

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67420; File No. SR-NYSEMKT-2012-17)

July 12, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule for Professional Customers and Broker-Dealers to Increase the Transaction Fee for Electronic Executions and Introduce Volume-Based Tiers for Certain Electronic Executions that Would Be Charged a Lower Per Contract Rate

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 June 29, 2012, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“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”) for Professional Customers and Broker-Dealers to increase the transaction fee for electronic executions and introduce volume-based tiers for certain electronic executions that would be charged a lower per contract rate. The proposed rule change will be operative on July 1, 2012. The text of the proposed rule 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.

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

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

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 Exchange proposes to amend the Fee Schedule for Professional Customers and Broker-Dealers to increase the transaction fee for electronic executions and introduce volume-based tiers for certain electronic executions that would be charged a lower per contract rate.

Specifically, the Exchange proposes to increase the per contract transaction fee for electronically executed orders for Professional Customers and Broker-Dealers from \$.23 and \$.20, respectively, to \$.28 per contract for both categories of market participant.<sup>3</sup> The Exchange notes that the proposed fee is within the range of

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<sup>3</sup> In March 2012, the Exchange increased the per contract execution costs for certain participants. See Securities Exchange Act Release No. 66561 (Mar. 9, 2012), 77 FR 15429 (Mar. 15, 2012) (SR-NYSEAmex-2012-16). However, the Exchange inadvertently did not increase Broker-Dealer fees to the same level as Professional Customer fees, as required by the definition of Professional Customer in Rule 902.NY(18A), which provides that Professional Customer and Broker-Dealer fees must be the same. The proposed change would make the fees for Professional Customers and Broker-Dealers the same level, as they were prior to March 2012.

Professional Customer fees presently assessed in the industry, which range from \$.20 per contract for non-Select Symbols on the International Securities Exchange (“ISE”)<sup>4</sup> to \$.50 per contract to take liquidity on The NASDAQ Options Market (“NOM”) for non-Penny Pilot securities.<sup>5</sup> Similarly, the proposed fee for electronic Broker-Dealer transactions is within the range of fees assessed in the industry, which range from \$.20 to add liquidity in Complex Orders on NASDAQ OMX PHLX to \$.60 to transact in non-Penny Pilot securities on NASDAQ OMX PHLX.<sup>6</sup>

At the same time, the Exchange proposes to establish volume-based tiers for Professional Customers and Broker-Dealers that take liquidity on the Exchange.<sup>7</sup> Upon achieving these volume tiers, they will automatically become eligible for a lower per contract rate on all of their electronic executions in that month irrespective of whether those executions resulted from taking or making liquidity. The proposed volume-based tiers and associated rates per contract are shown below.<sup>8</sup>

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<sup>4</sup> See ISE fee schedule dated June 1, 2012, available at [http://www.ise.com/assets/documents/OptionsExchange/legal/fee/fee\\_schedule.pdf](http://www.ise.com/assets/documents/OptionsExchange/legal/fee/fee_schedule.pdf).

<sup>5</sup> See NOM Fee Schedule, available at <http://www.nasdaqtrader.com/Micro.aspx?id=OptionsPricing>.

<sup>6</sup> See NASDAQ OMX PHLX Fee Schedule, available at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLXTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F1&manual=%2Fnasdaqomxphlx%2Fphlx%2Fphlx%2Drulesbrd%2F>.

<sup>7</sup> Whenever a participant sends a marketable order to immediately trade against a resting bid or offer in the Exchange’s Consolidated Order Book, it will be viewed as taking liquidity. Conversely, whenever a participant posts a bid or offer that does not immediately execute they will be viewed as making liquidity on the Exchange.

<sup>8</sup> The average daily volume will be calculated by taking the sum total of a Professional Customer’s or Broker-Dealer’s taking liquidity volume and dividing it by the number of days the Exchange was open for business during the month. Any electronic volumes that arise from the execution of either Complex Orders or

Average Daily Volume Tiers For Professional Customers and Broker-Dealers Taking Liquidity	Rate Per Contract
0 to 50,000	\$.28
50,001 to 100,000	\$.26
Over 100,000	\$.23

Thus, for Professional Customers that have average daily volume of over 100,000 contracts, the fee per contract will remain the same as it currently is at \$.23.

In addition, the Exchange proposes to amend the Fee Schedule to clarify that the “Broker Dealer Manual” fee and “Professional Customer Manual” fee are the same.

The proposed change will be operative on July 1, 2012.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)<sup>9</sup> of the Securities Exchange Act of 1934 (the “Act”), in general, and Section 6(b)(4)<sup>10</sup> of the Act, in particular, in that it is designed to provide for the equitable allocation of reasonable dues, fees, and other charges among its members and other persons using its facilities and is not unfairly discriminatory.

Specifically, the Exchange believes that the proposed fee increase for certain electronically executed orders on behalf of Professional Customers and Broker-Dealers is equitable and reasonable because it will help offset the Exchange’s costs in processing the relatively higher volume of orders, many of which do not execute, that are being

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Qualified Contingent Cross (“QCC”) orders will not be included in the calculation of average daily volume. QCC orders will remain subject to the current \$.20 per contract pricing in the Fee Schedule applicable to non-Customers.

