April 14, 20011

The Hon. Mary L. Schapiro, Chairman
The Hon. Kathleen L. Casey, Commissioner
The Hon. Elisse B. Walter, Commissioner
The Hon. Luis A. Aguilar, Commissioner
The Hon. Troy A. Paredes, Commissioner

U.S. Securities and Exchange Commission
I00 F Street, N. E.
Washington, DC 20549

Re: SR-NYSE-Amex-2011-18

Dear Honorable Commissioners,

By way of introduction, the author of this comment is and has been an investor/owner of unredeemed, ongoing, and still in-force New York Stock Exchange Option Trading Rights for over twenty-two years and as such affirms his past, present, and future ownership position in the license to effect option trades in/on all NYSE or NYSE related and/or affiliated markets or any of its evolved syntheses. Resultantly, the Commenter, whose issuer-investor contract commenced on January 10, 1989; whose unredeemed rights-status was authenticated in an April 21, 1997 letter from the NYSE to the SEC, (Exhibit b, p.78); and who, according to the SEC on February 27, 2006, "*own(s) NYSE Option Trading Rights ("OTRs") that are separate from full NYSE seat ownership ("Separated OTRs")*", (Exhibit f), stands opposed to the proposed rule change. Among the bases for opposition, in addition to the Exchange's endeavor to propose third party investment into the same unredeemed Exchange assets into which it had already consummated third party investment and therefore no longer owns are: a) the Exchange's expropriation of trading right assets from investors, involuntarily, into what eventually became

its own account; b) questions regarding the Exchange's underlying incentive for its relatively short exit-entry from the option business need resolution; and c) the presence of a prevailing issuer-investor implied contract that defines the commenter and other investors as true licensees and continues to obligate all parties. The presence of these factors and others undergird a New York Stock Exchange executed policy whose inconsistency with the requirements of the Act is unfortunate but clear and must therefore serve at minimum, as the foundation for proposed rule change denial.

BACKGROUND

The facts are that when the NYSE recently converted from a membership institution to a shareholder entity, it identified the assets that it would need to buy back from investors to effect that conversion as: a) the 1,366 shares in the Exchange's physical structure; and b) 1,366 trading rights in the Exchange's various products. In 2006, it successfully repurchased all of the 1,366 shares in the physical structure and most of the 1,366 trading rights. It did not, however, buy back all trading rights inasmuch as it failed to redeem its separated option trading rights, rendering their ongoing option trading licenses, bona fide, unequivocal, and except for the Exchange's relatively brief exit from the option business, uninterrupted. By virtue of the issuer-investor contract then, willingly agreed upon by the NYSE and its investors, the validity of which transcends all other NYSE option ventures/combinations/acquisitions/mergers, etc. that followed, the commenter hereby asserts its rights (as well as those of the approximately fifty others who accessed the publically open, separated option trading rights market and contracted

similarly) to effect trades on any and all NYSE option products, enjoying the same present and future privileges as it did before the Exchange's curiously staged exit-reentry.

CAUSE FOR PROPOSED RULE CHANGE DISAPPROVAL

Since the platform of the subject proposed rule change is built upon a foundation that is not consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, "……. *to promote just and equitable principles of trade,…….. and, in general, to protect investors and the public interest…."et al* (Exhibit l), the proposed rule change must necessarily be denied. Inconsistency with the requirements of the Act is demonstrated by the Exchange's unsubtle maneuvering with the trading rights it had itself issued and with the unusual way it subsequently justified the maneuvering using a unique interpretation of its new identity. Compounding the issue was the move to impose a conversion of its investors' assets/rights into what ultimately became the account of the Exchange itself. With a stroke of the pen (Exhibit b, 19th page) on May 26, 2005, the Exchange assigned "no value" to NYSE Option Trading Rights and endeavored to set them and its other trading rights apart from the physical assets of itself; extinguish them; bring to an unexpected halt the NYSE Membership Department facilitated market in them; and package them as part of the full seat buy back (Ibid) thereby facilitating corporate conversion but disenfranchising the options rights investors with whom it was already contractually bound. (The NYSE Membership Department Options Trading Rights market had been accessed by public investors, NYSE seat detachers, and NYSE seat re-attachers continuously since 1983, including the duration when no option business was being conducted.)

Efforts by the Exchange to validate its actions were made by dividing its justifying rationale into three components that it had apparently hoped would negate its contractual obligations. The first was that option participants now lacked physical entry onto the NYSE floor in order to conduct business. The second was the identity of the NYSE entity that was going to conduct an option business had evolved into something different than was the one upon whom the contractual obligation rested. The third was that an option business would not be conducted "immediately after the merger".

"*In addition, no options are currently traded on the NYSE, and no options will be traded on NYSE Market immediately after the merger. The only entity affiliated with New York Stock Exchange LLC immediately after the merger that will trade options will be NYSEArca, which is not a successor to the NYSE and will be an entity separate from New York Stock Exchange LLC, with its own rules, regulations, qualifications, filings and requirements for options trading. There will be neither physical entry upon NYSE Market's trading floor to trade options nor any options admitted to dealing on NYSE Market. Thus, none of the operative conditions of an OTR is met,"* (Exhibit d).

