

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68036; File No. SR-NYSEMKT-2012-50)

October 11, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE Amex Options Fee Schedule Relating to Criteria for Rebates to Order Flow Providers

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 September 28, 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 (the “Fee Schedule”) to establish criteria for Order Flow Providers (“OFPs”)<sup>4</sup> to earn rebates based on the average daily volume (“ADV”) of Customer<sup>5</sup> electronic equity and exchange-traded fund (“ETF”) contracts executed by an OFP on the Exchange. 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> 15 U.S.C. 78a.

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

<sup>4</sup> An OFP is any ATP Holder that submits, as agent, orders to the Exchange. See Rule 900.2NY(57).

<sup>5</sup> The term “Customer” means an individual or organization that is not a broker-dealer. See Rule 900.2NY(18).

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend the Fee Schedule to establish criteria for OFPs to earn rebates based on the ADV of Customer electronic equity and ETF contracts executed by an OFP on the Exchange. The Exchange proposes to implement these changes on October 1, 2012.

The Exchange proposes to establish a rebate for OFPs based on the ADV of Customer electronic equity and ETF contracts executed by an OFP on the Exchange (the “Tiers”) relative to the overall Total Industry Customer equity and ETF option ADV.<sup>6</sup> In order to be eligible for the rebate, certain criteria must be met. Once all of the criteria have been met, the highest rebate earned will apply to all eligible volume for the particular month for the particular OFP. The criteria will be detailed in new endnote 17 to the Fee Schedule.

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<sup>6</sup> Total Industry Customer equity and ETF option ADV would be that which is reported for the month by OCC in the month in which the rebates may apply. For example, October 2012 Total Industry Customer equity and ETF option ADV will be used in determining what, if any, rebate an OFP may be eligible for based on the Customer electronic equity and ETF option ADV it transacts on the Exchange in October 2012. Total Industry Customer equity and ETF option ADV is comprised of those equity and ETF option contracts that clear in the customer account type at OCC and does not include contracts that clear in either the firm or market maker account type at OCC or contracts overlying a security other than an equity and ETF security.

The first criterion is that an OFP must execute Customer electronic equity and ETF option volume on the Exchange that is equal to or greater than the percentage of Total Industry Customer equity and ETF option ADV shown in the table below (e.g., 2.7% of Total Industry Customer equity and ETF option ADV for the lowest tier). However, no rebate would be paid on Customer electronic equity and ETF option volume that is less than 120,000 ADV; thus, in a month where the Total Industry Customer equity and ETF option ADV as a whole drops substantially, it is possible that no rebates will be paid.

Volume from executions of Qualified Contingent Cross (“QCC”) Orders,<sup>7</sup> Strategy Executions<sup>8</sup> and orders that are routed to one or more exchanges in connection with the Options Order Protection and Locked/Crossed Market Plan referenced in Rule 991NY (“routed orders” for purposes of this proposed rebate) would not count toward either the 120,000 Customer electronic equity and ETF option ADV minimum or any of the proposed Customer electronic equity and ETF option ADV Tiers. Volume from executions of Customer Electronic Complex Orders would not count toward the 120,000 Customer electronic equity and ETF option ADV minimum, but would count toward any of the Customer electronic equity and ETF option ADV Tiers. Volume attributable to the execution of QCC Orders, Strategy Executions, Customer Electronic Complex Orders or routed orders would not receive a rebate.<sup>9</sup>

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<sup>7</sup> A QCC Order is comprised of an order to buy or sell at least 1,000 contracts that is identified as being part of a qualified contingent trade, as that term is defined in Commentary .01 to Rule 900.3NY, coupled with a contra-side order to buy or sell an equal number of contracts. See Rule 900.3NY(y).

<sup>8</sup> Strategy Executions are defined in endnote 8 of the Fee Schedule.

<sup>9</sup> The Exchange notes that both QCC Orders and Customer Electronic Complex Orders are currently eligible to earn rebates and that Strategy Executions are capped on both a per trade and a monthly basis. Additionally, the Exchange notes that in complying with the requirements of the Options Order Protection and Locked/Crossed Market Plan referenced in Rule 991NY, the Exchange incurs routing fees and clearing charges when it

The second criterion that must be met in order for an OFP to qualify for the rebate is that an OFP must execute an ADV of at least 200,000 Customer electronic equity and ETF contracts that specifically result from posting orders to the Exchange’s Consolidated Order Book (also known as “making” liquidity). In calculating the 200,000 Customer electronic equity and ETF option ADV posting requirement, the Exchange would exclude volume attributable to QCC Orders, Strategy Executions, Electronic Customer Complex Orders and routed orders.

The proposed volume tiers and the corresponding per contract rebate would be as follows:

<b>Customer Electronic Equity and ETF Option ADV Tiers</b>	<b>Rebate Per Contract For All Customer Electronic Equity and ETF Option Volume Over 120,000 ADV (excludes volume from QCC Orders, Strategy Executions, Complex Orders, and routed orders)</b>
at least 2.7% of Total Industry Customer equity and ETF option ADV	\$0.07
at least 3.6% of Total Industry Customer equity and ETF option ADV	\$0.08
at least 4.4% of Total Industry Customer equity and ETF option ADV	\$0.09

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routes Customer orders to exchanges that in turn do not charge Customer fees, which the Exchange does not pass along to OFPs.

