

Sub-Advisors' fees to the public. Applicants submit that the relief requested to use Aggregate Fee Disclosure will encourage Sub-Advisors to negotiate lower subadvisory fees with the Advisor if the lower fees are not required to be made public.

8. For the reasons discussed above, Applicants submit that the requested relief meets the standards for relief under section 6(c) of the Act. Applicants state that the operation of the Subadvised Series in the manner described in the application must be approved by shareholders of a Subadvised Series before that Subadvised Series may rely on the requested relief. In addition, Applicants state that the proposed conditions to the requested relief are designed to address any potential conflicts of interest, including any posed by the use of Wholly-owned Sub-Advisors, and provide that shareholders are informed when new Sub-Advisors are hired. Applicants assert that conditions 6, 7, 10 and 11 are designed to provide the applicable Board with sufficient independence and the resources and information it needs to monitor and address any conflicts of interest with affiliated person of the Advisor, including Wholly-Owned Sub-Advisors. Applicants state that, accordingly, they believe the requested relief is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

#### Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Before a Subadvised Series may rely on the order requested in the application, the operation of the Subadvised Series in the manner described in the application, including the hiring of Wholly-Owned Sub-Advisors, will be approved by a majority of the Subadvised Series' outstanding voting securities as defined in the Act, or, in the case of a new Subadvised Series whose public shareholders purchase shares on the basis of a prospectus containing the disclosure contemplated by condition 2 below, by the sole initial shareholder before offering the Subadvised Series' shares to the public.

2. The prospectus for each Subadvised Series will disclose the existence, substance, and effect of any order granted pursuant to the application. Each Subadvised Series will hold itself out to the public as employing the multi-manager structure

described in the application. Each prospectus will prominently disclose that the Advisor has the ultimate responsibility, subject to oversight by the applicable Board, to oversee the Sub-Advisors and recommend their hiring, termination and replacement.

3. The Advisor will provide general management services to a Subadvised Series, including overall supervisory responsibility for the general management and investment of the Subadvised Series' assets. Subject to review and approval of the applicable Board, the Advisor will (a) set a Subadvised Series' overall investment strategies, (b) evaluate, select, and recommend Sub-Advisors to manage all or a portion of a Subadvised Series' assets, and (c) implement procedures reasonably designed to ensure that Sub-Advisors comply with a Subadvised Series' investment objective, policies and restrictions. Subject to review by the applicable Board, the Advisor will (a) when appropriate, allocate and reallocate a Subadvised Series' assets among multiple Sub-Advisors; and (b) monitor and evaluate the performance of Sub-Advisors.

4. A Subadvised Series will not make any Ineligible Sub-Advisor Changes without such agreement, including the compensation to be paid thereunder, being approved by the shareholders of the applicable Subadvised Series.

5. A Subadvised Series will inform shareholders of the hiring of a new Sub-Advisor within 90 days after the hiring of a new Sub-Advisor pursuant to the Modified Notice and Access Procedures.

6. At all times, at least a majority of the applicable Board will be Independent Board Members, and the selection and nomination of new or additional Independent Board Members will be placed within the discretion of the then-existing Independent Board Members.

7. Independent Legal Counsel, as defined in rule 0-1(a)(6) under the Act, will be engaged to represent the Independent Board Members. The selection of such counsel will be within the discretion of the then-existing Independent Board Members.

8. The Advisor will provide the applicable Board, no less frequently than quarterly, with information about the profitability of the Advisor on a per Subadvised Series basis. The information will reflect the impact on profitability of the hiring or termination of any sub-advisor during the applicable quarter.

9. Whenever a sub-advisor is hired or terminated, the Advisor will provide the applicable Board with information

showing the expected impact on the profitability of the Advisor.

10. Whenever a sub-advisor change is proposed for a Subadvised Series with an Affiliated Sub-Advisor or a Wholly-Owned Sub-Advisor, the applicable Board, including a majority of the Independent Board Members, will make a separate finding, reflected in the applicable Board minutes, that such change is in the best interests of the Subadvised Series and its shareholders and does not involve a conflict of interest from which the Advisor or the Affiliated Sub-Advisor or Wholly-Owned Sub-Advisor derives an inappropriate advantage.

