

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67902; File No. SR-NYSEMKT-2012-23)

September 21, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Order Granting Approval of a Proposed Rule Change Amending the Members' Schedule of NYSE Amex Options LLC in Order to Reflect Changes to the Capital Structure of the Company

I. Introduction

On July 25, 2012, NYSE MKT LLC ("NYSE MKT" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend the Members' Schedule (as defined herein) of NYSE Amex Options LLC to reflect changes to the capital structure of the company. The proposed rule change was published for comment in the Federal Register on August 7, 2012.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

NYSE Amex Options LLC ("Company") was formed as a joint venture between NYSE MKT⁴ and its corporate parent NYSE Euronext, and seven firms, for the purpose of operating an options platform as a facility of NYSE MKT. The seven firms, which are referred to in the joint venture's operating documents as "Founding Firms," are: Banc of America Strategic Investments Corporation ("BAML"), Barclays Electronic Commerce Holdings Inc. ("Barclays"),

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 67569 (August 1, 2012), 77 FR 47138.

⁴ At the time it entered into the joint venture, NYSE MKT was referred to as NYSE Amex LLC. On May 14, 2012, NYSE Amex LLC filed a proposed rule change under Section 19(b)(3)(A) of the Act, 15 U.S.C. 78s(b)(3)(A), to change its name to NYSE MKT LLC. See Securities Exchange Act Release No. 67037 (May 21, 2012), 77 FR 31415 (May 25, 2012) (SR-NYSEAmex-2012-32).

Citadel Securities LLC (“Citadel”), Citigroup Financial Strategies, Inc. (“Citigroup”), Goldman, Sachs & Co. (“Goldman Sachs”), Datek Online Management Corp. (“TD Ameritrade”) and UBS Americas Inc. (“UBS”).

Collectively, NYSE MKT and the Founding Firms are “Members” of the Company. Their respective ownership interests are set forth in a schedule (“Members’ Schedule”) to the Company’s LLC Agreement, dated as of June 29, 2011.⁵ The amount of each Member’s ownership is represented by limited liability interests in the Company (“Common Interests”). The LLC Agreement designates two types of Member, Class A Member and Class B Member, and the different classes of Members hold corresponding classes of Interests, *i.e.*, Class A Common Interests and Class B Common Interests. Although both classes of Common Interests entitle Members to some measure of voting and economic entitlements, the two classes of Common Interests are not fungible. Members’ voting and economic entitlements are determined by reference to: (1) each Member’s holdings of Common Interests, and (2) the aggregate economic and voting power of the Class A Members relative to the Class B Members.

Under the Members’ Schedule attached to the LLC Agreement dated as of June 29, 2011, NYSE MKT was the only Class A Member and therefore the only Member that held Class A Common Interests. The Founding Firms were designated Class B Members, each holding Class B Common Interests. According to this schedule, NYSE MKT owned Class A Common Interests amounting to an equity interest of 47.20% in the Company, while the Founding Firms collectively owned Class B Common Interests amounting to an equity interest of the remaining 52.80% in the Company.

⁵ In addition to the LLC Agreement, the Company is governed by an agreement among the Members, the Company and NYSE Euronext (“Members Agreement”), also dated as of June 29, 2011.

The Exchange proposes to amend the Members' Schedule to reflect changes to the capital structure of the Company based on three transactions that have occurred or will occur since the Commission approved the Exchange's proposal relating to the formation of the Company.⁶ The first transaction relates to the admission of NYSE Market, Inc. ("NYSE Market"), an affiliate of NYSE MKT, on September 19, 2011, as a Member with an equity ownership interest in the Company. The second transaction relates to the issuance of additional Common Interests to Class B Members of the Company on February 29, 2012, pursuant to an annual incentive program as set forth in the Members Agreement. The third transaction relates to the expected transfer of Common Interests on or around September 25, 2012, from the Founding Firms to NYSE Market. These transactions are described in greater detail below.

Admission of NYSE Market as a Member

Each Founding Firm has the right, pursuant to Section 3.2 of the Members Agreement and subject to certain conditions and limitations, to cause NYSE MKT (or an affiliate designated by NYSE MKT) to purchase a portion of the Founding Firm's Common Interests. All of the Founding Firms exercised this right on September 19, 2011, thereby causing an aggregate equity interest of 5.28% in the Company to be transferred from the Founding Firms to NYSE Market, the NYSE MKT affiliate that NYSE MKT designated to receive the ownership interest. As a result of the transaction, NYSE MKT continued to own an equity interest of 47.20% in the Company, NYSE Market owned an equity interest of 5.28% in the Company, and the Founding Firms collectively owned the remaining equity interest of 47.52% in the Company.

Several provisions of the LLC Agreement impact the terms of this transfer. Because NYSE Market is an affiliate of NYSE MKT, pursuant to Section 11.2(c) of the LLC Agreement,

⁶ See Securities Exchange Act Release No. 64742 (June 24, 2011), 76 FR 38436 (June 30, 2011).

Common Interests transferred from Founding Firms to NYSE Market automatically convert from Class B Common Interests to Class A Common Interests. Also, under Sections 10.4 and 11.1, upon receiving the transfer of Common Interests and satisfying certain other conditions, and subject to amendment of the Member's Schedule, NYSE Market became a Class A Member of the Company.