Regarding mode of effecting option trades, since being admitted to the trading floor was the highest form of access one could attain during the time the 1980's and 1990's when the NYSE began to conduct its option business and when the exchange issued its Option Trading Rights, its logical extension would provide the rights-investor to whatever the most advanced access currently was (electronic, etc.). Even if one leans toward the Exchange's to-the-letter interpretation of the Constitution, however, that an option series must actually be listed on an NYSE floor for it to qualify for Option Trading Rights access, a closer reading of that document reveals that Options Trading Rights access was granted to all Exchange listed options, floor accessible or otherwise, with the privilege of having a floor presence at its disposal. " …. *may maintain facilities on the trading floor for the execution of orders to buy and sell options that are from time to time admitted to dealings on the Exchange ('Exchange Options'),* (Exhibit b, p.17).

With respect to the Exchange's other reasoning, that options are now traded in the various markets of what the NYSE, Inc. became cannot be contested. That options are now traded on an exchange whose identity/name evolution from NYSE, Inc. does not alter the original issuer-investor contract into which it freely entered also stands beyond debate. Furthermore, any dependence that the Exchange held on its Board being able to alter the rules and Constitution as it saw fit, "*The specific wording of the NYSE's Constitution describing OTRs refutes this contention"* (Exhibit d footnote #21) has since been countered by the courts (Exhibit j).

A not surprising turn of events is that the Exchange today derives a significant part of its annual revenue from leasing out the rights to trade options in its various forums.

COURTS

On August 4, 2007, the Delaware Chancery Court, whose jurisdiction admittedly does not extend to the NYSE but whose relevance with respect to its opinion on a coinciding trading rights case is clear, stated,

"The notion that the ..... Board MAY UNILATERALLY DEFEAT CONTRACTUAL RIGHTS—Protected not only by state contract (or corporation law) but also by state fiduciary duty law—to achieve exclusive benefit of its seat members MERELY BY FILING WITH THE SEC IS TROUBLING."(emphasis added)(Exhibit j).

It went on to say,

"In sum, it is not immediately and conclusively obvious why a regulatory act voluntarily (and not necessarily) taken by the ..... Board can be isolated from the reach of fiduciary duty law, especially when the consequences (great benefits to the Seat Members and great detriment to the ….. Full Members) were so apparent at the time when the …. Board decided to act." (Ibid)

The court continued,

"*Moreover, even if it turns out that the SEC's mandate requires that ….. Full Members be excluded from trading on the ….. —a point about which the Court expresses no formal view—it*

does not ineluctably follow that, in these unique circumstances, they are also divested of whatever economic (or contractual) rights they hold as the result of that status."(Ibid)

The SEC responded to the court declaring on January 15, 2008,
"*and if the state law decision calls into question the basis on which our decision here with respect to these state law issues or any other relevant state law issues was made, we would expect …..… to respond appropriately, or we will act on our own as necessary.*" (Exhibit k)

The SEC continued,
"As the court emphasized, the court 'has jurisdiction to consider the 'economic rights' issues by the Complaint because those claims emerge from and are governed by state contract or fiduciary duty law.'" (Ibid)

Furthermore, the SEC responded in a manner relevant to both the matter before it then and the rule change now being considered,
"…… The possibility of a proceeding to determine whether it (the proposed rule) should be disapproved" (Ibid)

To clarify the law as it relates to the implied, issuer-investor contract that continues to be in force to this day, one only need read the Baltimore and Ohio R. Co. v United States 261 U.S. 592 (1923), decision of the United States Supreme Court. It defines,
"an *agreement 'implied in fact'" as "founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."*

CONTRACTUAL RIGHTS SURVIVING PREVIOUS RULE CHANGES

Without delving deeply into the NYSE's incentive for exiting and reentering the rapidly growing option business in this comment letter, the fact remains that it did. Contractually entitled, unredeemed separated option trading rights were by the Exchange's own Constitution,

as noted above, at the time of contract entry and subsequently, legal licenses to effect NYSE trades on all option products.

"The New York Stock Exchange, Inc. ("NYSE") submitted on July 29, 1983, copies of a proposed rule change pursuant to Section 19(b)(1)of the Securities Exchange Act of 1934 (the "Act") and Rule 19b-4 thereunder, to amend the NYSE Constitution to authorize the extension of options trading rights on the NYSE to persons and organizations who are not NYSE members" (Exhibit m).

As the court suggested, CONTRACTUAL RIGHTS CANNOT BE RULE-CHANGED OUT OF EXISTENCE, NOW, IN 2006, OR IN THE FUTURE.

Since the Exchange has reentered the option business, unredeemed option trading rights' legal license status continues in full force. Noteworthy is that the 1997 proposal by the Exchange to redeem separated option trading rights as a *"housekeeping measure* "for CBOE Lease Pool benefits was ultimately withdrawn by the Exchange (Exhibit b, p.78) leaving separated options trading rights' license status fully live, operational, and perpetual as long as the Exchange conducts an option business.

