

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-76009; File No. SR-NYSEMKT-2015-67)

September 29, 2015

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Adding Definitions Applicable to Certain Co-location Services and Modifying the Fee for Users that Host Their Customers at the Exchange's Data Center

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the "Act")² and Rule 19b-4 thereunder,³ notice is hereby given that on September 18, 2015, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been 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 add definitions applicable to certain co-location services to the NYSE MKT Equities Price List ("Price List") and the NYSE Amex Options Fee Schedule ("Fee Schedule") and modify the fee for users that host their customers at the Exchange's Data Center. The text of the proposed rule change is available on the Exchange's website at 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange operates a data center in Mahwah, New Jersey, from which it provides co-location services to Users.⁴ The Exchange's co-location services allow Users to rent space in the data center so they may locate their electronic servers in close physical proximity to the Exchange's trading and execution system.⁵ The Exchange proposes to amend the Price List and the Fee Schedule as they apply to co-location services to add the definitions of User, Hosting User and Hosted Customer. The Exchange also proposes to modify the fee for users that host their customers at the Exchange's Data Center, effective January 1, 2016.⁶

Definitions of User, Hosting User and Hosted Customer

In 2011, the Exchange changed the definition of the term "User," for the purposes of co-location services, to include any market participant that requests to receive co-location services

⁴ The Exchange initially filed rule changes relating to its co-location services with the Securities and Exchange Commission ("Commission") in 2010. See Securities Exchange Act Release No. 62961 (September 21, 2010), 75 FR 59299 (September 27, 2010) (SR-NYSEAmex-2010-80).

⁵ See id. at 59299.

⁶ As specified in the Price List and the Fee Schedule, a User that incurs co-location fees for a particular co-location service pursuant thereto would not be subject to co-location fees for the same co-location service charged by the Exchange's affiliates New York Stock Exchange LLC and NYSE Arca, Inc. See Securities Exchange Act Release No. 70176 (August 13, 2013), 78 FR 50471 (August 19, 2013) (SR-NYSEMKT-2013-67).

directly from the Exchange.⁷ As described in the 2011 Releases, Users could include member organizations, as that term is defined in the definitions section of the General and Floor Rules of the NYSE MKT Equities Rules (“Members”), and ATP Holders, as that term is defined in NYSE Amex Options Rule 900.2NY(5)(“ATP Holders”)(Members and ATP Holders together referred to herein as “Member Organizations”); Sponsored Participants, as that term is defined in NYSE MKT Rule 123B.30(a)(ii)(B) – Equities and NYSE Amex Options Rule 900.2NY(77)(“Sponsored Participants”); and non-Member Organization broker-dealers and vendors that request to receive co-location services directly from the Exchange. At the time, the Exchange contemplated that such definition would encompass Users that would provide, for example, hosting, service bureau, technical support, risk management, order routing and market data delivery services to their customers while such Users are co-located in the Exchange’s data center.

The Exchange proposes to add the current definition of User to the Price List and the Fee Schedule, without changes from the 2011 Releases, as follows:

A “User” means any market participant that requests to receive co-location services directly from the Exchange.

The proposed definition would, consistent with the 2011 Releases, encompass Member Organizations, Sponsored Participants and non-member broker-dealers, as well as vendors that provide hosting, service bureau and technical support, risk management services, order routing services and market data delivery services to their customers while such Users are co-located in

⁷ See Securities Exchange Act Release Nos. 65974 (December 15, 2011), 76 FR 79249 (December 21, 2011) (SR-NYSEAmex-2011-81) and 65975 (December 15, 2011), 76 FR 79233 (December 21, 2011) (SR-NYSEAmex-2011-82) (the “2011 Releases”).

the Exchange's data center. Any entity that could be a User based on the term as described in the 2011 Releases would be considered a User under the proposed definition.

The Exchange also proposes to make a non-substantive change to the description in the Price List and the Fee Schedule of the Exchange's billing practice for co-location services received by Users that connect to the Exchange and one or more of its affiliates, by replacing the term, "user," with the defined term, "User."

In the 2011 Releases, the Exchange also amended the Price List and the Fee Schedule to establish a fee applicable to Users that provide hosting services to their customers at the Exchange's data center. As described in the 2011 Releases, "hosting" is a service offered by a User to another entity in the User's space within the data center and can include, for example, a User supporting such other entity's technology, whether hardware or software, through the User's co-location space. The 2011 Releases used the term "Hosted User" to describe a customer to which a User provides hosting services.

The Exchange now proposes to include definitions relating to hosting services in the Price List and the Fee Schedule, as follows:

A "Hosting User" means a User that hosts a Hosted Customer in the User's co-location space.

A "Hosted Customer" means a customer of a Hosting User that is hosted in a Hosting User's co-location space.