11. No Board member or officer of a Subadvised Series, or partner, director, manager, or officer of the Advisor, will own directly or indirectly (other than through a pooled investment vehicle that is not controlled by such person), any interest in a Sub-Advisor, except for (a) ownership of interests in the Advisor or any entity, except a Wholly-Owned Sub-Advisor, that controls, is controlled by, or is under common control with the Advisor, or (b) ownership of less than 1% of the outstanding securities of any class of equity or debt of a publicly traded company that is either a Sub-Advisor or an entity that controls, is controlled by, or is under common control with a Sub-Advisor.

12. Each Subadvised Series will disclose the Aggregate Fee Disclosure in its registration statement.

13. In the event the Commission adopts a rule under the Act providing substantially similar relief to that requested in the application, the requested order will expire on the effective date of that rule.

For the Commission, by the Division of Investment Management, under delegated authority.

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71614; File No. SR-ISEGemini-2014-10]

### Self-Regulatory Organizations; ISE Gemini, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend the Schedule of Fees

February 25, 2014.

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 February 10, 2014, ISE Gemini, LLC (the "Exchange" or "ISE Gemini") 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**

ISE Gemini is proposing to amend its Schedule of Fees to adopt subscription fees for its market data offerings. The text of the proposed rule change is available on the Exchange's Internet Web site at <http://www.ise.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 Exchange 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 these 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 aspects of such statements.

#### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

##### 1. Purpose

The purpose of the proposed rule filing is to amend the Schedule of Fees to adopt subscription fees for three ISE Gemini market data offerings: the ISE Gemini order feed ("Order Feed"), the ISE Gemini top quote feed ("Top Quote Feed"), and the ISE Gemini real-time depth of market data feed ("Depth Feed"), which were established by an immediately effective rule change filed on December 5, 2013.<sup>3</sup> Each of these market data offerings is presently available without charge, and going forward will be made available to both

members and non-members, and to both professional and non-professional subscribers, on a subscription basis as described in more detail below.<sup>4</sup>

##### Order Feed

The Order Feed provides real-time updates to subscribers every time a new limit order that is not immediately executable at the BBO is placed on the ISE Gemini order book. The Order Feed also announces the commencement of auctions including Flash, Facilitation, Solicitation, Block Order and Price Improvement Mechanisms, as well as Directed Orders, but does not include Immediate or Cancel ("IOC") or Fill or Kill ("FOK") orders, quotes, or any non-displayed interest. The information included on the Order Feed includes auction type, order side (*i.e.*, buy/sell), order price, order size, and a market participant (*e.g.*, priority customer) indicator, as well as details for each instrument series, including the symbols (series and underlying security), put or call indicator, the expiration date, and the strike price of the series. While the Options Price Reporting Authority ("OPRA") feed, as well as the Top Quote and Depth Feeds each provide aggregated order and quote information, the Order Feed provides each individual limit order, not including quote traffic, resulting in lower bandwidth usage and less data for subscribers to process.

The Exchange proposes to charge distributors \$500 per month for subscriptions to the Order Feed and will not charge distributors a monthly fee per controlled device as long as the feed is for internal use only.<sup>5</sup> For subscribers that redistribute the Order Feed externally, or redistribute the Order Feed internally and externally, the Exchange proposes to charge each distributor an additional fee of \$5 per month per controlled device with a combined maximum fee capped at \$625 per month. For example, a firm that subscribes to the Order Feed and then redistributes it via controlled device to 10 clients will pay \$550 per month (\$500 for the feed and \$50 for the controlled devices (\$5 × 10)). If that same firm redistributes the data via controlled device to 50 clients, the fee

for that firm will be capped at \$625 per month, resulting in a savings of \$125.<sup>6</sup>

##### Top Quote & Depth Feeds

The Top Quote and Depth Feeds are each real-time market data feeds that aggregate non-marketable, displayed quotes and orders on the Exchange on both the bid and offer side of the market. The Top Quote Feed provides aggregate quotes and orders at the top price level on the Exchange, and provides subscribers with a consolidated view of tradable prices at the BBO or "top of book." The Depth Feed, on the other hand, provides aggregate quotes and orders at the top five price levels on the Exchange, and provides subscribers with a consolidated view of tradable prices beyond the BBO, showing additional liquidity and enhancing transparency for ISE Gemini traded options. The data provided for each instrument includes the symbols (series and underlying security), put or call indicator, expiration date, the strike price of the series, and trading status. In addition, subscribers are provided with total quantity, customer quantity (if present), price, and side (*i.e.*, bid/ask). This information is provided for the top price level on the Top Quote Feed, and for each of the five indicated price levels on the Depth Feed.

