

the Act,<sup>22</sup> the Division also received data from a commenter purporting to show a decline in average price improvement and average percentage of contracts price improved in the PIP.<sup>23</sup> The Suspension Order states that the Commission has not reached any conclusions with respect to the issues involved.<sup>24</sup> To the contrary, the Suspension Order seeks additional comment and data with respect to the issues raised by the filing,<sup>25</sup> and the institution of proceedings will provide the Commission the opportunity to more fully assess the issues raised, including a further assessment of the facts underlying the issues.

Third, the Division's action pursuant to delegated authority to suspend the filing and institute proceedings is an interim step that does not involve a conclusion of law that is clearly erroneous. The Suspension Order states that the Commission has not reached any conclusions with respect to the issues involved,<sup>26</sup> and no finding as to whether the proposed rule change is consistent with the Act was made in the Suspension Order. To the contrary, the Suspension Order seeks additional comment and data with respect to the issues raised by the filing, which will help the Commission further assess the proposed rule change and inform its ultimate decision as to whether the proposed rule change is consistent with the Act. Based on the proposed rule change as filed, the comments received, and BOX's response to comments, the Commission finds that the Division acted appropriately in finding that it is appropriate in the public interest, for the protection of investors, and otherwise in furtherance of the purposes of the Act to temporarily suspend the filing.<sup>27</sup>

Fourth, the BOX Petition does not specifically allege that the Division's action pursuant to delegated authority was an exercise of discretion or decision of law or policy that is important and that the Commission should review pursuant to the standard of Rule 431(b)(2). For purposes of determining whether to grant de novo review of the Division's exercise of delegated authority with respect to the Suspension

Order, the Commission does not believe that the act of suspending and instituting proceedings in this filing embodies an exercise of discretion or a decision of law or policy that is important and that the Commission should review. The Commission believes that the Division acted appropriately, based on the record, in determining that the underlying BOX proposed rule change does merit additional opportunity for comment and Commission consideration. The Division's Suspension Order is the proper statutory mechanism to commence that process and conduct such review.

Finally, in its petition, BOX requests, if the Commission does determine to institute proceedings to determine whether to approve or disapprove the proposal, that the Commission not stay the effectiveness of the PIP fee during the course of the proceedings.<sup>28</sup> BOX notes its belief that the proposed fees allow it to compete with larger options exchanges that charge payment for order flow fees that, in BOX's view, are substantially similar to the proposed fees and that suspension of the fees would cause unfair harm to BOX.<sup>29</sup> However, under Section 19(b)(3)(C) of the Act,<sup>30</sup> the Commission cannot institute proceedings to determine whether to approve or disapprove an immediately effective rule change unless it first suspends the rule change. The Commission does not find a sufficient basis in the BOX Petition to diverge from the process contemplated in the statute in this case by lifting the suspension of the BOX PIP fee while it conducts the proceedings to determine whether to approve or disapprove BOX's proposed rule change. Importantly, commenters have raised material concerns (including one who presented supporting data) that call into question whether BOX's proposal unduly burdens competition and whether it is consistent with the Act. Among other things, the Commission will consider these issues, as well as BOX's assertion that its proposed fees are comparable to fees in effect at other options exchanges, during the conduct of the proceedings on BOX's proposal.

By the Commission.

**Elizabeth M. Murphy,**

Secretary.

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<sup>22</sup> The Division noted this data in the Suspension Order. See Suspension Order, *supra* note 3, at 58067.

<sup>23</sup> See Citadel Letter, *supra* note 10, at 3.

<sup>24</sup> See Suspension Order, *supra* note 3, at 58067.

<sup>25</sup> See *id.* at 58067-68.

<sup>26</sup> See *id.* at 58067.

<sup>27</sup> Pursuant to the provisions of Section 19(b)(3)(C) of the Act, the Commission must institute proceedings to determine whether to approve or disapprove an immediately effective rule change if it suspends such rule change. See 15 U.S.C. 78s(b)(3)(C).

<sup>28</sup> See BOX Petition, *supra* note 2, at 10.

<sup>29</sup> See *id.* at 9-10.

