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

Cathy H. Ahn,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64742; File No. SR–NYSEAmex–2011–18]

Self-Regulatory Organizations; NYSE Amex LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, Relating to the Formation of a Joint Venture Between the Exchange, Its Ultimate Parent NYSE Euronext, and Seven Other Entities To Operate an Electronic Trading Facility for Options Contracts

June 24, 2011.

I. Introduction

On March 23, 2011, NYSE Amex LLC (''NYSE Amex'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC'') a proposed rule change, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] in connection with the formation of a joint venture between NYSE Amex, its ultimate parent NYSE Euronext, a Delaware corporation, and the following entities (each, a ''Founding Firm''): Citadel Securities LLC (''Citadel''); Goldman, Sachs & Co. (''Goldman Sachs''); Banc of America Strategic Investments Corporation (''BAML''); Citigroup Financial Strategies, Inc. (''Citigroup''); Datek Online Management Corp. (''TD Ameritrade''); UBS Americas Inc. (''UBS''); and Barclays Electronic Commerce Holdings Inc. (''Barclays''), to operate an electronic trading facility (''Options Facility'') that will engage in the business of listing for trading options contracts permitted to be listed on a national securities exchange (or facility thereof) and related activities. The proposed rule change was published for comment in the **Federal Register** on April 4, 2011.[3] The Commission received three comment letters on the proposal.[4] The Commission subsequently extended to July 1, 2011, the time period in which to either approve the proposed rule change, or to institute proceedings to determine whether to disapprove the proposed rule change.[5] On June 15, 2011, NYSE Amex filed Amendment No. 1 to the proposed rule change.[6] This order approves the proposed rule change, as modified by Amendment No. 1.

II. Overview

NYSE Amex proposes to establish NYSE Amex Options LLC (''Company''), a Delaware limited liability company formed by NYSE Euronext, NYSE Amex, and the Founding Firms, and jointly owned by NYSE Amex and the Founding Firms, to operate the Options Facility. Pursuant to the proposal, the Options Facility will be operated as a facility[7] of NYSE Amex, which will act as the self-regulatory organization (''SRO'') for the Options Facility and as such have regulatory responsibility for the activities of the Options Facility.[8]

With this proposed rule change, NYSE Amex seeks the Commission's approval of the proposed governance structure of the Company as reflected in the proposed Limited Liability Company Agreement (''LLC Agreement'') for the Company and a proposed Members Agreement of the Company setting forth certain additional provisions (''Members Agreement'') relating to the proposed governance structure of the Company.[9] NYSE Amex is not proposing any changes to its listing and trading rules in connection with establishment of the Company and operation of the Options Facility.

As a limited liability company, ownership of the Company is represented by limited liability company interests in the Company (''Interests'').[10] The holders of Interests are referred to as the members of the Company (''Members'').[11] The Interests represent equity interests in the Company and entitle the holders thereof to participate in the Company's allocations and distributions. Initially, NYSE Amex will own 100% of the preferred non-voting Interests (''Preferred Interests'') and 47.2% of the Common Interests,[12] as Class A Common Interests. The Founding Firms will own the remaining 52.8% of the Common Interests, as Class B Common Interests, and no single Founding Firm (including its affiliates) will own Class B Common Interests comprising more than 19.9% of the issued and outstanding Common Interests. The 52.8% ownership of Class B Common Interests will initially be allocated as follows: 14.95% to each of Citadel and Goldman Sachs; 5.0% to each of BAML, Citigroup and TD Ameritrade; 4.9% to UBS; and 3.0% to Barclays.[13]

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[10] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 64144 (March 29, 2011), 76 FR 18591 (''Notice'').

[4] *See* Letter from Andrew Rothlein, to Hon. Mary L. Schapiro, Chairman, and Hon. Kathleen L. Casey, Hon. Elisse B. Walter, Hon. Luis A. Aguilar, and Hon. Troy A. Paredes, Commissioners, Commission, dated April 14, 2011 (''Rothlein Letter''); Letter from Benjamin Kerensa, dated April 25, 2011 (''Kerensa Letter''); and Letter from Joan C. Conley, Senior Vice President and Corporate Secretary, Nasdaq OMX Group, Inc. (''NASDAQ''), to Elizabeth M. Murphy, Secretary, Commission, dated April 29, 2011 (''NASDAQ Letter'').

[5] *See* Securities Exchange Act Release No. 64511 (May 18, 2011), 76 FR 29809 (May 23, 2011).

[6] *See* Amendment No. 1 dated June 15, 2011 (''Amendment No. 1''). Amendment No. 1 deletes an erroneous reference in Section 16.1(f) of the LLC Agreement; clarifies those Founding Firms that are NYSE Amex members or their affiliates; clarifies the availability of information noted ''To Come'' on certain Schedules to the LLC Agreement; and confirms the applicability of Section 4.9 of the LLC Agreement to a NYSE Amex member that is an affiliate of NYSE Amex. Amendment No. 1 is a technical amendment and is not subject to notice and comment.

[7] Pursuant to Section 3(a)(2) of the Act, 15 U.S.C. 78c(a)(2), the term ''facility'' when used with respect to a national securities exchange, includes ''its premises, tangible or intangible property whether on the premises or not, any right to the use of such premises or property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange), and any right of the exchange to the use of any property or service.''

[8] NYSE Amex represented that it has adequate funds to discharge all regulatory functions related to the Options Facility. *See* Notice, *supra* note 3, 76 FR 18592.

[9] Certain portions of the Members Agreement are not considered part of the proposed rule change. *See infra* note 13.

[10] ''Interest'' means the limited liability company interest in the Company owned by each Member including any and all benefits to which such Member may be entitled as provided in the LLC Agreement or required by the Act, together with all obligations of such Member to comply with the terms and provisions of the LLC Agreement. *See* Section 1.1 of the LLC Agreement. *See infra* note 11 for the definition of Member.

[11] ''Member'' means each Person who is a signatory to this Agreement (other than NYSE Euronext) or who has been admitted to the Company as a Member in accordance with this Agreement and has not ceased to be a Member in accordance with this Agreement or for any other reason. *See* Section 1.1 of the LLC Agreement. *See infra* note 78 for definition of Person.

[12] Common Interests consist of Class A Common Interests and Class B Common Interests. *See* Section 1.1 of the LLC Agreement. ''Class A Common Interests'' means the Interests in the form of shares owned by NYSE Amex, as specified in Schedule A of the LLC Agreement, having the rights and obligations specified in the LLC Agreement. *See id.* ''Class B Common Interests'' means the Interests in the form of shares owned by each Founding Firm, as specified in Schedule A of the LLC Agreement, having the rights and obligations specified in the LLC Agreement. *See id.* Schedule A of the LLC Agreement sets forth the Interest allocations of each Member.

