may be traded only to close the position.<sup>46</sup> The Commission believes that this provision is a reasonable means to address how to wind down an outstanding cash-settled FLEX ETF Option where the underlying ETF no longer qualifies under the liquidity and volume criteria, thereby addressing manipulation concerns, while still allowing market participants to close out positions.

The Commission recognizes that the proposal is unique in that it would allow options on ETFs that currently are only available to be traded on a national securities exchange with physical settlement to now have a cash-settlement alternative. The Exchange, acknowledging the “novel characteristics” of its proposal has committed to perform periodic data analyses with written assessments and to make such analyses and assessments available to the Commission on an annual basis for the first five years of trading in the subject options.<sup>47</sup> As noted above, the Exchange has also stated that the reports will discuss any recommendations it has on enhancements to its proposed listing standards based on these reviews. The Commission notes that the annual reports will allow the Commission and the Exchange to evaluate, among other things, the impact such options have, and any potential adverse effects, on price volatility and the market for the underlying ETFs, the component securities underlying the ETFs, and the options on the same underlying ETFs and make appropriate recommendations, if any, in response to the reports.

The Commission notes that surveillance is important, among other things, to detect and deter fraudulent and manipulative trading activity as well as other violations of Exchange rules and the federal securities laws. The Exchange has represented that it has adequate surveillance procedures in place to monitor trading in these options and the underlying securities, including to detect manipulative trading activity in both the options and the underlying ETF.<sup>48</sup> The Exchange further

asserted that the liquidity and active markets in the underlying ETFs, and the high number of market participants in both the underlying ETFs and existing options on the ETFs, helps to minimize the possibility of manipulation. The Commission notes that the proposed surveillance, along with the liquidity criteria and position and exercise limits requirements, appear to be reasonably designed to mitigate manipulation concerns. The Commission further notes that under Section 19(g) of the Act, the Exchange, as a self-regulatory organization, is required to enforce compliance by its members and persons associated with its members with the Act, the rules and regulations thereunder, and the rules of the Exchange.<sup>49</sup> The Commission understands that the Exchange performs ongoing evaluations of its surveillance program to ensure its continued effectiveness and the Commission would, therefore, expect the Exchange to continue to review its surveillance procedures on an ongoing basis and make any necessary enhancements and/or modifications that may be needed for the cash settlement of FLEX ETF Options.

In approving the proposed rule change, the Commission notes that cash-settled FLEX ETF Options will be subject to the same trading rules and procedures that currently govern the trading of other FLEX Options on the Exchange, with the exception of the rules to accommodate the cash settlement feature being approved herein. The Commission also notes that the Exchange has represented that it will monitor any effect additional options series listed under the proposal have on market fragmentation and the capacity of the Exchange’s automated systems. The Commission notes that FLEX ETF Options, as the Exchange represented, cannot be traded until OCC represents to the Exchange that it is fully able to clear and settle such options.<sup>50</sup> Finally, the Commission expects that the Exchange will take prompt action, including timely communication with the Commission

algorithm gaming, marking the close and open, as well as more general abusive behavior related to front running, wash sales, quoting/routing, and Reg SHO violations, that may occur on the Exchange and other markets. Furthermore, the Exchange stated that it has access to information regarding trading activity in the pertinent underlying securities as a member of ISC. See Amendment No. 1, *supra* note 6, at 11–12. See also *id.* at n.15.

<sup>49</sup> 15 U.S.C. 78s(g).

<sup>50</sup> See *supra* note 24 and accompanying text. The Commission understands that, as of the date of this Order, OCC has not yet made the necessary representations for the Exchange to be able to commence trading.

and with other self-regulatory organizations responsible for oversight of trading in options, the underlying ETFs, and the ETFs’ component securities, should any unanticipated adverse market effects develop.

Based on the Exchange’s representations with respect to the proposed cash-settlement of FLEX Equity Options, whose underlying security is an ETF, and for the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the Act.

#### **IV. Accelerated Approval of Proposed Rule Change, as Modified By Amendment No. 1**

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of notice of the filing of Amendment No. 1 in the **Federal Register**. As discussed above, Amendment No. 1 modified the original proposed rule change to limit the cash settlement of FLEX Equity Options to underlying ETFs, with a maximum cap of 50 such ETFs, that have met the originally proposed average daily notional value and national average daily volume requirements, using average daily volume as a tiebreaker if more than 50 ETFs otherwise qualify. Amendment No. 1 also modified the original proposal to require that the proposed position and exercise limits for cash-settled FLEX ETF Options be aggregated with all physically-settled options on the same underlying ETF. Amendment No. 1 stated that the Exchange would provide a report to the Commission annually for five years providing an analysis, along with any recommendations, concerning the trading of cash-settled FLEX ETF Options. Finally, Amendment No. 1 made some additional clarifying changes to the original proposal.