Although the Exchange's ownership of the physical asset portion in itself is granted, its claim of complete ownership of the trading rights portion thereof is not based on fact. Unless it is now proposing to divest itself of only the rights which it repurchased at the time of its corporate

conversion, which it has not specified in the subject proposed rule change, the question becomes how can the NYSE be in a position to sell something which it does not fully own.

Tangentially, and to the Exchange's credit, it had sufficient foresight to apparently not cancel its option exchange registration with the SEC in 1997 when it "transferred" its option business to the CBOE. It must have thought it prudent to hold the registration in the event it decided to reenter the business at a future date. With all due modesty, the commenter and others demonstrated similar foresight inasmuch they too anticipated a reentry decision by the Exchange, and accordingly held their NYSE option trading rights, confident in the binding issuer-investor contract they knew would continue to be in force when reentry was actualized.

EXIT-RENTRY

As noted the issuer-investor contract stands on sufficiently firm legal ground to, by itself, warrant disapproval of the prospective rule change. An important additional factor for disapproval, however, is the set of circumstances surrounding the Exchange's relatively short exit-reentry into the option business …… specifically its incentive to transform itself so dramatically by jettisoning its option business in the face of options' rapidly growing and integral role in the securities industry. Surely it must have realized in 1997 that in order to maintain its premier position as the world's foremost marketplace, it would need to have exposure in the option business. Surely it must have realized that in order to be a global, one-stop, 24 hour securities market, it would need all products in its line. The unfortunate impression with which an observer is left is the actual intention of the Exchange to permanently exit the

option business. By means of a clause in its "transfer" agreement with the CBOE, its apparent not surrendering its option exchange registration with the SEC, its keeping alive its option rules throughout the exit, and other factors, clear direction is demonstrated that at the very least, the Exchange was making contingency plans to reenter. The question is, did it exit the business in 1997 in full expectation of reentering. The NYSE can set the record straight, if it so chooses, by declaring in its response to this comment, what its intentions were at the time. In simple wording, did the members of the 1997 NYSE Board and/or senior management team definitively anticipate option business reentry …… yes or no? The Exchange's clarification on this point, either way, will be helpful to the process. (An interesting sidebar is that the prediction of a member of the senior NYSE management team of 1997 to this commenter in 1997 that, "it looks like I'll be fighting with your heirs" begs the question about what would be fighting if the Exchange was permanently exiting the option business.)

CONCLUSION

The advent of converging phenomena both within the Exchange and without has yielded fresh status to the issues raised herein. Recent developments such as the changed regulatory/judicial environment and the NYSE's modified structural make up, as well as the serious nature of the concerns brought forth, constitute far more than just an ordinary contractual dispute between two private parties that otherwise might be examined (and justifiably so) with less meticulous oversight. To be sure, now that the court has made known its position regarding contractual rights and regulatory acts, it is apparent that this matter represents significantly more than just a routinely proposed rule change. In addition, since the newly evolved/evolving composition of the

NYSE market has reversed the original premise upon which previous rule changes were allowed, this matter presents as a great deal more than just a run-of-the-mill process. Moreover, this matter represents much more than just a typically proposed rule change that can be approved based on the precedent of previous rule changes; or a disinclination of the Commission to be involved in certain law issues not specifically mentioned in the Act, even though engagement is authorized by superseding and empowering pronouncement to protect the public …… jurisdiction that prevails as its raison d'être.

Regardless, for the moment, of the Exchange's motivation to exit and reenter, which was no doubt confused by the well publicized change of NYSE administrations but nevertheless could alone turn out to be sufficient grounds for denying the rule change, and notwithstanding the political pressure that is bound to come from many quarters upon the surfacing of these issues, as a government-sanctioned, people-entrusted institution, would not the NYSE itself be compelled to take action if one of its listed companies or associated entities behaved comparably with an issuer-investor contract into which it had entered? Would it not be compelled to take action if the investors' assets of one of its listed companies or associated entities ultimately ended up in the account of that listed company or associated entity against the express wishes of the investors? Indeed, aspirations of the Exchange to insure commercial honor and just and equitable principles of trade among its members, member organizations, principal executives, approved persons, and employees of member organizations is so important to its business model that on February 5, 2010, it moved to codify them.

"In adopting this revised rule text for Rule 476(a)(6), the Exchange would be able to bring a charge relating to failing to observe high standards of commercial honor and just and equitable principles of trade against not only members and member organizations, but also against principal executives, approved persons, and employees of member organizations." SR-NYSE-

2010-07.