[13] Following the effective date of the proposed rule change, additional Class B Common Interests will be issued to the Founding Firms based, in part, on each Founding Firm's contribution to the annual volume of the Options Facility from October 1, 2009 to December 31, 2010 (*i.e.,* the ''Volume-Based Equity Plan''). *See* Notice, *supra* note 3, 76 FR at

Pursuant to Section 2.1 of the Members Agreement, for an initial period of five (5) years and three (3) months, each Founding Firm will have to satisfy certain minimum volume requirements. Under the Volume-Based Equity Plan (''Incentive Plan''),[14] for each measurement period, the Company will issue Annual Incentive Shares.[15] Each Founding Firm will be entitled to receive, for no additional consideration, a portion of the Annual Incentive Shares such that it dilutes, maintains or increases its equity interest in the Company (relative to the other Founding Firms) based on the degree to which the Founding Firm has failed to achieve, achieved or exceeded its ''Individual Target'' during the measurement period. A Founding Firm's Individual Target will be its *pro rata* portion of an aggregate Founding Firm target contribution to the annual volume of the Options Facility.[16] This *pro rata* calculation will be performed once, based on the Founding Firm's holdings of Class B Common Interests relative to the other Founding Firms at the time the Company is formed and will not change as a Founding Firm's equity holdings fluctuate as a result of the Incentive Plan. The Incentive Plan will not affect the equity holdings of NYSE Amex and it will not increase or decrease the aggregate equity interest of the Founding Firms relative to NYSE Amex. The Annual Incentive Shares not allocated to one or more Founding Firms by virtue of each such Founding Firm failing to achieve its respective Individual Target will be either partially or fully reallocated among those Founding Firms that exceed their respective Individual Targets.

III. Regulatory Structure

As an SRO, NYSE Amex has regulatory responsibility for all of its facilities, including the Options Facility. Day-to-day operations of the Company and the management of its business and affairs will be delegated to the Company's officers and to NYSE Group, Inc. (''NYSE Group''), a subsidiary of NYSE Euronext, in accordance with a services agreement (''NYSE Euronext Agreement'') between NYSE Group and the Company.[17] Under the NYSE Euronext Agreement, NYSE Group will agree to provide the Options Facility with a range of operational and support services.[18] The Board [19] will be responsible for the oversight of the Company's officers and NYSE Group's performance under the NYSE Euronext Agreement.[20] The Board initially will consist of six directors [21] designated by the Founding Firms (one by each Founding Firm), and seven directors designated by NYSE Amex.[22]

NYSE Regulation, Inc. (''NYSE Regulation''), an indirect wholly-owned subsidiary of NYSE Euronext, and NYSE Amex entered into a regulatory services agreement (''RSA'') dated October 1, 2008 pursuant to which NYSE Regulation performs all of NYSE Amex's regulatory functions on NYSE Amex's behalf. However, certain of these member and market regulatory functions, which include surveillance, examination, investigation and related disciplinary functions, are performed by the Financial Industry Regulatory Authority, Inc. (''FINRA'') pursuant to a RSA dated June 14, 2010 among FINRA, NYSE Group, New York Stock Exchange LLC, NYSE Regulation, NYSE Arca, Inc. and NYSE Amex. FINRA and NYSE Amex have also entered into an allocation agreement pursuant to Section 17(d)(1) of the Act,[23] and Rule 17d–2 [24] thereunder, whereby FINRA assumed regulatory responsibility for specified rules that are common to FINRA and NYSE Amex and for common members. Because the Options Facility will be a facility of NYSE Amex, FINRA will perform the applicable regulatory functions and responsibilities with respect to activity on or through the Options Facility, including both general regulatory functions, as noted above, and targeted regulatory reviews as applicable.

Pursuant to the RSA between NYSE Regulation and NYSE Amex, NYSE Regulation exercises oversight, on behalf of NYSE Amex, of FINRA's performance of the regulatory functions performed by FINRA as described above. NYSE Regulation also has responsibilities with respect to the Options Facility for rule interpretation, regulatory policy and participation in rule development. NYSE Regulation periodically reports on regulatory matters to the board of directors of NYSE Amex, which has appointed a Chief Regulatory Officer (''CRO'') who is also the Chief Executive Officer of NYSE Regulation. NYSE Amex does not have a regulatory oversight committee of its board of directors, but the CRO is also an officer of NYSE Amex, and in that capacity is charged with reporting on regulatory matters to the NYSE Amex board of directors. Notwithstanding the foregoing, NYSE Amex will still retain ultimate legal responsibility for the performance of all of its regulatory obligations as an SRO, including with respect to the Options Facility, as well as the ability to take action as required to meet that responsibility.

The board of directors of NYSE Amex currently consists of five (5) directors, a majority of whom are required to be individuals domiciled in the U.S. who are classified as independent members of the NYSE Euronext board of directors. At least twenty percent (20%) of NYSE Amex's directors (currently one individual) must be ''non-affiliated'' directors who are not members of the NYSE Euronext board of directors and need not be independent under the independence requirements of NYSE Euronext. Any required non-affiliated directors of NYSE Amex are nominated and elected through a process designed to ensure fair representation of members of NYSE Amex on NYSE Amex's board of directors. NYSE Amex does not have any committees of its board of directors that perform functions relating to audit, governance and compensation. Instead, such functions are performed for NYSE Amex by related committees of the NYSE Euronext board of directors that are comprised solely of NYSE Euronext directors who meet the independence requirements of NYSE Euronext.

Decisions on the listing of options to be traded on the Options Facility will be

18594. NYSE Amex represented that this issuance of shares to the Founding Firms will not result in any Member (alone or together with its affiliates) other than NYSE Amex exceeding the 19.9% Maximum Percentage (as defined below).

[14] As stated in the purpose section of the proposed rule change, it is NYSE Amex's view that the Incentive Plan does not constitute a proposed rule change within the meaning of Section 19(b)(1) of the Act and Rule 19b–4 thereunder. *See* Notice, supra *note* 3, 76 FR at 18594, n.19.

[15] Pursuant to Section 2.1(a) of the Members Agreement, ''Annual Incentive Shares'' generally are additional Class B Common Interests equal to a percentage of the amount of Class B Common Interests issued and outstanding immediately prior to such issuance and owned by the Founding Firms.

[16] *See* Notice, *supra* note 3, 76 FR at 18610. *See also* Members Agreement, Section 1.1 (defining ''Individual Target''). In determining whether a Founding Firm has achieved its individual target for a measurement period, a Founding Firm will receive one credit for each side of a transaction executed through the Options Facility, either for its proprietary account or for the account of its customers. *See* Section 2.3(a) of the Members Agreement.

Members of the LLC are entitled to distributions of the LLC's available cash, reflective of their common interest percentages. *See* Section 6.1 of the Members Agreement. *See also* Section 1.1 of the LLC Agreement (defining ''available cash'' generally as cash held by the Company that both (i) is not required for the operations of the Company based on the annual budget of the Company for the year; and (ii) the Board of Directors of the Company (''Board'') determines in good faith is not required for the payment of liabilities of the Company or the setting aside of reserves to meet the anticipated cash needs of the Company.

