

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-77168; File No. SR-NYSEMKT-2016-21)

February 18, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Amending the NYSE Amex Options Fee Schedule

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 4, 2016, 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, II, and III 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 amend the NYSE Amex Options Fee Schedule (“Fee Schedule”) to exclude from its monthly calculations of contract volume any trading day on which the Exchange is not open for the entire trading day and/or a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours. The Exchange proposes to implement the fee change effective February 4, 2016. The proposed change is available on the Exchange’s website 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

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend its Fee Schedule to exclude from its monthly calculations of contract volume any trading day on which (1) the Exchange is not open for the entire trading day and/or (2) a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours. The Exchange proposes to implement the fee change effective February 4, 2016.

As provided in the Exchange’s Fee Schedule, several of the Exchange’s transaction fees and credits are based on trading, quoting and liquidity thresholds that involve a monthly calculation of contract volume, including calculations of average daily volume (“ADV”).<sup>4</sup> The

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<sup>4</sup> For example, the NYSE Amex Options Market Makers are eligible for reduced per contract rates for electronic transactions in Standard Options based on rates applicable to monthly contract volume in a given tier. See Fee Schedule, Section I. C (NYSE Amex Options Market Maker Sliding Scale – Electronic). Similarly, Order Flow Providers (“OFP”) are eligible for certain credits for orders submitted to the Exchange as agent payable only on customer volume based on (1) calculating, on a monthly basis, the average daily Customer contract volume an OFP executes Electronically on the Exchange as a percentage of total average daily industry Customer equity and ETF options volume, or (2) calculating, on a monthly basis, the average daily contract volume an OFP executes Electronically in all participant types (i.e., Customer, Firm, Broker-Dealer, NYSE Amex Options Market Maker, Non-NYSE Amex Options Market Maker, and Professional Customer) on the Exchange, as a percentage of total average daily industry Customer equity and ETF option volume, with the further requirement that a specified percentage of the minimum volume required to qualify for the Tier must be Customer volume. See Fee Schedule, Section I. E (Amex Customer Engagement (“ACE”) Program – Standard Options).

Exchange proposes to add a definition of Systems Disruptions to the Fee Schedule Preface that would permit the Exchange to exclude from its monthly contract volume calculations contracts traded on any day on which the Exchange is not is not [sic] open for the entire trading day. This would allow the Exchange to exclude days where the Exchange declares a trading halt in all securities or honors a market-wide trading halt declared by another market as well as days on which the market closes early for holiday observances. The Exchange's proposal is consistent with the rules of other self-regulatory organizations.<sup>5</sup>

The artificially low volumes of trading on days when the Exchange is not open for the entire trading day reduces the average daily activity of ATP Holders both daily and monthly. Given the decreased trading volumes, the numerator for the monthly calculation (e.g., trading volume) would be correspondingly lower, but the denominator for the threshold calculations (e.g., the number of trading days) would not be decreased, and could result in an unintended increase in the cost of trading on the Exchange, a result that is unintended and undesirable to the Exchange and its ATP Holders. The Exchange believes that the authority to exclude days when the Exchange is not open for the entire trading day would provide ATP Holders with greater certainty as to their monthly costs and diminish the likelihood of an effective increase in the cost of trading.<sup>6</sup>

Similarly, the Exchange proposes to modify its Fee Schedule to permit the Exchange to

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<sup>5</sup> See, e.g., NASDAQ Stock Market LLC Rule 7018(j) (“ For purposes of determining average daily volume and total consolidated volume under this rule, any day that the market is not open for the entire trading day will be excluded from such calculation.”); International Securities Exchange, LLC Fee Schedule (“For purposes of determining Priority Customer ADV, any day that the regular order book is not open for the entire trading day or the Exchange instructs members in writing to route their orders to other markets may be excluded from such calculation; provided that the Exchange will only remove the day for members that would have a lower ADV with the day included.”).