The SEC's responsibility, as it sees it, "*is not a forum to litigate state law issues that may arise regarding an SRO's rule proposal,"* (Exhibit k) but it also recognizes it does not exist in a vacuum and declares emphatically that it will enforce state law (Ibid); and by underlying mission to apply standards in any other and all realms that will promote just and equitable principles of trade, and, in general, to protect investors and the public interest. It is well within the SEC's mandate to declare that even in a best case scenario with respect to motivation, EXIT-REENTRY CANNOT NULLIFY AN INVESTMENT OR NEGATE A CONTRACT, implied or otherwise, nor reduce, let alone cancel the economic benefits that may accrue as a result thereof. It should be noted that litigation in an alternate venue need not be underway in order for the Commission to recognize the existence of state (or federal) law issues including those that conflict with the principles of the Act, as any incumbent burden on the investor to bring the facts before the appropriate regulatory authority has been met. Whereas the outcome of a legal concern being favorably resolved as a function of the ability to fund a team of attorneys is an objectionable but admittedly current fact of life in ordinary matters, its potential existence as a factor when it involves the center of American capitalism, is for obvious reasons, intolerable. Understood is that in order to explore and remedy the concerns set forth herein, the Commission would have to utilize some of the tools at its disposal to find a way to counter the approval it gave on February 27, 2006 …. specifically with its finding of consistency *"with Section 6(b)(1) of the Act and the NYSE rules for the NYSE to eliminate its rules that provide for options trading rights."* Indeed, given the facts and circumstances; and the opinion of the court calling into serious question an exchange's authority to "*unilaterally defeat contractual rights"* or *"that the Board can be isolated from the reach of fiduciary duty law"*, it would be difficult to

conceptualize how the Commission would not move to remedy. In fact it must be clear to even the Exchange's most ardent supporters, of which this commenter is one, that its unsolicited assumption of investors' assets by "rule change" into what ultimately became its own account, would find the legitimacy befitting its trusted station in jeopardy, should the light of judicial day ever be brought to bear.

As the overseer of the national market complex, the mechanism upon which the country and much of the world depend to insure the presence of a level playing field in the entire marketplace, let alone the very heart of it, the Commission would be doing a service not only to the subject public investor(s) of this comment but to system transparency in general by denying approval of the proposed rule change on the cited grounds. A perception of lack of fairness at the core of the system can have the long term effect of undermining orderly functioning of the system itself. If the Commission is reluctant to examine the issues including the exit-reentry circumstances in its role as SRO regulator, perhaps because NYSE Separated Option Trading Rights were purchased in an Exchange facilitated market that was open to the general public, it should then consider them in its role as protectors of investors and the public interest, just as it would with a firm that did not happen to be an SRO. The Commenter opposes the proposed rule change in its present form.

Respectfully,

/Andrew Rothlein/
Investor/Owner
New York Stock Exchange Option Trading Rights

Exhibits (a)-(m)

(a) http://www.sec.gov/rules/sro/cboe/2008/34-57159.pdf Pages 51, 52

(b) http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf

(c) http://www.sec.gov/rules/sro/nyse/34-53073.pdf

(d) http://www.sec.gov/rules/sro/nyse/nyse200577/myeager020706.pdf

(d) http://www.sec.gov/rules/sro/nyse/nyse200577/myeager020706.pdf

(e) http://www.sec.gov/rules/sro/nyse/nyse200577/arothlein021206.pdf

(f) http://www.sec.gov/rules/sro/nyse/34-53382.pdf

(g) http://www.sec.gov/rules/sro/nyse/2006/34-55026.pdf

(h) http://www.sec.gov/comments/sr-nyse-2006-120/nyse2006120-1.pdf

(i) http://www.sec.gov/rules/sro/nyse/2007/34-55293.pdf

(j)http://courts.state.de.us/opinions/(f13zbcjisng4j134yamj54ak)/download.aspx?ID=95630

(k) http://www.sec.gov/rules/sro/cboe/2008/34-57159.pdf, page 52

(l) http://www.sec.gov/about/laws/sea34.pdf

(m) SR-NYSE-1983-29, 30, 31 (below)

NOTICE OF FILING AND IMMEDIATE EFFECTIVENESS OF PROPOSEDRULE CHANGE BY THE NEW YORK STOCK EXCHANGE, INC.

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 20051

File No. SR-NYSE-83-31

1983 SEC LEXIS 1092

August 4, 1983

TEXT: [*1]

The New York Stock Exchange, Inc. ("NYSE") submitted on July 29, 1983, copies of a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") and Rule 19b-4 thereunder, to establish fees for options agency and principal transactions

and to establish a $100 application fee to defray the costs of processing applications for option trading rights.

The foregoing change has become effective, pursuant to Section 19(b)(3)(A) of the Act. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate 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.

