

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79389; File No. SR-NYSEMKT-2016-107)

November 23, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 15 – Equities Relating to Pre-Opening Indications

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on November 17, 2016, 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 Rule 15 – Equities relating to pre-opening indications. The proposed rule change is available on the Exchange’s website at 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.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

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

1. Purpose

The Exchange proposes to amend Rule 15 – Equities (“Rule 15”) relating to pre-opening indications. The proposed rule changes would restore the obligation for a DMM to publish a pre-opening indication if a security has not opened by 10:00 a.m. Eastern Time and add a new parameter for when a pre-opening indication should be published for lower-priced securities.

Background

The Exchange recently amended Exchange rules to consolidate and amend requirements relating to pre-opening indications in Rule 15.⁴ Rule 15(a) provides that a pre-opening indication will include the security and the price range within which the opening price is anticipated to occur and that a pre-opening indication will be published via the securities information processor and proprietary data feeds. Rule 15(b) specifies the conditions for publishing a pre-opening indication, and Rule 15(b)(1) provides that a DMM will publish a pre-opening indication, as described in Rule 15(e), before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the “Applicable Price Range” from a specified “Reference Price” before the security opens.

Under Rule 15(c), the Reference Price for a security, other than an ADR, is the securities last reported stale price on the Exchange, the security’s offering price in the case of an initial public offering (“IPO”), or the security’s last reported sale price in the securities market from which the security is being transferred to the Exchange. Rule 15(d)(1) provides that, except

⁴ See Securities Exchange Act Release No. 78673 (August 25, 2016), 81 FR 60038 (August 31, 2016) (SR-NYSEMKT-2016-79) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change) (“Opening Filing”). The Exchange implemented the changes described in the Opening Filing on September 12, 2016.

under conditions set forth in Rule 15(d)(2), the Applicable Price Range for determining whether to publish a pre-opening indication will be 5%. Rule 15(d)(2) provides that if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures are +/- 2% from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 80B – Equities, or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market, the Applicable Price Range for determining whether to publish a pre-opening indication will be 10%.

Proposed Rule Change

The Exchange proposes to amend Rule 15(b)(1) to add another condition for when a DMM would be required to publish a pre-opening indication. As proposed, a DMM would be required to publish a pre-opening indication if a security has not opened by 10:00 a.m. Eastern Time. This requirement was previously set forth in rule text in Rule 123D(b) – Equities that was deleted in the Opening Filing.⁵ The Exchange proposes to restore this requirement, as modified. Specifically, the Exchange would not retain the prior rule text that required Executive Floor Governor approval to extend the 30-minute time frame. The Exchange believes that current Rule 15(e)(1), which requires a Floor Governor to supervise and approve the publication of a pre-opening indication, provides for appropriate oversight of the publication of a pre-opening indication, including if such publication would be after 10:00 a.m.

The Exchange believes that restoring the requirement to publish a pre-opening indication

⁵ See Opening Filing, supra note 4 at 60039. Before being amended in the Opening Filing, Rule 123D(b) – Equities provided: “If an indication is disseminated after the opening bell, it must be considered a delayed opening. In addition, any stock that is not opened with a trade or a reasonable quotation within 30 minutes after the opening of business must be considered a delayed opening (except for IPOs) and requires Floor Official supervision, as well as an indication. That 30-minute time frame may only be extended by an Executive Floor Governor on a Floor-wide basis.”

if a security is not opened by 10:00 a.m. Eastern Time would promote transparency in the opening process for securities that do not open on either a trade or a quote by such time. The Exchange believes that there are limited circumstances when a security would not be opened by 10:00 a.m. and for which a pre-opening indication has not already been published. For example, if the reason a security has not opened by 10:00 a.m. is due to an order imbalance, the DMM would have already published a pre-opening indication, as required by current Rule 15(b)(1). By contrast, if there is no trading interest in a security, such as the first day of trading of a security listed on a when issued basis, the proposed requirement to publish a pre-opening indication for such security would provide investors with additional information regarding the indicative price for such security so they can evaluate whether to submit trading interest to participate in the opening. The Exchange believes that 10:00 a.m. is an appropriate time threshold for publishing a pre-opening indication in such circumstances as it would provide sufficient time for the DMM to gather pricing information for a security that may otherwise have no trading interest.⁶

To effect this proposed change, the Exchange proposes to amend Rule 15(b)(1) to add sub-numbering within the paragraph, delete the phrase “before the security opens” as duplicative of a prior reference to the same phrase, and add the new text, as follows (new text is in italics, deleted text bracketed):

⁶ For example, a security that is listed on a when issued basis generally does not have an offering document that specifies a price for such security. In the absence of trading interest to provide an indication of how market participants would price such a security, a DMM would have to look to other sources, such as research analyst reports, to identify the appropriate pricing. The Exchange notes that in such scenarios, there may be wide fluctuations on the estimated price. The first published pre-opening indication therefore may be wide, but would serve the purpose of providing transparency regarding the potential pricing for such a security.

(b) Conditions for publishing a pre-opening indication:

(1) A DMM will publish a pre-opening indication, as described in paragraph (e), (i) before a security opens if the opening transaction on the Exchange is anticipated to be at a price that represents a change of more than the "Applicable Price Range," as specified in paragraph (d) of this Rule, from a specified "Reference Price," as specified in paragraph (c) of this Rule[, before the security opens]; or (ii) if a security has not opened by 10:00 a.m. Eastern Time.

