

proposal, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

## VI. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment Nos. 1 and 2 to the proposed rule change are consistent with the Exchange 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-FINRA-2009-060 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-FINRA-2009-060. 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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-FINRA-2009-060 and should be submitted on or before January 3, 2013.

## VII. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>66</sup> that the proposed rule change (SR-FINRA-2009-060), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>67</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68383; File No. SR-NYSEMKT-2012-72]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Exchange Rule 952NY With Respect to Opening Trading in an Options Series

December 7, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on November 26, 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 and II 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 Exchange Rule 952NY (Trading Auctions) with respect to opening trading in an options series. The text of the proposed rule 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 Statutory Basis for, the Proposed Rule Change

##### 1. Purpose

The Exchange proposes to amend Rule 952NY to provide for how the System<sup>3</sup> may open an options series for trading when there are no executable orders and/or quotes and the bid-ask differential of the NBBO disseminated by Options Price Reporting Authority ("OPRA") or a Market Maker quote does not exceed the bid-ask differential specified under Rule 925NY(b)(4). The Exchange's Rules are currently silent on how the System opens an options series when it does not conduct an auction. Specifically, the proposed rule change (i) will codify that the Exchange opens an option series when there are no executable orders and/or quotes to match up in the System ("open a series on a quote"), which is currently based on the bid-ask differentials that are within the acceptable range defined in Rule 925NY(b)(4); and (ii) will also amend the current process to provide that the bid-ask differential to allow for the System to open a series on a quote would be based on the bid-ask differentials specified in Rule 925NY(b)(5), which are wider than the bid-ask differential that allows for the System to open via an auction during the Auction Process.

##### Current Opening Process

Currently, Rule 952NY describes the process pursuant to which the System opens an option series. Pursuant to the procedures described in Rule 952NY(b) and (c), after the primary market for the underlying security disseminates the opening trade or opening quote, the System conducts an "Auction Process" to open a series whereby the System determines a single price at which a series may be opened by looking either to: (i) the midpoint of the initial uncrossed NBBO disseminated by the Options Price Reporting Authority

<sup>66</sup> 15 U.S.C. 78(b)(2).

<sup>67</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>3</sup> The term "System" refers to the Exchange's electronic order delivery, execution and reporting system through which orders and quotes for listed options are consolidated for execution and/or display.

(“OPRA”), or (ii) the midpoint of the best quotes or orders in the System Book. If the bid-ask differential for a series is not within an acceptable range, the System will not open the series for trading. For purposes of this rule, the acceptable range means the bid-ask differential guidelines specified in Rule 925NY(b)(4) (“narrow-width quotes”).<sup>4</sup> Assuming the bid-ask differential is within the acceptable range, the System matches up orders and quotes in the system based on price-time priority and executes the orders that are matched at the midpoint pricing. Any orders in the System Book that are not executed in the Auction Process become eligible for the Core Trading Session immediately after the conclusion of the Auction Process.

In addition, although not currently specified in the rule, if the bid-ask differential is within the acceptable range, but there are no orders or quotes to be matched up with one another, the System will open the series for trading on a disseminated quote, at which point any unexecuted orders in the System Book during the Auction Process become eligible for the Core Trading Session. If the bid-ask differential is not within the acceptable range, the Exchange will not open that series for trading until the System either receives a narrow-width NBBO from OPRA or a Market Maker submits a narrow-width quote.

#### Proposed Change to Opening Process

The Exchange proposes to amend Rule 952NY both to specify that the System may open a series on a quote when there are no executable orders and/or quotes and to amend the rule to provide a different bid-ask differential for opening a series on a quote. As noted above, the Exchange currently uses the narrow-width quote bid-ask differential for determining both whether to open with an auction (when there are executable orders and/or quotes) or with a quote (when there are no executable orders and/or quotes). In codifying the process for opening a series on a quote, the Exchange proposes to adopt the bid-ask differential specified under Rule 925NY(b)(5) instead of the narrow-width quotes.<sup>5</sup>

<sup>4</sup> See Exchange Rule 925NY(b)(4). The bid-ask guidelines specified in Rule 925NY(b)(4) that are required to open a series are narrower than the \$5 wide bid-ask differential for options traded on the System during Core Trading Hours. See also Exchange Rule 925NY(b)(5). Rule 925NY(b)(5) provides that options traded on the System during Core Trading Hours may be quoted with a difference not to exceed \$5 between the bid and offer regardless of the price of the bid.

