

particular securities.<sup>24</sup> The Commission believes that the potential lack of a Market Maker quoting in particular series will be a factor to be considered in a broker-dealer's best execution routing determination, similar to other factors a broker-dealer must consider in connection with its best execution obligation.

The NYSE Euronext Comment Letter also questions how Nasdaq's proposal fosters transparency, price competition, and the development of the national market system.<sup>25</sup> The Commission does not believe that the proposal will have a negative affect on price transparency, as the prices and sizes of orders on NOM will continue to be disseminated on the consolidated tape even though Market Makers may not be posting two-sided quotations. Further, the Commission believes that the proposal could foster intermarket price competition by providing an additional market and source of liquidity for options series that would otherwise have been prohibited from trading on NOM due to the lack of a Market Maker registered in that series. Finally, the Commission does not believe that the proposal will have a negative effect on the development of a national market system. As noted above, notwithstanding the elimination of the requirement to have a registered Market Maker trading in a particular series, NOM is designed to ensure, and the Options Order Protection and Locked/Crossed Market Plan requires that procedures are in place to ensure, that orders executed on NOM will not trade-through better prices on other options exchanges.

Finally, the NYSE Euronext Comment Letter expresses doubt about the necessity of the proposed rule change and suggests that if there is no Market Maker to trade a series, NOM should simply not list such series.<sup>26</sup> The Commission notes that a proposed rule change is not required to be "necessary" in order to be found consistent with the Act. Further, as Nasdaq noted, one of the primary purposes of the proposal is to expand the number of series available to investors for trading and hedging purposes on NOM, and NYSE Euronext's recommendation would not advance this objective.

For the reasons noted above, the Commission believes that the proposed rule change is consistent with the Act.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>27</sup> that the proposed rule change (SR-NASDAQ-2010-007), 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>28</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. 2010-6516 Filed 3-23-10; 8:45 am]

BILLING CODE 8011-01-P

#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61736; File No. SR-NASDAQ-2010-038]

#### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by The NASDAQ Stock Market LLC To Permit the Concurrent Listing of \$3.50 and \$4 Strikes for Classes Participating in the \$0.50 Strike Program and the \$1 Strike Program

March 18, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on March 16, 2010, The NASDAQ Stock Market LLC ("NASDAQ") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by NASDAQ. 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

NASDAQ is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposal for the NASDAQ Options Market ("NOM" or "Exchange") to amend Chapter IV, Section 6 (Series of Options Contracts Open for Trading) to permit the concurrent listing of \$3.50 and \$4 strikes for classes that participate in both the \$0.50 Strike Price Program ("\$0.50 Strike Program")<sup>3</sup> and the \$1

Strike Price Program ("\$1 Strike Program").<sup>4</sup>

The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b-4(f)(6)(iii).<sup>5</sup>

The text of the proposed rule change is available from NASDAQ's Web site at <http://nasdaq.cchwallstreet.com/Filings/>, at NASDAQ's principal office, 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 Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The purpose of this proposal is to amend Chapter IV, Section 6 to permit the concurrent listing of \$3.50 and \$4 strikes for classes that participate in both the \$0.50 Strike Program and the \$1 Strike Program.

The Exchange recently implemented a rule change that permits strike price intervals of \$0.50 for options on stocks trading at or below \$3.00 pursuant to the \$0.50 Strike Program.<sup>6</sup> As part of the filing to establish the \$0.50 Strike Program, the Exchange contemplated that a class may be selected to

<sup>4</sup> The \$1 Strike Program was initially approved as a pilot on March 12, 2008. See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080) (order approving). The program was subsequently made permanent and expanded. See Securities Exchange Act Release Nos. 58093 (July 3, 2008), 73 FR 39756 (July 10, 2008) (SR-NASDAQ-2008-057) (notice of filing and immediate effectiveness); 59588 (March 17, 2009), 74 FR 12410 (March 24, 2009) (SR-NASDAQ-2009-025) (notice of filing and immediate effectiveness); and 61347 (January 13, 2010), 75 FR 3513 (January 21, 2010) (SR-NASDAQ-2010-003) (notice of filing and immediate effectiveness).