The proposed definition of "Hosting User" incorporates the description of a User that hosts customers in its co-location space as set forth in the 2011 Releases. For the avoidance of doubt, a Hosting User must be a User pursuant to the proposed definition of User. Any User that could be a Hosting User based on the description of a User that hosts customers in the 2011

Releases would be considered a Hosting User under the proposed definition.

The proposed definition of “Hosted Customer” would be a customer of a Hosting User that is hosted in a Hosting User’s co-location space, and would be consistent with the description of the term, “Hosted User” used in the 2011 Releases.⁸ The Exchange proposes to change the name of the term from “Hosted User” to “Hosted Customer” to make it clear that the entities that are hosted are customers of the Hosting Users that do not, in contrast to Users, have a direct contractual relationship with the Exchange vis-à-vis co-location services. For consistency with this proposed change, the Exchange also proposes to change the term “Hosted User” as used in the “Hosting Fee” set forth in the Price List and the Fee Schedule, to “Hosted Customer.” Since, as noted above, only Users can be Hosting Users, a Hosted Customer may not provide hosting services to any other entities in the space in which it is hosted. Other than the change to the name of the definition, no other changes to the definition are intended and all current customers of a Hosting User would be “Hosted Customers” under the proposed definition.

Hosting Fee

In the 2011 Releases, the Exchange amended its Price List and the Fee Schedule to establish a fee charged to Users of \$500.00 per month with respect to each Hosted Customer (defined as “Hosted User” in the 2011 Releases) that a User hosts in the Exchange’s data center (the “Hosting Fee”).

Effective January 1, 2016, the Exchange proposes to modify the Hosting Fee to provide that the Hosting Fee would be assessed to a Hosting User on a per Hosted Customer basis and for each cabinet in which the Hosting User hosts the Hosted Customer. This approach to hosting

⁸ A “customer of a Hosting User,” as used in the definition of a “Hosted Customer” would be any person that has a contractual relationship with a Hosting User to use that Hosting User’s co-location space. There is no limitation on the types of persons who could be Hosted Customers.

fees is comparable to the structure used by the NASDAQ Stock Market, Inc. (“NASDAQ”) in its Multi-Firm Cabinets Fee, and would similarly mean that a Hosting User would be assessed the Hosting Fee for each Hosted Customer that occupies space in a cabinet.⁹ Thus, for example, if a Hosting User hosts a Hosted Customer in two of the Hosting User’s cabinets, the Hosting User would be charged two Hosting Fees, one for each cabinet in which the Hosted Customer is hosted. The Exchange also proposes to increase the monthly Hosting Fee from \$500 per Hosted Customer to \$1,000 per Hosted Customer for each cabinet in which the Hosted Customer is hosted, effective January 1, 2016.

As is the case currently, Users may independently set fees for their Hosted Customers and the Exchange would not receive a share of any such fees.

General

As is the case with all Exchange co-location arrangements (i) neither a User nor any of the User’s customers would be permitted to submit orders directly to the Exchange unless such User or customer is a Member Organization, a Sponsored Participant or an agent thereof (e.g., a service bureau providing order entry services) and (ii) use of the co-location services proposed herein would be completely voluntary and available to all Users on a non-discriminatory basis.¹⁰ In addition, a User would only incur one charge for the particular co-location service described

⁹ See Nasdaq Rule 7034(a) and Securities Exchange Act Release No. 71200 (Dec. 30, 2013), 79 FR 677 (Jan. 6, 2014)(SR-NASDAQ-2013-57). [sic]

¹⁰ As is currently the case, Users that receive co-location services from the Exchange will not receive any means of access to the Exchange’s trading and execution systems that is separate from, or superior to, that of others with access to the Exchange’s trading and execution systems. In this regard, all orders sent to the Exchange enter the Exchange’s trading and execution systems through the same order gateway, regardless of whether the sender is co-located in the data center or not. In addition, co-located Users do not receive any market data or data service product that is not available to users that have access to the Exchange’s trading and execution systems, although Users that receive co-location services normally would expect reduced latencies in sending orders to, and receiving market data from, the Exchange.

herein, regardless of whether the User connects only to the Exchange or to the Exchange and one or both of its affiliates.¹¹

The proposed change is not otherwise intended to address any other issues relating to co-location services and/or related fees, and the Exchange is not aware of any problems that Users would have in complying with the proposed change.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Sections 6(b)(5) of the Act,¹³ in particular, because it is 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, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Exchange believes that the proposal is not designed to permit unfair discrimination between customers, issuers, broker, or dealers. First, the proposed addition of the definitions for User, Hosting User and Hosted Customer to the Price List and the Fee Schedule, would, by their addition to the Price List and the Fee Schedule, make the application of such definitions more accessible and transparent. There is no change to the definition of User. There is no change to

