

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77370; File No. SR-NYSEMKT-2016-35]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Change Modifying the NYSE Amex Options Fee Schedule

March 15, 2016.

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 March 3, 2016, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 modify the NYSE Amex Options Fee Schedule (“Fee Schedule”). The Exchange proposes to implement the fee change effective March 3, 2016. The proposed change is available on the Exchange’s Web site 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 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 purpose of this filing is to add the definitions of “Appointed MM” and “Appointed OFP” to the Exchange’s Fee

Schedule, effective March 3, 2016, which would increase opportunities for firms to qualify for the Amex Customer Engagement (“ACE”) program (the “ACE Program” or “Program”).

Specifically, the Exchange proposes to allow NYSE Amex Options Market Makers to designate an Order Flow Provider (“OFP”) as its “Appointed OFP” and for an OFP to designate an NYSE Amex Options Market Maker as its “Appointed MM,” for purposes of sections I.D. and I.E. of the Fee Schedule.<sup>3</sup> ATP Holders would effectuate the designation by each sending an email to the Exchange.<sup>4</sup> The Exchange would view corresponding emails as acceptance of such an appointment and would only recognize one such designation for each party once every 12-months, which designation would remain in effect unless or until the Exchange receives an email from either party indicating that the appointment has been terminated.<sup>5</sup> The proposed new concepts would be applicable to, and included in, sections 1.D. and 1.E. of the Fee Schedule, as described below, and are designed to increase opportunities for firms to qualify for the ACE Program.<sup>6</sup>

Last year, the Exchange instituted a Prepayment Program that allows NYSE Amex Options Market Makers the option to commit to either a 1-year or 3-year term (the “1 Year Prepayment Program” or “3 Year Prepayment Program,” respectively).<sup>7</sup> In connection with these Prepayment Programs, the Exchange added the ACE Program (described below), which enables an NYSE Amex Options Market Maker (“Market Maker”) that elects to participate in either of the Prepayment Programs to qualify its Affiliated OFP to be eligible to receive the enhanced credit(s) under the ACE Program. Currently, an OFP is only eligible for the enhanced credits of section 1.E. by virtue of its affiliation (*i.e.*, minimum of

<sup>3</sup> See proposed Fee Schedule, Key Terms and Definitions.

<sup>4</sup> See proposed section 1.E. to Fee Schedule, Designating an Appointed OFP/Appointed MM. ATP Holders should direct their emails designating Appointed OFP/Appointed MMs to [optionsbilling@nyse.com](mailto:optionsbilling@nyse.com). See *id.*

<sup>5</sup> See *id.* The Commission notes that the proposed rule text specifies that the Exchange will recognize one such designation for each party, and that a party may make a designation not more than once every 12-months, which designation shall remain in effect unless or until the Exchange receives an email from either party indicating that the appointment has been terminated.

<sup>6</sup> See proposed Fee Schedule, sections 1.D. and 1.E.

<sup>7</sup> See Securities Exchange Act Release No. 74086 (January 16, 2015), 80 FR 3701 (January 16, 2015) [sic] (SR-NYSEMKT-2015-04). See also Fee Schedule, section 1.D., Prepayment Program.

70% common ownership) with a Market Maker in one of the Prepayment Programs.

Section I.E. of the Fee Schedule describes the ACE Program,<sup>8</sup> which features five tiers expressed as a percentage of total industry Customer equity and ETF option average daily volume (“ADV”).<sup>9</sup> OFPs receive per contract credits solely for Electronic Customer volume that the OFP, as agent, submits to the Exchange.<sup>10</sup> The ACE Program offers two methods for OFPs to receive credits:

1. By calculating, on a monthly basis, the average daily Customer contract volume an OFP executes Electronically on the Exchange as a percentage of total average daily industry Customer equity and ETF options volume;<sup>11</sup> or

2. By calculating, on a monthly basis, the average daily contract volume an OFP executes Electronically in all participant types (*i.e.*, Customer, Firm, Broker-Dealer, NYSE Amex Options Market Maker, Non-NYSE Amex Options Market Maker, and Professional Customer) on the Exchange, as a percentage of total average daily industry Customer equity and ETF option volume,<sup>12</sup> with the further requirement that a specified percentage of the minimum volume required to qualify for the Tier must be Customer volume.

Upon reaching a higher tier, an Affiliated OFP receives for all eligible Customer volume the per contract enhanced credit associated with the highest tier achieved, retroactive to the first contract traded each month, regardless of which of the two calculation methods the OFP qualifies under.<sup>13</sup>

<sup>8</sup> See Fee Schedule, section I.E, ACE Program.