The Exchange proposes to charge distributors \$1,000 per month for subscriptions to the Top Quote Feed, which will allow both internal use and external distribution to professional or non-professional subscribers.<sup>7</sup> In addition, the Exchange proposes to charge each distributor a fee of \$5 per month per controlled device for professional subscribers,<sup>8</sup> with a combined maximum fee capped at \$1,250 per month for internal use or \$1,500 per month for external redistribution or for internal and external redistribution. There will be no monthly controlled device fees applicable to non-professional subscribers. Customers who also subscribe to the Depth Feed will not pay a separate fee for the Top Quote Feed, as the Top Quote Feed is embedded in the Depth Feed.

<sup>6</sup> Fee caps described below for the Top Quote and Depth Feeds operate in the same manner as described here with respect to the Order Feed.

<sup>7</sup> Firms that redistribute the Top Quote Feed via controlled device to both professional and non-professional subscriber clients will only pay a single \$1,000 per month fee plus the applicable controlled device fees for professional subscribers as described below.

<sup>8</sup> A controlled device is any device that a distributor permits to access the information in an ISE Gemini market data feed.

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

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

<sup>3</sup> See Securities Exchange Act Release No. 71087 (December 5, 2013) 78 FR 77545 (December 23, 2013) (SR-Topaz-2013-17).

<sup>4</sup> See *id.*

<sup>5</sup> A distributor is any firm that receives one of the market data feeds directly from ISE Gemini or indirectly through a redistributor and then distributes it either internally or externally. A redistributor includes market data vendors and connectivity providers such as extranets and private network providers.

The Exchange proposes to charge distributors \$1,500 per month for subscriptions to the Depth Feed, which will allow both internal use and external distribution to professional or non-professional subscribers.<sup>9</sup> Each distributor will also be charged \$10 per month per controlled device for professional subscribers, with a combined maximum fee capped at \$2,000 per month for internal use or \$2,500 per month for external redistribution, and \$1 per month per controlled device for non-professional subscribers, with a combined maximum fee capped at \$2,500 per month.

#### Multi-Product Subscription Discount

In order to encourage subscriptions to multiple market data feeds, the Exchange proposes to adopt a multi-product subscription discount. Subscription fees will be discounted by 10% for customers who subscribe to two of these data feeds. As customers who subscribe to the Depth Feed and Top Quote Feed will only pay fees for the Depth Feed, such subscription counts as one feed for the purpose of the discount.

#### 2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Act,<sup>10</sup> in general, and furthers the objectives of Section 6(b)(4) of the Act,<sup>11</sup> in particular, in that it provides for an equitable allocation of reasonable fees and other charges among Exchange Members and other persons using its facilities.

The Exchange believes that the proposed rule change is also consistent with Section 6(b)(8) of the Act,<sup>12</sup> in that it does not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. The proposed fees are the same for all similarly-situated market participants, and therefore do not unreasonably discriminate among market participants.

In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

<sup>9</sup> Firms that redistribute the Depth Feed via controlled device to both professional and non-professional subscriber clients will only pay a single \$1,500 per month fee plus the applicable controlled device fees for each as described below.

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

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

<sup>12</sup> 15 U.S.C. 78f(b)(8).

The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act's goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.<sup>13</sup>

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

On July 21, 2010, President Barack Obama signed into law H.R. 4173, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all SRO rule proposals establishing or changing dues, fees, or other charges are immediately effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, 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 this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

<sup>13</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

The decision of the United States Court of Appeals for the District of Columbia Circuit in *NetCoalition v. SEC*, 615 F.3d 525 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission's reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’”<sup>14</sup>

The court's conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

The Exchange believes that the proposed fees for the ISE Gemini market data offerings are consistent with the requirements of the Act because competition provides an effective constraint on the market data fees that the Exchange has the ability and the incentive to charge. ISE Gemini has a compelling need to attract order flow from market participants in order to maintain its share of trading volume. This compelling need to attract order flow imposes significant pressure on the Exchange to act reasonably in setting the fees for its market data offerings, particularly given that the market participants that will pay such fees often will be the same market participants from whom the Exchange must attract order flow. These market participants include broker-dealers that control the handling of a large volume of customer and proprietary order flow. Given the portability of order flow from one exchange to another, any exchange that sought to charge unreasonably high market data fees would risk alienating many of the same customers on whose

<sup>14</sup> *NetCoalition*, at 535 (quoting H.R. Rep. No. 94–229, at 92 (1975), as reprinted in 1975 U.S.C.C.A.N. 321, 323).

orders it depends for competitive survival. ISE Gemini currently competes with 11 other options exchanges for order flow.