The Commission notes that the changes made to the original proposal in Amendment No. 1 narrows the scope of the proposed rule change and limits its applicability to ETFs, which should help to mitigate potential risks of manipulation and market disruption. The amendment to aggregate position and exercise limits also addressed similar concerns. Furthermore, the Commission notes that the original, broader proposal, including the proposed numerical eligibility criteria applied to the underlying ETFs, was published for comment in the **Federal Register** and no comments were received. The Exchange’s annual report requirement also supplements the

<sup>46</sup> See *supra* note 14 and accompanying text.

<sup>47</sup> See *supra* notes 36–37 and accompanying text.

<sup>48</sup> See *supra* notes 28–35 and accompanying text. Among other things, the Exchange noted that its regulatory program included cross-market surveillance designed to identify manipulative and other improper trading, including spoofing,

proposal and should help the Exchange and the Commission in assessing any potential market impacts, including on price volatility, from the trading of the cash-settled FLEX ETF Options under the proposal. In addition, Amendment No. 1 clarifies and provides additional explanation relating to the proposed rule change. The changes and additional information in Amendment No. 1 have also assisted the Commission in evaluating the proposal and finding that the proposal is consistent with the Act.

Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>51</sup> to approve the proposed rule change, SR-NYSEAMER-2019-38, as modified by Amendment No. 1, on an accelerated basis.

#### V. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 to the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

##### *Electronic Comments*

- Use the Commission's internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAMER-2019-38 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-1090. All submissions should refer to File Number SR-NYSEAMER-2019-38. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be

available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEAMER-2019-38 and should be submitted on or before March 3, 2020.

#### VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,<sup>52</sup> that the proposed rule change (SR-NYSEAMER-2019-38), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>53</sup>

**J. Matthew DeLesDernier,**

*Assistant Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

##### **Securities Act of 1933, Release No. 10753/February 6, 2020; Securities Exchange Act of 1934, Release No. 88137/February 6, 2020; Order Regarding Review of FASB Accounting Support Fee for 2020 Under Section 109 of The Sarbanes-Oxley Act of 2002**

The Sarbanes-Oxley Act of 2002 (the "Act") provides that the Securities and Exchange Commission (the "Commission") may recognize, as generally accepted for purposes of the securities laws, any accounting principles established by a standard setting body that meets certain criteria. Consequently, Section 109 of the Act provides that all of the budget of such a standard setting body shall be payable from an annual accounting support fee assessed and collected against each issuer, as may be necessary or appropriate to pay for the budget and provide for the expenses of the standard setting body, and to provide for an independent, stable source of funding, subject to review by the Commission.

Under Section 109(f) of the Act, the amount of fees collected for a fiscal year shall not exceed the "recoverable budget expenses" of the standard setting body. Section 109(h) amends Section 13(b)(2) of the Securities Exchange Act of 1934 to require issuers to pay the allocable share of a reasonable annual accounting support fee or fees, determined in accordance with Section 109 of the Act.

On April 25, 2003, the Commission issued a policy statement concluding that the Financial Accounting Standards Board ("FASB") and its parent organization, the Financial Accounting Foundation ("FAF"), satisfied the criteria for an accounting standard-setting body under the Act, and recognizing the FASB's financial accounting and reporting standards as "generally accepted" under Section 109 of the Act.<sup>1</sup> As a consequence of that recognition, the Commission undertook a review of the FASB's accounting support fee for calendar year 2020.<sup>2</sup> In connection with its review, the Commission also reviewed the budget for the FAF and the FASB for calendar year 2020.

Section 109 of the Act also provides that the standard setting body can have additional sources of revenue for its activities, such as earnings from sales of publications, provided that each additional source of revenue shall not jeopardize, in the judgment of the Commission, the actual or perceived independence of the standard setter. In this regard, the Commission also considered the interrelation of the operating budgets of the FAF, the FASB, and the Governmental Accounting Standards Board ("GASB"), the FASB's sister organization, which sets accounting standards used by state and local government entities. The Commission has been advised by the FAF that neither the FAF, the FASB, nor the GASB accept contributions from the accounting profession.

The Commission understands that the Office of Management and Budget ("OMB") has determined the FASB's spending of the 2020 accounting support fee is sequestrable under the Budget Control Act of 2011.<sup>3</sup> So long as sequestration is applicable, we anticipate that the FAF will work with the Commission and Commission staff

<sup>1</sup> Financial Reporting Release No. 70.

<sup>2</sup> The Financial Accounting Foundation's Board of Trustees approved the FASB's budget on November 19, 2019. The FAF submitted the approved budget to the Commission on November 20, 2019.

<sup>3</sup> See "OMB Report Pursuant to the Sequestration Transparency Act of 2012" (P.L. 112-155), page 222 of 224 at: [http://www.whitehouse.gov/sites/default/files/omb/assets/legislative\\_reports/stareport.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/legislative_reports/stareport.pdf).

<sup>51</sup> 15 U.S.C. 78s(b)(2).

<sup>52</sup> 15 U.S.C. 78s(b)(2).

<sup>53</sup> 17 CFR 200.30-3(a)(12).