

only must a QCC Order be part of a qualified contingent trade by satisfying each of the six underlying requirements of the NMS QCT Exemption, the requirement that a QCC Order be for a minimum size of 1,000 contracts provides another limit to its use by ensuring only transactions of significant size may avail themselves of this order type.<sup>30</sup>

The Commission notes that, under CBOE's proposal, QCC Orders may be submitted electronically from either on or off the floor through the CBOE Hybrid Trading System. CBOE has represented that to effect proprietary orders, including QCC Orders, electronically from on the floor of the Exchange, members must qualify for an exemption from Section 11(a)(1) of the Act,<sup>31</sup> which concerns proprietary trading on an exchange by an exchange member. Among other exemptions, common exemptions include: An exemption for transactions by broker dealers acting in the capacity of a market maker under Section 11(a)(1)(A);<sup>32</sup> the "G" exemption for yielding priority to non-members under Section 11(a)(1)(G) of the Act and Rule 11a1-1(T) thereunder;<sup>33</sup> and the "effect vs. execute" exemption under Rule 11a2-2(T) under the Act.<sup>34</sup> The Exchange recognized in its filing that, consistent with existing Exchange rules for effecting proprietary orders from on the floor of the Exchange, TPHs effecting QCC Orders and relying on the "G" exemption would be required to yield priority to any interest, not just public customer orders, in the electronic book at the same price to ensure that non-member interest is protected.<sup>35</sup>

In approving a similar order type for ISE, the Commission considered the

<sup>30</sup> The Commission notes that the requirement that clean crosses be of a certain minimum size is not unique to the QCC Order. See, e.g., NSX 11.12(d), which requires, among other things, that a Clean Cross be for at least 5,000 shares and have an aggregate value of at least \$100,000.

<sup>31</sup> 15 U.S.C. 78k(a)(1). Generally, Section 11(a)(1) of the Act restricts any member of a national securities exchange from effecting any transaction on such exchange for: (i) The member's own account, (ii) the account of a person associated with the member, or (iii) an account over which the member or a person associated with the member exercises discretion, unless a specific exemption is available.

<sup>32</sup> 15 U.S.C. 78k(a)(1)(A).

<sup>33</sup> 15 U.S.C. 78k(a)(1)(G) and 17 CFR 240.11a1-1(T).

<sup>34</sup> 17 CFR 240.11a2-2(T).

<sup>35</sup> See, e.g., Securities Exchange Act Release No. 59546 (March 10, 2009), 74 FR 11144 (March 16, 2009) (SR-CBOE-2009-016) and CBOE Regulatory Circular RG09-35 (providing guidance on the application of Section 11(a)(1) and certain of the exemptions, as well as the application of the "G" exemption and the Effect vs. Execute exemption to trading on the Hybrid Trading System).

issues raised in the Galivan Letter, March Letter, and Stamer Letter, and found that ISE's QCC order type was consistent with the requirements of the Act and the rules and regulations thereunder.<sup>36</sup> In addition, the Commission believes that CBOE's response letter clarified the questions raised by ISE in the ISE Letter.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5)<sup>37</sup> and 6(b)(8)<sup>38</sup> of the Act. Further, the Commission finds that the proposed rule change is consistent with Section 11A(a)(1)(C) of the Act.<sup>39</sup>

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>40</sup> that the proposed rule change (SR-CBOE-2011-041) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>41</sup>

**Cathy H. Ahn,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64656; File No. SR-NYSEAmex-2011-36]

### Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule To Adopt a Monthly Fee Cap and Related Service Fee for All Member Firm Proprietary Transactions Executed in Open Outcry and To Increase Both the Existing Monthly Fee Cap and a Related Trading Volume Threshold Applicable to Market Makers

June 13, 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 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

<sup>36</sup> See ISE QCC Approval, *supra* note 24.

<sup>37</sup> 15 U.S.C. 78f(b)(5).

<sup>38</sup> 15 U.S.C. 78f(b)(8).

<sup>39</sup> 15 U.S.C. 78k-1(a)(1)(C).

<sup>40</sup> 15 U.S.C. 78s(b)(2).

<sup>41</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.