¹¹ See SR-NYSEMKT-2013-67, supra note 6 at 50471. The Exchange's affiliates have also submitted substantially the same proposed rule change to propose the changes described herein. See SR-NYSE-2015-40 and SR-NYSEArca-2015-82.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

the definition of “Hosted User” as described in the 2011 Releases other than to change the name to “Hosted Customer” to add clarity to the use and the application of the definition. The proposed new term, “Hosting User” reflects the description of a User that hosts customers in its co-location space as set forth in the 2011 Releases. Finally, an entity that could be a User, a User that hosts customers and a Hosted User based on the 2011 Releases, would be considered a User, Hosting User or Hosted Customer, respectively under the proposed definitions. The proposed definitions would be applied uniformly for comparable services provided by the Exchange.

The Exchange believes that the proposal would remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, protect investors and the public interest because by including definitions in the Price List and the Fee Schedule, the proposed change would provide Users with clarity as to the availability and application of co-location hosting services and fees.

The proposed change to the Hosting Fee would be applied uniformly for comparable services provided by the Exchange to comparable Hosting Users and their customers and would not unfairly discriminate between similarly situated Hosting Users. The Exchange notes that assessing a fee per Hosted Customer per cabinet is comparable to the approach that NASDAQ takes to the same type of services in its Multi-Firm Cabinets Fee.¹⁴ The Exchange also notes that the Hosting Fee has not been changed since it was established in 2011. The Exchange believes the proposed Hosting Fee is reasonable in that the fee is designed to reflect the expenses and resources expended by the Exchange in connection with hosting services. In addition, while Hosting Users may independently set fees for their Hosted Customers, and the Exchange would not receive a share of any such fees, the Hosting Fee on a per Hosted Customer per cabinet basis

¹⁴ See supra note 9.

continues to be lower than the fees a Hosted Customer would pay for co-location space purchased directly from the Exchange.

The Exchange also believes that the proposed rule change is consistent with Section 6(b)(4) of the Act,¹⁵ in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its Member Organizations, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers. Overall, the Exchange believes that the proposed change is consistent with the Act because the Exchange offers the co-location services described herein as a convenience to Users, but in so doing incurs certain costs, including costs related to the data center facility, hardware and equipment and costs related to personnel required for initial installation and ongoing monitoring, support and maintenance of such services.

For the reasons above, the proposed change would not unfairly discriminate between or among market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established from time to time by the Exchange.

Finally, the Exchange believes that it is subject to significant competitive forces, as described below in the Exchange's statement regarding the burden on competition.

For these reasons, the Exchange believes that the proposal is consistent with the Act.

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

In accordance with Section 6(b)(8) of the Act,¹⁶ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act because any market participants that are otherwise capable of satisfying any applicable co-location fees, requirements, terms and conditions established

¹⁵ 15 U.S.C. 78f(b)(4).

¹⁶ 15 U.S.C. 78f(b)(8).

from time to time by the Exchange could have access to the co-location services provided in the data center. This is also true because, in addition to the services being completely voluntary, they are available to all Users on an equal basis (i.e., the same range of products and services are available to all Users).

The Exchange believes that incorporating the definitions of User, Hosting User and Hosted Customer into the Price List and the Fee Schedule, the change to the Hosting Fee and the change to the application of the Hosting Fee will not impose any burden on competition that is not necessary or appropriate in further of the purposes of the Act because the definitions have been previously filed with the Commission¹⁷ and their inclusion in the Price List and the Fee Schedule will provide further clarity in the application of the fees. The Exchange believes that the changes to the Hosting Fee will not impose any burden on competition that is not necessary or appropriate in further of the purposes of the Act because they are designed to reflect the expenses and resources expended by the Exchange in connection with hosting services and because NASDAQ takes the same approach to the same type of services in its Multi-Firm Cabinets Fee.¹⁸

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if, for example, they deem fee levels at a particular venue to be excessive or if they determine that another venue's products and services are more competitive than on the Exchange. In such an environment, the Exchange must continually review, and consider adjusting, the services it offers as well as any corresponding fees and credits to remain competitive with other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

¹⁷ See 2011 Releases, supra note 7.

¹⁸ See supra note 9.

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 foregoing 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 from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁹ and Rule 19b-4(f)(6) thereunder.²⁰

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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

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:

¹⁹ 15 U.S.C. 78s(b)(3)(A).

²⁰ 17 CFR 240.19b-4(f)(6). Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and 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. The Exchange has satisfied this requirement.

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2015-67 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2015-67. This file number should be included on the subject line if e-mail 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 website (<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 website 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-NYSEMKT-2015-67 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²¹

Robert W. Errett
Deputy Secretary

²¹ 17 CFR 200.30-3(a)(12).