

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68527; File No. SR-NYSEMKT-2012-83]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending the NYSE MKT LLC Price List To Specify Pricing that is Currently Applicable to Certain Executions on the Exchange But That Is Not Currently Included in the Price List

December 21, 2012.

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 December 14, 2012, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“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 amend its Price List to specify pricing that is currently applicable to certain executions on the Exchange, but that is not currently included in the Price List. 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 is proposing to amend its Price List to specify pricing that is currently applicable to certain executions on the Exchange, but that is not currently included in the Price List. The Exchange proposes to make the changes immediately effective and operative.

Specifically, the Exchange proposes to amend the Price List, as necessary, to reflect pricing that is currently being assessed for the following intraday transactions:

- For a Floor broker discretionary e-Quote (“d-Quote”) that adds liquidity, a credit of \$0.0016 per share for trades in a security priced \$1 or above, as well as a credit of \$0.0025 for NASDAQ Stock Market-listed securities (“Nasdaq securities”) trading on the Exchange pursuant to a grant of unlisted trading privileges (“UTP”);<sup>3</sup>
- For a d-Quote that adds liquidity, no charge (i.e., free) for a security priced below \$1, as well as a credit of 0.10% of total dollar value of the transaction for a Nasdaq security trading pursuant to UTP;
- For a non-electronic agency transaction of a Floor broker that executes against the Book, no charge for a security priced \$1 or above, a security priced below \$1, or a Nasdaq security trading pursuant to UTP;
- No charge for a non-electronic agency transaction between Floor brokers in the crowd in a security priced below \$1;<sup>4</sup> and
- No charge for an agency cross trade (i.e., a trade where a member organization has customer orders to buy and sell an equivalent amount of the same security) in a security priced below \$1.<sup>5</sup>

##### d-Quotes

The Price List currently provides that d-Quotes are subject to a transaction fee.<sup>6</sup> The current rate in the Price List

is \$0.0005 per share for a security priced \$1 or above or, for a security priced below \$1, the lesser of (i) \$0.0005 per share and (ii) 0.25% of the total dollar value of the transaction. For Nasdaq securities trading pursuant to UTP, the current rate in the Price List is \$0.0005 per share for a security priced \$1 or above or, for a security priced below \$1, 0.20% of the total dollar value of the transaction.

Despite the descriptions in the Price List, the fee in the Price List is currently charged only for a d-Quote that removes liquidity from the Book. A d-Quote that provides liquidity to the Book for a security priced \$1 or above currently receives a credit of \$0.0016 per share, or, for Nasdaq securities trading pursuant to UTP, \$0.0025 per share.<sup>7</sup> For a security priced below \$1, a d-Quote that provides liquidity to the Book is not charged, or, for Nasdaq securities trading pursuant to UTP, a credit of 0.10% of the total dollar value of the transaction is provided.<sup>8</sup>

The Exchange proposes to amend the descriptions in the Price List related to d-Quotes to specify that the corresponding rates apply only to a d-Quote that removes liquidity from the Book. Providing a credit of \$0.0016 per share for a d-Quote for a security priced \$1 or above that provides liquidity to the Book would be in accordance with the \$0.0016 per share rate for providing liquidity that is currently in the Price List, and therefore the Exchange is not proposing a new or separate line item therein for this type of transaction. This is also true with respect to Nasdaq securities trading pursuant to UTP and the related credit of \$0.0025 that is currently in the Price List. Similarly, not charging for a d-Quote for a security priced below \$1 that provides liquidity to the Book would be in accordance with the “no charge” rate for providing liquidity that is currently in the Price List, and therefore the Exchange is not proposing a new or separate line item therein for this type of transaction. Again, this is also true with respect to Nasdaq securities trading pursuant to UTP and the related credit of 0.10% of

<sup>3</sup> See, e.g., Securities Exchange Act Release No. 62479 (July 9, 2010), 75 FR 41264 (July 15, 2010) (SR-NYSEAmex-2010-31).

<sup>4</sup> As discussed below, this is already specified in the Price List for securities priced \$1 or above and for Nasdaq securities trading pursuant to UTP.

<sup>5</sup> As discussed below, this is already specified in the Price List for securities priced \$1 or above and for Nasdaq securities trading pursuant to UTP.

<sup>6</sup> See Securities Exchange Act Release No. 59045 (December 3, 2008), 73 FR 75151 (December 10, 2008) (SR-NYSEALTR-2008-09); Securities Exchange Act Release No. 59883 (May 7, 2009), 74 FR 22785 (May 14, 2009) (SR-NYSEAmex-2009-16); and Securities Exchange Act Release No. 62488

(July 13, 2010), 75 FR 41912 (July 19, 2010) (SR-NYSEAmex-2010-69).