Publication of the submission is expected to be made in the Federal Register during the week of August 8, 1983. Interested persons are invited to submit written data, views and arguments concerning the submission within 21 days after the date of publication in the Federal Register. Persons desiring to make written comments should file six copies thereof with the Secretary of the Commission, Securities[*2] and Exchange Commission, 450 Fifth Street, N.W., Washington, DC 20549. Reference should be made to File No. SR-NYSE-83-31.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change which are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those which may be withheld from the public in accordance with the provisions of *5 U.S.C. § 552*, will be available for inspection and copying at the Commission's Public Reference Room. Copies of the filing and of any subsequent amendments also will be available for inspection and copying at the principal office of the above-mentioned self-regulatory organization.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Legal Topics:

For related research and practice materials, see the following legal topics:

Securities Law: Blue Sky Laws: Options, Subscription Rights & Warrants

Securities Law: Self-Regulating Entities: National Securities Exchanges: New York Stock Exchange

Securities Law: U.S. Securities & Exchange Commission: Transaction Fees

NOTICE OF FILING OF PROPOSED RULE CHANGE BY THE NEW YORKSTOCK EXCHANGE, INC.

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 20050

File No. SR-NYSE-83-30

1983 SEC LEXIS 1091

August 4, 1983

TEXT: [*1]

The New York Stock Exchange, Inc. ("NYSE") submitted on July 29, 1983, copies of a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") and Rule 19b-4 thereunder, to adopt forms of agreements governing the application of NYSE rules to the transaction of business in NYSE-traded options by non-member organizations and individuals holding or exercising options trading rights. n1

n1 Provision for the offer of the rights to non-members is made in a contemporaneous rule change proposal, File No. SR-NYSE-83-29.

Publication of the submission is expected to be made in the Federal Register during the week of August 8, 1983. In order to assist the Commission in determining whether to approve the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved, interested persons are invited to submit written data, views and arguments concerning the submission within 21 days from the date of publication in the Federal Register. Persons desiring to make written comments should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, [*2] Washington, DC 20549. Reference should be made to File No. SR-NYSE-83-30.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change which are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those which may be withheld from the public in accordance with the provisions of *5 U.S.C. § 552*, will be available for inspection and copying at the Commission's Public Reference Room. Copies of the filing and of any subsequent amendments also will be available at the principal office of the above-mentioned self-regulatory organization.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Legal Topics:

For related research and practice materials, see the following legal topics:

Securities Law: Regulation of Securities Markets: Trading by Exchange Members

Securities Law: Self-Regulating Entities: National Securities Exchanges: New York Stock Exchange

NOTICE OF FILING OF PROPOSED RULE CHANGE BY THE NEW YORKSTOCK EXCHANGE, INC.

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 20049

File No. SR-NYSE-83-29

1983 SEC LEXIS 1090

August 4, 1983

CORE TERMS: proposed rule, trading, rule change, authorize, amend

TEXT: [*1]

The New York Stock Exchange, Inc. ("NYSE") submitted on July 29, 1983, copies of a proposed rule change pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") and Rule 19b-4 thereunder, to amend the NYSE Constitution to authorize the extension of options trading rights on the NYSE to persons and organizations who are not NYSE members. The rule change proposal would allow full NYSE members to transfer or lease options trading rights n1 and would authorize a current resolution by the NYSE Board of Directors to invite members of any one or more other securities and commodities exchanges to apply to the NYSE for option trading rights. Rights granted pursuant to such applications would not be transferable. Finally, the rule change proposal would amend the NYSE Constitution to make NYSE and Options Clearing Corporation rules applicable to holders of NYSE options trading rights as well as NYSE members.

n1 Option trading rights accruing to "annual members" and "electronic access members," however, would not be separable from those memberships.

Publication of the submission is expected to be made in the Federal Register during the week of August 8, 1983. [*2] In order to assist the Commission in determining whether to approve the proposed rule change or institute proceedings to determine whether the proposed rule change should be disapproved, interested persons are invited to submit written data, views and arguments concerning the submission within 21 days from the date of publication in the Federal Register. Persons desiring to make written comments should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, Washington, DC 20549. Reference should be made to File No. SR-NYSE-83-29.

Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change which are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those which may be withheld from the public in accordance with the provisions of *5 U.S.C. § 552,* will be available for inspection and copying at the Commission's Public Reference Room. Copies of the filing and of any subsequent amendments also will be available at the principal office of the above-mentioned self-regulatory organization. [*3]

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Legal Topics:

For related research and practice materials, see the following legal topics:

Securities Law: Blue Sky Laws: Options, Subscription Rights & Warrants

Securities Law: Self-Regulating Entities: National Securities Exchanges: New York Stock Exchange

New York Stock Exchange, Inc.; Order Approving Proposed RuleChanges

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 20202

File Nos. SR-NYSE-83-29, SR-NYSE-83-30

1983 SEC LEXIS 759

September 20, 1983

CORE TERMS: trading, proposed rule, stock index, options market, subsidization, membership, permanent, one-year, stock market, three-year, non-member, predatory, commodities, start-up, entrant, regulations thereunder, competitive advantage, index option, inappropriate, furtherance, marketplace, competitive, speculative, temporary, dominance, investors, traders, unfair, easing

TEXT: [*1]