<sup>5</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>6</sup> See Securities Exchange Act Release No. 60952 (November 6, 2009), 74 FR 59277 (November 17, 2009) (SR-NASDAQ-2009-099) (notice of filing and immediate effectiveness); and Chapter IV, Section 6, Supplementary Material .05 to Section 6.

<sup>27</sup> 15 U.S.C. 78s(b)(2).

<sup>28</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> The \$0.50 Strike Program was initiated in an immediately effective filing on November 6, 2009. See Securities Exchange Act Release No. 60952 (November 6, 2009), 74 FR 59277 (November 17, 2009) (SR-NASDAQ-2009-099) (notice of filing and immediate effectiveness).

<sup>24</sup> *Id.*

<sup>25</sup> See NYSE Euronext Comment Letter, *supra* note 5, at 2.

<sup>26</sup> See NYSE Euronext Comment Letter, *supra* note 5, at 2.

participate in both the \$0.50 Strike Program and the \$1 Strike Program. Under the \$1 Strike Program, new series with \$1 intervals are not permitted to be listed within \$0.50 of an existing \$2.50 strike price in the same series, except that strike prices of \$2 and \$3 are permitted to be listed within \$0.50 of a \$2.50 strike price for classes also selected to participate in the \$0.50 Strike Program.<sup>7</sup> Under the Exchange's current Chapter IV, Section 6, for classes selected to participate in both the \$0.50 Strike Program and the \$1 Strike Program, the Exchange may either: (a) List a \$3.50 strike but not list a \$4 strike; or (b) list a \$4 strike but not list a \$3.50 strike. For example, if a \$3.50 strike for an option class in both the \$0.50 and \$1 Strike Programs was listed, the next highest permissible strike price would be \$5.00. Alternatively, if a \$4 strike was listed, the next lowest permissible strike price would be \$3.00. The intent of the \$0.50 Strike Program was to expand the ability of investors to hedge risks associated with stocks trading at or under \$3 and to provide finer intervals of \$0.50, beginning at \$1 up to \$3.50. As a result, the Exchange believes that the current filing is consistent with the purpose of the \$0.50 Strike Program and will permit the Exchange to fill in any existing gaps resulting from having to choose whether to list a \$3.50 or \$4 strike for options classes in both the \$0.50 and \$1 Strike Programs.

Therefore, the Exchange is submitting the current filing to permit the listing of concurrent \$3.50 and \$4 strikes for classes that are selected to participate in both the \$0.50 Strike Program and the \$1 Strike Program. To effect this change, the Exchange is proposing to amend Chapter IV, Section 6, Supplementary Material .02(b) to Section 6 by adding \$4 to the strike prices of \$2 and \$3 currently permitted if a class participates in both the \$0.50 Strike Program and the \$1 Strike Program.

The Exchange is also proposing to amend the current rule text to delete references to "\$2.50 strike prices" (and the example utilizing \$2.50 strike prices) and to replace those references with broader language, e.g., "existing strike prices."

Finally, the Exchange is proposing technical, housekeeping rule changes to Chapter IV, Section 2, Supplementary Material .02 to Section 6 to conform formatting and punctuation and to Chapter IV, Section 6, Supplementary Material .09 to Section 6 to ensure consistency of internal numbering.

## 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act<sup>8</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act<sup>9</sup> in particular, in that 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, and to remove impediments to and perfect the mechanisms of a free and open market and a national market system, by permitting the Exchange to list more granular strikes on options overlying lower priced securities, which the Exchange believes will provide investors with greater flexibility by allowing them to establish positions that are better tailored to meet their investment objectives.

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

NASDAQ does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)<sup>10</sup> of the Act and Rule 19b-4(f)(6)<sup>11</sup> thereunder. The Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing the proposed rule change.

The Exchange has requested that the Commission waive the 30-day operative delay to permit the Exchange to

compete with other exchanges whose rules permit concurrent listing of \$3.50 and \$4 strikes for classes similarly participating in both a \$0.50 strike program and a \$1 strike program. The Commission finds that waiver of the operative delay is consistent with the protection of investors and the public interest because such waiver will encourage fair competition among the exchanges. Therefore, the Commission designates the proposal operative upon filing.<sup>12</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## 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-NASDAQ-2010-038 on the subject line.

