

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-67634; File No. SR-NYSEMKT-2012-33)

August 9, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Implementing Changes to the NYSE Amex Options Fee Schedule Relating to the Monthly Cost for an Amex Trading Permit and Monthly Fees Relating to Trading in Premium Products

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 August 1, 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 Substance of the Proposed Rule Change

The Exchange proposes to amend the NYSE Amex Options Fee Schedule (“Fee Schedule”) to (i) change the monthly cost for an Amex Trading Permit (“ATP”), and (ii) introduce a group of 10 issues, to be known as Premium Products, that will carry a monthly fee for certain NYSE Amex Options Market Makers that trade them. 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

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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

NYSE MKT proposes to amend the Fee Schedule to (i) change the monthly cost for an ATP, and (ii) introduce a group of 10 issues, to be known as Premium Products, that will carry a monthly fee for certain NYSE Amex Options Market Makers that trade them.

Specifically, the Exchange proposes to amend the monthly cost for ATPs that are required by an NYSE Amex Options Market Maker in creating their appointment for those options for which they want to submit electronic quotations to the Exchange. Presently, each ATP that a NYSE Amex Options Market Maker has during a month carries a charge of \$5,000 per month. The Exchange will adopt a sliding scale for ATPs as follows:

1<sup>st</sup> ATP = \$8,000

2<sup>nd</sup> ATP = \$6,000

3<sup>rd</sup> ATP = \$5,000

4<sup>th</sup> ATP = \$4,000

5<sup>th</sup> ATP = \$3,000

For additional ATPs beyond five, the monthly fee will be \$2,000 for each ATP.

A Floor Market Maker<sup>4</sup> will be permitted to purchase up to two ATPs at a lower rate of

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<sup>4</sup> A Floor Market Maker is a registered Market Maker who makes transactions as a dealer-specialist while on the Floor of the Exchange and provides quotations (A) manually, by

\$5,000 for each such ATP (i.e., lower than the \$8,000 or \$6,000 monthly rate for the first and second ATP, respectively, set forth above) if certain requirements are met. Specifically, the lower fees will only be available if the Floor Market Maker has no more than two ATPs in any month and transacts at least 75% of its Market Maker volume manually, by public outcry (excluding Qualified Contingent Cross and Strategy Executions). Such a Floor Market Maker may continue to submit quotes electronically through an auto-quoting device, subject to the requirement to execute at least 75% of contract volume via public outcry.

Concurrent with this change, the Exchange will introduce a list of 10 Premium Products that will carry a monthly fee for any NYSE Amex Options Market Maker who transacts in them, except those Floor Market Makers subject to the lower ATP fees previously described. The proposed fee is \$1,000 per product traded with a monthly cap of \$7,000. The 10 Premium Products are SPY, AAPL, IWM, QQQ, BAC, EEM, GLD, JPM, XLF, and VXX. Any change to the list of Premium Products would be done through a fee filing.

The proposed changes will be operative on August 1, 2012.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the provisions of Section 6(b)<sup>5</sup> of the Act, in general, and Section 6(b)(4)<sup>6</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.

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public outcry, and (B) electronically through an auto-quoting device. See Rule 900.2NY(29).

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

<sup>6</sup> 15 U.S.C. 78f(b)(4).

The proposed changes in NYSE Amex Options Market Maker ATP fees from a fixed fee of \$5,000 per month per permit to a sliding scale that ranges from \$8,000 per month for the first ATP to \$2,000 per month for each additional ATP beyond five ATPs is reasonable, equitable, and not unfairly discriminatory for the following reasons. First, the proposed change is both reasonable and equitable when viewed in light of the cost for a market maker on at least two other exchanges to obtain a sufficient number of trading permits or rights to quote a similar number of names. For example, on the International Securities Exchange (“ISE”), a Competitive Market Maker (“CMM”) is required to have nine CMM Trading Rights in order to quote all issues on the ISE.<sup>7</sup> CMM Trading Rights on the ISE are fixed in terms of the number that are available and must be bought or leased from someone who possesses them. The last sale for a CMM Trading Right on the ISE was for \$1,550,000 on November 30, 2009.<sup>8</sup> As of July 17, 2012, there appeared to be a total of seven CMM Trading Rights available for sale or lease, which are two fewer than the number required to quote all issues on the ISE.<sup>9</sup> The Exchange estimates that the monthly lease cost is somewhere in the range of \$7,000 to \$11,000 per month.<sup>10</sup> Assuming the best-case scenario of being able to obtain a lease at the most favorable price for each of the nine CMM Trading Rights needed to quote every name on ISE, the Exchange estimates that it would cost a market maker approximately \$63,000 per month in rights

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<sup>7</sup> See ISE Rule 802(c) and <http://www.ise.com/WebForm/viewPage.aspx?categoryId=563>.