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 proposes to amend its Options Fee Schedule (the "Schedule") by adopting (i) A monthly fee cap of \$100,000 per month for member firms on all proprietary trading in open outcry, with certain exclusions, and (ii) a related service fee of \$.01 per contract for volumes in excess of the cap. The Exchange also proposes to amend the monthly fee cap that is currently applicable to market makers by increasing it from \$250,000 to \$350,000 for all trades with certain exclusions, while raising the threshold at which capped market makers begin to pay \$.01 per contract from 2,500,000 contracts to 3,500,000 contracts. 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 cap all member firm proprietary transactions executed in open outcry at \$100,000 per month, with certain exclusions. Once the monthly fee cap has been reached, member firm proprietary transactions in open outcry will be subject to a \$.01 per contract service fee for all volumes in excess of the cap.<sup>3</sup> For example, the

<sup>3</sup> The Exchange trades several products subject to Royalty Fees, which are fees charged by the owner of the intellectual property rights associated with an index for the right to trade options on the index. Royalty Fees are not subject to the proposed monthly firm fee cap, and a capped firm will

member firm rate per contract for open outcry executions is \$.25 per contract. Therefore, a member firm will cap once they have executed 400,000 contracts in proprietary transactions in open outcry, and at that point in time all subsequent proprietary transactions executed in open outcry by that member firm will be subject to a \$.01 per contract service fee. The proposed service fee is being instituted to defray the Exchange's costs of providing services to members, which include trade matching and processing, post trade allocation, submission for clearing and customer service activities related to trading activity on the Exchange.

The proposed fee cap is functionally similar to the "Multiply-Listed Option Fee Cap" in place at the Chicago Board Options Exchange ("CBOE"),<sup>4</sup> the "Firm Related Equity Option Cap" in place at NASDAQ OMX PHLX, Inc. ("PHLX"),<sup>5</sup> and a monthly firm proprietary fee cap on the International Securities Exchange ("ISE") that features a service fee.<sup>6</sup> The Exchange believes the proposed new fee cap would create an incentive for members to continue to send order flow to the Exchange. The Exchange is limiting the proposed new fee cap to manual firm proprietary orders in order to attract large block order flow to the floor of the Exchange, where such orders can be better handled in comparison with electronic orders that are not negotiable. The Exchange notes that NYSE Arca, Inc. also recently established a fee cap of \$75,000 per month that is applicable only to manual firm proprietary trades in options.<sup>7</sup>

The Exchange also proposes to amend the current fee cap applicable to market makers<sup>8</sup> by increasing it from \$250,000 per month to \$350,000 per month and at the same time increasing the

threshold from 2,500,000 contracts per month to 3,500,000 contracts per month, at which point the capped market makers will pay \$.01 per contract for all subsequent volumes executed that month, subject to certain exclusions.<sup>9</sup> The Exchange is making this change as overall industry volumes and resultant volume on the Exchange have grown. In keeping up with this growth the Exchange is continually enhancing our systems to provide our market makers with the bandwidth necessary to quote competitively, and The Exchange believes that adjusting the fee cap upwards is appropriate given the ongoing costs of providing the throughput needed by high volume market makers.

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"),<sup>10</sup> in general, and Section 6(b)(4) of the Act,<sup>11</sup> 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 believes that adopting the proposed new fee cap for manual firm proprietary trades is reasonable because it will potentially lower transaction fees for members providing liquidity on the Exchange. Members who reach the fee cap during a month will not have to pay regular transaction fees and thus will be able to lower their monthly fees.

The Exchange believes that this proposed new fee cap is not unfairly discriminatory because all member firms are eligible to reach the cap. In addition, the Exchange believes that the proposed monthly fee cap, which applies only to manual firm proprietary trades, is not unfairly discriminatory to other market participants because its purpose is to attract large block order flow to the floor of the Exchange, where such orders can be better handled in

comparison with electronic orders that are not negotiable. To the extent that this purpose is achieved, all of the Exchange's market participants should benefit from the improved market liquidity. The Exchange has previously adopted other incentive programs targeting other business areas: no fees for customer orders<sup>12</sup> and fee caps for market makers.<sup>13</sup>

The Exchange further believes the proposal to adopt the fee cap is equitable because it would uniformly apply to all member firms engaged in manual proprietary trading in option classes traded on the Exchange. As noted, market makers currently receive the benefit of a fee reduction once they reach a volume threshold.

