

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-80866; File No. SR-NYSEArca-2017-46)

June 6, 2017

Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing of Proposed Rule Change to Amend NYSE Arca Equities Rule 13.2, Liability of Corporation

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on May 23, 2017, NYSE Arca, Inc. (the “Exchange” or “NYSE Arca”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend NYSE Arca Equities Rule 13.2 (“Liability of Corporation”) by (1) aligning the scope of 13.2(a) with the rules of other national securities exchanges by specifying that the Exchange is not liable to its ETP Holders’ “successors, representatives or customers”; (2) eliminating the daily caps that limit the amount the Exchange may compensate ETP Holders for claims arising under the rule; (3) changing the procedural requirements for submitting notification to the Exchange of any claims for compensation; and (4) replace the words “acknowledged receipt of” in Rule 13.2(b) with the word “received.”

Additionally, the Exchange seeks to have the proposed changes to eliminate the daily caps function retroactively to March 1, 2017. The proposed rule change is available on the

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

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

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

Exchange's website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

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

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

1. Purpose

NYSE Arca Equities Rule 13.2 ("Rule 13.2") provides a mechanism for ETP Holders to receive compensation for losses sustained as a result of the negligent acts or omissions of the Exchange's employees or for the failure of Exchange systems or facilities. Specifically, if an ETP Holder transmits an order to or through the Exchange's order routing systems, electronic book, or automatic execution systems or to any other automated facility of the Exchange and the Exchange has acknowledged receipt of the order, Rule 13.2(b) permits the Exchange to compensate ETP Holders for losses resulting from "the negligent acts or omissions of its employees or for the failure of its systems or facilities." The Exchange is only permitted to compensate an ETP Holder for losses to the extent the Exchange's rules authorize such compensation. As described below, the Exchange proposes to:

- Align its rule with those of other national securities exchanges by adding that the Exchange is not liable to "successors, representatives, or customers" of ETP

Holder;

- eliminate the daily caps on liability;
- change the procedural requirements for submitting notification to the Exchange of any claims for compensation; and
- replace the words “acknowledged receipt of” in Rule 13.2(b) with the word “received.”

Proposal to Align and Clarify the Scope of 13.2(a) with Rules of Other National Securities Exchanges

The Exchange proposes to align the scope of 13.2(a) with the rules of other national securities exchanges<sup>4</sup> by adding rule text specifying that, except as otherwise expressly provided in the rules, the Exchange is not liable to ETP Holders’ successors, representatives or customers. Rule 13.2 does not authorize the Exchange to compensate a successor, representative or customer of an ETP Holder because the rule does not reference those entities. As such, the Exchange believes that the proposed text specifically referencing these entities clarifies the scope of the rule.

Proposal to Eliminate Daily Caps on Liability

Rule 13.2 provides the Exchange with the authority to compensate ETP Holders for claims arising out of the negligent acts or omissions of its employees or for the failure of its systems or facilities up to specified amounts in paragraph (b) of the Rule. Specifically, Rule 13.2(b) provides that:

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<sup>4</sup> See Investors’ Exchange LLC (“IEX”) Rule 11.260, BATS BZX Exchange Inc. (“BATS”) Rule 11.16, and EDGX Exchange Inc. (“EDGX”) Rule 11.14.

- As to claims made by a single ETP Holder, with respect to a single trading day, the Exchange will not be liable in excess of the larger of \$100,000, or the amount of any recovery obtained by the Exchange under any applicable insurance;
- As to claims made by all ETP Holders, with respect to a single trading day, the Exchange will not be liable in excess of the larger of \$250,000 or the amount of the recovery obtained by the Exchange under any applicable insurance; and
- As to claims made by all ETP Holders, with respect to a single calendar month, the Exchange will not be liable in excess of the larger of \$500,000, or the amount of the recovery obtained by the Exchange under any applicable insurance.

The Exchange proposes to eliminate the daily caps in paragraphs (b)(1) and (b)(2). The Exchange would retain the monthly cap in (b)(3) of \$500,000. The proposal to eliminate the daily caps in paragraphs (b)(1) and (b)(2) is consistent with the rules of other national securities exchanges, which only have a monthly cap.<sup>5</sup> In addition, the Exchange believes that it is more appropriate and fair to have a monthly limit on liability rather than a daily limit on liability, which could potentially result in disparate treatment among ETP Holders with claims on different days. Under the current rules, the Exchange is liable on any day as to the aggregate of all claims up until \$250,000. Therefore, ETP Holders with claims on a day where other ETP Holders also have claims are less likely to receive full compensation compared to an ETP Holder that has a claim on a day when no other or fewer other ETP Holders have claims. Accordingly, the Exchange's proposal seeks to limit the possibility for disparate treatment by proposing to eliminate the current daily liability caps.