<sup>30</sup> See 15 U.S.C. 78s(b)(3)(C).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65590; File No. SR-NYSEAmex-2011-80]

### Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Retire a Pilot Program and Harmonize the Exchange's rules Regarding Listing Expirations with the Existing Rules of Other Exchanges

October 19, 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 October 13, 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 and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to amend NYSE Amex Options Rule 903 (Series of Options Open for Trading) and Commentary .11 thereto to retire a pilot program and harmonize the Exchange's rules regarding listing expirations with the existing rules of other exchanges. The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, at the Commission's Public Reference Room, and at the Commission's Web site at <http://www.sec.gov>.

#### 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.

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

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

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

1. Purpose

The purpose of the proposed rule change is to retire the Additional Expiration Months Pilot Program ("Pilot Program") and to amend the Exchange's rules regarding listing expirations. This filing is based on the existing rules of the NASDAQ Options Market ("NOM")<sup>3</sup> and NASDAQ OMX PHLX LLC ("PHLX").<sup>4</sup>

NYSE Amex Options Rules Governing Listing of Expirations

Pursuant to NYSE Amex Rule 903, the Exchange typically opens four expiration months for each class of options open for trading on the Exchange: The first two being the two nearest months, regardless of the quarterly cycle on which that class trades, and the third and fourth being the next two months of the quarterly cycle previously designated by the Exchange for that specific class. For competitive reasons, in 2010 the Exchange established the Pilot Program pursuant to which it could list up to an additional two expiration months, for a total of six expiration months for each class of options open for trading on the Exchange.<sup>5</sup> The filing to establish the Pilot Program was substantially similar in all material respects to a proposal of the International Securities Exchange, LLC ("ISE").<sup>6</sup>

After NYSE Amex and ISE established their respective Pilot Programs, ISE submitted a filing in response to a PHLX filing regarding the listing of expirations.<sup>7</sup> In the PHLX filing, PHLX amended its rules that so that it could open "at least one expiration month" for each class of standard options open for trading on PHLX.<sup>8</sup> PHLX stated in its filing that this amendment was "based directly on the recently approved rules of another options exchange, namely

Chapter IV, Sections 6 and 8 of NOM."<sup>9</sup> Since PHLX's rules did not hard code an upper limit on the maximum number of expirations that could be listed per class, ISE believed that PHLX (and NOM) had the ability to list expirations that ISE would not be able to then list under its rules. As a result, ISE amended its rules by adding new Supplementary Material .10 to ISE Rule 504 and Supplementary Material .04 to ISE Rule 2009 to permit ISE to list additional expiration months on options classes opened for trading on ISE if such expiration months are opened for trading on at least one other national securities exchange.<sup>10</sup>

Because the Exchange had adopted a Pilot Program similar to ISE's, the Exchange adopted new Commentary .14 to Rule 903 that permits the Exchange to list additional expiration months on options classes opened for trading on the Exchange if such expiration months are opened for trading on at least one other national securities exchange.<sup>11</sup>

*Retire Additional Expiration Months Pilot and Adopt Amended Rules*

The Exchange established the Pilot Program for competitive reasons. Now that the Exchange has the ability to match the expiration listings of other exchanges<sup>12</sup> (that may exceed six expirations and may occur on a regular basis) the Exchange believes that the Pilot Program is no longer necessary and is proposing to retire it. To effect this change, the Exchange is proposing to delete the text of Commentary .11 to Rule 903, which sets forth the terms of the Pilot Program, which is currently scheduled to expire on October 31, 2011.<sup>13</sup>

As noted, the Exchange's ability to match the expirations listed by other exchanges is set forth in Commentary .14 to Rule 903. This provision, however, only provides the Exchange with the ability to match expirations initiated by other options exchanges. To encourage competition and to place the Exchange on a level playing field, the Exchange should have the same ability as PHLX and NOM to initiate expirations. Therefore, the Exchange is proposing to harmonize its rules with the rules of PHLX and NOM by clarifying that NYSE Amex will open at least one expiration month and one series for each class open for trading on

the Exchange. To effect this change, the Exchange is proposing to amend the text of Rule 903(b) and (c) to track the rule text of NOM Chapter IV, Section 6 and PHLX Rule 1012.

