

unconditional price improvement guarantees are involved.<sup>15</sup>

The proposed rule change does exactly what the response to Question 13 of the FAQs allows. The Exchange will provide price improvement in a sub-penny increment only when circumstances dictate, *i.e.*, only: (1) When a Non-Displayed Order is resting on the opposite side of the market from a displayed order at the locking price, or (2) when an order subject to price sliding is ranked at a price opposite a displayed order.

All orders and quotations in these scenarios are accepted, displayed and/or ranked in a permissible penny increment price and are only executed in a sub-penny increment under certain limited circumstances—if the displayed order opposite the resting Non-Displayed Order or price slid order is cancelled or executed, then the Non-Displayed order or price slide order is again available at its full limit price.<sup>16</sup> There are also no unconditional price improvement guarantees involved.

The Exchange notes that this proposal does not propose any new policies or provisions that are unique or unproven, as the Exchange and multiple other exchanges allow orders to execute at half-penny prices.<sup>17</sup> The Exchange does not believe that there is anything novel or controversial about executing marketable orders in a fully transparent manner that is consistent with its other pre-existing rules, and under the proposed functionality, both sides to each transaction executed will receive at least one half penny price improvement on their orders. As stated above, Commission Staff has also publicly interpreted Rule 612 as allowing sub-penny executions due to price improvement, and arguably has encouraged such executions by stating that “ \* \* \* sub-penny executions due to price improvement are generally beneficial to retail investors.”<sup>18</sup>

<sup>15</sup> *Id.*

<sup>16</sup> The Exchange notes that permitting an execution in a sub-penny increment under certain limited circumstances, while never ranking the applicable orders at such sub-penny increments, has already been implemented by multiple exchanges, including the Exchange, in the form of mid-point orders. See BATS Rule 11.9(c)(9) (“Mid-Point Peg Orders”); see also, NASDAQ Rule 4751(f)(4) (“Midpoint Peg” orders); NYSE Arca Equities Rule 7.31(h)(5) (“Mid-Point Passive Liquidity Orders”); EDGX Rule 11.5(c)(7) (“Mid-Point Match Orders”). The order types listed above are not displayed but can execute at the mid-point of the NBBO, including in penny-wide markets.

<sup>17</sup> See *id.*

<sup>18</sup> See Exchange Act Release No. 34-54714 at 4 (November 6, 2006), 71 FR 66352 (November 14, 2006).

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

The Exchange does not believe that the proposed rule change imposes any burden on competition.

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

The Exchange has neither solicited nor received written comments on the proposed rule change.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the 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-BATS-2011-015 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-BATS-2011-015. 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 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. 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-BATS-2011-015 and should be submitted on or before June 8, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011-12132 Filed 5-17-11; 8:45 am]

**BILLING CODE 8011-01-P**

## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-64485; File No. SR-CBOE-2011-046]

### **Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Orders Qualifying for Certain Quantity-Based Fee Waivers**

May 13, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934, 15 U.S.C. 78s(b)(1), notice is hereby given that on April 29, 2011, Chicago Board Options Exchange, Incorporated (“CBOE” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II and III below, which Items have been prepared by CBOE. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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

Chicago Board Options Exchange, Incorporated ("CBOE" or "Exchange") proposes to amend its Fees Schedule regarding the waiver of customer transaction fees for orders of a certain size in options on exchange-traded funds ("ETFs"), exchange-traded notes ("ETNs") and Holding Company Depositary Receipts ("HOLDRs") and customer transaction fees for orders of a certain size that are routed in whole or in part, to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Rule CBOE 6.80 ("Linkage Fees"). 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, CBOE included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. CBOE has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.

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

#### 1. Purpose

The Exchange proposes to institute the following fee changes effective May 2, 2011:

The Exchange currently waives transaction fees for customer orders of 99 contracts or less in ETF, ETN and HOLDRs options.<sup>1</sup> For the purpose of determining which orders qualify for this quantity-based fee waiver, the Exchange proposes to aggregate multiple orders from the same executing firm for itself or for a CMTA or correspondent firm in the same series on the same side of the market that are received by the Exchange within 500 milliseconds. This change is intended to discourage firms from dividing orders into multiple orders of less than 100 contracts for

purposes of qualifying for the fee waiver and avoiding transaction fees.

Additionally, under Section 20 of the CBOE Fees Schedule, for each customer order with an original size of 100 or more contracts that is routed, in whole or in part, to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Rule 6.80, the Exchange passes through the actual transaction fee assessed by the exchange(s) to which the order was routed, minus \$0.05 per contract. For the same reason stated above, the Exchange proposes to aggregate multiple orders from the same executing firm for itself or for a CMTA or correspondent firm in the same series on the same side of the market that are received by the Exchange within 500 milliseconds for the purpose of determining the order quantity.

The proposed aggregation of orders is similar to a provision in the Exchange's Order Handling System ("OHS") Order Cancellation Fee that enables the Exchange to aggregate certain orders and count them as one executed order for purposes of the Cancellation Fee.<sup>2</sup>

#### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 ("Act"),<sup>3</sup> in general, and furthers the objectives of Section 6(b)(4)<sup>4</sup> of the Act in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among CBOE Trading Permit Holders and other persons using its facilities. In particular, the Exchange believes the proposed rule change is equitable and reasonable in that it is designed to discourage firms from dividing orders into multiple smaller size orders for purposes of qualifying for quantity-based fee waivers and avoiding fees. In addition, the proposed aggregation of orders is similar to a provision in the Exchange's OHS Order Cancellation Fee that enables the Exchange to aggregate certain orders and count them as one executed order for purposes of the Cancellation Fee.