### *Paper Comments*

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

All submissions should refer to File Number SR-NASDAQ-2010-038. 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 Web site (<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

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>7</sup> See Chapter IV, Section 6, Supplementary Material .02(b) to Section 6.

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 Web site 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. 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-NASDAQ-2010-038 and should be submitted on or before April 14, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>13</sup>

**Florence E. Harmon,**  
Deputy Secretary.

[FR Doc. 2010-6515 Filed 3-23-10; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61732; File No. SR-CBOE-2010-027]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend CBOE Rule 31.85 to, Among Other Things, Prohibit Broker Discretionary Voting on the Elections of Directors

March 18, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 4, 2010, the Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange filed the proposal as a "non-controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder.<sup>4</sup> The Commission is publishing this notice to

solicit comments on the proposed rule change from interested persons.

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

CBOE proposes to amend CBOE Rule 31.85 to eliminate broker discretionary voting for all elections of directors at shareholder meetings, whether contested or not, except for companies registered under the Investment Company Act of 1940 (the "1940 Act"), to amend CBOE Rule 31.85 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company, and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment advisor. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.org/legal>), at the Exchange's Office of the Secretary, and at the Commission.

### 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

A shareholder of a public company may hold shares either directly, as the record holder, or indirectly, as the beneficial holder, with the shares held in the name of the beneficial shareholder's broker-dealer, bank nominee, or custodian ("securities intermediary"), which is the record holder.<sup>5</sup> The latter generally is referred to as holding securities in "street name."<sup>6</sup> The number of beneficial owners holding securities in street name

has increased significantly over the past thirty-three years.

Currently, CBOE Rule 31.85 permits brokers to vote without voting instructions from the beneficial owner on uncontested elections of directors.<sup>7</sup> Rule 31.85 also lays out a list of enumerated items for which a member may not give a proxy to vote without instructions from the beneficial owner.<sup>8</sup> This list does not include the election of directors. Due to the increase in the holding of securities in street name, the impact of the broker vote on the election of directors has become increasingly significant. At the same time, the number of proxy campaigns, such as "just vote no" or "withhold" campaigns, that have targeted the election of directors without a formal contest has also increased. This has made the "uncontested" election of directors a more controversial, as opposed to routine, matter.<sup>9</sup>

In light of this development, the New York Stock Exchange proposed a rule filing to declare the election of directors ineligible for broker discretionary voting.<sup>10</sup> The Commission approved this filing, as amended, on July 1, 2009.<sup>11</sup> Correspondingly, CBOE proposes to amend CBOE Rule 31.85 to add all elections of directors at shareholder meetings whether contested or not, except for companies registered under the 1940 Act, to the list of enumerated items for which a member may not give a proxy to vote without instructions from the beneficial owner.

CBOE also proposes to amend CBOE Rule 31.85 to preclude broker discretionary voting on a matter that materially amends an investment advisory contract with an investment company and to define that a material amendment to an investment advisory contract would include any proposal to obtain shareholder approval of an investment company's investment advisory contract with a new investment advisor for which shareholder approval is required by the 1940 Act and the rules thereunder. These proposed amendments will help ensure the full and effective voting rights of investment company shareholders on material matters.

##### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the

<sup>7</sup> See CBOE Rule 31.85(a), which explains the process and situations in which brokers may vote without voting instructions from the beneficial owner.

<sup>8</sup> See CBOE Rule 31.85(b).

<sup>9</sup> See *supra* note 2 [sic].

<sup>10</sup> See SR-NYSE-2006-92.

<sup>11</sup> See *supra* note 2 [sic].

<sup>13</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

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

<sup>4</sup> 17 CFR 240.19b-4(f)(6).

<sup>5</sup> See Commission Release No. 34-60215 (July 1, 2009).

<sup>6</sup> See *supra* note 2 [sic].