[17] *See* Section 8.1(b) of the LLC Agreement.

[18] *See* Notice, supra *note* 3, 76 FR at 18593.

[19] *See* Section 8.1(a) of the LLC Agreement.

[20] *See* Section 8.1(b) of the LLC Agreement.

[21] *See* Section 8.1(a) of the LLC Agreement.

[22] *See* Section 8.1(d) of the LLC Agreement.

[23] 15 U.S.C. 78q(d)(1).

[24] 17 CFR 240.17d–2.

made by the business side of NYSE Amex in accordance with NYSE Amex's rules. The business side also will continue to be responsible for new product development, participation in rule development, strategic analysis, administering NYSE Amex programs, business development and client outreach.

IV. Summary of Comment Letters

As noted above, the Commission received three comment letters on the proposed rule change. One commenter opposed the proposed rule change, asserting that he continues to own unredeemed New York Stock Exchange Option Trading Rights (''OTRs'') that were separated from full New York Stock Exchange, Inc. (''NYSE, Inc.'') seats (''Separated OTRs'').[25] All NYSE, Inc. seat ownership (with or without OTRs) was extinguished in the 2006 demutualization of NYSE, Inc.[26] The commenter believes that the owners of Separated OTRs retained their Separated OTRs, even after NYSE, Inc. exited the options business in 1997, with the expectation that their ownership of the Separated OTRs would afford them full rights to trade options under the auspices of NYSE, Inc. or its successor entity. The commenter further argues that such ownership gives him rights to effect options trades on all NYSE related or affiliated markets, including the various successor markets to NYSE, Inc. The Commission notes that the issue of the rights of owners of Separated OTRs is not before the Commission in the context of this proposed rule change and thus its consideration of the NYSE Amex proposal does not address the rights of owners of Separated OTRs.

Another commenter opposed the proposed rule change because Goldman Sachs will be a Founding Firm.[27] The commenter stated that Goldman Sachs should not be able to benefit from the proposed rule change because the firm ''recently was found by a congressional committee to have been involved [in] deceptive and potentially illegal practices.'' The Commission does not find the comment to be dispositive in its determination regarding whether to approve the proposed rule change. Moreover, the Commission believes that, as discussed more fully below, the proposed rule change is designed to provide NYSE Amex, in its capacity as an SRO, and the Commission appropriate authority and jurisdiction to oversee any issues or concerns that may arise from ownership by NYSE Amex's members of the Company, which is organized to operate a facility of NYSE Amex.

The third commenter expressly did not object to the proposal, but stated that the Incentive Plan is ''virtually indistinguishable in purpose and effect from other fee or rebate-based incentive plans operated by national securities exchanges,'' and that the Commission ''must apply the same principles to all fee and rebate plans.'' [28]

NASDAQ also stated that the proposed rule change will allow NYSE Amex to make distinctions among market participants and to pre-select firms that will be rewarded for order flow. NASDAQ remarked that NYSE Amex's proposal ''seems reasonably designed to incentivize order flow and enhance the competitiveness of its market'' and that ''[m]arket participants benefit in reduced costs and improved liquidity when the Commission allows genuine competition among exchanges.'' NASDAQ further cited to data indicating that NYSE Amex's options volume generally has increased from around 6% in October 2009, which was about the time of the initial announcement of the transaction, to 15% in March 2011, when the proposal was filed with the Commission. NASDAQ drew the conclusion that such increase correlates to the Incentive Plan [29] noting that the initial volume measurement period began in October 2009.

NASDAQ noted that the Commission has been ''reluctant to endorse differential pricing for exchanges'' in the past. NASDAQ indicated that Section 6(b)(4) of the Act focuses on ''equitable'' allocation of fees, not identical fees, and that Section 6(b)(5) of the Act prohibits the ''unfair discrimination,'' not any differentiation, between customers. NASDAQ stated that, in the past, the Commission required that fees and rebates be open to all members and that transparent thresholds provide equal fees and rebates to all members that meet the threshold and contended that the Incentive Plan is a departure from this interpretation.

Finally, NASDAQ stated that exchanges should have the flexibility to offer fee incentives and rebates, and that such flexibility should not be limited to the use of equity and equity-like instruments, and that limiting such flexibility to equity incentive plans penalizes exchanges that choose to avoid the appearance of a conflict of interest when an SRO is owned by its members. NASDAQ noted, however, that the Incentive Plan includes several provisions that attempt to deal with the appearance of such a conflict of interest. The Commission discusses the Incentive Plan in light of NASDAQ's comments in Section V.E. below.

V. Discussion and Commission Findings

After careful consideration, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[30] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,[31] which, among other things, requires a national securities exchange to be so organized and have the capacity to be able to carry out the purposes of the Act and to enforce compliance by its members and persons associated with its members with the provisions of the Act, the rules and regulations thereunder, and the rules of the exchange.

The Commission also finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[32] which requires, among other things, that the rules of a national securities exchange be 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 regulating, clearing, settling, and processing information with respect to, and 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.

A. The Options Facility as a Facility of NYSE Amex

The Commission believes that the proposed rule change is consistent with Section 6(b)(1) of the Act in that, upon

[25] *See* Rothlein Letter, *supra* note 4. NYSE, Inc. is the predecessor to New York Stock Exchange LLC (''NYSE''). *See* Securities Exchange Act Release No. 53382 (February 27, 2006), 71 FR 11251 (March 6, 2006) (SR–NYSE–2005–77) (order approving merger of NYSE, Inc. and Archipelago, and demutualization of NYSE, Inc.) (''NYSE–Arca Merger Order'').

[26] *See* NYSE–Arca Merger Order.

[27] *See* Kerensa Letter, *supra* note 4.

[28] *See* NASDAQ Letter, *supra* note 4.

[29] *See also* Notice, *supra* note 3, 76 FR at 18592, n. 6 (explaining that additional Class B Common Interests will be issued to the Funding Firms based on their contribution to the annual volume of the options facility from October 1, 2009 to December 31, 2010).

[30] In approving the proposed rule change, the Commission has considered its impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[31] 15 U.S.C. 78f(b)(1).