Finally, the Exchange is proposing to slightly modify Rule 903 regarding the opening of additional series. Specifically, the Exchange proposes to amend Rule 903(c) to permit the listing of additional series when (among other reasons) the market price of the underlying stock moves more than five strike prices from the initial exercise price or prices.<sup>14</sup> Currently, Rule 903(c) permits the listing of additional series when the market price of the underlying stock moves substantially from the initial exercise price or prices. This proposed rule change again tracks PHLX and NOM's existing rule text.

The Exchange believes the proposed rule change is proper, and indeed necessary, in light of the need to have rules that do not put the Exchange at a competitive disadvantage. The Exchange's proposal puts the Exchange in the same position as PHLX and NOM and provides the Exchange with the same ability to initiate and match identical expirations across exchanges for products that are multiply-listed and fungible with one another. The Exchange believes that the proposed rule change should encourage competition and be beneficial to traders and market participants by providing them with a means to trade on the Exchange securities that are initiated by the Exchange and listed and traded on other exchanges.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>16</sup> in particular, because 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. In particular, the proposed rule change would permit the Exchange to accommodate requests made by ATP Holders and other market participants to list additional expiration months and thus encourages

<sup>3</sup> See NOM Chapter IV, Section 6 (Series of Options Contracts Open for Trading). See also Securities Exchange Act Release No. 57478 (March 12, 2008), 73 FR 14521 (March 18, 2008) (SR-NASDAQ-2007-004 and SR-NASDAQ-2007-080).

<sup>4</sup> See PHLX Rule 1012 (Series of Options Open for Trading). See also Securities Exchange Act Release No. 63700 (January 11, 2011), 76 FR 2931 (January 18, 2011) (SR-Phlx-2011-04). The PHLX filing was based on NOM's existing rules.

<sup>5</sup> See Securities Exchange Act Release No. 63170 (October 25, 2010), 75 FR 66818 (October 29, 2010) (SR-NYSEAmex-2010-99).

<sup>6</sup> See Securities Exchange Act Release No. 63104 (October 14, 2010), 75 FR 64773 (October 20, 2010) (SR-ISE-2010-91).

<sup>7</sup> See Securities Exchange Act Release No. 64343 (April 26, 2011), 76 FR 24546 (May 2, 2011) (SR-ISE-2011-26). See also *supra* note 4.

<sup>8</sup> See *supra* note 4 at 2932.

<sup>9</sup> *Id.*

<sup>10</sup> See *supra* note 7 at 24547.

<sup>11</sup> See Securities Exchange Act Release No. 64519 (May 19, 2011), 76 FR 30411 (May 25, 2011) (SR-NYSEAmex-2011-33).

<sup>12</sup> See Commentary .14 to Rule 903.

<sup>13</sup> The Exchange proposes to mark Commentary .11 to Rule 903 as "Reserved."

<sup>14</sup> Rule 903(d) also permits the Exchange to add additional series of options of the same class when the Exchange deems it necessary to maintain an orderly market and to meet customer demand. These "additional series" provisions are similar to existing provisions in NOM Chapter IV, Section 6 and PHLX Rule 1012.

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

<sup>16</sup> U.S.C. 78f(b)(5).

competition without harming investors or the public interest.

#### *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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>17</sup> and Rule 19b-4(f)(6) thereunder.<sup>18</sup>

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest because the proposal should promote competition by allowing the Exchange, without undue delay, to incorporate rules that previously have been adopted by other exchanges and thereby to list and trade option series that are trading on those other options exchanges. Therefore, the Commission designates the proposal operative upon filing.<sup>19</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of

investors, or otherwise in furtherance of the purposes of the Act.

### IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAmex-2011-80 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-2011-80. 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-2011-80 and should be submitted on or before November 15, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

Kevin M. O'Neill,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65591; File No. SR-NYSEArca-2011-73]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Retire a Pilot Program and Harmonize the Exchange's Rules Regarding Listing Expirations With the Existing Rules of Other Exchanges

October 19, 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 October 13, 2011, NYSE Arca, Inc. (the "Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The 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 NYSE Arca Options Rule 6.4 (Series of Options Open for Trading) and Commentary .09 thereto to retire a pilot program and harmonize the Exchange's rules regarding listing expirations with the existing rules of other exchanges. The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, at the Commission's Public Reference Room, and at the Commission's Web site at <http://www.sec.gov>.

#### 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

<sup>17</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>18</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>19</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>20</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.