The New York Stock Exchange, Inc. ("NYSE") 11 Wall Street, New York, New York 10005, submitted on July 29, 1983 copies of two related proposed rule changes pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act") and Rule 19b-4 thereunder. One would amend the NYSE Constitution to authorize the extension of options trading rights on the NYSE to persons and organizations who are not NYSE members or member organizations and to make NYSE and Options Clearing Corporation rules applicable to holders of NYSE options trading rights as well as NYSE members (File No. SR-NYSE-83-29). Under that proposal, full NYSE members would be able to transfer or lease options trading rights, n1 and the NYSE Board of Directors would be authorized to invite members of any one or more other securities and commodities exchanges to apply to the NYSE for one-year, free options trading rights. n2 The

other proposed rule change would adopt forms of agreements governing the application of NYSE rules to transactions of business in NYSE-traded options by non-member organizations and individuals holding or exercising options trading rights (File No. SR-NYSE-83-30).

n1 Options trading rights accruing to "annual members" and "electronic access members," however, would not be separable from those memberships.

n2 Members of the New York Future Exchange, Inc. ("NYSE"), a wholly-owned subsidiary of the NYSE, would be able to apply for three-year, free options trading rights.

[*2]

Notice of the proposed rule changes together with the terms of substance of the proposed rule changes was given by issuance of Commission Releases (Securities Exchange Act Release Nos. 20049 and 20050, August 4, 1983) and by publication in the Federal Register *(48 FR 36549 and 36550,* August 11, 1983).

The American Stock Exchange, Inc. ("Amex") and the Chicago Board Options Exchange, Incorporated ("CBOE") submitted comment letters opposing the proposed rule changes. n3 CBOE stated that the provision of free options trading rights to non-members of the NYSE would represent a subsidization of the NYSE's new options markets by NYSE's stock market members and by past stock market profits. CBOE suggested that this would give the NYSE an unfair competitive advantage over the exchanges trading index options who, in order to cover their costs, must charge membership fees to non-members interested in obtaining access to their facilities.

n3 See letter dated August 16, 1983, from Anne Taylor, Secretary, CBOE, to George A. Fitzsimmons. Secretary, SEC; and letter dated August 31, 1983, from Robert J. Birnbaum, President, Amex, to George A. Fitzsimmons, Secretary, SEC.

Amex, while not[*3] objecting to the provision of trading rights to NYSE members, stated that the provision for free one-year options trading rights to non-NYSE members is a "clearly predatory and anticompetitive" proposal. The Amex claims this portion of NYSE's proposal represents an attempt to lure away market making expertise and capital from other exchanges without even covering the NYSE's costs of operating its index option program, and suggests that entry to NYSE's marketplace should be limited to those able to pay the costs of entry as determined in the marketplace based on true economic value.

Discussion

The Commission finds that the proposed rule change contained in File No. SR-NYSE-83-30, which consists of the agreement that must be signed by non-NYSE members and member organizations in order to be approved for options trading on the NYSE, is adequately designed to enable the NYSE to regulate the activities of those who may trade NYSE's index options products.

The Commission is unable to concur with the commentators' suggestion that NYSE's proposal to offer free one- to three-year options trading rights is unfair or "predatory." First, any suggestion that the NYSE's proposal constitutes[*4] subsidization is inherently speculative because it assumes that, were the trading rights sold, the market would attribute significant value to them. This appears particularly questionable, in light of the fact that the NYSE rule proposal would create 1,366 transferable options trading rights attached to existing NYSE memberships. Since the index options trading facility can only accommodate a fraction of that number of traders and brokers, there would appear to be a more than adequate supply of means for permanent access to the NYSE stock index options markets. For this reason, it is doubtful that a substantial economic benefit is being conferred by the NYSE in making available one-year n4 or (for existing NYSE members) three-year temporary trading privileges. n5 Thus, the NYSE proposal does not appear to constitute an attempt, as the commentators ever, to impose inappropriate burdens on competition by depriving the established options markets of personnel and capital by offering their trading professionals the ability to trade on the NYSE on an economically unsupportable basis. Instead, it seems intended to provide existing securities and commodities traders an opportunity for[*5] a limited period of time to test out the NYSE market to see how it compares to the existing markets and to determine whether it would be worth the acquisition of a permanent trading right. For a new entrant into a well-established and highly competitive industry, this is neither excessive nor improper, rather, it appears to be a reasonable business decision calculated to increase competiion in the industry.

n4 The strict time limitations on the trading privileges extended to members of other securities and commodities exchanges, in particular, casts doubt on Amex' contentions that the NYSE proposal constitutes improper predation by virtue of effecting a "long-term" competitive advantage for the NYSE. The CBOE, in commenting on a related NYSE proposed rule change (File No. SR-NYSE-83-23), has contended that the NYSE intends to accomplish precisely that result by charging uneconomically low fees on index option transactions. See letter from Anne Taylor, Secretary, CBOE, to George A. Fitzsimmons, Secretary, SEC, dated August 16, 1983. Since the Commission has not yet received a transactions fee proposal from the NYSE relating to stock index options, it is unable to evaluate that contention.

n5 A recent press report indicates that one firm has begun to make a market in the permanent options trading rights, with bids starting as low as $2,000. See Wall Street Letter at 4, September 5, 1983. This suggests that one-year non-renewable trading privileges probably carry substantially lower economic value.