[32] 15 U.S.C. 78f(b)(5).

establishing the Options Facility as a facility of NYSE Amex, and entering into the relationship with the Company described above, NYSE Amex will remain so organized and have the capacity to carry out the purposes of the Act. As an SRO, NYSE Amex will have regulatory control over the Options Facility and will be responsible for ensuring its compliance with the federal securities laws and all applicable rules and regulations thereunder. Furthermore, the Company is obligated under the LLC Agreement to operate the Options Facility in a manner consistent with the regulatory and oversight responsibilities of NYSE Amex and the Act, and the rules and regulations thereunder. The Commission notes that it previously approved similar structures with respect to the operation of exchange facilities.[33]

Although the Company does not carry out any regulatory functions, all of its activities must be consistent with the Act. As a facility of a national securities exchange, the Options Facility is not solely a commercial enterprise but is an integral part of an SRO that is registered pursuant to the Act and therefore subject to obligations imposed by the Act. The Commission believes that the LLC Agreement and Members Agreement are reasonably designed to enable the Company to operate in a manner that is consistent with this principle. The LLC Agreement provides that the Company, NYSE Euronext, NYSE Group, each Member, and the officers, directors, agents, and employees of the Company, NYSE Euronext, NYSE Group, and each Member agree to comply with the federal securities laws and the rules and regulations promulgated thereunder and cooperate with NYSE Amex and the Commission, and to engage in conduct that fosters and does not interfere with the Company's and NYSE Amex's ability to carry out their respective responsibilities under the Act.[34]

The LLC Agreement likewise provides that the Board collectively, and each member of the Board individually, must comply with the federal securities laws and the rules and regulations thereunder and cooperate with NYSE Amex and with the Commission.[35] Moreover, each Director must take into consideration whether his or her actions, and each Member must take into consideration whether its actions, would cause the Options Facility or the Company to engage in conduct that fosters, and does not interfere with, NYSE Amex's or the Company's ability to carry out their respective responsibilities under the Act.[36]

The LLC Agreement stipulates that all confidential information pertaining to the self-regulatory function of NYSE Amex or the Company (including but not limited to disciplinary matters, trading data, trading practices, and audit information) contained in the books and records of the Company will not be made available to any persons other than to those officers, directors, employees, and agents of the Company that have a reasonable need to know the contents thereof; will be retained in confidence by the Company and their respective officers, directors, employees, and agents; and will not be used for any non-regulatory purposes.[37] Nothing in the LLC Agreement, however, will limit or impede the rights of the Commission or NYSE Amex to access and examine confidential information of the Company pursuant to the federal securities laws and rules and regulations thereunder or limit or impede the ability of a member of the Board, any Member, or any officer, director, agent, or employee of a Member or the Company to disclose confidential information to the Commission or NYSE Amex.[38]

The LLC Agreement also provides that NYSE Amex will receive notice of planned or proposed changes to the Company (excluding Non-Market Matters [39]) or the Options Facility, and NYSE Amex must not object affirmatively to such changes prior to implementation.[40] In the event that NYSE Amex, in its sole discretion, determines that such planned or proposed changes to the Company or the Options Facility could cause a Regulatory Deficiency [41] if implemented, NYSE Amex may direct the Company to, and the Company shall, modify the planned or proposed changes as necessary to ensure that it does not cause a Regulatory Deficiency.[42] Likewise, in the event that NYSE Amex, in its sole discretion, determines that a Regulatory Deficiency exists or is planned, NYSE Amex may direct the Company to, and the Company shall, undertake such modifications to the Company (but not to include Non-Market Matters) or the Options Facility as are necessary or appropriate to eliminate or prevent the Regulatory Deficiency and allow NYSE Amex to perform and fulfill its regulatory responsibilities under the Act.[43]

Moreover, Section 16.1 of the LLC Agreement provides requirements regarding regulatory approvals and compliance.[44] So long as the Options Facility is a facility of NYSE Amex, in the event that NYSE Amex, in its sole discretion, determines that any action, transaction or aspect of an action or transaction, is necessary or appropriate for, or interferes with, the performance or fulfillment of NYSE Amex's regulatory functions, its responsibilities under the Act or as specifically required by the Commission, NYSE Amex shall have the sole and exclusive authority to direct that any such required, necessary or appropriate action, as it may determine in its sole discretion, be taken or transaction be undertaken by or on behalf of the Company without regard to the vote, act or failure to vote or act by any other party in any capacity.[45]

Furthermore, before any amendment to or repeal of any provision of the LLC Agreement or Members Agreement becomes effective, such amendment or repeal must be submitted to the board of directors of NYSE Amex, and if such

[33] *See* Securities Exchange Act Release Nos. 55389 (March 2, 2007), 72 FR 10575 (March 8, 2007) (order approving CBOE Stock Exchange as a facility of the Chicago Board Options Facility) (''CBSX Order''); 54399 (September 1, 2006), 71 FR 53728 (September 12, 2006) (order approving the ISE Stock Exchange as a facility of the International Securities Exchange) (''ISE Stock Order''); 54364 (August 25, 2006), 71 FR 52185 (order approving the Boston Equities Exchange as a facility of the Boston Stock Exchange) (''BeX Order''); 49065 (January 13, 2004), 69 FR 2768 (January 20, 2004) (order approving the Boston Options Facility as a facility of the Boston Stock Exchange) (''BOX Order''); and 59281 (January 22, 2009), 74 FR 5014 (January 28, 2009) (order approving the New York Block Exchange as a facility of the New York Stock Exchange) (''NYSE Block Order'').

[34] *See* Section 16.1(e) of the LLC Agreement. *See also* Section 7.6 of the LLC Agreement.

[35] *See* Sections 8.1(m)(i) of the LLC Agreement.

[36] *See,* respectively, Sections 8.1(m)(ii) and 7.6 of the LLC Agreement.

[37] *See* Section 14.1(j) of the LLC Agreement.

[38] *See* Section 14.1(k) of the LLC Agreement.

[39] ''Non-Market Matters'' means matters relating solely to one or more of the following: Marketing, administrative matters, personnel matters, social or team-building events, meetings of Members, communication with Members, finance, location and timing of Board meetings, market research, real property, equipment, furnishings, personal property, intellectual property, insurance, contracts unrelated to the operation of the Options Facility and *de minimis* items. *See* Section 1.1 of the LLC Agreement.

[40] *See* Section 8.1(m)(iii) of the LLC Agreement.

[41] *See* Section 1.1 of the LLC Agreement (defining ''Regulatory Deficiency'').

[42] *See* Section 8.1(m)(iii) of the LLC Agreement.

[43] *See id.*

[44] *See* Section 16.1 of the LLC Agreement.

[45] *See* Section 16.1(a) of the LLC Agreement. Furthermore, in its proposal, NYSE Amex represents that nothing contained in the LLC Agreement or the Members Agreement limits the ability of NYSE Amex, in its capacity as an SRO, (i) to take any action or to direct the taking of any action that it determines is necessary or appropriate for the performance or fulfillment of its obligations as an SRO or (ii) to direct that an action that it determines interferes with the performance or fulfillment of its obligations as an SRO not be taken. *See* Notice, supra *note* 3, 76 FR at 18610.

amendment or repeal is required, under Section 19 of the Act and the rules promulgated thereunder to be filed with, or filed with and approved by, the Commission before such amendment or repeal may be effective, then such amendment or repeal shall not be effective until filed with, or filed with and approved by, the Commission, as the case may be.[46]

The Commission believes that certain additional provisions in the LLC Agreement that make accommodation for NYSE Amex as the SRO for the Options Facility are consistent with the Act, because they enhance the ability of NYSE Amex to carry out its self-regulatory responsibilities with respect to the Options Facility. The LLC Agreement provides that, with written consent of NYSE Amex, the Board, by a Supermajority Vote,[47] may suspend or terminate a Member's voting privileges, including the ability to designate Board directors, if the Member materially violates any Regulatory Matters Provision[48] or any applicable law; such Member is subject to statutory disqualification;[49] or such action is necessary or appropriate in the public interest or for the protection of investors.[50] The Director designated by the Member subject to sanction will be excluded from any vote to suspend or terminate such Member's voting privileges.[51]