The Exchange is constrained in pricing its market data offerings by the availability to market participants of alternatives to purchasing these products. The Exchange must consider the extent to which market participants would choose one or more alternatives instead of purchasing the Exchange's data.

For the reasons cited above, the Exchange believes that the proposed fees for the ISE Gemini data feeds are equitable, fair, reasonable and not unreasonably discriminatory. The Exchange further believes that the continued availability of each of the ISE Gemini data feeds enhances transparency, fosters competition among orders and markets, and enables buyers and sellers to obtain better prices. In addition, the Exchange believes that no substantial countervailing basis exists to support a finding that the proposed terms and fees for these products fail to meet the requirements of the Act. Moreover, the Exchange notes that the proposed fees are lower than fees currently charged by ISE Gemini's sister exchange, the International Securities Exchange, LLC ("ISE"), which offers its own market data feeds that provide comparable information to that provided by the ISE Gemini order feeds.<sup>15</sup>

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

In accordance with Section 6(b)(8) of the Act,<sup>16</sup> the Exchange does not believe that the proposed rule change will impose any burden on intermarket or intramarket competition that is not necessary or appropriate in furtherance of the purposes of the Act. Notwithstanding its determination that the Commission may rely upon competition to establish fair and equitably allocated fees for market data, the NetCoalition court found that the Commission had not, in that case, compiled a record that adequately supported its conclusion that the market for the data at issue in the case was competitive. The Exchange believes that a record may readily be established to demonstrate the competitive nature of the market in question.

For the reasons discussed above, the Exchange believes that the Dodd-Frank Act amendments to Section 19 materially alter the scope of the

Commission's review of future market data filings, by creating a presumption that all fees may take effect immediately, without prior analysis by the Commission of the competitive environment. Even in the absence of this important statutory change, however, the Exchange believes that a record may readily be established to demonstrate the competitive nature of the market in question.

There is intense competition between trading platforms that provide transaction execution and routing services and proprietary data products. Transaction execution and proprietary data products are complementary in that market data is both an input and a byproduct of the execution service. In fact, market data and trade execution are a paradigmatic example of joint products with joint costs. The decision whether and on which platform to post an order will depend on the attributes of the platform where the order can be posted, including the execution fees, data quality and price and distribution of its data products. Without the prospect of a taking order seeing and reacting to a posted order on a particular platform, the posting of the order would accomplish little. Without trade executions, exchange data products cannot exist. Data products are valuable to many end users only insofar as they provide information that end users expect will assist them or their customers in making trading decisions.

The costs of producing market data include not only the costs of the data distribution infrastructure, but also the costs of designing, maintaining, and operating the exchange's transaction execution platform and the cost of regulating the exchange to ensure its fair operation and maintain investor confidence. The total return that a trading platform earns reflects the revenues it receives from both products and the joint costs it incurs. Moreover, an exchange's customers view the costs of transaction executions and of data as a unified cost of doing business with the exchange. A broker-dealer will direct orders to a particular exchange only if the expected revenues from executing trades on the exchange exceed net transaction execution costs and the cost of data that the broker-dealer chooses to buy to support its trading decisions (or those of its customers). The choice of data products is, in turn, a product of the value of the products in making profitable trading decisions. If the cost of the product exceeds its expected value, the broker-dealer will choose not to buy it.

Moreover, as a broker-dealer chooses to direct fewer orders to a particular

exchange, the value of the product to that broker-dealer decrease, for two reasons. First, the product will contain less information, because executions of the broker-dealer's orders will not be reflected in it. Second, and perhaps more important, the product will be less valuable to that broker-dealer because it does not provide information about the venue to which it is directing its orders. Data from the competing venue to which the broker-dealer is directing orders will become correspondingly more valuable. Thus, a super-competitive increase in the fees charged for either transactions or data has the potential to impair revenues from both products. "No one disputes that competition for order flow is 'fierce'."<sup>17</sup> However, the existence of fierce competition for order flow implies a high degree of price sensitivity on the part of broker-dealers with order flow, since they may readily reduce costs by directing orders toward the lowest-cost trading venues. A broker-dealer that shifted its order flow from one platform to another in response to order execution price differentials would both reduce the value of that platform's market data and reduce its own need to consume data from the disfavored platform. Similarly, if a platform increases its market data fees, the change will affect the overall cost of doing business with the platform, and affected broker-dealers will assess whether they can lower their trading costs by directing orders elsewhere and thereby lessening the need for the more expensive data.

