

conjunction with the cap.¹⁴ The proposed service fee is also similar to the incremental charge of \$.01 per contract that the Exchange currently charges on market maker volume executed in excess of 2,500,000 contracts per month.¹⁵

The Exchange believes the proposal to amend the monthly market maker fee cap is equitable and not unfairly discriminatory because it would uniformly apply to all market makers. Market maker fee caps generally are designed to give market makers who provide substantial liquidity on the Exchange a benefit by way of a lower transaction fee. The Exchange notes that other exchanges, notably the CBOE,¹⁶ PHLX,¹⁷ and ISE¹⁸ offer volume discounts and/or fee caps for market makers transacting business on their exchanges. The Exchange believes that the proposed increase in the amount of the fee cap is reasonable because of the additional costs being incurred by the Exchange in enhancing its systems to provide our market makers with the increased bandwidth needed to quote competitively, given the growth in overall industry volumes and resultant increased volume on the Exchange. The Exchange notes further that even at the newly proposed \$350,000 level, the market maker fee cap would be substantially less than similar caps on PHLX (which offers a cap of \$550,000 per month including only certain symbols)¹⁹ and CBOE (which requires a \$8,446,400 annual prepayment, equivalent to over \$700,000 per month, in order to attain a rate of \$0.03 per contract).²⁰

For the reasons noted above, the Exchange believes that the proposed fees are fair, equitable and not unfairly discriminatory.

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.

¹⁴ See *supra* note 6 (describing the operation of the ISE service fee).

¹⁵ See *supra* note 13 (describing the operation of the \$.01 incremental charge).

¹⁶ See CBOE Fees Schedule—Liquidity Provider Scale on page 2 of 15 and related footnote 10 on page 4 of 15.

¹⁷ See PHLX Fee Schedule—Section II (Equity Options Fees) on page 8 of 42.

¹⁸ See ISE Schedule of Fees—ISE Market Maker sliding scale on page 4 of 17.

¹⁹ See *supra* note 17.

²⁰ See *supra* note 16, footnote 10 on page 4 of 15.

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 is effective upon filing pursuant to Section 19(b)(3)(A)²¹ of the Act and subparagraph (f)(2) of Rule 19b-4²² thereunder, because it establishes a due, fee, or other charge imposed by NYSE Amex.

At any time within 60 days of the filing of such 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. Please include File Number SR-NYSEAmex-2011-36 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-NYSEAmex-2011-36. 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 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-NYSEAmex-2011-36 and should be submitted on or before July 8, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Cathy H. Ahn,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64655; File No. SR-NYSEAmex-2011-37]

Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule To Establish a New Fee Designed To Encourage Efficient Use of Bandwidth by ATP Firms and To Rename a Related Existing Fee

June 13, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that, on June 1, 2011, NYSE Amex LLC (the "Exchange" or "NYSE Amex") filed with the Securities and Exchange Commission (the "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.

²³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

²¹ 15 U.S.C. 78s(b)(3)(A).

²² 17 CFR 240.19b-4(f)(2).

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

The Exchange proposes to amend its Options Fee Schedule (the "Schedule") by renaming an existing fee to better reflect the nature of the fee and introducing a new fee designed to encourage efficient use of bandwidth by both order sending and quote sending ATP firms. The proposed changes will be operative on June 1, 2011. The text of the proposed rule change is available at the Exchange, the Commission's Public Reference Room, and <http://www.nyse.com>.

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 the proposal is to encourage efficient usage of systems capacity by all ATP firms. The Exchange feels that it is in the best interests of all ATP firms and investors who access our markets to encourage efficient usage of capacity.

The first change proposed is simply a name change to an existing fee, the Ratio Threshold Fee, which measures monthly order to trade ratios. This fee is being renamed the Order to Trade Ratio Fee to better reflect what the fee is based on.