To reflect that the Options Facility is not solely a commercial enterprise, the LLC Agreement also stipulates that any individual designated to the Board must certify that he or she is not subject to a statutory disqualification within the meaning of Section 3(a)(39) of the Act.[52] Further, any director who becomes subject to any applicable statutory disqualification shall be deemed to have automatically resigned from the Board.[53]

B. Regulatory Jurisdiction Over the Company and Its Members

The Commission also believes that the terms of the LLC Agreement provide clarification of the Commission's and NYSE Amex's regulatory jurisdiction over the Company and its Members. The LLC Agreement provides that (i) the books, records, premises, officers, directors, agents and employees of the Company and (ii) to the extent related to the Company's business, the books, records, premises, officers, directors, agents and employees of each Member, shall be deemed the books, records, premises, officers, directors, agents, and employees of NYSE Amex for purposes of, and subject to oversight pursuant to, the Act.[54] The LLC Agreement also provides that the books and records of the Company will be subject at all times to inspection and copying by the Commission and NYSE Amex at no additional charge to the Commission or NYSE Amex.[55]

The LLC Agreement further provides that the Company, NYSE Euronext, NYSE Group, each Member and the officers, directors, agents and employees of the Company, NYSE Euronext, NYSE Group and each Member irrevocably submit to the jurisdiction of the U.S. federal courts, the Commission, and NYSE Amex (in its capacity as SRO) for purposes of any suit, action, or proceeding pursuant to U.S. federal securities laws and the rules and regulations thereunder, arising out of, or relating to, activities of the Company and waive, and agree not to assert by way of motion, as a defense or otherwise in any such suit, action, or proceeding, any claims that they are not personally subject to the jurisdiction of the Commission; that the suit, action, or proceeding is an inconvenient forum; that the venue of the suit, action, or proceeding is improper; or that the subject matter may not be enforced in or by such courts or agency.[56] Moreover, the Company, NYSE Euronext, NYSE Group and each Member must take such action as is necessary to ensure that the officers, directors, agents, and employees of the Company, NYSE Euronext, NYSE Group and each Member who are involved in the activities of the Company or the Options Facility consent in writing to the application to them of specified provisions in the LLC Agreement with respect to their activities relating to the Company or the Options Facility.[57]

The Commission believes that these provisions are consistent with the Act because they are reasonably designed to facilitate the Commission's and NYSE Amex's regulatory jurisdiction over the Company and the Options Facility. These provisions clarify the Commission's authority under the Act to inspect the Company's books and records by deeming them to be the books and records of a national securities exchange. Further, these provisions clarify that the Commission may exercise its authority under Section 19(h)(4) of the Act[58] with respect to the officers and directors of the Company and its Members, because such officers and directors are deemed to be officers and directors of NYSE Amex. Finally, the LLC Agreement clarifies that the books and records of the Company and, to the extent that they are related to the Company's business, the books and records of each Member, are subject to the Commission's examination authority under Section 17(b)(1) of the Act.[59]

Even in the absence of these provisions, Section 20(a) of the Act[60] provides that any person with a controlling interest in the Company will be jointly and severally liable with and to the same extent that the Company is

[46] *See* Section 16.10 of the LLC Agreement and Section 5.10 of the Members Agreement.

[47] ''Supermajority Vote'' means, with respect to matters submitted to the Board at a validly called and validly noticed meeting, (x) for so long as NYSE Amex's Common Interest Percentage equals or exceeds fifteen percent (15%), (A) the affirmative vote of more than fifty percent (50%) of the Directors designated by NYSE Amex pursuant to Section 8.1(d)(i) entitled to vote thereon and present in person or by proxy and (B) the affirmative vote of more than fifty percent (50%) of those Directors designated by Founding Firms pursuant to Section 8.1(d)(ii) entitled to vote thereon and present in person or by proxy, and (y) for so long as NYSE Amex's Common Interest Percentage is less than fifteen percent (15%), the affirmative vote of more than fifty percent (50%) of all Directors entitled to vote thereon and present in person or by proxy (which excess of fifty percent (50%) must include more than two-thirds (⅔) of those Directors designated by Founding Firms and NYSE Amex in the aggregate entitled to vote thereon and present in person or by proxy). *See* Section 1.1 of the LLC Agreement.

[48] *See* Section 1.1 of the LLC Agreement (defining ''Regulatory Matters Provision'').

[49] *See* Section 3(a)(39) of the Act, 15 U.S.C. 78c(a)(39) (defining ''statutory disqualification'').

[50] *See* Section 7.6 of the LLC Agreement.

[51] *See id.*

[52] *See* Section 8.1(h) of the LLC Agreement.

[53] *See* Section 8.1(e)(iii) of the LLC Agreement. Pursuant to Section 8.1(e)(ii), the Board, by a Supermajority Vote (excluding the vote of the Directors designated by the Member subject to sanction), may suspend or terminate a Director's service in the event such director has materially violated any Regulatory Matters Provision or any applicable law, or such action is necessary or appropriate in the public interest or for the protection of investors.

[54] *See* Section 13.2(c) of the LLC Agreement.

[55] *See id.*

[56] *See* Section 16.1(d) of the LLC Agreement.

[57] *See* Section 16.1(f) of the LLC Agreement. Specifically, the persons noted above will have to consent to the applicability of Section 13.2(c), Section 16.1(d), Section 16.1(e), Section 8.1(m), Section 14.1(i) and Section 14.1(j) of the LLC Agreement, as applicable, with respect to their activities relating to the Company or the Options Facility. *See* Amendment No. 1, which deleted from Section 16.1(f) a reference to the final sentence of Section 8.1(d)(iv).

[58] 15 U.S.C. 78s(h)(4) (authorizing the Commission, by order, to remove from office or censure any officer or director of a national securities exchange if it finds, after notice and an opportunity for hearing, that such officer or director has: (1) Willfully violated any provision of the Act or the rules and regulations thereunder, or the rules of a national securities exchange; (2) willfully abused his or her authority; or (3) without reasonable justification or excuse, has failed to enforce compliance with any such provision by a member or person associated with a member of the national securities exchange).

[59] 15 U.S.C. 78q(b)(1).

