November 2, 2011

Re: SR-NYSEAMEX-2011-78

Dear Honorable Commissioners,

The author of this letter thanks the Commission for encouraging the submission of public comments as it deliberates on the proposed rule change that would allow the indirect parent of NYSE Amex LLC, NYSE Euronext, to become a wholly owned subsidiary of Alpha Beta Netherlands Holding N.V. While taking no position on the merits of the combination in general terms, the Commenter hereby affirms opposition to it specifically on the grounds that among the NYSE assets being considered for transfer, are some that it does not fully own. New York Stock Exchange Separated Option Trading Rights Investor/Owners, of which this Commenter is one of fifty, remain unredeemed option trading licensees and must be considered in any Exchange transaction that involves the licenses to trade NYSE options.

HISTORY

July 29, 1983 NYSE files a proposed rule change seeking approval for options trading rights to non-NYSE members. *"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"* SR-NYSE-1983-29, 30, 31

September, 1983 NYSE enters option business issuing 1,366 option trading rights to be attached to its 1,366 seats, amending Constitution accordingly, http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf pages 17, 18

September, 1983 – May, 2005 50 NYSE Options Trading Rights are separated from their seats (sold to 50 investors by their original grantees) by means of a public, Exchange facilitated, open market.

February 26, 1997 NYSE files proposed rule change seeking to transfer its option business to the Chicago Board Options Exchange (SR NYSE 97 05), http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf page 61

February 26, 1997 The proposed rule change to allow transfer of the NYSE option business requires that Separated Option Trading Rights be surrendered to the Exchange as a "housekeeping matter" since they will only have "speculative value".
http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf page 70

April 21, 1997 NYSE responds to comments regarding its option business transfer, withdrawing its "housekeeping" request. http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf page 78

April 23, 1997 SEC approves NYSE Option business to Chicago Board Options Exchange, remarking, *"The Exchange conducted a careful assessments and review of its options business and determined that it no longer wished to continue this business. There is nothing in the Act that compels the NYSE to continue to trade a particular product line."*
http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf page 82

May 25, 1999 NYSE Chairman Grasso tells the Wall Street Journal that the options business had changed dramatically since the Big Board sold its small options operation to the CBOE in 1997. He added that at that point, the NYSE had made no decision to re-enter.

May 26, 2005 NYSE President, John Thain circulates memo, contending Option Trading Rights will have no value. *http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf p.19*

December 5, 2005 A group of owner/investors of NYSE Option Trading Rights submits a comment to the SEC regarding the proposed combination with ARCA as it relates to Option Trading Rights. (The comment was filed before the official filing of the proposed merger.)
http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf

January 6, 2006 NYSE submits a proposed rule change seeking approval to combine with ARCA and which included the Pacific Stock Exchange options business. (SR-NYSE 2005-77).
http://www.sec.gov/rules/sro/nyse/34-53073.pdf

February 7, 2006 **NYSE** responds to comments about it proposed ARCA combination.
http://www.sec.gov/rules/sro/nyse/nyse200577/myeager020706.pdf

February 12, 2006 NYSE Option Trading Rights Investors/Owners respond the NYSE's comment-responses. http://www.sec.gov/rules/sro/nyse/nyse200577/arothlein021206.pdf

February 27, 2006 SEC approves ARCA combination. http://www.sec.gov/rules/sro/nyse/34-53382.pdf

December 29, 2006 NYSE files proposed rule change seeking to combine with Euronext and which included its option business. (SR-NYSE-2006-120) http://www.sec.gov/rules/sro/nyse/2006/34-55026.pdf

January 17, 2007 As a means of bringing light to the same relevant factors involved in the NYSE/Euronext merger, the Commenter responds to February 27 SEC ARCA combination approval remarks. http://www.sec.gov/comments/sr-nyse-2006-120/nyse2006120-1.pdf

February 14, 2007 SEC approves Euronext merger.
http://www.sec.gov/comments/sr-nyse-2006-120/nyse2006120-1.pdf pages 48, 49

August 4, 2007 The Delaware Chancery Court states in a similar case: *"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." It went on to assert, "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." It 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."*
http://courts.state.de.us/opinions/(f13zbcjisng4j134yamj54ak)/download.aspx?ID=95630

August 1, 2008 NYSE files proposed rule change seeking approval for acquisition of the American Stock Exchange including its options business. (SR-NYSE-2008-60) http://www.sec.gov/rules/sro/nyse/2008/34-58285.pdf

May 24, 2010 The Commenter files a complaint with the Markets and Trading division of the SEC. Its contents closely parallels the comment submitted to the proposed AMEX joint venture on April 14, 2011. (Other than acknowledgement of receipt thereof, no response was received.)