<sup>7</sup> The Exchange has provided a credit for d-Quotes for a security priced \$1 or above that add liquidity since December 2008. For Nasdaq securities, the Exchange has provided a credit for d-Quotes for a security priced \$1 or above that add liquidity since July 2010.

<sup>8</sup> The Exchange has not charged for d-Quotes for a security priced below \$1 that add liquidity since December 2008. For Nasdaq securities, the Exchange has provided a credit for d-Quotes for a security priced below \$1 that add liquidity since July 2010.

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

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

the total dollar value of the transaction that is currently in the Price List.

#### Non-Electronic Agency Transactions

The Price List currently provides that verbal agency interest by Floor brokers is charged \$0.0005 per share for a security priced \$1 or above and is charged the lesser of (i) \$0.0005 per share and (ii) 0.25% of the total dollar value of the transaction for a security priced less than \$1.<sup>9</sup> For Nasdaq securities priced \$1 or above, the same \$0.0005 rate applies, and, for sub-\$1 Nasdaq securities, the rate in the Price List is 0.20% of the total dollar value of the transaction. The Exchange proposes to specify in the Price List that verbal agency interest, which the Exchange proposes to hereafter refer to as a non-electronic agency transaction, of a Floor broker that executes against the Book is not charged (i.e., it is free),<sup>10</sup> both for a security priced \$1 or above and for a security priced below \$1 as well as for Nasdaq securities trading pursuant to UTP.<sup>11</sup> This is the same rate (i.e., free) that is currently specified in the Price List for non-electronic agency transactions between Floor brokers in the crowd in securities priced \$1 or above and for Nasdaq securities trading pursuant to UTP.<sup>12</sup> In this regard, the Exchange also proposes to specify in the Price List that there is no charge for a non-electronic agency transaction between Floor brokers in the crowd in a security priced below \$1.<sup>13</sup>

#### Agency Cross Trades

The Price List currently specifies that an agency cross trade<sup>14</sup> is not charged for a security priced \$1 or above or for Nasdaq securities trading pursuant to UTP.<sup>15</sup> Similarly, the Exchange proposes to specify in the Price List that

there is no charge for an agency cross trade in a security priced below \$1.<sup>16</sup>

The Exchange notes that the proposed change is not otherwise intended to address any other issues surrounding Floor broker charges and that the Exchange is not aware of any problems that Floor brokers would have in complying with the proposed change.

#### 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>17</sup> in general, and furthers the objectives of Sections 6(b)(4) and 6(b)(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 Exchange believes that the proposed rates for a d-Quote that adds liquidity are reasonable because they may encourage additional liquidity during the trading day and may incentivize Floor brokers to provide additional intra-quote price improved trading, which would contribute to the quality of the Exchange's market. The Exchange also believes that the proposed rates are equitable and not unfairly discriminatory because they may provide opportunities for Floor brokers to attract additional liquidity to the Floor and thereby increase the quality of order execution on the Exchange's market, which benefits all market participants.

Additionally, the Exchange believes that not charging for a non-electronic agency transaction of a Floor broker that executes against the Book, in both securities priced \$1 or above as well as securities priced below \$1, is reasonable because it would be set at a level that would align the rate with certain other non-electronic agency Floor broker interest that is similarly not charged. In this regard, and as noted above, the Exchange does not charge for executions of non-electronic agency transactions between Floor brokers in the crowd. Additionally, the Exchange believes that this is equitable and not unfairly discriminatory because a non-electronic agency transaction of a Floor broker would be used, for example, at a time of the trading day when a Floor broker

is physically present at the point of sale and requires flexibility to represent customer interest, but which may also result in added opportunity cost and uncertainty for the Floor broker when compared to an electronic execution, which is unique to a Floor broker.

The Exchange also believes that it is reasonable to specify that a non-electronic agency transaction between Floor brokers in the crowd is not charged for securities priced below \$1 because doing so will add greater specificity to the Price List by reflecting that it is the same as the rate charged for such transactions in securities priced \$1 or above. This is also equitable and not unfairly discriminatory because it would provide greater certainty regarding the applicable rates for transactions in securities priced below \$1. The Exchange believes that not charging for these transactions is further reasonable because it may incentivize additional liquidity in these low-priced securities, which typically are more thinly-traded and less liquid than securities priced \$1 or above. Accordingly, it is also equitable and not unfairly discriminatory to not charge for these transactions because the increased liquidity that may result in these securities would increase the quality of order execution on the Exchange's market, which benefits all market participants. Finally, and as described above for a non-electronic agency transaction of a Floor broker that executes against the Book, the Exchange believes that this is equitable and not unfairly discriminatory because non-electronic agency transactions between Floor brokers in the crowd occur, for example, at a time of the trading day when a Floor broker is physically present at the point of sale and requires flexibility to represent customer interest, which is unique to a Floor broker, but which may also result in added opportunity cost and uncertainty for the Floor broker when compared to an electronic execution.