<sup>9</sup> In calculating ADV, the Exchange utilizes monthly reports published by the OCC for equity options and ETF options that show cleared volume by account type. See OCC Monthly Statistics Reports, available here, <http://www.theocc.com/webapps/monthly-volume-reports> (including for equity options and ETF options volume, subtotaled by exchange, along with OCC total industry volume). The Exchange calculates the total OCC volume for equity and ETF options that clear in the Customer account type and divide this total by the number of trading days for that month (*i.e.*, any day the Exchange is open for business). For example, in a month having 21 trading days where there were 252,000,000 equity option and ETF option contracts that cleared in the Customer account type, the calculated ADV would be 12,000,000 (252,000,000/21 = 12,000,000).

<sup>10</sup> Electronic Customer volume is volume executed electronically through the Exchange System, on behalf of an individual or organization that is not a Broker-Dealer and who does not meet the definition of a Professional Customer.

<sup>11</sup> See *supra* n. 9.

<sup>12</sup> *Id.*

<sup>13</sup> In the event that an OFP is eligible for credits under both calculation methods, the OFP would benefit from whichever criterion results in the

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

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

The Exchange proposes to modify sections 1.D. (Prepayment Programs) and 1.E (ACE Program) to include the newly introduced concepts of an Appointed OFP and Appointed MM.<sup>14</sup> The proposal would be available to all Market Makers and OFPs. Specifically, the proposed changes would enable any Market Maker—not just those participating in a Prepayment Program—to qualify its Appointed OFP for credits under the ACE Program. In this regard, the proposed change would enable a Market Maker without an Affiliated OFP—or with an Affiliated OFP that doesn't meet the volume requirements for credits under the Program—to enter a relationship with an Appointed OFP. Similarly, as proposed, an OFP, by virtue of designating an Appointed MM, would be able to aggregate its own Customer volume with the activity of its Appointed MM, which would enhance the OFP's potential to qualify for additional credits in ACE.<sup>15</sup> Thus, the proposed changes would enable firms that are not currently eligible for the ACE Program to avail themselves of the Program as well as to assist firms that are currently eligible for the Program to potentially achieve a higher ACE tier, thus qualifying to higher credits. The Exchange believes these proposed changes would incent firms to direct their order flow to the Exchange to the benefit of all market participants. Further, the Exchange believes that the proposed changes would encourage market making firms to participate in one of the Exchange's Prepayment Programs, which would increase capital commitment and liquidity on the Exchange to the benefit of all market participants.

As proposed, the Exchange would only process one designation of an Appointed OFP and Appointed MM per year, which designation would remain in effect unless or until the parties informed the Exchange its

highest per contract credit for all the OFP's eligible ADV. In calculating an OFP's Electronic volume, certain volumes are excluded (e.g., QCC trades). See Fee Schedule, section I.E.

<sup>14</sup> The Exchange also proposes to make the non-substantive change of adding a period following reference to section I.C. See proposed Fee Schedule, section I.D. The Exchange also proposes to remove an errant period from item 2 in section 1.D. of the Fee Schedule. See *id.*

<sup>15</sup> An OFP that has both an Appointed MM and an Affiliated NYSE Amex Market Maker may only aggregate volumes with one of these two, not both. Specifically, the Exchange proposes to specify in section I.E. that “[i]n calculating an OFP's Electronic volume, the Exchange will include the activity of either (i) Affiliates of the OFP, such as when an OFP has an Affiliated NYSE Amex Options Market Making firm, or (ii) an Appointed MM of such OFP.”

termination.<sup>16</sup> The Exchange believes that this requirement would impose a measure of exclusivity and would enable both parties to rely upon each other's, and potentially increase, transaction volumes executed on the Exchange, which is beneficial to all Exchange participants.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,<sup>17</sup> in general, and furthers the objectives of sections 6(b)(4) and (5) of the Act,<sup>18</sup> in particular, because it provides for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its facilities and does not unfairly discriminate between customers, issuers, brokers or dealers.

The proposal is reasonable, equitable and not unfairly discriminatory for the following reasons. First, the proposal would be available to all Market Makers and OFPs and the decision to be designated as an “Appointed OFP” or “Appointed MM” is completely voluntary and ATP Holders may elect to accept this appointment or not. In addition, the proposed changes would enable firms that are not currently eligible for the ACE Program to avail themselves of the Program as well as to assist firms that are currently eligible for the Program to potentially achieve a higher ACE tier, thus qualifying to higher credits. The Exchange believes these proposed changes would incent firms to direct their order flow to the Exchange. Specifically, the proposed changes would enable any Market Maker—not just those participating in a Prepayment Program—to qualify its Appointed OFP for credits under the ACE Program. Moreover, the proposed change would allow any OFP, by virtue of designating an Appointed MM, to aggregate its own Customer volume with the activity of its Appointed MM, which would enhance the OFP's potential to qualify for additional credits under the ACE Program. The Exchange believes these proposed changes would incent Appointed OFPs and OFPs with an Appointed MM to direct their order flow to the Exchange, which increase in orders routed to the Exchange would benefit all market participants by expanding liquidity, providing more trading opportunities and tighter spreads, including those market participants that opt not to become an Appointed OFP and therefore may be

ineligible to earn the credits under the ACE Program.