[60] 15 U.S.C. 78t(a).

liable under any provision of the Act, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action. Moreover, NYSE Amex is required to enforce compliance with these provisions, because they are ''rules of the exchange'' within the meaning of Section 3(a)(27) of the Act.[61] A failure on the part of NYSE Amex to enforce its rules could result in suspension or revocation of its registration, pursuant to Section 19(h)(1) of the Act.[62]

C. Changes in Control of the Company

The Commission believes that the provisions in the LLC Agreement and Members Agreement relating to direct and indirect changes in control of the Company, which will operate the Options Facility are consistent with the Act. The LLC Agreement provides that the aggregate Common Interest Percentage[63] held by NYSE Amex and its affiliates will not decline below 15% unless and until NYSE Amex had delivered to the Board a notice in writing of its intention to Transfer[64] any Common Interests that will result in such a decline.[65] Furthermore, before NYSE Amex could reduce its Common Interest Percentage to less than 15%, it must first file a proposed rule change with the Commission under Section 19(b) of the Act and obtain the Commission's approval of that proposal.[66] NYSE Amex's regulatory obligations for the Options Facility will endure as long as the Options Facility is a facility of NYSE Amex, regardless of the size of NYSE Amex's ownership interest in the Company.[67]

The LLC Agreement and Members Agreement also provide that no Member may resign or voluntarily withdraw as a Member or Transfer any Common Interests other than in accordance with the applicable provisions of the LLC Agreement and the Members Agreement.[68] NYSE Amex will have an initial right of first offer to purchase Class B Common Interests that a Founding Firm intends to transfer, at a price at least equal to their fair market value.[69] In the event NYSE Amex does not exercise its right of first offer, the transferring Founding Firm will have the right, subject to certain conditions, to sell its Class B Common Interests to NYSE Amex at a price equal to their fair market value or to sell its Common Interests to a third party.[70] In addition, on or after the tenth anniversary of the effective date of the LLC Agreement, NYSE Amex will have the right to buy some or all of the Class B Common Interests from the Members at a price equal to their *pro rata* portion fair market value.[71] In the event NYSE Amex intends to transfer any of its Class A Common Interests, the Founding Firms will have certain rights of first offer to purchase these Class A Common Interests.[72] In the event that NYSE Amex acquires any Class B Common Interests, such Class B Common Interests will automatically be converted into Class A Common Interests.[73] Similarly, in the event any Founding Firms acquire Class A Common Interests, such Class A Common Interests will be automatically converted into Class B Common Interests.[74] Also, subject to certain conditions, Members will be obligated to transfer their Common Interests where another Member, acting alone or together with other Members, intends to make a transfer of 75% of the then-outstanding Common Interests and the Board, by Supermajority Vote,[75] approves the sale of the Company to a person or entity who is not an affiliate of the Company.

A person or entity may become a Member by acquiring any Interest.[76] Any new Member of the Company will be required to become a party to the LLC Agreement.[77]

The LLC Agreement also provides that no Person[78] that is not a Member either alone or together with its Affiliates,[79] may directly own (or vote) Common Interests in the Company representing more than the 19.9% of the then issued and outstanding Common Interests (''19.9% Maximum Percentage)[80] or any successive 5% ownership threshold (''Concentration Limitation'').[81] The Concentration Limitation, however, will not apply to NYSE Amex alone or together with its Affiliates.[82] Further, the LLC Agreement permits the Concentration Limitation to be waived if

[61] 15 U.S.C. 78c(a)(27).

[62] 15 U.S.C. 78s(h)(1).

[63] ''Common Interest Percentage'' means (i) with respect to NYSE Amex or a Transferee of Class A Common Interests, the product of (w) the Aggregate Class A Economic Allocation multiplied by (x) a fraction, (A) the numerator of which shall be the number of Class A Common Interests then held by NYSE Amex or such Transferee and (B) the denominator of which shall be the number of Class A Common Interests then held NYSE Amex and all such Transferees, and (ii) with respect to any Founding Firm or a Transferee of Class B Common Interests, the product of (y) the Aggregate Class B Economic Allocation multiplied by (z) a fraction, (A) the numerator of which shall be the number of Class B Common Interests then held by such Founding Firm or such Transferee, including, for the purpose of determining any economic entitlement or entitlement to designate a Director, any Non-voting Common Interests and (B) the denominator of which shall be the number of Class B Common Interests then held by all Founding Firms and all such Transferees, including, for the purpose of determining any economic entitlement or entitlement to designate a Director, any Non-voting Common Interests. *See* Section 1.1 of the LLC Agreement. *See also* Section 1.1 of the LLC Agreement (defining Transferee). *See also* Section 10.2(b) of the LLC Agreement (defining Aggregate Class A and Aggregate Class B Economic Allocation).

[64] *See* Section 1.1 of the LLC Agreement (defining ''Transfer'').

[65] *See* Section 11.8(c) of the LLC Agreement.

[66] *See id.*

[67] *See* Securities Exchange Act Release Nos. 58324 (August 7, 2008), 73 FR 46936 (August 12, 2008) (order approving the transfer of the Boston Stock Exchange's ownership interest in the Boston Options Facility Group, the operator of the BOX facility, to MX US 2, Inc., a wholly owned subsidiary of the Montréal Exchange); 44983 (October 25, 2001), 66 FR 55225 (November 1, 2001) (order approving the establishment of Archipelago Exchange as a facility of the Pacific Exchange where Pacific Exchange's ownership interest in Archipelago Exchange, L.L.C. (''Arca L.L.C.''), the operator of Archipelago Exchange, consisted solely of a 10% interest in Archipelago Holdings, LLC, the parent company of Arca L.L.C.); 41210 (March 24, 1999), 64 FR 15857 (April 1, 1999) (order approving electronic system operated as a facility of Philadelphia Stock Exchange (''Phlx''), which had no ownership interest in the operation of the system); and 54538 (September 29, 2006), 71 FR 59184 (October 6, 2006) (order approving Phlx's New Equity Trading system and operation of optional outbound router as a facility of Phlx, which had no ownership interest in the third-party operator).

[68] *See* Sections 11.1 and 11.2 of the LLC Agreement and Article III of the Members Agreement.

[69] *See* Section 3.2(b)(ii) of the Members Agreement.

[70] *See* Section 3.2(c) of the Members Agreement.

[71] *See* Section 3.4 of the Members Agreement.

[72] *See* Section 3.3(a) of the Members Agreement.

[73] *See* Section 11.2(c) of the LLC Agreement. *See also* Section 3.3(e) of the Members Agreement.

[74] *See id.*

[75] *See* Section 11.3(a) of the LLC Agreement.

[76] *See* Sections 10.4 and 11.1 of the LLC Agreement.

[77] *See id.*

[78] ''Person'' means an individual, partnership, limited liability company, trust, estate, association, joint stock company, unincorporated organization, governmental or regulatory body or other entity. *See* Section 1.1 of the LLC Agreement.

[79] ''Affiliate'' means, with respect to any Person, and other Person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such Person. The term ''control,'' as used in this definition of ''Affiliate'' means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of such Person, whether through the ownership of voting securities, through the right or power to appoint majority of the board of directors, by contract or otherwise, and ''controlled by'' and ''under common control'' have corresponding meanings. *See* Section 1.1 of the LLC Agreement.

[80] *See* Section 4.9(b) of the LLC Agreement.