The Exchange believes that adopting the service fee is reasonable because it will also potentially lower transaction fees for member firms. Member firms who reach the fee cap during a month will pay the service fee instead of the regular transaction fees and thus will be able to lower their monthly fees. The Exchange believes that charging a service fee is also reasonable because it will allow the Exchange to recoup the costs incurred in providing certain services, which include trade matching and processing, post trade allocation, submission for clearing and customer service activities related to trading activity on the Exchange. The Exchange believes the proposed fee change will attract additional order flow to the Exchange and thereby will benefit all market participants.

The Exchange believes the proposal to adopt the service fee is equitable and not unfairly discriminatory because it would uniformly apply to all member firms engaged in manual proprietary trading. The proposed fee is designed to give member firms that trade a lot on the Exchange a benefit by way of a lower transaction fee.

The Exchange believes the proposed service fee change will benefit market participants by potentially lowering their fees while allowing the Exchange to remain competitive with other exchanges that offer similar fee cap programs. The Exchange notes that the proposed service fee is similar to fees other exchanges charge for providing certain services to their members. For example, ISE's monthly firm proprietary fee cap described above features a service fee that is applicable in

continue to pay Royalty Fees at the rate(s) stated in the Schedule. In addition, Firm Facilitation trades will continue to be executed at a rate of \$0.00 per contract regardless of whether a firm is capped or not.

<sup>4</sup> The CBOE fees are capped at \$75,000. See CBOE Fees Schedule, May 2, 2011, Section 1 (Equity Options Fees) on page 2 of 15 at <http://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf>.

<sup>5</sup> PHLX Firms are subject to a maximum fee of \$75,000. See PHLX Fee Schedule, May 19, 2011, Section II (Equity Options Fees) on page 8 of 42 at <http://www.nasdaqtrader.com/content/marketregulation/membership/phlx/feesched.pdf>.

<sup>6</sup> ISE firms are capped at \$100,000 with certain exclusions and subject to a service fee on all volumes once the cap has been reached. See ISE Schedule of Fees, April 11, 2011, footnote 1 on page 15 of 17 at [http://www.ise.com/assets/documents/OptionsExchange/legal/fee/fee\\_schedule.pdf](http://www.ise.com/assets/documents/OptionsExchange/legal/fee/fee_schedule.pdf).

<sup>7</sup> See Securities Exchange Act Release No. 63471 (December 8, 2010), 75 FR 77928 (December 14, 2010) (File No. SR-NYSEArca-2010-108).

<sup>8</sup> This category includes Specialists, eSpecialists, and NYSE Amex Options Market Makers (both Directed and Non-Directed).

<sup>9</sup> The Exchange notes that the current market maker fee cap is exclusive of Royalty Fees charged for transactions in products subject to Royalty Fees. No change is occurring with respect to this, and capped market makers will continue to be subject to the Royalty Fees stated in the Schedule. Similarly, any fees or volume associated with a Strategy Trade will not be counted towards either the \$350,000 cap or the volume threshold of 3,500,000 contracts. Additionally, the charge for all non-Public Customers who transact in the electronic Complex Order Book is \$.05 per contract, and capped market makers trading in the Complex Order Book will continue to pay \$.05 per contract.

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

<sup>11</sup> 15 U.S.C. 78f(b)(4).

<sup>12</sup> See NYSE Amex Options Fee Schedule as of May 11, 2011, Customer Electronic and Customer Manual charges on pages 2-3 of 10 at [http://www.nyse.com/pdfs/NYSEAmex\\_Options\\_Fee\\_Schedule\\_CLEAN\\_05\\_11\\_11\\_Effective\\_Date.pdf](http://www.nyse.com/pdfs/NYSEAmex_Options_Fee_Schedule_CLEAN_05_11_11_Effective_Date.pdf).

<sup>13</sup> See *id.* at footnote 5 on page 9 of 10.

conjunction with the cap.<sup>14</sup> 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.<sup>15</sup>

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,<sup>16</sup> PHLX,<sup>17</sup> and ISE<sup>18</sup> 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)<sup>19</sup> 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).<sup>20</sup>

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.

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

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

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

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

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

<sup>19</sup> See *supra* note 17.

<sup>20</sup> 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)<sup>21</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>22</sup> 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](mailto: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.<sup>23</sup>

**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")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> 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.

<sup>23</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>21</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>22</sup> 17 CFR 240.19b-4(f)(2).