Analyzing the cost of market data distribution in isolation from the cost of all of the inputs supporting the creation of market data will inevitably underestimate the cost of the data. Thus, because it is impossible to create data without a fast, technologically robust, and well-regulated execution system, system costs and regulatory costs affect the price of market data. It would be equally misleading, however, to attribute all of the exchange's costs to the market data portion of an exchange's joint product. Rather, all of the exchange's costs are incurred for the unified purposes of attracting order flow, executing and/or routing orders, and generating and selling data about market activity. The total return that an exchange earns reflects the revenues it receives from the joint products and the total costs of the joint products.

Competition among trading platforms can be expected to constrain the aggregate return each platform earns from the sale of its joint products, but

<sup>15</sup> See ISE Schedule of Fees, Section X, Market Data.

<sup>16</sup> 15 U.S.C. 78f(b)(8).

<sup>17</sup> *NetCoalition*, at 24.

different platforms may choose from a range of possible, and equally reasonable, pricing strategies as the means of recovering total costs. For example, some platform may choose to pay rebates to attract orders, charge relatively low prices for market information (or provide information free of charge) and charge relatively high prices for accessing posted liquidity. Other platforms may choose a strategy of paying lower rebates (or no rebates) to attract orders, setting relatively high prices for market information, and setting relatively low prices for accessing posted liquidity. In this environment, there is no economic basis for regulating maximum prices for one of the joint products in an industry in which suppliers face competitive constraints with regard to the joint offering.

The market for market data products is competitive and inherently contestable because there is fierce competition for the inputs necessary to the creation of proprietary data and strict pricing discipline for the proprietary products themselves. Numerous exchanges compete with each other for listings, trades, and market data itself, providing virtually limitless opportunities for entrepreneurs who wish to produce and distribute their own market data. This proprietary data is produced by each individual exchange, as well as other entities, in a vigorously competitive market.

Broker-dealers currently have numerous alternative venues for their order flow, including numerous self-regulatory organization (“SRO”) markets, as well as internalizing broker-dealers (“BDs”) and various forms of alternative trading systems (“ATSS”), including dark pools and electronic communication networks (“ECNs”). Each SRO market competes to produce transaction reports via trade executions, and two FINRA-regulated Trade Reporting Facilities (“TRFs”) compete to attract internalized transaction reports. Competitive markets for order flow, executions, and transaction reports provide pricing discipline for the inputs of proprietary data products. The large number of SROs, TRFs, BDs, and ATSS that currently produce proprietary data or are currently capable of producing it provides further pricing discipline for proprietary data products. Each SRO, TRF, ATSS, and BD is currently permitted to produce proprietary data products, and many currently do.

Any ATSS or BD can combine with any other ATSS, BD, or multiple ATSS or BDs to produce joint proprietary data products. Additionally, order routers

and market data vendors can facilitate single or multiple broker-dealers’ production of proprietary data products. The potential sources of proprietary products are virtually limitless.

The fact that proprietary data from ATSS, BDs, and vendors can by-pass SROs is significant in two respects. First, non-SROs can compete directly with SROs for the production and sale of proprietary data products, as BATS and Arca did before registering as exchanges by publishing proprietary book data on the Internet. Second, because a single order or transaction report can appear in an SRO proprietary product, a non-SRO proprietary product, or both, the data available in proprietary products is exponentially greater than the actual number of orders and transaction reports that exist in the marketplace. Market data vendors provide another form of price discipline for proprietary data products because they control the primary means of access to end users. Vendors impose price restraints based upon their business models. For example, vendors such as Bloomberg and Reuters that assess a surcharge on data they sell may refuse to offer proprietary products that end users will not purchase in sufficient numbers. Internet portals, such as Google, impose a discipline by providing only data that will enable them to attract “eyeballs” that contribute to their advertising revenue. Retail broker-dealers, such as Schwab and Fidelity, offer their customers proprietary data only if it promotes trading and generates sufficient commission revenue. Although the business models may differ, these vendors’ pricing discipline is the same: They can simply refuse to purchase any proprietary data product that fails to provide sufficient value. The Exchange and other producers of proprietary data products must understand and respond to these varying business models and pricing disciplines in order to market proprietary data products successfully.

#### *C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

#### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

The foregoing rule change has become effective pursuant to Section

19(b)(3)(A)(ii) of the Act,<sup>18</sup> and subparagraph (f)(2) of Rule 19b-4 thereunder,<sup>19</sup> because it establishes a due, fee, or other charge imposed by ISE Gemini.