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

<sup>10</sup> 15 U.S.C. 78f(b)(4).

submitted to the Exchange by Professional Customers and Broker-Dealers.<sup>11</sup> Rather than passing the costs of higher order volumes along to all participants, the Exchange believes it is more equitable to assess those costs to the participants that are responsible for them.<sup>12</sup>

The Exchange notes that other participants pay substantially more for the ability to trade on the Exchange and, as such, the proposed amount of the increase is reasonable. For example, Market Makers have much higher fixed monthly costs as compared to Professional Customers and Broker-Dealers. A Market Maker seeking to stream quotes in the entire universe of names traded on the Exchange would have to pay \$20,000 per month in Amex Trading Permit (“ATP”) fees. In addition, a Market Maker acting as a Specialist, e-Specialist, or Directed Order Market Maker will incur monthly Rights Fees that range from \$75 per option to \$1,500 per option. Professional Customers and Broker-Dealers, who access the Exchange via an order routing firm, pay only \$500 per month in ATP fees (assuming the cost is passed back to them), and for that low monthly cost are able to send orders in all issues traded on the Exchange.<sup>13</sup> For Broker-Dealers who are ATP Holders and do access the Exchange directly, they will incur the monthly ATP fee

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<sup>11</sup> The Exchange does not believe that the costs associated with this increased volume are fully addressed through the Exchange’s existing fee structure. Cancellation fees only apply to public customer orders, the messages-to-contracts ratio fee only applies after 1 billion messages, and the order-to-trades ratio fee only applies after the ratio reaches 10,000 orders to 1 execution.

<sup>12</sup> At this time, the Exchange is leaving in place current rate of \$.20 per contract for Firms because unlike Professional Customers and Broker-Dealers, the majority of Firm volumes are transacted in open outcry or manually, and de facto market making activity by Firm participants is very limited.

<sup>13</sup> The Exchange notes that it has proposed to increase the ATP fees for an order routing firm from \$500 per month to \$1,000 per month effective July 1, 2012. See SR-NYSEMKT-2012-16.

of \$500 and in turn have the ability to send orders in all issues traded on the Exchange. Other participants have a much higher per contract cost to trade on the Exchange, such as Non-NYSE Amex Options Market Makers, who pay \$.43 per contract to transact on the Exchange electronically. Given these facts, coupled with the aforementioned range in Professional Customer and Broker-Dealer fees on other exchanges, the Exchange believes that the proposed increase is both reasonable and equitable.

The Exchange further notes that Broker-Dealers and Professional Customers may directly compete with Market Makers; unlike Customers, they are not prohibited from de facto market making.<sup>14</sup> Both Broker-Dealers and Professional Customers have a measurable economic advantage relative to a NYSE Amex Options Market Maker's cost when trading with Customer order flow. For example, an NYSE Amex Options Market Maker trading against a Customer order in a non-Penny Pilot name will pay as much as \$.85 in transaction charges, whereas under the proposal, both Broker-Dealers and Professional Customers will pay a maximum of \$.28 per contract.<sup>15</sup> The proposed fee increase will diminish the maximum per contract differential between Market Makers with quoting obligations who trade against Customers versus Broker-Dealers and Professional Customers who do not have such obligations and who may trade electronically against Customers in a manner that the Exchange believes is more

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<sup>14</sup> See Rule 995NY(b).

<sup>15</sup> NYSE Amex Options Market Makers must pay marketing charges of \$.65 per contract when they trade contra to a Customer order electronically. This is in addition to the Exchange transaction fee of \$.20 per contract applicable to a NYSE Amex Options Market Maker. The Exchange notes that the marketing charges are used by NYSE Amex Options Market Makers to attract Customer order flow to the Exchange. Such order flow is beneficial to all participants on the Exchange, including Broker-Dealers and Professional Customers who are permitted to act as a de facto market maker by placing electronic orders on both sides of the market simultaneously.

equitable in light of the differing roles such participants play on the Exchange and the attendant costs, benefits, and obligations.

The Exchange believes the proposed change to increase fees as high as \$.28 per contract for lower volume Professional Customer and Broker-Dealer participants is not unfairly discriminatory as the change will apply to all Professional Customers and Broker-Dealers equally. Further, Professional Customers and Broker-Dealers are free to change the manner in which they access the Exchange. A Professional Customer may, by sending fewer than 390 orders per day across the industry, begin participating as a Customer and avoid incurring any transaction fees. Additionally Professional Customers may elect to register as a Broker-Dealer and, once registered as a Broker-Dealer, may apply to become Market Makers to transact on a proprietary basis as Market Makers or become ATP Holders to transact on the Exchange as a Firm. In light of the ability to access the Exchange in a variety of ways, each of which is priced differently, Professional Customers, Broker-Dealers and other participants may access the Exchange in a manner that makes the most economic sense for them.

The Exchange believes that the proposed change to establish volume-based tiers for Professional Customers and Broker-Dealers that transact electronically is reasonable, equitable, and not unfairly discriminatory. As noted previously, they have lower aggregate fees when compared to, for example, the ATP fees incurred by a NYSE Amex Market Maker to quote the entire universe of names traded on the Exchange. Further, the establishment of the tiers will enable Professional Customers and Broker-Dealers that transact in sufficient volumes to obtain a lower per contract rate on all of their electronic volumes in a given month. This is reasonable and equitable given that a higher volume

of marketable orders, which these volume tiers will encourage, is beneficial to other Exchange participants due to the increased opportunity to trade. The Exchange believes the proposed change to adopt volume-based tiers for Professional Customers and Broker-Dealers that transact electronically is not unfairly discriminatory because the change will apply to all participants in those categories equally.

The Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they determine that such venues offer more favorable trading conditions and rates.

Finally, the Exchange believes that the amendment of the “Broker Dealer Manual” and “Professional Customer Manual” fees in the Fee Schedule is equitable and reasonable because it would result in increased clarity in the Fee Schedule regarding such fees.

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

The foregoing rule change is effective upon filing pursuant to Section 19(b)(3)(A)<sup>16</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>17</sup> thereunder, because it establishes a due, fee, or other charge imposed by NYSE MKT.

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.

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 e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2012-17 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.

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<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

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

All submissions should refer to File Number SR-NYSEMKT-2012-17. 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, D.C. 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 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-2012-17 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>18</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).