

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68381; File No. SR-NYSEMKT-2012-77)

December 7, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Proposing to Modify the NYSE Amex Options Fee Schedule Regarding the Manner in which Funds from Marketing Charges Are Controlled

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 November 30, 2012, 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 the Substance of the Proposed Rule Change

The Exchange proposes to modify the NYSE Amex Options Fee Schedule with respect to the manner in which funds from marketing charges are controlled. 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.

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

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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.

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 modify the NYSE Amex Options Fee Schedule with respect to the manner in which funds from marketing charges are controlled.<sup>4</sup>

The Exchange currently imposes a marketing charge against a Market Maker that trades against an electronic customer order.<sup>5</sup> Currently, the pool of monies resulting from the collection of marketing charges on electronic non-Directed Order flow is controlled by the Specialist or the e-Specialist with superior volume performance over the previous quarter for distribution by the Exchange at the direction of such Specialist or e-Specialist to eligible payment accepting firms.<sup>6</sup> The pool of monies resulting from collection of marketing charges on electronic Directed Order flow is controlled by the NYSE Amex Options Market Maker to which the order was directed and

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<sup>4</sup> The Exchange is not proposing any changes to the current rates of the marketing charges. The marketing charge is currently \$0.65 per contract side on transactions in non Penny Pilot issues where Market Makers trade against electronic customer orders or \$0.25 per contract side on transactions in Penny Pilot issues where Market Makers trade against electronic customer orders.

<sup>5</sup> See endnote 9 in the Fee Schedule. Broker Dealer and Professional Customer electronic orders that trade contra to a Market Maker do not result in the collection of marketing charges, nor do executed Qualified Contingent Cross orders.

<sup>6</sup> See endnote 10 in the Fee Schedule. In making this determination, the Exchange, on a class by class basis, evaluates Specialist and e-Specialist performance based on the number of electronic contracts executed at the Exchange per class. The Specialist/e-Specialist with the best volume performance will control the pool of marketing charges collected on electronic non-Directed Order flow for these issues for the following quarter.

distributed by the Exchange at the direction of such NYSE Amex Options Market Maker to payment accepting firms.<sup>7</sup>

Notwithstanding the description above, an ATP Holder that submits an Electronic Complex Order to the Exchange may designate an NYSE Amex Options Market Maker to control the pool of monies resulting from the collection of marketing charges related thereto, regardless of whether such Market Maker is assigned to the particular class, and such funds are distributed by the Exchange at the direction of such designated NYSE Amex Options Market Maker to payment accepting firms.<sup>8</sup> The Exchange proposes to expand this method of control of marketing charge funds, such that an ATP Holder that submits any electronic non-Directed Order to the Exchange may designate an NYSE Amex Options Market Maker to control the pool of monies resulting from the collection of marketing charges related thereto, regardless of whether such Market Maker is assigned to the particular class, and such funds will be distributed by the Exchange at the direction of such designated NYSE Amex Options Market Maker to payment accepting firms. As is currently the case for Electronic Complex Orders, if an ATP Holder submits an electronic non-Directed Order to the Exchange without designating an NYSE Amex Options Market Maker, the pool of monies resulting from the collection of such marketing charges will be distributed in the same manner as is currently applicable for non-Directed Order flow, as described above.

The Exchange recently learned that other option exchanges allow their market participants to have access to those exchanges' marketing fee funds, regardless of whether the

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<sup>7</sup> See endnote 10 in the Fee Schedule.

<sup>8</sup> See endnote 10 in the Fee Schedule. If an ATP Holder submits an Electronic Complex Order to the Exchange without designating an NYSE Amex Options Market Maker, the pool of monies resulting from the collection of such marketing charges is distributed in the same manner as non-Directed Order flow, as described above.

market participant has an appointment in the class in which the order is received and executed.<sup>9</sup> As such, the Exchange has decided to permit the same on its market for all electronic orders.

The Exchange believes that permitting a Market Maker to control marketing charge funds generated from all electronic non-Directed Orders, regardless of whether the order is for a class in which the Market Maker is assigned, may allow Market Makers to encourage greater order flow to be sent to the Exchange. A Market Maker could be able to amass a greater pool of funds with which to use to incent order flow providers to send order flow to the Exchange. The Exchange believes that this increased order flow would benefit all market participants on the Exchange. Indeed, a Market Maker would likely often not even be the direct beneficiary of the increased order flow, since the Market Maker would not trade with that order (as the Market Maker is not assigned to that class). The market participants who can trade with that order would be the direct beneficiaries. Allowing a Market Maker to control marketing charge funds generated from an electronic non-Directed Order, regardless of whether the order is for a class in which the Market Maker is assigned, would provide a Market Maker with an incentive to encourage the routing of order flow into classes in which the Market Maker otherwise would not (i.e., classes in which the Market Maker is not assigned or quoting). Further, this will also provide Market Makers with more flexibility to change their assignments, as they will not have

