

regulations thereunder applicable to a national securities exchange.

#### IV. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>36</sup> that the proposed rule change (SR-NYSEArca-2012-138) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>37</sup>

**Kevin M. O'Neill**,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68901; File No. SR-CBOE-2013-018]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Fees Schedule

February 11, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on February 1, 2013, Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange is proposing to amend the Fees Schedule. The text of the proposed rule change is available on the Exchange's Web site (<http://www.cboe.com/AboutCBOE/CBOELegalRegulatoryHome.aspx>), at the Exchange's Office of the Secretary, and at the Commission.

#### 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 Exchange 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 these 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 aspects of such statements.

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

###### 1. Purpose

The Exchange is proposing to amend its Fee Schedule. Specifically, the Exchange is proposing to increase the threshold in which it waives customer transaction fees, implement a \$0.25 marketing fee for trading in SPY and QQQ options, and eliminate the complex order surcharge.

First, the Exchange is proposing to increase the threshold at which the Exchange waives the customer transaction fee in "ETF, ETN and HOLDRs Options." Currently, the Exchange waives transaction fees for customer orders of 99 contracts or less in transactions in ETFs, ETNs, and HOLDRs options. Any order that is 100 contracts or more is charged a fee of \$0.18. The Exchange is proposing to increase this threshold and waive transaction fees for customer orders of 249 contracts or less in these options. The Exchange will charge any leg of a complex orders in these options that exceeds 249 even if the leg is only partially executed below the 249 threshold. For orders 250 contracts and above, the Exchange will continue to charge a fee of \$0.18. Corresponding edits will also be made to Footnote 9 in the Fees Schedule to reflect the change. Raising the threshold for which the Exchange will waive transaction fees will allow customers who engage in ETF, ETN and HOLDRs options trading the opportunity to pay lower fees for larger transactions and provide greater incentives for such trading. In addition, increasing this threshold will encourage more interaction with Exchange customers and encourage the direction of customer ETF, ETN and HOLDRs options orders to the Exchange.

Next, the Exchange is proposing to implement a \$0.25 marketing fee for electronic trading in SPY and QQQ

options. Currently, the Marketing Fee assessed on all Penny Pilot Exchange-Traded Fund ("ETF") options is \$0.25 per contract, with the exception of SPY and QQQ. The Exchange only charges a \$0.25 fee per contract in SPY and QQQ options for qualifying complex orders that trade via the Exchange Complex Order Book against individual leg markets. The Exchange is proposing to amend the Fees Schedule to assess this \$0.25 fee per contract on all qualifying orders whether simple or complex. This change will place SPY and QQQ on the same footing regarding the Marketing Fee as other options in the Penny Pilot classes. Other exchanges assess their marketing fees on SPY and QQQ.<sup>3</sup> To correspond with this proposed change, the Exchange also proposes to eliminate the "Notes" section of the "Marketing Fee" table of the Fees Schedule to reflect this change.<sup>4</sup>

Finally, the Exchange is proposing to eliminate the surcharge on complex orders. Currently, the Exchange has a \$0.10 surcharge per contract for the electronic execution leg of a complex order in multiply-listed options that executes against a customer complex order. This surcharge is in addition to the other transaction fees. The Exchange is proposing to eliminate this surcharge. Eliminating the surcharge for complex orders will allow Trading Permit Holders ("TPHs") who engage in complex order trading the opportunity to pay lower fees for such transactions and provide greater incentives for such trading. In addition, eliminating the \$0.10 surcharge will encourage more interaction with Exchange customers.

Thus, the proposed changes are designed to attract greater order flow to the Exchange. This would bring greater liquidity to the market, which benefits all market participants. The proposed changes are to take effect on February 1, 2013.

###### 2. Statutory Basis

The Exchange believes the proposed rule change is consistent with the Securities Exchange Act of 1934 (the

<sup>3</sup> See Section II, "Payment for Order Flow Fees," of the Nasdaq OMX PHLX ("Phlx") Fee Schedule.

<sup>4</sup> The "Notes" section of the "Marketing Fee" table reads "The marketing fee will not be assessed on electronic transactions in SPY and QQQ, except for electronic transactions resulting from AIM and complex orders that trade in either COA or COB (excluding complex orders that trade against the leg markets, on which the marketing fee will not be assessed). The marketing fee will continue to be assessed on open outcry transactions in SPY and QQQ." Because the Exchange proposes to assess the Marketing Fee to SPY and QQQ in the same manner as it applies to other Penny Pilot classes the SPY- and QQQ-specific specifications set out in the "Notes" section are no longer relevant and can be deleted.

<sup>36</sup> 15 U.S.C. 78s(b)(2).

<sup>37</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.