March 29, 2011 NYSE AMEX files for approval of joint venture (SR-NYSE-AMEX-2011-18). http://www.sec.gov/rules/sro/nyseamex/2011/34-64144.pdf

April 14, 2011 The Commenter submits comment on proposed AMEX joint venture as it related to Option Trading Rights (SR-NYSE-AMEX-2011-18), http://www.sec.gov/comments/sr-nyseamex-2011-18/nyseamex201118-1.pdf

April 28, 2011 The Exchange announces that *"Derivatives net revenue of $236 million in the first quarter of 2011 ….."* and that *"NYSE Euronext's U.S. equity options exchanges accounted for 26% of total consolidated U.S. equity options trading in the first quarter of 2011, compared to 27% in the first quarter of 2010."* *http://www.nyse.com/press/1303951095628.html*

May 18, 2011 SEC designates a longer period to consider AMEX joint venture. http://www.sec.gov/rules/sro/nyseamex/2011/34-64511.pdf

June 24, 2011 SEC approves AMEX joint venture noting, *"The Commission notes that the issue of the rights of owners of Separated OTRs is not before the Commission in the context of this proposed rule change and thus its consideration of the NYSE Amex proposal does not address the rights of owners of Separated OTRs. "* http://www.sec.gov/rules/sro/nyseamex/2011/34-64742.pdf

October 14, 2011 The New York Stock Exchange LLC; the NYSE AMEX LLC; and NYSE ARCA file to have their parent company, NYSE Euronext, become a wholly owned subsidiary of Alpha Beta Netherlands Holding N.V. http://www.sec.gov/rules/sro/nyse/2011/34-65562.pdf ; http://www.sec.gov/rules/sro/nyseamex/2011/34-65563.pdf ; http://www.sec.gov/rules/sro/nysearca/2011/34-65567.pdf

Discussion

The NYSE's entrance, exit, and re-entry into the option business are a matter of public record. It made its initial entrance therein in 1983, issued 1,366 permanent licenses to trade option products under its auspices, facilitated an open public aftermarket for them, amended its Constitution to provide for them including their permanency and thereby agreed to the issuer-investor implied contracts that continue to be in force to date.

After 13 plus years in the business, the Exchange announced that it would exit that business in 1997 and sought on February 26 of that year to have the 50 option rights that had been separated from their original grantees, surrendered back to the Exchange due to their prospective "speculative value".

"(vi) Conditions to Receipt of Permits and Lease-Pool Payments
The discretionary condition requiring transfer of separated OTRs to the Exchange is a housekeeping matter designed to assure that all OTRs, which will have only speculative value at the conclusion of the transfer, are held either by regular members or the Exchange itself.

B. Basis -The basis under the Securities Exchange Act of 1934 ("1934 Act") for this proposed rule change is the requirement under Section 6(b! (5) that an exchange have rules that are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a full and open market and a national market system, and, in general to protect investors and the public interest."

Option Trading Rights investors found the Exchange's reasoning curious inasmuch as a remark about speculative value to investors coming from an entity that owes its very existence to investing and to some degree speculation, presented with a measure of irony. Not as curious, however, was the Exchange's rationale to have Separated Options Trading Rights held by *"regular members or the Exchange itself".* Either way, as hindsight reveals, option licenses would have ultimately come back to where they are now …. into the account of the and profitably employed by the NYSE itself.

*"Three of the letters assert as inappropriate the proposal that the Exchange have discretion to require holders of options trading rights (*OTRs) that are separated from their Exchange equity memberships to surrender these OTRs as a condition of receiving payments under the lease pool to be established by CBOE. These assertions are moot because, although the Exchange believes that the surrender of such OTRs would be a permissible and appropriate housekeeping measure, it has determined not to require such surrender as a condition of participation in the **CBOE** lease pool."*

The Exchange withdrew its "housekeeping" request on April 21, 1997.

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On May 25, 2005, the Exchange facilitated, open, public, which had operated continuously showing bids and offers since 1983, displayed a posted bid in New York Stock Exchange Separated Option Trading Rights a posted "no offer". On May 26, 2005, after President Thain moved to halt that market, contending that they would be extinguished for no value, bids and offers were no longer posted.

"OTRs have conferred no trading privileges since the NYSE closed its options trading floor in 1997. In addition, as noted, OTRs, along with all other trading rights inherent in, or derived from, the NYSE memberships, will be extinguished in the merger with Archipelago. In the transaction with Archipelago, NYSE memberships -with or without OTRs --will all receive the same consideration. Separated OTRs will be extinguished f0r no consideration. They will have no value."