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<sup>5</sup> See ISE Rule 705, Nasdaq Stock Market LLC ("Nasdaq") Rule 4626, Nasdaq OMX PHLX LLC ("Nasdaq PHLX") Rule 1015, and Nasdaq BX, Inc. ("Nasdaq BX") Rule 4626.

Under Rule 13.2(c), if claims cannot be fully satisfied because in the aggregate they exceed the maximum liability provided under paragraph (b), the maximum amount is allocated among all claims. In connection with its proposal to eliminate the daily caps in paragraphs (b)(1) and (b)(2), the Exchange is making a conforming change to eliminate in paragraph (c) the reference to allocating claims arising “on a single trading day.”

#### Proposal to Change Procedural Requirements for Submitting a Claim

The Exchange proposes to clarify and change the time frame in which ETP Holders are required to submit notification to the Exchange of any claims for compensation under Rule 13.2. Rule 13.2(c) currently refers to written notice of claims “to the Corporation no later than the opening of trading on the next business day following the day on which the use or enjoyment of the Corporation’s facilities giving rise to the claim occurred...” The Exchange proposes to clarify the requirement to provide written notice of all claims. Specifically, the Exchange proposes to delete the reference in paragraph (c) to written notice and replace it with new paragraph (d), the first sentence of which would state that all claims for compensation must be in writing. The proposal would conform the Exchange’s notice requirements for claims to that of other national securities exchanges, which require written notice of claims.<sup>6</sup>

In addition, proposed new paragraph (d) would require that ETP Holders make such written claims by noon Eastern Time the next business day following the day on which the use of the Exchange gave rise to such claims. The Exchange believes it is appropriate to extend the time for an ETP Holder to submit a written claim from 9:30 a.m. Eastern Time to noon Eastern Time because it would provide time for an ETP Holder to evaluate what losses may have

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<sup>6</sup> See Nasdaq Rule 4626, Nasdaq PHLX Rule 1015, and Nasdaq BX Rule 4626 (providing that members must submit claims in writing by noon Eastern Time on the next business day following the system issue).

occurred on the prior trading day, particularly if the issue occurred later in the day. This proposed time frame is based on the rules of other national securities exchanges.<sup>7</sup>

#### Proposed Change to Re-word Rule 13.2(b)

The Exchange proposes to replace the words “acknowledged receipt of” in Rule 13.2(b) with the word “received.” The Exchange believes this language is more concise and accurately reflects that all orders received in Exchange systems, whether acknowledged or not, are eligible under the Rule. Additionally, the Exchange notes that this language is similar to that found in the rules of other national securities exchanges.<sup>8</sup>

#### Operability of the Proposal to Eliminate the Daily Caps on Liability

Finally, the Exchange requests to have the proposed changes to eliminate the daily caps in paragraphs (b)(1) and (b)(2) function retroactively to March 1, 2017. Specifically, the Exchange seeks to have the ability to compensate ETP Holders in connection with losses incurred from an Exchange system issue on March 20, 2017. Prior to March 20, 2017, the Exchange had never received a claim that exceeded the liability limits and thus the Exchange was never prevented from fully compensating an ETP Holder. In connection with the March, [sic] 20, 2017, system issue, the Exchange received claims from ETP Holders that exceed amounts provided for in the daily caps. The Exchange believes that retroactively applying the monthly liability limit promotes fairness in that it provides the Exchange with the ability to compensate ETP Holders equally and reduces the potential for disparate treatment among ETP Holders who suffered a loss on March 20, 2017 and those ETP Holder [sic] who suffered a loss on a different day. Lastly, the Exchange notes that the Commission has approved other national

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<sup>7</sup> Id.