[*6]

Second, as a general matter, in developing a market for a new financial product, it may be extremely difficult, if not impossible, to avoid some form of operational subsidization. The Commission notes that the subsidization the commentators opine the NYSE proposal would effect has occurred to a degree at each exchange that has introduced new securities options. n6 It is the Commission's understanding that CBOE and Amex still are not recovering the advertising and other ongoing overhead expenses, not to mention the start-up costs, of their debt options contracts or even their very successful stock index options contracts. Thus, to single the NYSE proposal out as an effort to inappropriately cross-subsidize the start-up of new market is to ignore the history of new product development.

n6 In this regard, it should be noted that, when the CBOE first commenced trading, it granted for virtually no cost permanent memberships to all existing and future members of the Chicago Board of Trade.

As discussed above, however, underlying the commentators' remarks is an inference that, while such forms of subsidy may be appropriate for other new entrants, they are inappropriate when proferred[*7] by the NYSE given its historical dominance in the equity securities market. In this regard, Amex and CBOE each cite to the concerns identified along these lines in the SEC's Options Study with respect to NYSE trading of individual stock options. As noted by CBOE and Amex, however, the Options Study discussion related to the NYSE's proposal to trade options on individual equity securities. In that context, the Options Study indicated that the NYSE might enjoy substantial competitive advantages over other options exchanges because its options would be trading in close proximity with their underlying stocks. n7 The NYSE's index options market, however, will not enjoy the type of market information or order routing efficiency advantages discussed by the Options Study. n8 Indeed, the experience of NYSE in trading the NYSE Composite Index futures contract, where NYSE has been a successful but certainly not dominant market participant, raises serious questions of NYSE's ability to simply transfer its market power from equity securities to derivative instruments, at least index products. Thus, the Commission can identify no reason to forbid the NYSE from providing the same kind of temporary[*8] start-up support for its index options contract as the existing competitions in that market have provided their products.

n7 Report of the Special Study of the Options Market to the Securities and Exchange Commission, H. Rep. No. IFC-3, 96th Cong., 1st Sess. (Comm. Print 1978) ("Options Study") at 983-1027.

n8 In previously approving the NYSE's proposal to trade stock index options, the Commission specifically determined that the NYSE's entry into the stock index options market does not raise the same concerns which might be raised by NYSE trading of individual equity options. See Securities Exchange Act Release No. 19264, November 22, 1982; *47 FR 43981*, November 30, 1982.

The Commission finds, therefore, that, rather than representing a predatory abuse of its market dominance in the stock market, this portion of the NYSE's proposal is designed chiefly to help it establish its position as a new entrant in the market for index options by easing access to its facilities. By easing access, the proposal furthers the purposes of Section 6(b)(2) of the Act, and by being designed ultimately to create a viable trading market for its new options product, the proposal is in the interests[*9] of investors and the public, in furtherance of Section 6(b)(5) of the Act, and

should actually promote competition in the stock index options market, consistent with Section 6(b)(8) of the Act. In sum, the Commission finds that the arguments presented indicate at most that a speculative burden on competition will be imposed by the proposal and, consistent with Section 6(b)(8), such burden as may be imposed is necessary and appropriate in furtherance of the purposes of the Act.

The Commission also finds that the remainder of the proposed rule change contained in File No. SR-NYSE-83-29, which relates to options trading rights of NYSE members and of NYSE members, is consistent with the purpose of providing access to Exchange facilities and is designed to protect investors and the public interest. n9

n9 None of the commentators criticized these portions of this filing, nor did they suggest that the impose any burden on competition. The Commission finds that these portions of SR-NYSE-83-29 do not in fact impose a burden on competition.

For these reasons, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations [*10]thereunder applicable to a national securities exchange and, in particular the requirements of Section 8 and the rules and regulations thereunder.

It is therefore ordered pursuant to Section 19(b)(2) of the Act, that the above-referenced proposed rule changes be, and hereby are, approved.

By the Commission.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law: Types of Contracts: Option Contracts

Securities Law: Regulation of Securities Markets: Trading by Exchange Members

Securities Law: Self-Regulating Entities: National Securities Exchanges: New York Stock Exchange

New York Stock Exchange, Inc.; Filing and Order GrantingAccelerated Approval of Proposed Rule Changes by the New York Stock Exchange,Inc.

SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934

Release No. 20218

SR-NYSE-83-32, etc.

1983 SEC LEXIS 733

September 22, 1983

CORE TERMS: proposed rule, trading, Securities Exchange Act, expiration, notice, commence, exceptional circumstances, regulations thereunder, specifications, specialist's, adaptations, off-floor, conform, parity, floor

TEXT: [*1]

In the matter of the New York Stock Exchange, Inc., 11 Wall Street, New York, NY 10005 (SR-NYSE-83-32, SR-NYSE-83-35, SR-NYSE-83-38, SR-NYSE-83-39, SR-NYSE-83-40, SR-NYSE-83-41, SR-NYSE-83-42, SR-NYSE-83-44).