<sup>8</sup> See Secondary Market Sales after May 1, 2002, available at <http://www.ise.com/WebForm/viewPage.aspx?categoryId=222>.

<sup>9</sup> See <http://www.ise.com/WebForm/viewPage.aspx?categoryId=563>.

<sup>10</sup> Based on the last reported sale of \$1,550,000, if one uses five-year straight-line depreciation, the monthly cost of a single CMM Trading Right is \$25,833. In light of this, coupled with decreased volumes in the industry, the Exchange believes that a lease rate of between \$7,000 and \$11,000 per month per CMM Trading Right is a reasonable estimate and has confirmed that estimate informally with market participants.

fees. By comparison, under the proposal, a NYSE Amex Options Market Maker will pay \$23,000 per month in rights fees to quote the entire universe of names on the Exchange.

A further comparison may be made with the Chicago Board Options Exchange (“CBOE”) and the trading permit costs for a market maker to create an assignment there. CBOE has a sliding scale for Trading Permit Holders (“TPHs”) who are acting as market makers. The sliding scale is \$5,500 per month for permits one to 10, \$4,000 per month for permits 11 to 22 [sic], and \$2,500 for permits 21 and higher. The discounted permit rates of \$4,000 and \$2,500 are only available to TPHs who commit to a full year of that number of permits. In configuring an appointment on CBOE, a market maker incurs an appointment cost for each option in its appointment based on various tiers.<sup>11</sup> The appointment cost can be calculated using an “appointment calculator” provided to TPHs.<sup>12</sup> The Exchange used the appointment calculator dated July 10, 2012 to calculate the cost to construct a market maker appointment consisting of all 2,196 options traded on the Exchange as of June 30, 2012. The result shows that a total of 28 trading permits would be required to create a market maker appointment on CBOE that consisted of all options traded on the Exchange.<sup>13</sup> Assuming the best-case scenario in which a market maker committed to a full year of utilizing 28 permits, a market maker on CBOE would pay \$115,000 per month in permit costs or \$92,000 more per month than an NYSE Amex Options Market Maker would pay under the proposal.

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<sup>11</sup> See CBOE Rule 8.3.

<sup>12</sup> The appointment calculator is available at <https://www.cboe.org/publish/SeatCalculator/SeatCalcUpdated071012.xlt>.

<sup>13</sup> Of the 2,196 options traded on the Exchange as of June 30, 2012, 2,000 were trading on the CBOE, and it would require 28 TPHs to create an appointment in those names.

The Exchange further notes that by virtue of the limited number of CMM Trading Rights available for sale or lease on ISE and the Class Quoting Limit (“CQL”)<sup>14</sup> on CBOE, the barriers to entry on both exchanges for a market maker are quite high in that it may not be possible to create a market maker appointment of one’s choosing due to either a lack of available CMM Trading Rights on ISE or a CQL on CBOE that has been reached. Under the Exchange’s proposal, no such artificial barrier to entry will be created, and coupled with the relatively lower monthly cost to acquire ATPs, the proposal is both reasonable and equitable.

A second aspect of the proposed change in the monthly ATP cost that needs to be considered is that while a total of four ATPs are required under the proposal to quote all options on the Exchange, in practice some participants have more than the maximum number of ATPs required. Typically this is done for accounting or risk management purposes within an ATP Holder’s organization. Under the proposal, the fifth ATP is reduced in cost from \$5,000 per month to \$3,000 per month, and ATPs beyond the fifth ATP are reduced in cost from \$5,000 per month to \$2,000 per month. This is both reasonable and equitable given that acquiring additional ATPs beyond the four required to quote all options on the Exchange is likely to be for purely accounting or risk management purposes. As this aspect of the proposal applies to all NYSE Amex Options Market Maker ATPs equally, it is not unfairly discriminatory.

The Exchange’s proposal to adopt lower fees for certain Floor Market Makers who purchase an ATP is reasonable, equitable, and not unfairly discriminatory for the following reasons. First, the Exchange believes that open or public outcry markets serve an important role in the price discovery process that benefits all participants on the Exchange and in the marketplace. Presently, there are 41 entities that have 109 market making ATPs on the

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<sup>14</sup> See CBOE Rule 8.3A.