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

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

<sup>2</sup> See CBOE Fees Schedule, Section 14 and Securities Exchange Act Release No. 59690 (April 2, 2009), 74 FR 16243 (April 9, 2009).

<sup>3</sup> 15 U.S.C. 78f(b).

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

### 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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>5</sup> and subparagraph (f)(2) of Rule 19b-4<sup>6</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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-CBOE-2011-046 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.

All submissions should refer to File Number SR-CBOE-2011-046. 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>5</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>6</sup> 17 CFR 240.19b-4(f)(2).

<sup>1</sup> See CBOE Fees Schedule, Footnote 9.

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 such filing also will be available for inspection and copying at the principal office of CBOE. 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-CBOE-2011-046 and should be submitted on or before June 8, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

[FR Doc. 2011-12240 Filed 5-17-11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64480; File No. SR-Phlx-2011-65]

### Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by NASDAQ OMX PHLX LLC Regarding Opening Index Option Months and Series

May 12, 2011.

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> notice is hereby given that on May 6, 2011, NASDAQ OMX PHLX LLC ("Phlx" or the "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change, from interested persons.

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

The Exchange is filing with the Commission a proposal to clarify that the Exchange will open at least one expiration month and one series for

each class of index options open for trading on the Exchange; and that the Exchange may open additional series of index options under certain circumstances. The proposed change is based directly on the recently approved rule of another options exchange, namely Chapter IV, Section 6 of the NASDAQ Options Market, as well as on Rule 1012 (Series of Options Open for Trading) of the Exchange.

The text of the proposed rule change is available on the Exchange's Web site at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLX/Filings/>, at the principal office of the Exchange, on the Commission's Web site at <http://www.sec.gov>, 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 Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

The purpose of this proposed rule change is to amend Exchange Rule 1101A to indicate that the Exchange will open at least one expiration month and one series for each class of index options open for trading on the Exchange; and that the Exchange may open additional series of index options under certain circumstances. The proposed change is based directly on the recently approved rules of another options exchange, namely Chapter IV, Sections 6 and 8 of the NASDAQ Options Market ("NOM"), as well as on Rule 1012 of the Exchange.<sup>3</sup>

In 2008, the Commission approved the establishment of NOM and rules pertaining thereto<sup>4</sup> that, among others,

<sup>3</sup> NOM and the Exchange are each self-regulatory organizations ("SROs") that operate as independent options exchanges within the NASDAQ OMX Group.

<sup>4</sup> See Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and NASDAQ-2007-080) (order approving rules for trading of options on the

included NOM Chapter IV, Section 6 regarding series of options contracts open for trading<sup>5</sup> and Section 8 regarding long-term options contracts. NOM Sections 6 and 8 generally apply to options that overlay single-stocks or Exchange-Traded Funds and similar products.

In 2011, the Exchange filed an immediately effective proposal at SR-Phlx-2011-04 to conform its rule 1012 regarding the listing of months and series of options on stock or Exchange Traded Fund Shares ("ETFs") that are approved for listing and trading on the Exchange to the equivalent NOM rules at Chapter IV, Section 6 and Section 8.<sup>6</sup> By SR-Phlx-2011-04, the Exchange harmonized its Rule 1012 regarding opening a minimum of one option expiration month and series for trading and adding new series with similar NOM procedures.<sup>7</sup>

The Exchange now proposes to similarly revise its Rule 1101A

NASDAQ Options Market, including Chapter IV, Sections 6 and 8).

<sup>5</sup> NOM Chapter IV, Sec 6 states, in relevant part: (b) At the commencement of trading on NOM of a particular class of options, NOM will open a minimum of one (1) series of options in that class. The exercise price of the series will be fixed at a price per share, relative to the underlying stock price in the primary market at about the time that class of options is first opened for trading on NOM.

(c) Additional series of options of the same class may be opened for trading on NOM when Nasdaq deems it necessary to maintain an orderly market, to meet Customer demand or when the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices. The opening of a new series of options shall not affect the series of options of the same class previously opened. New series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, Nasdaq, in its discretion, may add a new series of options on an individual stock until five (5) business days prior to expiration.

<sup>6</sup> See Securities Exchange Act Release No. 63700 (January 11, 2011), 76 FR 2931 (January 18, 2011) (SR-Phlx-2011-04) (notice of filing and immediate effectiveness conforming Phlx Rule 1012 and NOM Chapter IV, Sections 6 and 8).

<sup>7</sup> Rule 1012 states, in relevant part: (A) At the commencement of trading on the Exchange of a particular class of stock or Exchange-Traded Fund Share options, the Exchange shall open a minimum of one expiration month and series for each class of options open for trading on the Exchange.

(B) Additional series of stock or Exchange-Traded Fund Share options of the same class may be opened for trading on the Exchange when the Exchange deems it necessary to maintain an orderly market, to meet customer demand or when the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices. The opening of a new series of options shall not affect the series of options of the same class previously opened. New series of options on an individual stock may be added until the beginning of the month in which the options contract will expire. Due to unusual market conditions, the Exchange, in its discretion, may add a new series of options on an individual stock until five (5) business days prior to expiration.

<sup>7</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.