<sup>5</sup> Currently, if there are executable orders and/or quotes and the options series does not meet the

Rule 925NY(b)(5) provides that options traded on the System during Core Trading Hours may be quoted with a difference not to exceed \$5 between the bid and offer regardless of the price of the bid (“standard-width quote”). As proposed, if there are no executable orders and/or quotes, but the OX System either receives a standard-width quote NBBO from OPRA in that series or a Market Maker submits a standard-width quote in the option series, the Exchange shall open the series on a quote. The proposed change will align the requirements to open the unopened series on a quote with the existing Market Maker quoting requirements during Core Trading Hours.

While the Exchange believes that narrow-width quoting requirements are beneficial for opening auctions pursuant to the Auction Process in the System, the Exchange believes that the continued application of the narrow-width quoting requirement when there are no executable quotes and/or orders to conduct an auction has the opposite effect and prevents series from opening promptly and thus unnecessarily delays the execution of orders on the Exchange. The Exchange believes that setting a wider quote differential requirement for opening on a quote would expedite the opening of all options series on the Exchange promptly after the opening of the underlying security. The Exchange believes that market participants will benefit by having the ability to execute orders on the Exchange without unnecessary delay. In addition, applying the standard-width quote bid-ask differential for opening a series on a quote is consistent with the quoting requirements that are applicable during Core Trading Hours.

The Exchange further believes that applying the standard-width quote for determining when to open a series on a quote is appropriate because it would more closely align the Exchange’s rules with the rules of other option exchanges with respect to opening a series. Other options exchanges have the ability to open a series for trading when there are no executable orders and/or quotes to conduct an auction. Both BOX Options Exchange (“BOX”) and NASDAQ Options Market (“NOM”), allow for the opening of series without conducting an opening auction. Neither BOX nor NOM require any bid-ask differential to be met prior to opening series for trading on a quote. Specifically, on BOX, the BOX system attempts to conduct an

narrow-width quote bid-ask differential, but does meet the standard-width quote differential, the Exchange will not open the options series for trading. See Exchange Rule 952NY(b)(D).

opening match (similar to Auction Process) to determine a single price at which a particular option series will be opened.<sup>6</sup> During the “Pre-Opening Phase” on BOX, narrow bid-ask differentials are required in a similar manner to the Exchange. However, if the BOX system is not able to determine an opening price, the option series will nevertheless move from the “Pre-Opening Phase” to the continuous trading phase and the option series will be open for trading. When the option series move from Pre-Opening Phase to the continuous trading phase, there is no requirement for a bid-ask differential to be met. Market makers on BOX would only be required to meet the \$5 bid-ask differential in the option series if and when they ever decided to quote.<sup>7</sup> Similarly, NOM has no bid-ask differential requirements to open a series if an “Opening Cross” (similar to Trading Auction) cannot be initiated because there are no opening quotes or orders that lock or cross each other.<sup>8</sup> Specifically, if an Opening Cross cannot be initiated because there are no opening quotes or orders that lock or cross each other, the option series will open for trading on NOM.<sup>9</sup> Market makers on NOM would only be required to meet the \$5 bid-ask differentials in the option series if and when they ever decided to quote.<sup>10</sup> Both, BOX and NOM could open options series and disseminate a protected quotation without the benefit of Market Maker quotation to facilitate price discovery.

By contrast, currently, if the options series does not meet the narrow-width quotes, the series will not open at all on the Exchange, which differs from BOX and NOM. As noted above, neither BOX nor NOM require any bid-ask differential to be met prior to opening series for trading on a quote. The current inability of the Exchange to open a series without executable quotes and/or orders subject to a standard-width quote requirement puts the Exchange at a competitive disadvantage to other options exchanges that do not have that similar restriction. By not opening the option series, the Exchange cannot display orders on its Consolidated Book and thus has no protected quotation in the options series. Until the options series officially opens for trading, the Exchange cannot route out orders on its Consolidated

<sup>6</sup> See BOX Rule 7070(e).

