

Please direct your written comments to Thomas Bayer, Director/Chief Information Officer, Securities and Exchange Commission, c/o Remi Pavlik-Simon, 6432 General Green Way, Alexandria, Virginia 22312, or send an email to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

Dated: August 27, 2012.

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67732; File No. SR-NYSEArca-2012-90]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the First Trust CBOE S&P 500 VIX Tail Hedge Fund (Formerly, the First Trust CBOE VIX Tail Hedge Index Fund)

August 27, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on August 13, 2012, NYSE Arca, Inc. ("Exchange" or "NYSE Arca") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to correct the reference to the Index Provider applicable to the First Trust CBOE S&P 500 VIX Tail Hedge Fund (formerly, the First Trust CBOE VIX Tail Hedge Index Fund) ("Fund"), and to reflect changes to the name of the index underlying the Fund and to the name of the Fund, which the Commission has approved for listing and trading on the Exchange under NYSE Arca Equities Rule 5.2(j)(3). The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission's Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and discussed any comments it received on the proposed rule change. The text of those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

###### 1. Purpose

The Commission has approved listing and trading on the Exchange of shares ("Shares") of the Fund<sup>3</sup> under NYSE Arca Equities Rule 5.2(j)(3), the Exchange's listing standards for Investment Company Units ("Units").<sup>4</sup>

The Shares will be offered by First Trust Exchange-Traded Fund ("Trust"), which is organized as a Massachusetts business trust and is registered with the Commission as an open-end management investment company.<sup>5</sup> The investment adviser to the Fund will be First Trust Advisors L.P. ("Adviser" or "First Trust"). First Trust Portfolios L.P. ("Distributor") is the principal underwriter and distributor of the Fund's Shares. The Bank of New York Mellon Corporation ("BNY") will serve

<sup>3</sup> See Securities Exchange Act Release No. 67485 (July 23, 2012), 77 FR 44291 (July 27, 2012) (SR-NYSEArca-2012-50) ("Prior Order"). See also Securities Exchange Act Release No. 67107 (June 4, 2012), 77 FR 34102 (June 8, 2012) (SR-NYSEArca-2012-50) ("Prior Notice," and together with the Prior Order, the "Prior Release").

<sup>4</sup> An Investment Company Unit is a security that represents an interest in a registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities (or holds securities in another registered investment company that holds securities comprising, or otherwise based on or representing an interest in, an index or portfolio of securities). See NYSE Arca Equities Rule 5.2(j)(3)(A).

<sup>5</sup> The Trust is registered under the Investment Company Act of 1940 (15 U.S.C. 80a-1) ("1940 Act"). On July 18, 2012, the Trust filed with the Commission an amendment to its registration statement on Form N-1A under the Securities Act of 1933 (15 U.S.C. 77a), and under the 1940 Act relating to the Fund (File Nos. 333-125751 and 811-21774) ("Registration Statement"). The description of the operation of the Trust and the Fund herein is based, in part, on the 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. 27068 (September 20, 2005) (File No. 812-13000) ("Exemptive Order").

as administrator, custodian, and transfer agent for the Fund.

According to the Prior Release, the Fund will seek investment results that correspond generally to the price and yield, before the Fund's fees and expenses, of an equity index called the CBOE S&P VIX Tail Hedge Index ("Index"). The Index is designed to provide a benchmark for investors interested in hedging tail risk in an S&P 500 portfolio.

In the Prior Notice, the Exchange represented that the Index is rules-based and is owned and was developed by Standard & Poor's Financial Services LLC ("S&P") and that S&P is the Index Provider.<sup>6</sup> The Exchange further represented that the Index Provider will calculate and maintain the Index.

The Exchange seeks to correct a representation made regarding the Index Provider reflected in the Prior Release, as described below. The Exchange is revising this representation to state that, pursuant to an arrangement with the Chicago Board Options Exchange, Inc. ("CBOE"), S&P has certain rights to license the Index to third parties. S&P has licensed the Index to First Trust for use by First Trust and the Fund. CBOE compiles, maintains, and owns the Index, and CBOE is the Index Provider with respect to the Fund. CBOE is not a broker-dealer or affiliated with a broker-dealer, and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index.<sup>7</sup>

In the Prior Release, the Exchange represented that the name of the Index underlying the Fund is the CBOE S&P VIX Tail Hedge Index. The Exchange is changing this representation to state that the name of the Index underlying the Fund is the CBOE VIX Tail Hedge Index.<sup>8</sup>

In addition, in the Prior Release, the Exchange represented that the name of the Fund is the First Trust CBOE VIX Tail Hedge Index Fund. The Exchange is changing this representation to state that the name of the Fund has been

<sup>6</sup> S&P is not a broker-dealer or affiliated with a broker-dealer, and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index.