[81] *See* Section 11.8(b)(i) of the LLC Agreement. *See also* Section 4.9(a). *See* Amendment No. 1, which confirmed that Section 4.9 of the LLC Agreement would prohibit a NYSE Amex member that is an affiliate of NYSE Amex to own or vote Common Interests in excess of 19.9% of the then issued and outstanding Common Interests, unless it has received Commission approval to do so pursuant to the rule filing process under Section 19(b) of the Act.

[82] *See* Section 11.8(b)(ii) of the LLC Agreement.

written notice of the intention to exceed the Concentration Limitation is delivered to the Board; prior to the acquisition of any Common Interests that will exceed the Concentration Limitation, the Board determines not to oppose the acquisition; and the notice has been filed as a proposed rule change with, and approved, by the Commission under Section 19(b) of the Act and shall have become effective thereunder.[83] Nevertheless, the Board shall oppose the ownership of Common Interests if: such ownership will impair the ability of the Company and the Board to carry out their functions and responsibilities, including but not limited to, under the Act; such ownership will impair the ability of the SEC to enforce the Act; if the acquiring Person or its Affiliates are subject to any statutory disqualification within the meaning of Section 3(a)(39) of the Act; or if such ownership would result in the Person, alone or together with its Affiliates, having an ownership of more than 20% of the aggregate Common Interests and such Person or one of its Affiliates is a member or member organization of NYSE Amex.[84]

Moreover, the LLC Agreement provides that, if any Person, alone or together with any Affiliate, acquires a direct or indirect ownership of 25% or more of the total voting power of a Member (such person, a ''Controlling Person,'' and such interest a ''Controlling Interest'' [85]), and the Member, alone or together with any Affiliate, holds an ownership interest in the Company equal to or greater than 20% of the aggregate Common Interests, then such Controlling Person must become a party to the LLC Agreement and agree to abide by all provisions relating to regulatory matters.[86] The LLC Agreement also provides that NYSE Amex must file with the Commission, pursuant to Section 19(b) of the Act, any amendment to the LLC Agreement executed to comply with the provisions of the LLC Agreement relating to indirect ownership of the Company.[87] The non-economic rights and privileges, including all voting rights, of the Member in which such Controlling Interest is acquired will be suspended until the proposed rule change has become effective under the Act or until the Controlling Person ceases to hold a Controlling Interest in such Member.[88]

A proposed rule change filed with the Commission in any of the circumstances noted above will afford the Commission an opportunity to ensure that a change to the LLC Agreement or a change in the ownership of the Company will be consistent with the Act, including whether the Commission and NYSE Amex will retain sufficient regulatory jurisdiction over the proposed indirect controlling party. The Commission understands that the LLC Agreement will apply to any ultimate parent of the Company, no matter how many levels of ownership are involved, provided that a Controlling Interest exists between each link of the ownership chain.

Finally, the LLC Agreement requires the Company to provide the Commission with written notice ten days prior to the closing date of any acquisition of an Interest by a person that results in a Member's percentage ownership interest in the Company, alone or together with any Affiliate, meeting or crossing the 5%, 10%, or 15% thresholds.[89] This notice requirement is analogous to a requirement in Form 1,[90] the application and amendments to the application for registration as a national securities exchange. Exhibit K of Form 1 requires any exchange that is a corporation or partnership to list any persons that have an ownership interest of 5% or more in the exchange.[91] Additionally, Rule 6a–2(a)(2) under the Act [92] requires an exchange to update its Form 1 within ten days after any action that renders inaccurate the information previously filed in Exhibit K.

Exhibit K imposes no obligation on an exchange to report parties whose ownership interest in the exchange is less than 5%. Similarly, Section 11.8(a) of the LLC Agreement requires the Company to notify the Commission of the acquisition of an Interest when that Interest reaches 5% or more. The Commission does not believe that a change to the LLC Agreement that reflects the acquisition of less than a 5% interest in a facility of a national securities exchange (or an increase that does not cross any of the additional thresholds) is a ''rule of the exchange'' that must be filed pursuant to Section 19(b) of the Act.

D. Ownership and Voting Restrictions on Members of the Company

Section 4.9(a) of the LLC Agreement prohibits any Member (other than NYSE Amex alone, or subject to receipt of Commission approval pursuant to the rule filing process under Section 19(b) of the Act, together with its Permitted Transferees) [93] from owning or voting (alone or together with its Affiliates), directly or indirectly more than the 19.9% Maximum Percentage.[94] In the event a Member (alone or together with its Affiliates) holds Excess Interests, such Excess Interests shall automatically and immediately constitute non-voting Common Interests and the Member shall institute remedial measures to either divest itself of such Excess Interests or retain such Excess Interests as non-voting interests, in each case as permitted by Section 4.9(c) of the LLC Agreement.[95]

The Commission has previously expressed concern regarding the potential for unfair competition and conflicts of interest where a member of an exchange owns more than 20% of that exchange or a facility thereof.[96] Although it is common for a member to have an ownership interest in an exchange or a facility of an exchange, such member's interest could become so large as to raise questions whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member. A member that has a controlling interest in the exchange or a facility might attempt to direct the exchange to refrain from diligently surveilling the member's conduct or from punishing any improper conduct. An exchange might also be reluctant to surveil and enforce its rules zealously against a member that the exchange relies on as its largest source of capital. The Company, which will operate the Options Facility, will be owned collectively by NYSE Amex and the seven Founding Firms, six of which currently are members, or affiliates of members, of NYSE Amex and a Member

[83] *See id.*

[84] *See* Section 11.8(b)(iii) of the LLC Agreement.

[85] *See* Section 1.1 of the LLC Agreement (defining ''Controlling Person'' and ''Controlling Interest'').

[86] *See* Sections 11.8(d)(i) and (ii) of the LLC Agreement.

[87] *See* Section 11.8(d)(iv) of the LLC Agreement.

[88] *See id.*

[89] *See* Section 11.8(a) of the LLC Agreement.

[90] 17 CFR 249.1 and 17 CFR 249.1a.

[91] This reporting requirement applies only to exchanges that have one or more owners, shareholders, or partners that are not also members of the exchange. *See* Form 1, Exhibit K. Exhibit K applies only to NYSE Amex itself, not to entities that operate facilities of the exchange.

[92] 17 CFR 240.6a–2(a)(2).

[93] *See* Section 11.4(a) of the LLC Agreement (defining ''Permitted Transferee'').

[94] *See* Section 4.9(a) of the LLC Agreement. Any amount in excess of the 19.9% Maximum Percentage are ''Excess Interests.''

[95] *See* Section 4.9(c) of the LLC Agreement. *See also* Section V.C. *infra* for a discussion of Section 11.8(b)(iii) of the LLC Agreement that prohibits the Board from approving ownership by a Member of more than 20% of the aggregate Common Interests and such Person or one of its Affiliates is a member or member organization of NYSE Amex.