<sup>6</sup> See, e.g., Securities Exchange Act Release No. 70657 (October 10, 2013), 78 FR 62899 (October 22, 2103) (SR-ISE-2013-51).

exclude from its monthly contract calculations, contracts traded on a trading day where a disruption affects an Exchange system that lasts for more than 60 minutes during regular trading hours even if such disruption would not be categorized as a complete outage of the Exchange's system. Such a disruption may occur where a certain options series traded on the Exchange is unavailable for trading due to an Exchange system issue or where, while the Exchange may be able to perform certain functions with respect to accepting and processing orders, the Exchange may be experiencing a failure to another significant process, such as routing to other market centers, that would lead permit holders that rely on such process to avoid utilizing the Exchange until the Exchange's entire system was operational. Once again, the Exchange's proposal is consistent with the rules of other self-regulatory organizations.<sup>7</sup>

The Exchange is not proposing any changes to the level of rebates currently being provided on the Exchange, or to the thresholds required to achieve each rebate tier.

The proposed change is also not otherwise intended to address any other issues, and the Exchange is not aware of any problems that permit holders 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,<sup>8</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(5) of the Act,<sup>9</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other

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<sup>7</sup> See, e.g., BATS BZX Exchange Fee Schedule ("The Exchange excludes from its calculation of ADAV and ADV shares added or removed on any day that the Exchange's system experiences a disruption that lasts for more than 60 minutes during regular trading hours ("Exchange System Disruption"), on any day with a scheduled early market close and on the last Friday in June (the "Russell Reconstitution Day").

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(4) and (5).

charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The Exchange believes that it is reasonable to permit the Exchange to eliminate from the calculation days on which the market is not open the entire trading day because it preserves the Exchange's intent behind adopting volume-based pricing. Similarly, the Exchange believes that its proposal is reasonable because it will help provide permit holders with a greater level of certainty as to their level of rebates and costs for trading in any month where the Exchange experiences such a system disruption on one or more trading days. The Exchange is not proposing to amend the thresholds permit holders must achieve to become eligible for, or the dollar value associated with, the tiered rebates or fees. By eliminating the inclusion of a trading day on which a system disruption occurs, the Exchange would almost certainly be excluding a day that would otherwise lower members' and member organizations' contract volume, thereby making it more likely for permit holders to meet the minimum or higher tier thresholds and thus incentivizing permit holders to increase their participation on the Exchange in order to meet the next highest tier.

The Exchange further believes that the proposal is reasonable because the proposed exclusion seeks to avoid penalizing permit holders that might otherwise qualify for certain tiered pricing but that, because of a significant Exchange system problem, would not participate to the extent that they might have otherwise participated. The Exchange believes that certain systems disruptions could preclude some permit holders from submitting orders to the Exchange even if such issue is not actually a complete systems outage.

Finally, the Exchange believes that the proposal is equitable and not unfairly discriminatory because the methodology for the monthly calculations would apply equally to all

permit holders and to all volume tiers.

The Exchange notes that, although unlikely, there is some possibility that a certain small proportion of permit holders may have a higher ADV as a percentage of average daily volume [sic] with their activity included from days where the Exchange experiences a system disruption. The Exchange believes that the proposal would still be equitable and not unfairly discriminatory given that the impacted universe is potentially quite small and that the proposal would benefit the overwhelming majority of market participants and would make the overall cost of trading on the Exchange more predictable for the membership as a whole.

For the foregoing 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,<sup>10</sup> 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.

The Exchange believes that, with respect to monthly contract calculations for rebates, there are very few instances where the exclusion would be invoked, and if invoked, would have little or no impact on trading decisions or execution quality. On the contrary, the Exchange believes that the proposal fosters competition by avoiding a penalty to permit holders for days when trading on the Exchange is disrupted for a significant portion of the day and would result in lower total costs to end users, a positive outcome of competitive markets. Further, other options exchanges have adopted rules that are substantially similar to the change in ADV calculation

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<sup>10</sup> 15 U.S.C. 78f(b)(8).

being proposed by the Exchange.<sup>11</sup>

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>12</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>13</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

At any time within 60 days of the filing of such 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 under Section 19(b)(2)(B)<sup>14</sup> of the Act 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:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or

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<sup>11</sup> See note 5, *supra*.

<sup>12</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>13</sup> 17 CFR 240.19b-4(f)(2).

<sup>14</sup> 15 U.S.C. 78s(b)(2)(B).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-21 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-2016-21. 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-2016-21 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.<sup>15</sup>

Robert W. Errett  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).