

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68183; File No. SR-NYSEMKT-2012-54)

November 8, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Increase the Options Regulatory Fee and to Revise the Circumstances Under Which NYSE Amex Options LLC Will Collect the Options Regulatory Fee

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 November 7, 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 amend the NYSE Amex Options Fee Schedule to increase its Options Regulatory Fee (“ORF”) and to revise the circumstances under which the Exchange will collect the ORF. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to increase its ORF and to revise the circumstances under which the Exchange will collect the ORF.

Background

The ORF, which is currently \$0.004 per contract, is assessed by the Exchange on each ATP Holder for all options transactions executed or cleared by the ATP Holder that are cleared by The Options Clearing Corporation ("OCC") in the customer range, i.e., transactions that clear in the customer account of the ATP Holder's clearing firm at OCC, regardless of the marketplace of execution.⁴ In other words, the Exchange imposes the ORF on all customer-range transactions executed by an ATP Holder even if the transactions do not take place on the Exchange. In the case where an ATP Holder executes a transaction and a different ATP Holder clears the transaction, the ORF is assessed to the ATP Holder who executes the transaction. In the case where a non-ATP Holder executes a transaction and an ATP Holder clears the transaction, the ORF is assessed to the ATP Holder who clears the transaction.

The dues and fees paid by ATP Holders go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation. In particular, the ORF is designed to recover a material portion of the costs to the Exchange of the supervision and regulation of ATP

⁴ See Securities Exchange Act Release No. 64400 (May 4, 2011), 76 FR 27118 (May 10, 2011) (SR-NYSEAmex-2011-27).

Holders, including performing routine surveillance and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The Exchange monitors the amount of revenue collected from the ORF so that, in combination with other regulatory fees and fines, it does not exceed regulatory costs. The ORF is collected indirectly from ATP Holders through their clearing firms by OCC on behalf of the Exchange.

Proposed Change

The Exchange proposes to (1) increase the ORF from \$0.004 per contract to \$0.005 per contract in order to recoup increased regulatory expenses while also monitoring the revenue collected so that the ORF will not exceed such expenses, and (2) revise the circumstances in which the Exchange will collect the ORF from ATP Holders. Transaction volumes across the industry have declined, thereby reducing ORF revenue, but the Exchange's regulatory expenses have not declined. The Exchange believes that revenue generated from the proposed ORF, when combined with all of the Exchange's other regulatory fees, will cover a material portion, but not all, of the Exchange's regulatory costs. The Exchange will continue to monitor the amount of revenue collected from the ORF so that, in combination with the Exchange's other regulatory fees and fines, it does not exceed regulatory costs. If the Exchange determines that regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a proposed rule change to the Commission.⁵

Additionally, the Exchange proposes to revise the manner in which it assesses the ORF. Currently, upon becoming an ATP Holder, a participant immediately becomes liable for the ORF. In certain instances, particularly at the outset of becoming an ATP Holder, a participant

⁵ The Exchange notes that its regulatory responsibilities with respect to member compliance with options sales practice rules have been allocated to the Financial Industry Regulatory Authority, Inc. ("FINRA") under an SEC Rule 17d-2 agreement. The ORF is not designed to cover the cost of options sales practice regulation. See supra note 4.

may be registered with the Exchange prior to obtaining the requisite technological certification needed to act as a Floor Broker, Market Maker, Clearing Member or Order Flow Provider. The Exchange believes that it is not equitable to assess the ORF on an ATP Holder that, prior to initially satisfying certain technology requirements, is not capable of availing itself of the benefits of its status as an ATP Holder.⁶ The Exchange does not desire to assess the ORF on such ATP Holders until they have satisfied applicable technological requirements necessary to commence operations on the Exchange. The proposed change will have no effect on the assessment of fees for current ATP Holders that are fully certified to transact business on the Exchange, as described above. The Exchange notes that at least one other exchange has such a provision for assessing the options regulatory fee after satisfaction of applicable technology requirements.⁷

The Exchange notes that the proposed change is not otherwise intended to address any other issues surrounding the ORF and that the Exchange is not aware of any problems that ATP Holders 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”),⁸ in general, and furthers the objectives of

⁶ The Exchange anticipates that any delay in satisfying applicable technological requirements necessary to commence operations on the Exchange would be brief.