At any time within 60 days of the filing of the 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 will institute proceedings 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-ISEGemini-2014-10 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-ISEGemini-2014-10. 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

<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(ii).

<sup>19</sup> 17 CFR 240.19b-4(f)(2).

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-ISEGemini-2014-10 and should be submitted on or before March 24, 2014.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>20</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-71613; File No. SR-NYSEMKT-2014-06]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Section 17, Which Are Rules Applicable to Securities Known as Fixed Return Options, To Reflect a Name Change to Binary Return Derivatives, a Change to the Calculation of the Settlement Price, Updating Rule References, Adding New Text for ByRDs Series Available for Trading, Amending the Quoting and Trading Increment Applicable to ByRDs, and Adding a New Paragraph 8 to Rule 975NY(a) and Amending Rule 975NY(b)(1) To Address Obvious Errors in ByRDs

February 25, 2014.

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 February 14, 2014, 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 Section 17, which are rules applicable to securities known as Fixed Return Options, to reflect a name change to Binary Return Derivatives ("ByRDs"), a change to the calculation of the Settlement Price, updating rule references, adding new text for ByRDs series available for trading, amending the quoting and trading increment applicable to ByRDs, and adding a new paragraph 8 to Rule 975NY(a) and amending Rule 975NY(b)(1) to address Obvious Errors in ByRDs. 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 Section 17, which are rules applicable to securities currently known as Fixed Return Options, to reflect a name change to ByRDs, a change to the calculation of the Settlement Price, updating rule references, adding new text for ByRDs series available for trading, amending the quoting and trading increment applicable to ByRDs, and adding a new paragraph 8 to Rule 975NY(a) and amending Rule 975NY(b)(1) to address Obvious Errors in ByRDs.

###### Overview

In 2007, the Exchange received approval to trade a type of binary option referred to as Fixed Return Options.<sup>4</sup> In

March 2009, when the Exchange migrated to a new trading system as part of its integration with NYSE Euronext, because the new trading system was not optimized to accommodate the trading of Fixed Return Options, the Exchange restricted the opening of new series of Fixed Return Options and limited transactions to closing only.<sup>5</sup> Subsequently, all open interest in Fixed Return Options was either closed or expired and the contracts became dormant.<sup>6</sup> Since first migrating over in 2009, the Exchange has regularly enhanced its systems in efforts to support new products and meet business demands. The Exchange's systems now have the necessary functionality and capacity to support the trading of ByRDs contracts.

The Exchange is now in a position to re-launch these securities and is proposing to update its rules to reflect the re-branding of Fixed Return Options ("FRO") as Binary Return Derivatives, also referred to as ByRDs. The Exchange also proposes to update various rule cites to reflect the adoption of Section 900NY, which are the rules that govern trading of options contracts at the Exchange, and which replaced the rules in place prior to March 2009 that previously governed the trading of Fixed Return Options, and delete the reference to the Constitution, which no longer exists.<sup>7</sup> Additionally, based on its experience from having trading Fixed Return Options and based on participant feedback, the Exchange is proposing to make changes to the manner in which the Settlement Price is calculated to ensure either the Finish High or Finish Low ByRDs contract pays off at expiration; adding text to clarify permissible strike price intervals and expiration series for ByRDs; adding text to specify the minimum price variation ("MPV") applicable to quoting and trading in ByRDs; and adding new text to Rule 975NY to address Obvious Error transactions in ByRDs. The Exchange is also proposing non-substantive technical changes to certain rules associated with the trading of ByRDs.

<sup>5</sup> See Information Circular #08-0210 <http://www.amex.com/amextrader/dailylist/data/options/infoCir/2008/ic080210.pdf>.

<sup>6</sup> See Information Circular #09-0024 <http://www.nyse.com/pdfs/ic090024.pdf>.

<sup>7</sup> See Securities Exchange Act Release No. 59472 (February 27, 2009) 74 FR 9843 (March 6, 2009), (Approval Order for SR-NYSEALTR-2008-14 as amended); See also Securities Exchange Act Release No. 59454 (March 31, 2009) 74 FR 15802 (April 7, 2009) (Notice of Filing and Immediate Effectiveness of SR-NYSEALTR-2009-17).

<sup>20</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.

<sup>4</sup> See Securities Exchange Act Release No. 56251 (August 14, 2007), 72 FR 46523 (August 20, 2007) (Approval Order for SR-Amex-2004-27, as amended).