The Exchange also believes that it is reasonable to specify that an agency cross trade is not charged for securities priced below \$1 because doing so will add greater specificity to the Price List by reflecting that it is the same as the rate charged for such transactions in securities priced \$1 or above. This is also equitable and not unfairly discriminatory because it would provide greater certainty regarding the applicable rates for transactions in securities priced below \$1. The Exchange believes that not charging for these transactions is further reasonable because of the nature of an agency cross trade, in that it is a trade where a

<sup>9</sup> See SR-NYSEAmex-2009-16, *supra* note 6.

<sup>10</sup> Because of the nature of non-electronic trading interest (i.e., verbal/manual interest), the concept of adding and removing liquidity is not applicable.

<sup>11</sup> The Exchange began charging for a non-electronic agency transaction of a Floor broker that executed against the Book in December 2008. Beginning in March 2009, the Exchange no longer charged for this type of transaction. For Nasdaq securities, the Exchange has not charged for these transactions since July 2010.

<sup>12</sup> This has been the case for Nasdaq securities trading pursuant to UTP since July 2010.

<sup>13</sup> The Exchange has not charged for a non-electronic agency transaction between Floor brokers in the crowd in a security priced below \$1 since December 2008, if the transaction was for 10,000 shares or more, and since March 2009, if the transaction was for fewer than 10,000 shares.

<sup>14</sup> Because of the nature of an agency cross trade (i.e., the member organization already has customer orders to buy and sell an equivalent amount of the same security), the concept of adding and removing liquidity is not applicable.

<sup>15</sup> This has been the case for Nasdaq securities trading pursuant to UTP since July 2010.

<sup>16</sup> The Exchange has not charged for an agency cross trade in a security priced below \$1 since December 2008, if the transaction was for 10,000 shares or more, and since March 2009, if the transaction was for fewer than 10,000 shares.

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

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

member organization has customer orders to buy and sell an equivalent amount of the same security.<sup>19</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

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 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2012-83 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-2012-83. 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-2012-83 and should be submitted on or before January 22, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>22</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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#### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-68534; File No. SR-Phlx-2012-143]

#### Self-Regulatory Organizations; NASDAQ OMX PHLX, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Extension of the Exchange's Penny Pilot Program and Replacement of Penny Pilot Issues That Have Been Delisted

December 21, 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 December

20, 2012, NASDAQ OMX Phlx, LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II 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 is filing with the Commission a proposal to: extend through June 30, 2013, the Penny Pilot Program in options classes in certain issues ("Penny Pilot" or "Pilot"), and to change the date when delisted classes may be replaced in the Penny Pilot.<sup>3</sup>

The Exchange requests that the Commission waive the 30-day operative delay period contained in Exchange Act Rule 19b-4(f)(6)(iii)<sup>4</sup> to the extent needed for timely industry-wide implementation of the proposal. [GPO FOLLOW LIT]

Proposed new language is *italicized* and proposed deleted language is [bracketed].

#### NASDAQ OMX PHLX Rules

##### Options Rules

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##### Rule 1034. Minimum Increments

(a) Except as provided in subparagraphs (i)(B) and (iii) below, all options on stocks, index options, and Exchange Traded Fund Shares quoting in decimals at \$3.00 or higher shall have a minimum increment of \$.10, and all options on stocks and index options quoting in decimals under \$3.00 shall have a minimum increment of \$.05.

(i)(A) No Change.

(B) For a pilot period scheduled to expire [December 31, 2012] *June 30, 2013* (the "pilot"), certain options shall be quoted and traded on the Exchange in minimum increments of \$0.01 for all series in such options with a price of less than \$3.00, and in minimum increments of \$0.05 for all series in such options with a price of \$3.00 or higher, except that options overlying the PowerShares QQQ Trust ("QQQ")<sup>®</sup>, SPDR S&P 500 Exchange Traded Funds

<sup>3</sup> The Penny Pilot was established in January 2007 and was last extended in June 2012. See Securities Exchange Act Release Nos. 55153 (January 23, 2007), 72 FR 4553 (January 31, 2007) (SR-Phlx-2006-74) (notice of filing and approval order establishing Penny Pilot); and 67326 (June 29, 2012), 77 FR 40126 (July 6, 2012) (SR-Phlx-2012-86) (notice of filing and immediate effectiveness extending the Penny Pilot through December 31, 2012).

<sup>4</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>19</sup> See *supra* note 14.

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

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

<sup>22</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.