<sup>8</sup> See NYSE Rule 18(b) and NYSE MKT Rule 18(b).

securities exchanges rules related to limitations on liability retroactively.<sup>9</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”), in general, and furthers the objectives of Section 6(b)(5),<sup>10</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to, and perfect the mechanism of, a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change removes impediments to and perfects the mechanism of a free and open market because it more adequately addresses issues of liability by (1) eliminating the daily caps on liability and rewording 13.2 (b) to reflect that all orders “received” are eligible under the Rule thus increasing the Exchange’s ability to compensate ETP Holders for losses incurred in relation to the failure of the Exchange’s systems or facilities or negligent acts or omissions of Exchange employees, (2) adding clarity and transparency to scope of the rule and the compensation mechanism provided for in the rule by specifying that the Exchange is not liable to an ETP Holder’s successors, representatives or customers, and (3) changing the procedural requirements for submitting notification of claims for compensation to the Exchange so that ETP Holders have a [sic] until noon Eastern Time the next business day following the day on which use of the Exchange’s facilities gave rise to such claims to submit written notice.

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<sup>9</sup> See Securities Exchange Act Release No.56085 (July 17, 2007), 72 FR 40348 (July 24, 2007) (SR-NYSE-2007-09).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

The Exchange further believes that the proposed changes are reasonable and would remove impediments to and perfect the mechanism of a free and open market because eliminating the daily caps would not adversely affect ETP Holders and would reduce the risk that a loss is not covered by the Exchange's liability limits. Further, the Exchange believes that the proposed text specifically referencing that the Exchange is not liable to ETP Holders' successors, representatives or customers aligns the scope of the rule with that of other national securities exchanges<sup>11</sup> and provides transparency as to the rule's application.

Further, clarifying and extending by a few hours the deadline in which ETP Holders are required to submit written notice of claims for compensation is reasonable given that an ETP Holder may not be aware of a claim or able to file a claim before the market open on the next business day. Additionally, the proposed procedural provisions are equitable because all ETP Holders are subject to the same procedural process for submitting claims for compensation. In addition, the Exchange notes that other national securities exchanges have similar requirements with respect to the timing in which written notice of claims must be submitted.<sup>12</sup>

Retroactively applying the proposed changes to eliminate the daily caps on the Exchange's liability is reasonable because it provides the Exchange with the ability to adequately compensate ETP Holders for losses incurred in relation to the Exchange's system failure that occurred on March 20, 2017. Additionally, the Exchange believes that applying the monthly liability limit retroactively promotes just and equitable principles of trade because it will apply uniformly to all ETP Holders that suffered a loss in connection with the March 20, 2017 system issues and any ETP Holder that potentially suffers a loss in connection with a future Exchange

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<sup>11</sup> See supra note 4.

<sup>12</sup> See supra note 6.

system issue. Prior to March 20, 2017, the Exchange had never received a claim that exceeded the liability limits and thus the Exchange was never prevented from fully compensating an ETP Holder for losses suffered in connection with the use of the Exchange's facilities, including losses caused by the negligent act or omission of an Exchange employee. Therefore, the Exchange believes that applying the rule retroactively would not be unfair or discriminatory. ETP Holders that suffered losses on March 20, 2017 and ETP Holders that previously received compensation from the Exchange would receive the same benefit of a fully paid claim. Further, the Exchange notes that the Commission has approved similar rules retroactively<sup>13</sup> and that the proposed liability limits more closely align with the limits of other national securities exchanges.<sup>14</sup> As such, the Exchange believes retroactively applying the proposed changes to the liability limits promotes just and equitable principles of trade, fosters cooperation and coordination with persons engaged in facilitating transactions in securities, removes impediments to, and perfects the mechanism of, a free and open market and a national market system and, in general, better protects investors and the public interest because it reduces the risk that losses suffered by a participant would be treated differently depending on the day or trading venue that the issue occurred on.

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 change is not designed to address any competitive issue but rather would add transparency to the rule and align more closely with current rules of other national stock

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<sup>13</sup> See supra note 9.

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

exchanges<sup>15</sup> and provide more certainty to members that, regardless of trading venue, losses incurred in connection with a failure of Exchange systems or facilities, including losses caused by the negligent act or omission of an Exchange employee, will be eligible for review by and compensation from the Exchange.

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

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

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

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 self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the 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-NYSEArca-2017-46 on the subject line.

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<sup>15</sup> See supra notes 4, 5 and 8.

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-NYSEArca-2017-46. 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; the Commission does not edit personal identifying information from submissions. You should

submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2017-46, 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>16</sup>

Brent J. Fields  
Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).