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<sup>9</sup> The Exchange understands that this is currently permitted on the Chicago Board Options Exchange (“CBOE”), the International Securities Exchange (“ISE”) and NASDAQ OMX PHLX (“PHLX”). See (i) footnote 6 in the CBOE Fee Schedule; (ii) the section in the PHLX Pricing Schedule pertaining to Payment for Order Flow Fees; and (iii) Section IV(D) of the ISE Fee Schedule, respectively, none of which contain requirements that a market maker (or similar market participant) have an appointment in the class in which an electronic order is received and executed in order to have access to the marketing charge funds generated from that order. See also Securities Exchange Act Release No. 68131 (November 1, 2012), 77 FR 67032 (November 8, 2012) (SR-CBOE-2012-101).

to be concerned with whether or not they have made arrangements to pay for order flow in a specific class prior to changing assignments.

Therefore, the Exchange proposes that an ATP Holder that submits any electronic non-Directed Order to the Exchange may designate an NYSE Amex Options Market Maker to control the pool of monies resulting from the collection of marketing charges related thereto, regardless of whether such Market Maker is assigned to the particular class, and such funds will be distributed by the Exchange at the direction of such designated NYSE Amex Options Market Maker to payment accepting firms. The Exchange proposes to amend endnote 10 in the Fee Schedule, as necessary, to reflect this proposed change. The purpose of this proposed change is to encourage the direction of increased order flow to the Exchange, to allow Market Makers more flexibility to change classes to which they are appointed, and to place the Exchange on even competitive footing with other option exchanges.

The Exchange notes that the proposed change is not otherwise intended to address any other issues surrounding marketing charges and that the Exchange is not aware of any problems that ATP Holders, Market Makers or any other market participants on the Exchange would have in complying with the proposed change. The Exchange proposes to implement these changes on December 1, 2012.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>10</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>11</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using

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

<sup>11</sup> 15 U.S.C. 78f(b)(4).

its facilities. The Exchange also believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>12</sup> 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 proposed change is reasonable because it will allow Market Makers greater access to marketing charge funds. In this regard, the Exchange believes that permitting a Market Maker to control marketing charge funds generated from all electronic non-Directed Orders, regardless of whether the order is for a class in which the Market Maker is assigned, may allow Market Makers to encourage greater order flow to be sent to the Exchange. A Market Maker could be able to amass a greater pool of funds with which to use to incent order flow providers to send order flow to the Exchange. This increased order flow would benefit all market participants on the Exchange. Indeed, a Market Maker would likely often not even be the direct beneficiary of the increased order flow, since the Market Maker would not trade with that order (as the Market Maker is not assigned to that class). The market participants who can trade with that order would be the direct beneficiaries. Allowing a Market Maker to control marketing charge funds generated from an electronic non-Directed Order, regardless of whether the order is for a class in which the Market Maker is assigned, would provide a Market Maker with an incentive to encourage the routing of order flow into classes in which the Market Maker

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<sup>12</sup> 15 U.S.C. 78f(b)(5).

otherwise would not (i.e., classes in which the Market Maker is not assigned or quoting). Further, this will also provide Market Makers with more flexibility to change their assignments, as they will not have to be concerned with whether or not they have made arrangements to pay for order flow in a specific class prior to changing assignments.

The Exchange also believes that the proposal is reasonable because other option exchanges allow their market participants to have access to and control those exchanges' marketing fee funds, regardless of whether the market participant has an appointment in the class in which the order is received and executed.<sup>13</sup> As such, the Exchange has decided to permit the same on its market.

The Exchange believes that the proposed change is equitable and not unfairly discriminatory because it is designed to allow Market Makers to encourage greater order flow to be sent to the Exchange. A Market Maker could be able to amass a greater pool of funds with which to use to incent order flow providers to send order flow to the Exchange. This increased order flow would benefit all market participants on the Exchange. Further, allowing a Market Maker to control marketing charge funds generated from an electronic non-Directed Order, regardless of whether the order is for a class in which the Market Maker is assigned, would provide a Market Maker with an incentive to encourage the routing of order flow into classes in which the Market Maker otherwise would not (i.e., classes in which the Market Maker is not assigned or quoting).

Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with

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<sup>13</sup> See supra note 9.

other exchanges. For the reasons described above, the Exchange believes that the proposed rule change reflects this competitive environment.

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>14</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>15</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

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<sup>14</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>15</sup> 17 CFR 240.19b-4(f)(2).

- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2012-77 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-NYSEMKT-2012-77. 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 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 offices of NYSE. 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-2012-77, 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>16</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).