## 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 its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The proposal to establish a tiered rebate for OFPs that execute the requisite ADV of Customer electronic equity and ETF contracts on the Exchange is reasonable because it is designed to attract additional Customer electronic equity and ETF volume to the Exchange, which would benefit all participants by offering greater price discovery, increased transparency and an increased opportunity to trade on the Exchange. Additionally, the Exchange believes that the proposed rebate is reasonable because it would incentivize OFPs to submit Customer electronic equity and ETF option orders to the Exchange and would result in a rebate that is reasonably related to an exchange’s market quality that is associated with higher volumes. The Exchange also believes that proposed thresholds for the tiers are reasonable because they will reward OFPs with a greater rebate when they bring a larger number of equity and ETF orders to the Exchange. Moreover, the Exchange believes that the proposed rebate is equitable and not unfairly discriminatory because it will be available to all OFPs that execute Customer electronic equity and ETF option orders on the Exchange on an equal and non-discriminatory basis. The Exchange also believes that the proposed rebate is not new or novel. Instead, the Exchange understands that at least two other option exchanges currently offer a rebate specifically for

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

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

Customer volume.<sup>12</sup> Further, the amount of the proposed per contract rebate is within the range of similar rebates on other exchanges.<sup>13</sup>

The Exchange believes that the proposal to exclude volume attributable to QCC Orders, Strategy Executions, Customer Electronic Complex Orders and routed orders from receiving the rebate is reasonable, equitable and not unfairly discriminatory for the following reasons. First, because all OFPs are treated equally in this regard, it is not unfairly discriminatory. Second, it is reasonable and equitable to exclude these volumes from receiving the rebate because QCC Orders and Customer Electronic Complex Orders already are eligible to receive separate rebates.<sup>14</sup> It is reasonable and equitable to exclude Strategy Executions because these transactions are already offered at a discounted rate of \$750 per day and further capped at \$25,000 per month per initiating firm. Additionally, it is reasonable and equitable to exclude routed orders because the Exchange often incurs a charge for routing Customer orders to away markets. Accordingly, excluding these volumes is both reasonable and equitable.

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<sup>12</sup> For example, the Chicago Board Options Exchange (“CBOE”) has a Volume Incentive Program that pays order flow providers on CBOE a tiered rebate, from \$0.00 to \$0.20 per contract, based on the number of Customer contracts per day that execute electronically on the exchange. This is described on page 3 of the CBOE fee schedule dated September 18, 2012, available at <http://www.cboe.com/publish/feeschedule/CBOEFeeSchedule.pdf>. Additionally, NASDAQ OMX PHLX (“PHLX”) has a Customer Rebate Program that pays tiered rebates that range from \$0.00 to \$0.12 per contract, as described in the PHLX fee schedule amended September 4, 2012, available at <http://nasdaqomxphlx.cchwallstreet.com/NASDAQOMXPHLXTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F1&manual=%2Fnasdaqomxphlx%2Fphlx%2Fphlx%2Drulesbrd%2F>.

<sup>13</sup> See *id.*

<sup>14</sup> The Exchange makes a rebate available to Floor Brokers for the execution of QCC Orders as well as a rebate available to OFPs for the execution of Customer Electronic Complex Orders, as described in the Exchange’s Fee Schedule, dated September 1, 2012, available at [http://globalderivatives.nyx.com/sites/globalderivatives.nyx.com/files/nyse\\_amex\\_options\\_fee\\_schedule\\_09\\_01\\_12.pdf](http://globalderivatives.nyx.com/sites/globalderivatives.nyx.com/files/nyse_amex_options_fee_schedule_09_01_12.pdf).

The Exchange believes that the proposal to only make a rebate available for Customer electronic equity and ETF option ADV in excess of 120,000 contracts is reasonable and equitable because it would reasonably ensure that the Exchange will derive sufficient revenue to continue to fund the rebates, for the benefit of all participants. Further this requirement is not unfairly discriminatory because it applies to all OFPs.

The Exchange believes that the requirement for an OFP to execute an ADV of at least 200,000 Customer electronic equity and ETF contracts as a result of posting orders to the Consolidated Book (i.e., “making” liquidity) to be eligible for the rebate is reasonable, equitable and not unfairly discriminatory for the following reasons. This provision is designed to encourage OFPs to send orders to the Exchange, which will contribute to the Exchange’s depth of book as well as to the top of book liquidity. Encouraging the posting of orders is both reasonable and equitable because it enhances transparency, price discovery and liquidity for all participants on the Exchange, benefiting all investors. As the requirement will apply to all OFPs equally, it is also not unfairly discriminatory.

For these reasons, the Exchange believes that the entire proposal is reasonable, equitable and not unfairly discriminatory. Finally, the Exchange notes that it operates in a highly competitive market in which market participants can readily favor competing venues if they deem fee levels at a particular venue to be excessive. In such an environment, the Exchange must continually review, and consider adjusting, its fees and credits to remain competitive with 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>15</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>16</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 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-2012-50 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>15</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>16</sup> 17 CFR 240.19b-4(f)(2).



All submissions should refer to File Number SR-NYSEMKT-2012-50. 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 20549-1090. Copies of the filing will also 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-2012-50 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>17</sup>

Kevin M. O'Neill  
Deputy Secretary

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