“Act”) and the rules and regulations thereunder applicable to the Exchange and, in particular, the requirements of Section 6(b) of the Act.<sup>5</sup> Specifically, the Exchange believes the proposed rule change is consistent with Section 6(b)(4) of the Act,<sup>6</sup> which provides that Exchange rules may provide for the equitable allocation of reasonable dues, fees, and other charges among its Trading Permit Holders and other persons using its facilities.

In particular, the proposed change to increase the threshold at which the Exchange waives the transaction fee for customer orders is reasonable because it will allow customers who engage in such trading to trade larger orders without any electronic transaction fee. It is equitable and not unfairly discriminatory because, while customers are assessed different, and often lower, fee rates than other market participants, this is a common practice within the options marketplace, and customers often do not have the sophisticated trading algorithms and systems that other market participants often possess. Further, to the extent that any change in intramarket competition may result from the proposed change to the threshold for waiving options customer transaction fees, such possible change is justifiable and offset because the changes to such fees are designed to attract greater customer order flow to the Exchange. This would bring greater liquidity to the market, which benefits all market participants. Further, the proposed change will be applied to all customers equally.

Next, the proposed change to assess a \$0.25 marketing fee for all SPY and QQQ options contracts is reasonable because it puts trading in SPY and QQQ options on the same footing regarding the Marketing Fee as other options in the Penny Pilot Classes. It is equitable and not unfairly discriminatory because it is applied to all TPHs equally and puts TPHs trading SPY and QQQ on the same footing, with regards to the Marketing Fee, as other Penny Pilot classes. Moreover, other exchanges assess their marketing fees on SPY and QQQ transactions.<sup>7</sup>

Finally, the proposed change to eliminate the complex order surcharge is reasonable because it will allow TPHs who engage in complex order trading the opportunity to pay lower fees for such transactions. It is equitable and not unfairly discriminatory because it is applied to all TPHs equally and will no

longer place non-customer market participants on a different footing, with regards to the complex order surcharge, from customers.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule changes will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange does not believe that the proposed changes to increase the threshold for waiving the electronic customer transaction fee will cause any unnecessary burden on intramarket competition because, while customers are assessed different, and often lower, fee rates than other market participants, this is a common practice within the options marketplace, and customers often do not have the sophisticated trading algorithms and systems that other market participants often possess. Further, to the extent that any change in intramarket competition may result from the proposed change to the threshold for waiving options customer transaction fees, such possible change is justifiable and offset because the changes to such fees are designed to attract greater customer order flow to the Exchange. This would bring greater liquidity to the market, which benefits all market participants. The Exchange does not believe that the proposed change will cause any unnecessary burden on intermarket competition because the changes are minimal. Further, to the extent that this change makes trading on CBOE more attractive to customers or other market participants on other exchanges, they can always elect to send orders to CBOE.

The Exchange does not believe the proposed changes to assess a \$0.25 fee in SPY and QQQ options will cause any unnecessary burden on intramarket competition because it merely puts these options classes on the same footing regarding the Marketing Fee as other options in the Penny Pilot Classes and will be assessed to the same market participants as other classes to which the Marketing Fee is assessed. The Exchange does not believe that the proposed change will cause any unnecessary burden on intermarket competition because the fee is similar to fees assessed at other exchanges assess their marketing fees on these classes.<sup>8</sup>

Finally, the Exchange does not believe the proposed changes to eliminate the complex order surcharge will cause any

unnecessary burden on intramarket competition because the change is minimal and applies to a specific set of orders. Further, it puts non-customer market participants on the same footing, with regards to the complex order surcharge, as customers. Moreover, to the extent that any change in intramarket competition may result from the proposed change, such possible change is justifiable and offset because the changes to such fees are designed to attract greater customer order flow to the Exchange. This would bring greater liquidity to the market, which benefits all market participants. The Exchange does not believe that the proposed change will cause any unnecessary burden on intermarket competition because the changes are very minimal and specific to certain order types. Further, to the extent that this change makes trading on CBOE more attractive to market participants on other exchanges, they can always elect to send orders to CBOE.

The Exchange also notes that it operates in a highly-competitive market in which market participants can readily direct order flow to competing venues if they deem fee levels at a particular venue to be excessive. The proposed rule changes reflects a competitive pricing structure designed to incent market participants to direct their order flow to the Exchange, and the Exchange believes that such structure will help the Exchange remain competitive with those fees and rebates assessed by other venues.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others*

The Exchange neither solicited nor received comments on the proposed rule change.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and paragraph (f) of Rule 19b-4<sup>10</sup> thereunder. 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.

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

<sup>7</sup> See Section II, “Payment for Order Flow Fees,” of the Phlx Fee Schedule.