Exchange, ranging from one ATP to 10 ATPs per entity. Of these 41 entities, 10 have Floor Market Makers, with six of the 10 having one Floor Market Maker each. In light of its desire to foster the price discovery process via public outcry markets, the Exchange believes that it is reasonable and equitable to establish a slightly discounted ATP fee for Floor Market Makers, which will be \$5,000 per month for each ATP, with a maximum of two such ATPs (or \$10,000 in that case). By contrast under the proposal, an NYSE Amex Options Market Maker will pay \$8,000 for the first ATP and \$6,000 for the second ATP, for a total of \$14,000. To ensure the Floor Market Maker ATP is being used to foster price discovery in public outcry markets, the Exchange has proposed to limit the availability of the lower fees to those Floor Market Makers who conduct at least 75% of their contract volume manually, by public outcry, and who do not utilize more than two ATPs for market making in a given month. The latter restriction is designed to encourage participation in public outcry from smaller broker-dealers looking to begin market making, which will encourage competition. The proposal is not unfairly discriminatory as it is available to any NYSE Amex Options Market Maker who wishes to contribute to public outcry markets such that at least 75% of its contract volumes are executed in public outcry. Those NYSE Amex Options Market Makers who have no desire to engage in public outcry trading are not being disadvantaged, as public outcry trading cannot take place at prices that are inferior to the electronic quotations submitted by an NYSE Amex Options Market Maker.

The Exchange's proposal to adopt a Premium Product Issues List and the associated monthly NYSE Amex Options Market Maker Fee of \$1,000 per issue with a \$7,000 per month cap is reasonable, equitable, and not unfairly discriminatory for the following reasons. The Exchange does not limit the number of participants who may act as market makers, either

electronically or in public outcry. This is in direct contrast to, for example, the ISE and CBOE, which have a limited number of CMM Trading Rights and a CQL, respectively. The result is that the Exchange has more than sufficient liquidity in the most active options on the Exchange as evidenced by its market share in those options. By adopting a Premium Product Issues List, which is comprised of many of the most active issues on the Exchange, and a corresponding monthly fee applicable to NYSE Amex Options Market Makers who transact in any of those names, the Exchange intends to encourage meaningful market maker participation in these names.

For example, presently it would be permissible within Exchange rules for an NYSE Amex Options Market Maker to send in a quote that is \$1 bid for one contract, offered at \$6 for one contract in the at-the-money series in SPY. Such a quote, while permitted under Exchange rules, has an extremely low probability of ever being executed against, although if it were to happen, it quite likely would be viewed as somewhat of a “windfall” from the market maker’s profitability perspective. Such a quote, however, is also required to be processed by the Exchange, despite the low probability of the quote ever being executed against. By adopting the Premium Product Issues List and the associated monthly fee applicable to NYSE Amex Options Market Makers who transact in a Premium Product issue, “less meaningful” quoting activity as described above should become less common given the economics of the proposal. Furthermore, the notion of “premium” or “select” pricing for a subset of issues traded on an Exchange is not novel. For example, both the ISE and Nasdaq OMX PHLX exchanges feature “select” symbol lists on their respective fee schedules.<sup>15</sup>

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<sup>15</sup> See ISE Fee Schedule dated July 6, 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), and the Nasdaq OMX PHLX Fee Schedule dated July 2, 2012, available at



The Premium Product Issues List will apply to all NYSE Amex Options Market Makers equally, except for those market makers who are eligible for the newly proposed reduced Floor Market Maker ATP fees, one of the requirements of which is that they achieve 75% or more of their volumes in public outcry. Excluding market makers who are subject to these lower fees is in keeping with the Exchange's stated goals of continuing to foster price discovery through public outcry while at the same time reducing the instances of "less meaningful" electronic quotes in the more liquid names that comprise the Premium Product Issues List. For these reasons, the Exchange believes that the proposal is reasonable, equitable, and not unfairly discriminatory.

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 the 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

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<http://www.nasdaqtrader.com/Micro.aspx?id=PHLXPricing>.

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

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

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-2012-33 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-2012-33. 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 Section, 100 F Street, NE, Washington, DC 20549-1090 on official business days between the hours of 10:00

a.m. and 3:00 p.m. Copies of the filing will also be available for inspection and copying at the Exchange's principal office and on its Internet website at [www.nyse.com](http://www.nyse.com). 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-2012-33 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).