⁷ See Securities Exchange Act Release No. 62804 (August 31, 2010), 75 FR 54688 (September 8, 2010) (SR-BX-2010-060).

⁸ 15 U.S.C. 78f(b).

Section 6(b)(4) of the Act,⁹ 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 its facilities.

The Exchange believes that the proposal is reasonable because the Exchange's revenue from the collection of the ORF has declined due to a decrease in industry volume, but the Exchange's regulatory expenses have not declined. As described above, through the ORF the Exchange seeks to recover the costs of supervising and regulating ATP Holders, including performing routine surveillance and investigations, as well as policy, rulemaking, interpretive and enforcement activities. The proposed ORF increase will help to maintain the total revenue collected to offset these regulatory expenses, but would not exceed those regulatory costs. The Exchange further notes that another options exchange has raised its options regulatory fee to \$0.0065 per contract, so the Exchange's proposed ORF of \$0.005 per contract will still be below that level.¹⁰

The Exchange believes that the proposed ORF increase is equitable and not unfairly discriminatory because it is objectively allocated to all ATP Holders on all of their transactions that clear in the customer range at OCC. Moreover, the Exchange believes that the ORF is equitable and not unfairly discriminatory because it results in fees being charged to those ATP Holders that require more Exchange regulatory services based on the amount of customer options business they conduct. In this regard, regulating customer trading activity is more labor intensive and requires greater expenditure of human and technical resources than regulating non-customer trading activity. Surveillance and regulation of non-customer trading activity generally

⁹ 15 U.S.C. 78f(b)(4).

¹⁰ See Securities Exchange Act Release No. 67597 (August 6, 2012), 77 FR 47887 (August 10, 2012) (SR-CBOE-2012-065).

tends to be more automated and less labor intensive. As a result, the costs associated with administering the customer component of the Exchange's overall regulatory program are anticipated to be higher than the costs associated with administering the non-customer component of its regulatory program. As such, the Exchange proposes to continue to assess the ORF to those ATP Holders that will require more Exchange regulatory services based on the amount of customer options business they conduct.¹¹

The Exchange believes that the ORF will continue to be equitable and not unfairly discriminatory because the fee increase is objectively allocated to all ATP Holders. The only ATP Holders that would not pay the fee will be those that have not yet achieved the technical certifications that are needed to actually begin acting as a Floor Broker, Market Maker, Clearing Member or Order Flow Provider on the Exchange. The Exchange believes that this exception is reasonable, equitable and not unfairly discriminatory. Not assessing the ORF on an ATP Holder that is not yet able to act in the capacity for which it is attempting to obtain certification is reasonable because the ATP Holder is not yet able to generate the revenue associated with serving in that capacity. In this respect, it is equitable and not unfairly discriminatory to not begin charging the ORF until the ATP Holder can generate the revenue to pay the fee. It is also equitable and not unfairly discriminatory because it will apply in an objective manner to all similarly situated ATP Holders.

As noted above, the Exchange will continue to monitor the amount of revenue collected from the ORF so that, in combination with its other regulatory fees and fines, it does not exceed

¹¹ The ORF is not charged for orders that clear in categories other than the customer range (e.g., market maker orders) because ATP Holders incur the costs of acquiring trading permits and through these permits are charged transaction fees, dues and other fees that go into the general funds of the Exchange, a portion of which is used to help pay the costs of regulation.

regulatory costs. If the Exchange determines that regulatory revenues exceed regulatory costs, the Exchange will adjust the ORF by submitting a proposed rule change to the Commission.

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)¹² of the Act and subparagraph (f)(2) of Rule 19b-4¹³ 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 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

¹² 15 U.S.C. 78s(b)(3)(A).

¹³ 17 CFR 240.19b-4(f)(2).

- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2012-54 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-2012-54. 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 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-2012-54, 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.¹⁴

Kevin M. O'Neill
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).