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On January 6, 2006, the NYSE proposed to re-enter the option business by combining with ARCA. Investor/owners of Separated Option Trading Rights opposed the transaction since it did not account for their still unredeemed licenses. Like the Exchange that even after its 1997 exit from the business had maintained its option exchange registration with the SEC, maintained an open, continuous public market in Separated Options Trading Rights and maintained its option rules on its books, on what may have been a just-in-case basis, investors/owners of both Separated and Non-Separated Option Trading Rights also held their licenses, on a just-in-case basis. Opposing comments regarding the ARCA proposed rule change were answered by the Exchange thusly:

"The OTR Commentators argue that an OTR carries the unfettered right "to trade all options under the auspices of the NYSE or its successor," whether by merger, acquisition or both. The specific wording of the NYSE's Constitution describing OTRs refutes this contention.21 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."

"The NYSE specifically described the creation of a Lease Pool arrangement pursuant to which certain CBOE trading permits would be leased out for a period of 7 years, with the proceeds from the leases to be distributed pro rata to the approximately 92 persons who, as a result of their OTRs, were entitled to the possible benefits discussed in the OTR Filing. The concept of compensating certain OTR holders was approved by the NYSE's board of directors …."

Efforts by the Exchange to validate its actions were made by dividing its justifying rationale into four main components that it had apparently hoped would nullify its contractual and other legal 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 which the contractual affiliation had originally been made. The third was that an option business would not be conducted *"immediately after the merger"*. Fourthly, the Exchange apparently posited that CBOE lease pool proceeds, benefitting ALL activated Options Trading Rights licensees (both of Separated Options Trading Rights and activated Non-Separated Options Trading Rights) were sufficient to satisfy its obligations and thereby free it of future responsibility.

Regarding mode of effecting option trades, since being admitted to the trading floor was the highest form of access one could attain during 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 were granted for all Exchange admitted 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')*

With respect to the Exchange's other supposition, 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"* has since been countered by the courts in a similar case. The Exchange's position that the Constitution permitted its Board to be able to act as it did, *"adopt, amend and repeal such rules as it may deem necessary or proper relating to options trading right holders,"* may find affirming the necessity or propriety of attempting to transfer Option Trading Rights from unwilling investor/owners into what ultimately became its own account and now benefitting economically from their possession, difficult to maintain.

As to the *"unfettered right"* to trade all NYSE options, since Option Trading Rights were licenses to do just that before the Exchange's exit from the option business as provided by the Constitution, there was no

reason to expect anything different after re-entry was achieved.

Finally the Exchange seemed to be claiming that participation by NYSE Separated Option Trading Rights investor/owners in a temporary CBOE lease pool served as a sufficient basis to relieve it of any future accountability in that regard. Separated Option Trading investor/owners reaffirmed that they did not invest in the NYSE name or the permanent right to trade options under its auspices so that it could be distracted by a temporary lease pool on another exchange (an assertion that confirmed their original position and was acknowledged by the Exchange in a letter to the SEC dated April 21, 1997).http://www.sec.gov/rules/sro/nyse/nyse200577/cl122305.pdf page 78

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On February 27, 2006, the SEC approved the ARCA combination. remarking, *"The NYSE has not traded options since 1997, when the Commission approved the transfer of NYSE's options business to the Chicago Board Options Exchange, Incorporated ("CBOE").233 At that time, the NYSE and CBOE put in place a program to provide certain persons that traded options on the NYSE with trading permits to trade options on CBOE. Benefits from the leasing of the CBOE options trading permits not so issued ("lease pool") were distributed to a group of approximately 92 persons that owned OTRs.234 The CBOE trading permits and lease pool had a duration of seven years. The Commission found the 1997 proposal to be consistent with the Act, noting that there is nothing in the Act that compels the NYSE to continue to trade a particular product line and the NYSE was free to terminate its options business entirely (in which case OTR holders would not have received any lease payments).235 It has been over eight years since the NYSE operated an options business. The Commission notes, as do the OTR investors in their comment letter, that holders of Separated OTRs do not have any membership vote and do not have ownership in the assets of the NYSE.As a result, the Commission finds it is consistent with Section 6(b)(1) of the Act236 and the NYSE's rules for the NYSE to eliminate its rules that provide for options trading rights."*

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On January 17, 2007, the Commenter wrote to the Commission regarding the proposed Euronext combination, "*Also, whether options are traded on the NYSE Market, NYSE/ARCA, Euronext, the National Exchange of India, or any other NYSE owned and/or associated entity, the fact remains that an implied contract was created between NYSE-issued Option Trading Rights investors and whatever the NYSE Group/Market/Regulation called itself in the 1980's; ……"*

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On February 14, 2007, the Commission approves the Euronext combination stating, "*The issue of the rights of owners of Separated OTRs is not before the Commission in the context of this rule filing. Pursuant to Section 19(b)(1) of the Exchange Act,133 an SRO (such as NYSE) is required to file with the Commission any proposed rule or any proposed change in, addition to, or deletion from the rules of such SRO. Further, pursuant to Section 19(b)(2) of the Exchange Act,134 the Commission shall approve a proposed rule change filed by an SRO if the Commission finds that such proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to the SRO. The NYSE is not proposing in this filing a change in the trading rights on the Exchange."*

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On April 14, 2011, the Commenter writes to the Commission regarding a proposed AMEX joint venture as it relates to NYSE Option Trading Rights.