At the same time, the Exchange proposes the introduction of a new fee designed to further encourage efficient systems usage ("Messages to Contracts Traded Ratio Fee"). This fee will take into consideration quotes as well as orders entered and will look at the number of contracts traded as a result. ATP firms that enter excessive amounts of orders and quotes that produce little or no volume will be assessed this fee based on the ratio of quotes and orders to contracts traded. The Exchange recognizes that there can be problems at the level of either an ATP firm or its

vendor or at the Exchange that can cause inadvertent bursts of quotes and/or orders. For that reason, the Exchange proposes to only consider those ATP firms who exceed 1 billion quotes and/or orders (collectively, "messages") in a given month in determining whether inefficient utilization of systems capacity has occurred. For those ATP firms exceeding 1 billion messages in a month, the Exchange proposes to assess a fee for those ATP firms that do not execute at least one (1) contract for every 1,500 messages entered. An ATP firm failing to meet that execution ratio will be charged \$.01 for every 1,000 messages in excess of 1 billion messages.

For example, assume an ATP firm enters a combination of quotes and orders in a given month that sum to 1,500,100,000. Assume that same ATP firm also traded 1,000,000 contracts that month. Having traded 1,000,000 contracts, that ATP firm would need to have sent fewer than 1,500,000,000 messages to stay within the execution ratio of 1 contract per 1,500 messages. In this case, the ATP firm sent 100,000 messages in excess of what is permitted under the 1 to 1,500 execution ratio. This would result in a charge of \$.01 per 1,000 messages in excess of 1,000,000,000, in this case a charge of \$5,001 (500,100,000 quotes/orders in excess of 1,000,000,000 or 500,100 groups of 1,000 messages times \$.01 per message group).

The need for the new fee based on the messages to contracts traded ratio is based on the fact that the existing Ratio Threshold Fee (to be renamed the Order to Trade Ratio Fee) only counts orders, not market maker quotes. The proposed Messages to Contracts Traded Ratio Fee incorporates market maker quotes, which the Exchange believes to be appropriate given that market maker quote traffic represents a substantial portion of the total message load that must be processed by Exchange systems each day. This proposed new fee will never be triggered unless a very high level of traffic is generated by a market maker (*i.e.*, over one billion quotes and orders per month); no such minimum exists for the Order to Trade Ratio Fee. Therefore, by preserving the existing fee and also adding the Messages to Contracts Traded Ratio Fee, the Exchange hopes to maintain its existing, well-understood incentives for order-sending firms to use bandwidth efficiently, while ensuring that market makers also have such incentives but with a higher level of traffic permitted before the fee takes effect. The Exchange feels that this higher level of free message traffic is appropriate due to the

quoting obligations incurred by market makers and their importance as liquidity providers in the options market.

The Exchange proposes that all ATP firms that send quotes and/or orders will be subject to the proposed Messages to Contracts Traded Ratio Fee as well as to the existing and renamed Order to Trade Ratio Fee, which will be referred to collectively as Excessive Bandwidth Utilization Fees on the Schedule. In the event that an ATP firm is liable for either or both of the Excessive Bandwidth Utilization Fees and/or for charges pursuant to the Cancellation Fee in a given month, that firm would only be charged the largest one of those three fees for the month.³ For example, if the fee calculated under the Order to Trade Ratio Fee is \$10,000, the fee calculated under the Messages to Contracts Traded Ratio Fee is \$5,001, and the charges calculated pursuant to the Cancellation Fee are \$6,000, the ATP firm would be billed \$10,000 for that month.⁴

Unlike the Order to Trade Ratio Fee, the Exchange is not proposing to exclude market-improving quotes or orders from the calculation of the Messages to Contracts Traded Ratio Fee. Due to the much larger amount of traffic generated by market makers, who are potentially included in this fee, addressing market-improving quotes or orders separately for billing purposes would greatly complicate the computation of this fee. In addition, because the parameters of this fee, including the exemption of the first 1 billion messages per calendar month, allow for a large amount of message traffic before the fee is triggered, the Exchange does not believe that including an additional exemption for market-improving quotes is necessary.