<sup>8</sup> See Section II, “Payment for Order Flow Fees,” of the Phlx Fee Schedule.

<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f).

#### 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2013-018 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-CBOE-2013-018. This file number should be included on the subject line if email 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at CBOE's principal office. 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-CBOE-2013-018, and should be submitted on or before March 8, 2013

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68870; File No. SR-NYSEArca-2012-139]

#### Self-Regulatory Organizations; NYSE Arca, Inc.; Order Granting Approval of Proposed Rule Change To List and Trade First Trust Preferred Securities and Income ETF Under NYSE Arca Equities Rule 8.600

February 8, 2013.

##### I. Introduction

On December 6, 2012, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission"), 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> a proposed rule change to list and trade shares ("Shares") of the First Trust Preferred Securities and Income ETF ("Fund") under NYSE Arca Equities Rule 8.600. The proposed rule change was published in the **Federal Register** on December 26, 2012.<sup>3</sup> The Commission received no comments on the proposal. This order grants approval of the proposed rule change.

##### II. Description of the Proposal

The Exchange proposes to list and trade the Shares of the Fund pursuant to NYSE Arca Equities Rule 8.600, which governs the listing and trading of Managed Fund Shares on the Exchange. The Shares will be offered by First Trust Exchange-Traded Fund III ("Trust"), which is organized as a Massachusetts business trust and is registered with the Commission as an open-end management investment company.<sup>4</sup> The

investment adviser to the Fund is First Trust Advisors L.P. ("Adviser"). Stonebridge Advisors LLC will serve as investment sub-adviser to the Fund ("Sub-Adviser") and will provide day-to-day portfolio management of the Fund. First Trust Portfolios L.P. ("Distributor") will be the principal underwriter and distributor of the Fund's Shares. Brown Brothers Harriman & Co. will serve as administrator, custodian, and transfer agent for the Fund. The Exchange states that each of the Adviser and Sub-Adviser is affiliated with a broker-dealer and represents that each such Adviser and Sub-Adviser has implemented a fire wall with respect to its respective broker-dealer affiliate regarding access to information concerning the composition of and changes to the Fund's portfolio.<sup>5</sup>

##### *Description of the Fund*

The Fund's objective will be to provide current income and total return. Under normal market conditions,<sup>6</sup> the Fund will invest at least 80% of its net assets (including investment borrowings) in preferred securities ("Preferred Securities") and income-producing debt securities ("Income Securities").<sup>7</sup> The Adviser represents

<sup>5</sup> See Commentary .06 to NYSE Arca Equities Rule 8.600. The Exchange represents that, in the event (a) the Adviser or the Sub-Adviser becomes newly affiliated with a broker-dealer, or (b) any new adviser or sub-adviser becomes affiliated with a broker-dealer, it will implement a fire wall with respect to such broker-dealer regarding access to information concerning the composition and/or changes to the portfolio, and will be subject to procedures designed to prevent the use and dissemination of material, non-public information regarding such portfolio.

<sup>6</sup> The term "under normal market conditions" includes, but is not limited to, the absence of extreme volatility or trading halts in the equity markets or the financial markets generally; operational issues causing dissemination of inaccurate market information; or force majeure type events such as systems failure, natural or man-made disaster, act of God, armed conflict, act of terrorism, riot or labor disruption, or any similar intervening circumstance.

<sup>7</sup> The Exchange states that the risks and potential rewards of investing in the Fund may at times be similar to the risks and potential rewards of investing in both equity funds and bond funds. Certain of the Preferred Securities in which the Fund will invest will be traditional preferred stocks that issue dividends that qualify for the dividend received deduction under which "qualified" domestic corporations are able to exclude a percentage of the dividends received from their taxable income. Certain of the Preferred Securities in which the Fund will invest will be preferred stock that does not issue dividends that qualify for the dividends received deduction for eligible investors ("non-DRD preferred stock") that do not qualify for the dividends received deduction or issue qualified dividend income. As described in the Registration Statement, hybrid preferred securities, another type of Preferred Securities, are typically junior and fully subordinated liabilities of

Continued

<sup>11</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> See Securities Exchange Act Release No. 68458 (December 18, 2012), 77 FR 76148 ("Notice").

<sup>4</sup> The Trust is registered under the Investment Company Act of 1940 ("1940 Act"). On September 23, 2011, the Trust filed with the Commission a registration statement on Form N-1A under the Securities Act of 1933 and under the 1940 Act relating to the Fund (File Nos. 333-176976 and 811-22245) ("Registration Statement"). In addition, the Commission has issued an order granting certain exemptive relief to the Trust under the 1940 Act. See Investment Company Act Release No. 30029 (April 10, 2012) (File No. 812-13795) ("Exemptive Order").