<sup>7</sup> The change to the representation regarding the Index Provider described herein will be effective upon filing with the Commission of another amendment to the Trust's Registration Statement. See note 5, *supra*.

<sup>8</sup> The change to the name of the Index underlying the Fund was reflected in the July 18, 2012 amendment to the Registration Statement. See note 5, *supra*.

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

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

changed to First Trust CBOE S&P 500 VIX Tail Hedge Fund.<sup>9</sup>

The Adviser represents that there is no change to the Fund's investment objective. The Fund will comply with all requirements under NYSE Arca Equities Rule 5.2(j)(3).<sup>10</sup>

Except for the changes noted above, all other facts presented and representations made in the Prior Release remain unchanged.

All terms referenced but not defined herein are defined in the Prior Release.

## 2. Statutory Basis

The basis under the Act for this proposed rule change is the requirement under Section 6(b)(5)<sup>11</sup> 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 free and open market and, in general, to protect investors and the public interest.

The Exchange believes that the proposed rule change is designed to prevent fraudulent and manipulative acts and practices in that the proposed rule change corrects the representation made in the Prior Release to state that CBOE, and not S&P, compiles, maintains, and owns the Index, and that CBOE is the Index Provider with respect to the Fund. Both S&P and CBOE are not broker-dealers and are not affiliated with a broker-dealer and have implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index. The Fund will comply with all requirements under NYSE Arca Equities Rule 5.2(j)(3), and Commentary .01(a)(A) thereto, except that the Index may include up to 1% of the Index weight in VIX call options, which are not NMS Stocks as defined in Rule 600 of Regulation NMS.

<sup>9</sup> The change to the name of the Fund was reflected in the July 18, 2012 amendment to the Registration Statement. See note 5, *supra*.

<sup>10</sup> As noted in the Prior Release, the Index for the Fund does not meet all of the "generic" listing requirements of Commentary .01(a)(A) to NYSE Arca Equities Rule 5.2(j)(3) applicable to the listing of Investment Company Units based upon an index of US Component Stocks, as defined in NYSE Arca Equities Rule 5.2(j)(3). Specifically, Commentary .01(a)(A) to NYSE Arca Equities Rule 5.2(j)(3) sets forth the requirements to be met by components of an index or portfolio of US Component Stocks. As described in the Prior Release, the Index consists of an S&P 500 Index stock portfolio and may consist of a position in specified VIX Index ("VIX") call options. The Index meets all requirements of NYSE Arca Equities Rule 5.2(j)(3) and Commentary .01(a)(A) thereto except that the Index may include up to 1% of the Index weight in VIX call options, which are not NMS Stocks as defined in Rule 600 of Regulation NMS. See notes 3 and 5, *supra*, and accompanying text.

<sup>11</sup> 15 U.S.C. 78f(b)(5).

The proposed rule change is designed to promote just and equitable principles of trade and to protect investors and the public interest in that the Adviser represents that there is no change to the Fund's investment objective. Both S&P and CBOE are unaffiliated with a broker-dealer and have implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index. The functions of the Index Provider are those described in the Prior Release, and this proposed rule change corrects representations made in the Prior Release by stating that CBOE, and not S&P, is the Index Provider and compiles, maintains, and owns the Index. In addition, the Exchange seeks to reflect changes to the name of the Index underlying the Fund and to the name of the Fund, as described above.

The proposed rule change is designed to perfect the mechanism of a free and open market and, in general, to protect investors and the public interest in that, except for the changes noted above, all other representations made in the Prior Release remain unchanged. The Adviser represents that there is no change to the Fund's investment objective. In addition, with the exception noted above,<sup>12</sup> the Fund will comply with all requirements under NYSE Arca Equities Rule 5.2(j)(3).

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

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

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to

Section 19(b)(3)(A) of the Act<sup>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</sup> The Commission notes that the proposed rule change does not significantly affect the protection of investors or the public interest and does not impose any significant burden on competition. NYSE Arca represents that there is no change to the Fund's investment objective and seeks to correct a representation made regarding the Index Provider reflected in the Prior Release to state that, pursuant to an arrangement with the CBOE, S&P has certain rights to license the Index to third parties. S&P has licensed the Index to First Trust for use by First Trust and the Fund. CBOE is the Index Provider and compiles, maintains, and owns the Index. CBOE is not a broker-dealer or affiliated with a broker-dealer and has implemented procedures designed to prevent the use and dissemination of material, non-public information regarding the Index. In addition, the Exchange seeks to reflect changes to the name of the Index underlying the Fund and the name of the Fund, as described above.