The Exchange also proposes to correct certain incorrect footnote references under "Trade-Related Charges" in the Schedule by (i) Eliminating a footnote reference under "Limit of Fees on Options Strategy Executions" that is not

³ Currently, ATP Holders are not charged the Ratio Threshold Fee if they incur charges on a monthly basis pursuant to the Cancellation Fee. This provision is being deleted from footnote 12 of the Schedule and being replaced with a new provision stating that the Exchange will now look at a firm's liability under the two Excess Bandwidth Utilization Fees and the Cancellation Fee and only require the firm to pay the largest one of these three fees for the month.

⁴ In calculating the Messages to Contracts Traded Ratio Fee, the Exchange will aggregate routing and market making activity in the case of an ATP firm that has both a routing and a market making arm affiliated with its operation. For purposes of determining whether the routing and market making arm are "affiliated" with the ATP firm, the Exchange will apply a 70% common ownership test as the criterion for affiliation.

applicable and (ii) adding an additional reference to a footnote on marketing charges under both "Electronic Complex Order Executions" and under "Marketing Charge." These error corrections are of a cleanup nature and do not represent changes to any of the Exchange's current fees or the way that they are calculated and applied.

The proposed changes will be operative on June 1, 2011.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6 of the Securities Exchange Act of 1934 (the "Act"),⁵ in general, and Section 6(b)(4) of the Act,⁶ in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities. The Exchange also believes that the proposed rule change furthers the objectives of Section 6(b)(5) of the Act⁷ in that it is designed to promote just and equitable principles of trade, remove impediments to and perfect the mechanisms of a free and open market and a national market system and, in general, to protect investors and the public interest by ensuring that systems capacity is utilized efficiently.

More specifically, the Exchange believes that the proposed Excessive Bandwidth Utilization Fees are equitable and not unfairly discriminatory since they will apply equally to all members who send quotes and/or orders. Additionally, the proposed Excessive Bandwidth Utilization Fees are reasonable and justified because they will encourage efficient utilization of system bandwidth, and unfettered growth in bandwidth consumption can have a detrimental effect on all participants who are potentially compelled to upgrade capacity as a result of the profligate ways of other participants.

The Exchange believes that the higher level of free message traffic permitted before the proposed new Messages to Contracts Traded Ratio Fee is triggered, even though the Order to Trade Ratio Fee has no such minimum trigger, is not unfairly discriminatory due to the substantial message load that exists from normal market maker quote traffic as well as the quoting obligations incurred by market makers and their importance as liquidity providers in the options market. In addition, the inclusion of market-improving quotes

and orders in the calculation of the Messages to Contracts Traded Ratio Fee (which orders are excluded from the calculation of the Order to Trade Ratio Fee) is not unfairly discriminatory because of the very high level of message traffic allowed before the fee is triggered (even with the inclusion of market-improving quotes and orders), as well as the computation complications from excluding such quotes and orders that would exist as a result of the much larger amount of quote traffic generated by market makers.

Finally, the fact that only one of the three related fees (the two Excessive Bandwidth Utilization Fees and the Cancellation Fee), whichever is the highest, will be charged to an ATP firm in a given month is an additional factor assuring that the application of these fees will be reasonable, equitable and not unfairly discriminatory.

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.

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 is effective upon filing pursuant to Section 19(b)(3)(A)⁸ of the Act and subparagraph (f)(2) of Rule 19b-4⁹ thereunder, because it establishes a due, fee, or other charge imposed by NYSE Amex.

At any time within 60 days of the filing of such 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

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Comments may be submitted by any of the following methods:

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- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEAmex-2011-37 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.

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For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰

Cathy H. Ahn,
Deputy Secretary.

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⁵ 15 U.S.C. 78f(b).

⁶ 15 U.S.C. 78f(b)(4).

⁷ 15 U.S.C. 78f(b)(5).

⁸ 15 U.S.C. 78s(b)(3)(A).

⁹ 17 CFR 240.19b-4(f)(2).

¹⁰ 17 CFR 200.30-3(a)(12).