The Exchange also proposes to amend Rule 15(d) to add a new Applicable Price Range for securities priced \$3.00 and lower. As proposed, for these securities, the Applicable Price Range would be \$0.15 on regular trading days. To effect this proposed change, the Exchange proposes to amend Rule 15(d)(1) to provide that, except under the conditions set forth in Rule 15(d)(2), the Applicable Price Range for determining whether to publish a pre-opening indication would be 5% for securities with a Reference Price over \$3.00 and \$0.15 for securities with a Reference Price equal to or lower than \$3.00. The Exchange proposes to make a related change to Rule 15(d)(2) to provide for what the Applicable Price Range would be for securities priced \$3.00 and lower if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures are +/- 2% from the prior day's closing price of the E-mini S&P 500 Futures, when reopening trading following a market-wide trading halt under Rule 80B [sic], or if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market. As proposed, in such case, the Applicable Price Range would be \$0.30.

The Exchange believes a price range movement of more than \$0.15 for lower-priced securities on regular trading days, and more than \$0.30 price range movement on more volatile

trading days, would better reflect when an opening price for such securities is significantly away from the Reference Price, thus warranting a pre-opening indication. By contrast, the Exchange believes that the current 5% Applicable Price Range applicable to securities priced \$3.00 and below is too narrow and would result in a disproportionate number of pre-opening indications for these securities as compared to how many pre-opening indications are required for securities priced above \$3.00. Requiring pre-opening indications when they would not otherwise be warranted would also reduce the number of securities that would be eligible to be opened by a DMM electronically. For example, based on Exchange data from January 2016 through October 2016, if the Exchange had applied the 5% Applicable Price Range, there would have been 18 securities requiring a pre-opening indication. By contrast, using a \$0.15 Applicable Price Change for this same period would have resulted in only two securities requiring a pre-opening indication.⁷ This reduced number of required pre-opening indications would mean that more securities would have been eligible to be opened electronically by the DMM. The Exchange further notes that the proposed break point of which parameter would be used is based on the current price buckets used in the Regulation NMS Plan to Address Extraordinary Market Volatility (“LULD Plan”) (providing that securities priced \$3.00 and below are subject to wider percentage parameters than securities priced above \$3.00).⁸

⁷ When applying the proposed double-wide Applicable Price Change for volatile trading days, as provided for in Rule 15(d)(2), to trade data from August 25, 2015, the change to a \$0.30 Applicable Price Change instead of a 10% Applicable Price Change would have resulted in four securities requiring pre-opening indications instead of 63. Similarly, applying these Applicable Price Changes to June 24, 2016, a 10% move would have resulted in 55 securities requiring pre-opening indications, whereas a \$0.30 parameter would have resulted in one security requiring pre-opening indication.

⁸ See Securities Exchange Act Release No. 77679 (April 21, 2016), 81 FR 24908 (April 27, 2016) (File No. 4-631) (Order approving 10th Amendment to the LULD Plan).

There are no technology changes associated with this proposed rule change. However, because the proposed rule change would require DMMs to change behavior, the Exchange will announce the operative date by a Trader Update that describes the proposed changes. The Exchange will publish this Trader Update no later than 10 days after the operative date of this filing.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,⁹ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁰ in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes that amending Rule 15(b)(1) to restore the requirement that a pre-opening indication be published if a security has not opened by 10:00 a.m. Eastern Time would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide additional transparency to the opening process if a security has not opened by 10:00 a.m. As such, the Exchange believes that the proposal would advance the efficiency and transparency of the opening process, thereby fostering accurate price discovery at the open of trading. For the same reasons, the proposal is also designed to protect investors as well as the public interest.

The Exchange further believes that providing for a \$0.15 Applicable Price Range for securities priced \$3.00 and lower on regular trading days, and a \$0.30 Applicable Price Range for such securities on more volatile trading days, would remove impediments to and perfect a

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

free and open market and a national market system because it would require a wider range of price movement before a pre-opening indication must be published for these lower-priced securities. The Exchange believes that these proposed changes would balance the goal of providing price transparency if there would be significant price dislocation in the opening price of a security compared to the Reference Price with the manual process involved with publishing pre-opening indications. Moreover, the Exchange believes that any reduction in number of pre-opening indications published for these lower-priced securities would not result in less transparency because the Exchange would continue to publish Order Imbalance Information for such securities, as provided for in Rule 15(g).

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. The proposed rule change is not intended to address competitive issues but rather promote greater efficiency and transparency at the open of trading on the Exchange.

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 Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹² 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 prior to 30 days from the date on which it was

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6).

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 and Rule 19b-4(f)(6)(iii) thereunder.¹³

A proposed rule change filed under Rule 19b-4(f)(6)¹⁴ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),¹⁵ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)¹⁶ of the Act to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

¹³ In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's intent to file the proposed rule change, along with a brief description and 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. The Exchange has satisfied this requirement.

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 240.19b-4(f)(6)(iii).

¹⁶ 15 U.S.C. 78s(b)(2)(B).

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2016-107 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEMKT-2016-107. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-NYSEMKT-2016-107 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁷

Robert W. Errett
Deputy Secretary

¹⁷ 17 CFR 200.30-3(a)(12).