A proposed rule change filed pursuant to Rule 19b-4(f)(6) under the Act<sup>15</sup> normally does not become operative for 30 days after the date of its filing. However, Rule 19b-4(f)(6) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. The Exchange has asked the Commission to waive the 30-day operative delay, noting that the Commission has previously approved listing and trading of the Fund on the Exchange, the Shares have not yet commenced trading, the proposed changes in this filing will not impact the operation of the Fund or the Index as described in the Prior Release, and the Adviser is prepared to commence Exchange listing and trading prior to the end of the 30-day operative-delay period. The Exchange proposes to correct the representation made in the Prior Release to state that CBOE, and not S&P, compiles, maintains, and owns the Index, and that CBOE is the Index Provider. Both S&P and CBOE are not broker-dealers and are not affiliated with a broker-dealer and have implemented procedures designed to prevent the use and dissemination of

<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

<sup>15</sup> 17 CFR 240.19b-4(f)(6).

<sup>12</sup> See note 10, *supra*.

material, non-public information regarding the Index. In addition, the Exchange is reflecting changes to the name of the Index underlying the Fund and to the name of the Fund, as described above. The changes to the representation regarding the Index Provider described herein will be effective upon filing with the Commission of another amendment to the Trust's Registration Statement. The changes to the name of the Index underlying the Fund and the name of the Fund were reflected in a July 18, 2012 amendment to the Registration Statement.<sup>16</sup> The Fund will comply with all requirements under NYSE Arca Equities Rule 5.2(j)(3).<sup>17</sup> Except for the changes noted above, all other representations made in the Prior Release remain unchanged. For the foregoing reasons, the Commission believes that waiving the 30-day operative delay would be consistent with the protection of investors and the public interest.<sup>18</sup> Therefore, the Commission designates the proposal operative upon filing.

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

#### IV. Solicitation of Comments

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

##### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEArca-2012-90 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-NYSEArca-2012-90. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEArca-2012-90 and should be submitted on or before September 21, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-67733; File No. SR-OCC-2012-11]**

#### **Self-Regulatory Organizations; Options Clearing Corporation; Order Approving Proposed Rule Change Relating to the Auction Process Under Options Clearing Corporation Rule 1104**

August 27, 2012.

#### **I. Introduction**

On July 3, 2012, the Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission

("Commission") the proposed rule change SR-OCC-2012-11 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> The proposed rule change was published for comment in the **Federal Register** on July 20, 2012.<sup>3</sup> The Commission received no comment letters. This order approves the proposed rule change.

#### **II. Description**

In a recent rule change, OCC proposed and the Commission approved provisions to OCC Rule 1104 and Rule 1106 to specifically provide that, in addition to all other permitted means of liquidating positions and collateral in the accounts of a suspended Clearing Member, OCC may, at its discretion, liquidate such positions and collateral through a private auction process.<sup>4</sup> The purpose of the current rule change is to add an interpretation .02 to Rule 1104 to provide a further general description of such a private auction process by which OCC may liquidate all or any part of a suspended Clearing Member's accounts. The proposed interpretation sets forth the basic parameters of such an auction, including the process for creating a standing pool of pre-qualified potential bidders, criteria for fixing the number of bidders to participate in any particular auction and the method of selection of such bidders. Such criteria are intended to ensure an orderly and robust auction and to ensure that auction bidders are financially able to make payment for and assume the obligations of the collateral and positions they are acquiring and able to manage the risk thereof and/or trade out of the positions without creating unnecessary further risk to the Corporation. Interpretations cross-referencing interpretation .02 to Rule 1104 will be added following Rules 1106, 1107, 2210, and 2210A, and the latter three rules are proposed to be amended to provide that the auction process is applicable to assets and obligations arising from exercised and assigned options and matured, physically-settled futures and to assets and obligations arising from the close-out of stock loan and borrow positions as well.

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

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

<sup>3</sup> Securities Exchange Act Release No. 67443 (July 16, 2012), 77 FR 42784 (July 20, 2012).

<sup>4</sup> See Exchange Act Release No. 65654 (October 28, 2011), 76 FR 68236 (November 3, 2011) (SR-OCC-2011-08) (Order Approving Proposed Rule Change, as Modified by Amendment No. 1, to Provide Specific Authority to Use an Auction Process as One of the Means to Liquidate a Defaulting Clearing Member's Accounts).

<sup>16</sup> See note 5, *supra*.

<sup>17</sup> See note 10, *supra*.

<sup>18</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>19</sup> 17 CFR 200.30-3(a)(12).