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

"….. 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 …."

"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? "

" 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 …."

VALUE

On April 21, 1997, the Exchange declared that the value of Separated Option Trading Rights would be too "speculative" to be held by anyone but a "regular member or the Exchange itself." On May 26, 2005, the Exchange declared that option trading rights would "have no value". On April 28, 2011, after having assumed from investor/owners into its own account their licenses to effect trades on option products under its auspices, the Exchange declared that net revenues from all derivative products including leasing out the rights to trade option products, rose $48 million, or 26% compared to the fourth quarter of 2010, to $236 million.

CONCLUSION

The Exchange's position that its Constitution permitted the Board to be able to conduct business as it did, "adopt, amend and repeal such rules as it may deem necessary or proper relating to options trading right holders," may find affirming the necessity or propriety of acquiring option trading rights from unwilling investors into what ultimately became its own account and now benefitting economically from their possession, difficult to maintain. The acts of exiting the option business, attempting to unilaterally void the obligations entered into prior to the exit on the basis that it was no longer in the business, attempting to value licenses at zero and extinguish their trading rights, and then reemerging into the business profiting itself from the very rights it had attempted to "extinguish", can hardly be considered just and equitable principles of trade. As the Exchange pointed out in its filing of February 26, 1997 (above), to be in compliance with provisions of the Securities Exchange Act of 1934, a national securities exchange is to *"……. to promote just and equitable principles of trade,……. and, in general, to protect investors and the public interest…."*. The assumption is that to promote just and equitable principles of trade, an exchange is compelled to practice them. Even in the best case scenario, where in a relatively short time after the NYSE's exit from the option business it decided to re-enter the business, the assumption of previously issued licenses entitling holders to effect trades on all NYSE options products, into what soon became revenue-generating assets for the Exchange itself, the practice of "*just and equitable principles of trade"* is

apparently absent. And since the foundation the Exchange's ownership of those assets is in question, the proposed rule change which merges them into a new entity must also be called into question and therefore denied.

Whether it was the original intention of the 1997 NYSE to exit the option business permanently or to get a fresh start later in a growing business unencumbered by NYSE Option Trading Rights investors/owners, the Exchange's exit and reentry cannot and does not negate the permanency of the licenses it had voluntarily issued prior to its exit. It should be noted that although the Commenter is advocating specifically for the 50 Separated Option Trading Rights investor/owners, in reality the 1,316 investor/owners of Non-Separated Options Trading Rights may be rightfully entitled, as well.

As the Commission is aware, the Commenter has attempted to bring the relevant information before it on other occasions. If past record is any indication of future performance, the expectation is that the Commission will rely on its ruling of February 27, 2006 (above) and will take no further action. Given that prospect and given the resulting likelihood that at some point, an investor/owner or his heir will consider the facts and the law do the calculations and recognize that bringing the matter on his own to court (including a higher court) will be worth his/their time and resources. Also entering into his computations will be the probability that the NYSE's efforts to "extinguish" trading rights, value them at zero and then assume them ultimately into its own account for its own profitable usage, will be a position more difficult to defend in a judicial setting. On that basis then, the Exchange is respectfully asked to set aside sufficient reserves to be able to meet its obligations when such an eventuality occurs. Separated Option Trading Rights were licenses to trade all NYSE listed options before the Exchange's exit and there is no reason to believe that they should be entitled to anything less now that the Exchange has re-entered the business. It is because unrealized, accumulating revenues accruing daily to Separated Option Trading Rights investors/owners from their share of the Exchange's multiple option-licensing-lease enterprises since re-entry, as well as future earnings based asset valuation (or an acceptable formula for continuing participation) and arrears, may reach an amount that even the Exchange will find hard to manage, that the concept of reserves has been proposed.

As observed in an earlier comment, it must be clear to even the Exchange's most ardent supporters, of which this commenter is one, that its unwelcome assumption of investors' assets by "rule change" into what ultimately became its own account, would find the legitimacy befitting its trusted station difficult to preserve, should the light of judicial day ever be brought to bear. The commenter stands opposed to the proposed acquisition of NYSE Euronext in its present form.

Respectfully,
/Andrew Rothlein/
Investor/Owner
NYSE Option Trading Rights