Similarly, the proposal, which would permit the opportunity for both parties to rely upon each other's, and potentially increase, transaction volumes, are reasonable, equitable and not unfairly discriminatory because they may encourage market making firms to participate in one of the Exchange's Prepayment Programs, which potential increase in order flow, capital commitment and resulting liquidity on the Exchange would benefit all market participants by expanding liquidity, providing more trading opportunities and tighter spreads.

The proposal is also reasonable, equitable and not unfairly discriminatory because the Exchange would only process one designation of an Appointed OFP and Appointed MM per year, which requirement would impose a measure of exclusivity while allowing both parties to rely upon each other's, and potentially increase, transaction volumes executed on the Exchange to the benefit of all Exchange participants.

Finally, the Exchange believes the proposal is reasonable, equitable and not unfairly discriminatory as it may encourage an increase in orders routed to the Exchange, which would expand liquidity and provide more trading opportunities and tighter spreads to the benefit of all market participants, even to those market participants that are either currently affiliated by virtue of their common ownership or that opt not to affiliate under this proposal (the latter group including market participants that are ineligible to earn the credits under the ACE Program).

## B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with section 6(b)(8) of the Act,<sup>19</sup> 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. The Exchange believes that the proposed changes are pro-competitive as they would increase opportunities for firms to qualify for the ACE Program, which may increase intermarket and intramarket competition by incenting participants to direct their orders to the Exchange thereby increasing the volume of contracts traded on the Exchange and enhancing the quality of quoting. Enhanced market quality and increased transaction volume that results from the anticipated increase in order flow directed to the Exchange would benefit

<sup>16</sup> See *supra* n. 5.

<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(4) and (5).

<sup>19</sup> 15 U.S.C. 78f(b)(8).

all market participants and improve competition on the Exchange.

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

*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>20</sup> of the Act and subparagraph (f)(2) of Rule 19b-4<sup>21</sup> thereunder, because it establishes a due, fee, or other charge imposed by the Exchange.

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. If the Commission takes such action, the Commission shall institute proceedings under section 19(b)(2)(B)<sup>22</sup> of the Act to determine whether the proposed rule change should be approved or disapproved.

**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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2016-35 on the subject line.

*Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2016-35. This file number should be included on the subject line if email 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 Web site (<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 Web site 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 the 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-2016-35, and should be submitted on or before April 11, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Robert W. Errett,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

**Submission for OMB Review; Comment Request**

*Upon Written Request, Copies Available From:* US Securities and Exchange Commission, Office of FOIA Services, 100 F Street NE., Washington, DC 20549-2736.

*Extension:*

<sup>23</sup> 17 CFR 200.30-3(a)(12).

Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 in Connection with Portfolio Margining of Swaps and Security-Based Swaps; SEC File No. S7-13-12, OMB Control No. 3235-0698.

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 ("PRA") (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission ("Commission") has submitted to the Office of Management and Budget ("OMB") a request for approval of extension of the existing collection of information provided for in the Order Granting Conditional Exemptions Under the Securities Exchange Act of 1934 ("Exchange Act") in Connection with Portfolio Margining of Swaps and Security-Based Swaps, Exchange Act Release No. 68433 (Dec. 14, 2012), 77 FR 75211 (Dec. 19, 2012) ("Order").

On December 14, 2012, the Commission found it necessary or appropriate in the public interest and consistent with the protection of investors to grant the conditional exemptions discussed in the Order. Among other things, the Order requires dually-registered broker-dealer and futures commission merchants ("BD/FCMs") that elect to offer a program to commingle and portfolio margin customer positions in credit default swaps ("CDS") in customer accounts maintained in accordance with Section 4d(f) of the Commodity Exchange Act ("CEA") and rules thereunder, to obtain certain agreements and opinions from its customers regarding the applicable regulatory regime, and to make certain disclosures to its customers before receiving any money, securities, or property of a customer to margin, guarantee, or secure positions consisting of cleared CDS, which include both swaps and security-based swaps, under a program to commingle and portfolio margin CDS. The Order also requires BD/FCMs that elect to offer a program to commingle and portfolio margin CDS positions in customer accounts maintained in accordance with Section 4d(f) of the CEA and rules thereunder, to maintain minimum margin levels using a margin methodology approved by the Commission or the Commission staff.

When it adopted the Order, the Commission discussed the burden hours and costs associated with complying with certain provisions of the Order that contain "collection of information requirements" within the meaning of the PRA.<sup>1</sup> The collection of information requirements are designed, among other things, to provide appropriate

<sup>1</sup> See Order, 77 FR at 75221-23.

<sup>20</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>21</sup> 17 CFR 240.19b-4(f)(2).

<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).