<sup>7</sup> See BOX Rule 7070(f). See also BOX Rule 8040, which sets forth BOX market maker quoting obligations.

<sup>8</sup> See NOM Chapter VI, Section 8(c)(1).

<sup>9</sup> See *id.*

<sup>10</sup> See NOM Chapter VII, Section 6(d).

Book pursuant to Linkage, nor can it have a protected quote that draws trading interest from other options markets. The Exchange believes that the delay in execution of orders on the Exchange in this situation is unnecessary and harmful to market participants. The Exchange's proposal would provide for the ability to open a option series on a quote in a similar fashion as both BOX and NOM, but in a more prudent and conservative manner that the Exchange believes better protects investors and other market participants. The Exchange believes that having a bid-ask differential requirement to open a series is beneficial for opening series and helps ensure there is a sufficient quoted market in the options series, whether it is via NBBO from OPRA or Market Maker generated quote, prior to opening of the series on the Exchange to facilitate transactions in securities on the Exchange.

To clarify that Rule 952NY governs the opening process, which includes both trading auctions and opening on a quote, the Exchange also proposes to amend the title of the rule by deleting the phrase "Trading Auction" and replacing it with "Opening Process." In addition, the Exchange proposes to clarify that the term "Auction Process" refers to the opening procedures set forth in Rule 952NY(b)(A)–(D), when the Exchange opens an options series for trading when there are orders and/or quotes that can be matched at a single price point.

## 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>11</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>12</sup> in particular, because it is designed to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

The proposed rule change is designed to remove impediments to, and perfect the mechanism of, a free and open market and a national market system because it would permit the Exchange to open a series when there are not sufficient orders or quotes to conduct an auction after receiving notification from OPRA that an NBBO has been established for the series or on a Market

Maker quote, provided that the bid-ask differential of the NBBO does not exceed the standard-quote width bid-ask differential. The wider quote differential requirement for openings when an Auction Process is not conducted will expedite the opening of all options series on the Exchange promptly after the opening of the underlying security, and thus remove impediments to and perfect the mechanism of a free and open market in a way that benefits market participants and enables them to execute their orders on the Exchange.

The proposed rule change contributes to the protection of investors and the public interest by maintaining the narrow-width quote bid-ask differentials for the Auction Process, which provides price protection for customers and other market participants when they have executable orders and quotes prior to the opening of a series on the Exchange.

The proposal would provide fair and orderly means to open a series when the Exchange does not have sufficient executable quotes and/or orders to conduct an Auction Process and would reasonably ensure that the Exchange does not open the series at a price that is beyond the price at which Market Makers are permitted to quote for the series during the Core Trading Session, which also contributes to the protection of investors and the public interest, generally. The proposed rule change is also designed to promote just and equitable principles of trade because it would permit the Exchange to open a series in a manner that is more consistent with the opening of individual series on other option exchanges.<sup>13</sup>

### 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

Because the proposed rule change does not (i) significantly affect the protection of investors or the public interest; (ii) impose any significant

burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>14</sup> and Rule 19b-4(f)(6)(iii) thereunder.<sup>15</sup> 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2012-72 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-2012-72. 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

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

<sup>15</sup> 17 CFR 240.19b-4(f)(6)(iii). As required under Rule 19b-4(f)(6)(iii), the Exchange provided the Commission with written notice of its intent to file the proposed rule change, along with a brief description and the text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission.

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

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

<sup>13</sup> See *supra* notes 6 and 8.

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-2012-72 and should be submitted on or before January 3, 2013.

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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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68381; File No. SR-NYSEMKT-2012-77]

### 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

December 7, 2012.

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 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 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

<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

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 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 a 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 market participant has an appointment in the class in which the order is received and

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.

<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.

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

<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.