[96] *See* NYSE Block Order, 74 FR at 5017–5018, n.65 and accompanying text. *See also* CBSX Order; ISE Stock Order; BeX Order; and BOX Order.

of the Company.[97] Initially, each of the Founding Firms will own less than 19.9% of the Company and pursuant to the LLC Agreement, and except as described above, will not be permitted to own or vote in excess of the 19.9% of the Maximum Percentage as long as they are a Member of the Company. Accordingly, the Commission believes that the ownership concentration and voting limitations in the LLC Agreement are designed to preserve the independence of NYSE Amex's self-regulatory functions and NYSE Amex's ability to fulfill its regulatory and oversight obligations.

E. The Incentive Plan

As noted above, NASDAQ did not object to the proposed rule change, but expressed the view that, by allowing NYSE Amex ''to make reasonable distinctions among market participants and to pre-select firms that will be rewarded for order flow,'' the Commission should provide comparable flexibility to fee or rebate-based plans of other exchanges that provide incentives to members to submit order flow. NASDAQ also expressed the view that the Incentive Plan is ''virtually indistinguishable in purpose and effect from other fee or rebate-based incentive plans operated by national securities exchanges,'' citing as an example NASDAQ's Investor Support Plan, and stating that the economic value to the Founding Firms is directly related to how much order flow they send to NYSE Amex.[98]

Any determination as to whether a particular plan or program provided by an exchange or to which an exchange is a party that has a component related to order flow, such as the Incentive Plan, constitutes a proposed rule change that is required to be filed with the Commission under Section 19(b) of the Act must be analyzed on a case-by-case basis and is dependent on the facts and circumstances of the particular plan's or program's features and its context.[99] Based on the facts and circumstances in this case, the Commission does not believe that the Incentive Plan constitutes a proposed rule change within the meaning of Section 19(b)(1) of the Act and Rule 19b–4 thereunder, and believes that it is distinguishable from the NASDAQ Investor Support Program.[100]

The Incentive Plan is one aspect of the equity investment and obligations of the Founding Firms as owners (Members) of the Company,[101] and reflects the commitment of each of the Founding Firms to maintain certain minimum levels of participation in the joint venture. A Founding Firm may meet or exceed its Individual Target, but may not realize an increase in its equity interest relative to the other Founding Firms depending on the extent to which the other firms meet or exceed their Individual Targets.[102] If each Founding Firm meets its Individual Target in any given year, there would be no change in its equity interest relative to any other Founding Firm. A Founding Firm cannot increase its equity interest relative to any other Founding Firm, no matter how much order flow it sends to the facility, unless one or more other Founding Firms fails to achieve its target for the year. Also, the Incentive Plan will not increase or decrease the aggregate equity interest of the Founding Firms as a group relative to NYSE Amex. The Commission therefore believes that the impact of the Incentive Plan is sufficiently attenuated from the submission of individual orders to the Options Facility by the Member that it is properly not viewed as an order flow or liquidity rebate that would constitute a proposed rule change under Section 19(b) of the Act. By comparison, the NASDAQ Investor Support Program provides a fee credit for each order in excess of a specified threshold to any member wishing to participate in the program.[103] The fee credits are directly linked to each incremental order provided and are guaranteed so long as the baseline threshold is met.[104]

For the reasons just discussed, the Commission believes that the Incentive Plan does not constitute a proposed rule change within the meaning of Section 19(b)(1) of the Act and Rule 19b–4 thereunder.

VI. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act,[105] that the proposed rule change (SR–NYSEAmex–2011–18), as modified by Amendment No. 1, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[106]

Cathy H. Ahn,

Deputy Secretary.

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[97] *See* Amendment No. 1, which states as follows: Founding Firms Goldman Sachs and Citadel hold NYSE Amex Options Trading Permits (''ATPs'' and each entity that holds an ATP, an ''ATP Holder''). In addition, Goldman, Sachs & Co. is also an affiliate of ATP Holder Goldman Sachs Execution & Clearing LP. Founding Firm BAML is an affiliate of ATP Holders Merrill Lynch, Pierce, Fenner & Smith Inc. and Merrill Lynch Professional Clearing Corp. Founding Firm Barclays is an affiliate of ATP Holder Barclays Capital Inc. Founding Firm Citigroup is an affiliate of ATP Holders Citigroup Derivatives Markets, Inc. and Automated Trading Desk Financial Services LLC. Founding Firm UBS is an affiliate of ATP Holders UBS Financial Services Inc. and UBS Securities LLC. Founding Firm TD Ameritrade is neither an ATP Holder nor an affiliate of an ATP Holder.

[98] *See* NASDAQ Letter, *supra* note 4. *See* NASDAQ Rule 7014 for a description of NASDAQ's Investor Support Program.

[99] The Commission notes that NASDAQ in its comment letter also pointed to the issue that ''[t]he ownership of self regulatory organizations by their members can raise at least the appearance of a conflict of interest.'' In the past, and as discussed in Section V. D. above, the Commission has expressed concern regarding the potential for unfair competition and conflicts of interest where a member of an exchange owns more than a 20% interest in that exchange of a facility thereof. *See infra* note 96 and accompanying text. The Commission believes, as discussed more fully above, that the proposed structure is designed to mitigate those concerns and preserve the independence of NYSE Amex's self-regulatory obligations. *See infra* Section V. D.

[100] As noted above, the determination regarding whether a plan or program that is provided by an SRO, or to which an SRO is a party, and that has a component related to order flow is or is not a proposed rule change is based on the particular facts and circumstances of the arrangement. Consequently, the Commission recommends that an SRO consult with Commission staff as to its determination as to whether such a plan or program (or any changes to such plan or program) is a proposed rule change.

[101] The LLC Agreement establishes the rights and obligations of the Company's Members. Aside from making an initial capital contribution in exchange for equity interest, the Members, among other things, are subject to ongoing regulatory capital contributions, voluntary capital contributions, and to potential penalties for failure to make requested capital contributions. *See* Sections 4.3, 4.4, and 4.5 of the LLC Agreement.

[102] *See supra* note 16 and accompanying text for a description of what constitutes an Individual Target.

[103] For a detailed description of the Investor Support Program, *see* Securities Exchange Act Release No. 63270 (November 8, 2010), 75 FR 69489 (November 12, 2010) (SR–NASDAQ–2010–141) (notice of filing and immediate effectiveness). *See also* Securities Exchange Act Release Nos. 63414 (December 2, 2010), 75 FR 76505 (December 8, 2010) (SR–NASDAQ–2010–153) (notice of filing and immediate effectiveness); 63628 (January 3, 2011), 76 FR 1201 (January 7, 2011) (SR–NASDAQ–2010–154) (notice of filing and immediate effectiveness); 63891 (February 11, 2011), 76 FR 9384 (February 17, 2011) (SR–NASDAQ–2011–022) (notice of filing and immediate effectiveness); and 64050 (March 8, 2011) (SR–NASDAQ–2011–034) (notice of filing and immediate effectiveness).

[104] *Id.*

[105] 15 U.S.C. 78s(b)(2).

[106] 17 CFR 200.30–3(a)(12).