NYSE MKT represented that, notwithstanding the transfer of Common Interests to NYSE Market, the Company's governance structure did not change. NYSE MKT continues to appoint a majority (7 of 13) of the Company's Board of Directors, and NYSE Market has no right to appoint a separate director. According to NYSE MKT, this transaction was structured as a transfer of Common Interests to NYSE Market, rather than NYSE MKT, for non-substantive business reasons relating to the corporate structure of NYSE MKT. NYSE MKT also noted that, as a Member, NYSE Market is bound by all of the provisions of the LLC Agreement and the Members Agreement.

Issuance of Annual Incentive Shares

The Members Agreement provides that each year, until 2015, unless extended by the Company's Board of Directors, the Company must issue a specified amount of Annual Incentive Shares to be allocated among eligible Class B Members. Pursuant to Section 2.1 of the Members Agreement, the Company must issue a number of Class B Common Interests equal to 30% of the then-outstanding Class B Common Interests as Annual Incentive Shares, and such shares are to be allocated among Class B Members based on each Class B Member's contribution to the volume of the Exchange relative to volume targets specified for the Members. While the issuance of Annual Incentive Shares may change the relative economic and voting rights of and

among Class B Members, by its terms it cannot impact the aggregate economic and voting rights of Class B Members in relation to Class A Members.

On February 29, 2012, the Company issued a total of 14.2560 Annual Incentive Shares to the Founding Firms. Because each Founding Firm achieved or exceeded its specified volume target, each Founding Firm's economic and voting interests remained the same in relation to the other Class B Members. The Exchange proposes to amend the Members' Schedule to reflect this issuance of Class B Common Interests.

Expected Transfer From Founding Firms to NYSE Market

Article XI of the LLC Agreement and Section 3.1 of the Members Agreement provide that a Member may transfer Common Interests to another Member or to a third party in accordance with the conditions and limitations set forth therein. In its proposal, NYSE MKT noted that the Founding Firms collectively intend to transfer an aggregate equity interest of 5.28% in the Company to NYSE Market. As with the first transaction noted above, the Founding Firms' Class B Common Interests will automatically convert to Class A Common Interests upon their transfer to NYSE Market. As a result of this transfer, NYSE MKT will continue to own an equity interest of 47.20% in the Company, NYSE Market will own an equity interest of 10.56% in the Company, and the Founding Firms, collectively, will own the remaining equity interest of 42.24% in the Company. The Exchange proposes, upon consummation of this transfer by the Founding Firms, to amend the Members' Schedule to reflect this transfer.

III. 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.⁷ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(1) of the Act,⁸ which requires, among other things, that a national securities exchange be so organized and have the capacity to carry out the purposes of the Act and to comply, and to enforce compliance by its members and persons associated with its members, with the provisions of the Act, the rules and regulations promulgated 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,⁹ 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.

As the Commission noted when it approved the Exchange's proposal relating to the formation of the Company, while the Company does not carry out any regulatory functions, all of its activities must be consistent with the Act.¹⁰ The Company's LLC Agreement and Members Agreement must be reasonably designed to enable the Company to operate in a manner that is consistent with the principle that the Company is not solely a commercial enterprise, but rather an integral part of an SRO that is registered pursuant to the Act and therefore subject to

⁷ In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁸ 15 U.S.C. 78(f)(b)(1).

⁹ 15 U.S.C. 78(f)(b)(5).

¹⁰ See supra note 6, 76 FR at 38439.

obligations imposed by the Act.¹¹ In addition, under Section 4.9 of the LLC Agreement, because the transactions described in the proposal result in NYSE Market, a “Permitted Transferee” of NYSE MKT,¹² together with NYSE MKT, owning more than 19.9% of outstanding Common Interests, the transfer and corresponding amendment to the Member’s Schedule are subject to receipt of Commission approval pursuant to the rule filing process under Section 19(b) of the Exchange Act.

The Commission notes that the addition of NYSE Market as a Member of the Company, and the proposed amendments to the Members’ Schedule to reflect the changes in ownership interest percentages as a result of the three transactions described above, do not significantly alter the governance structure of the Company. The result of the three transactions is to increase the equity ownership interest in the Company of NYSE MKT, together with its affiliate NYSE Market, from 47.20% of the Company to 57.76% of the Company and add NYSE Market as a Member of the Company. The Commission notes that, NYSE Market, as a new Member of the Company, is subject to, and bound by, all provisions of the LLC Agreement and Members Agreement. The Commission notes further that the provisions in the LLC Agreement and Members Agreement that are designed to preserve the independence of the Exchange’s regulatory functions and its ability to fulfill the Exchange’s regulatory oversight obligations are unaffected by the proposed rule change.

For the reasons discussed above, the Commission finds that the proposed rule change is consistent with the Act.

¹¹ See id.

¹² “Permitted Transferee” is defined in Sections 1.1 and 11.4(a) of the LLC Agreement.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹³ that the proposed rule change (SR-NYSEMKT-2012-23) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Kevin M. O'Neill
Deputy Secretary

¹³ 15 U.S.C. 78s(b)(2).

¹⁴ 17 CFR 200.30-3(a)(12).