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"), *15 U.S.C. 78s(b)(1)*, notice is hereby given that on September 12, 1983, the New York Stock Exchange, Inc. ("NYSE") filed with the Securities and Exchange Commission seven of the proposed rule changes as described herein. The Commission is publishing this notice to solicit comments on the proposed

rule changes from interested persons. The eighth proposed rule change, SR-NYSE-83-32, was submitted August 15, 1983, and previously published as noted below.

The proposed rule change contained in SR-NYSE-83-32 consists of the contract specifications for the NYSE's options on stock groups based upon the NYSE Composite Index. n1 These specifications are as follows: an index multiplier of 160; 5 point exercise price intervals; three expiration months of nine months duration, with an initial listing of November 1983, February 1984, and May 1984 options series; and expiration dates on the Saturday after the[*2] third Friday of the expiration month.

n1 On November 22, 1982, the Commission approved five specific indices with respect to which the NYSE could commence index options trading. Securities Exchange Act Release No. 19264 (November 22, 1932); *47 FR 55981* (November 30, 1982). The Exchange has submitted this as well as the other proposed rule changes discussed below in order to enable it to commence trading in options on the NYSE Composite Index on September 23, 1983.

Notice of SR-NYSE-83-32 together with its terms of substance was provided by issuance of a Commission Release (Securities Exchange Act Release No. 20070, August 16, 1983) and by publication in the Federal Register *(48 FR 38566,* August 24, 1983).

The other proposed rule changes are intended to bring NYSE option trading rules into conformity with the practice of other options exchanges or otherwise to make technical adaptations of NYSE rules to NYSE options trading.

The substance of the other proposed rule changes may be summarized as follows: SR-NYSE-83-35 adds a rule requiring NYSE approval for telephone links to the Exchange floor for options trading purposes; SR-NYSE-83-38 and SR-NYSE-83-42, in accord with American[*3] Stock Exchange ("Amex") practice, n2 grant parity with off-floor orders to Competitive Options Traders liquidating positions, and grant parity with off-floor orders not on the specialist's book to options specialists; SR-NYSE-83-39 eliminates closing options rotations, except in unusual circumstances, in accord with the recently approved Amex index options rules; n3 SR-NYSE-83-40 conforms

NYSE's rules on option facilitation orders to Amex Rules 950(d) and (e)(iv), providing the procedure and conditions for crossing a firm proprietary order with a customer order; SR-NYSE-83-41 sets 6:30 p.m. New York time on the last business day before expiration as the latest point at which members may prepare or accept exercise instructions absent certain exceptional circumstances; this proposal also provides for memoranda of exercises in such exceptional circumstances, for exercise advices in case of exercises of 25 or more contracts in the same series for the same account on the same day, and for other matters relating to exercise; it follows substantially a recently approved Chicago Board Options Exchange rule; n4 SR-NYSE-83-44 makes holders of NYSE options trading rights eligible to act under[*4] NYSE Rule 46 as floor officials for options trading.

n2 See American Stock Exchange Rules and Constitution ("Amex rules"), Rules 111(d), 108 and 950; and the Amex Floor Transactions Handbook (1981-82) at 57.

n3 Amex Rules 930C and 918C; see Securities Exchange Act Release No. 20169 (September 9, 1983), *48 FR 41545* (September 15, 1983).

n4 Securities Exchange Act Release No. 20172 (September 12, 1983), *48 FR 42889* (September 20, 1983).

Interested persons are invited to submit written data, views and arguments concerning the submissions within 21 days from the date of publication in the Federal Register. Persons desiring to make written comments should file six copies thereof with the Secretary of the Commission, Securities and Exchange Commission, 450 Fifth Street, Washington, DC 20549. Reference should be made to the file numbers indicated above.

Copies of the submissions, all subsequent amendments, all written statements on the proposed rule changes filed with the Commission, and all written communications relating to the proposed rule changes between the Commission and any person, other than those which may be withheld from the public in accordance with the provisions[*5] of *5 U.S.C. 552*, will be available for

inspection and copying at the Commission's Public Reference Room. Copies of the filings and of any subsequent amendments also will be available at the principal office of the NYSE.

The Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges and in particular, the requirements of Section 6 and the rules and regulations thereunder.

The Commission finds good cause for approving all of the proposed rule changes prior to the thirtieth day after the date notice of them was published in that the proposed changes either conform NYSE option rules to the rules of other options exchanges that have already been made available for public comment, reviewed by the Commission and approved; or the changes are merely technical adaptations of longstanding NYSE rules to the requirements of options trading, and it would, therefore, not serve the public interest to delay their implementation or the commencement of NYSE options trading.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule changes referenced[*6] above be, and hereby are, approved.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.

Legal Topics:

For related research and practice materials, see the following legal topics:

Securities Law: Self-Regulating Entities: National Securities Exchanges: American Stock Exchange

Securities Law: Self-Regulating Entities: National Securities Exchanges: New York Stock Exchange