

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77306; File No. SR-NYSEMKT-2016-31)

March 7, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Rule 123C-Equities to Provide for How the Exchange Would Determine an Official Closing Price if the Exchange is Unable to Conduct a Closing Transaction

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 February 25, 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, 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 Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 123C - Equities to provide for how the Exchange would determine an Official Closing Price if the Exchange is unable to conduct a closing transaction. 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

1. Purpose

The Exchange is proposing to amend its rules to specify back-up procedures for determining an Official Closing Price for Exchange-listed securities if it is unable to conduct a closing transaction in one or more securities due to a systems or technical issue.⁴ Specifically, the Exchange proposes to amend Rule 123C – Equities (“Rule 123C”) to provide for how the Exchange would determine an Official Closing Price if the Exchange is impaired.

The Exchange developed this proposal in consultation with its affiliated exchanges, NYSE Arca, Inc. (“NYSE Arca”) and New York Stock Exchange LLC (“NYSE”), and the NASDAQ Stock Market LLC (“Nasdaq”), and took into consideration feedback from discussions with industry participants, including meeting the following key goals important to market participants:

- Providing a pre-determined, consistent solution that would result in a closing print to the applicable securities information processor (“SIP”) within a reasonable time frame from the normal closing time;
- Minimizing the need for industry participants to modify their processing of data from the SIPs; and
- Providing advance notification of the applicable closing contingency plan to provide sufficient time for industry participants to route any closing interest to an

⁴ See NYSE press release dated July 22, 2015, available here: <http://ir.theice.com/press-and-publications/press-releases/all-categories/2015/07-22-2015.aspx>.

alternate venue to participate in that venue's closing auction.

Background

The Exchange recently amended Rule 123C to add the definition of "Official Closing Price" for all Exchange-listed securities and, once implemented, will disseminate to the SIP the Official Closing Price as an "M" value.⁵ In that filing, the Exchange amended Rule 123C(1)(e)(i) to define the "Official Closing Price" of a security listed on the Exchange as the price established in a closing transaction under paragraphs (7) and (8) of Rule 123C of one round lot or more. If there is no closing transaction in a security or if a closing transaction is less than one round lot, the Official Closing Price will be the most recent last-sale eligible trade in such security on the Exchange on that trading day.

The Exchange further amended Rule 123C(1)(e)(ii) to provide for how the Exchange would determine an Official Closing Price if the Exchange is unable to conduct a closing transaction in a security or securities due to a systems or technical issue. In such case, the Official Closing Price will be the last consolidated last-sale eligible trade for such security during regular trading hours on that trading day. The rule further provides that if there were no consolidated last-sale eligible trades in a security on a trading day when the Exchange is unable to conduct a closing transaction in a security or securities due to a systems or technical issue, the Official Closing Price of such security will be the prior day's Official Closing Price.

The Exchange also amended Rule 440B(b) - Equities to provide that Exchange systems will not execute or display a short sale order with respect to a covered security at a price that is

⁵ See Securities Exchange Act Release No. 76601 (Dec. 9, 2015), 80 FR 77680 (Dec. 15, 2015) (SR-NYSEMKT-2015-98). For a description of all sale conditions that are reportable to the SIP, including the "M" value, see the Consolidated Tape System Participant Communications Interface Specification, dated November 16, 2015, at 86, available here: https://www.ctaplan.com/publicdocs/ctaplan/notifications/trader-update/cts_input_spec.pdf.

less than or equal to the current national best bid if the price of that security decreases by 10% or more, as determined by the listing market for that security, from the security's Official Closing Price, as defined in Rule 123C as of the end of regular trading hours on the prior day ("Trigger Price").

Proposed Amendments

The Exchange proposes to amend Rule 123C(1)(e)(ii) to provide for the proposed new contingency plan of how the Exchange would determine an Official Closing Price if the Exchange is unable to conduct a closing transaction in a security or securities due to a systems or technical issue. To reflect this change, the Exchange would replace the current rule text in Rule 123C(1)(e)(ii).

As proposed, Rule 123C(1)(e)(ii) would provide that if the Exchange determines at or before 3:00 p.m. Eastern Time that it is unable to conduct a closing transaction in one or more securities due to a systems or technical issue, the Exchange would designate an alternate exchange for such security or securities. The Exchange would publicly announce the exchange designated as the alternate exchange via Trader Update.⁶ In such case, the Official Closing Price of each security would be determined on the following hierarchy:

- Proposed Rule 123C(1)(e)(ii)(A) would provide that the Official Closing Price would be the official closing price for such security under the rules of the designated alternate exchange. For example, if the Exchange designates NYSE Arca as the alternate exchange, the Official Closing Price would be based on NYSE Arca Equities Rule 1.1(ggP), which defines how NYSE Arca establishes

⁶ The Exchange expects that it would designate one of its affiliated exchanges as the alternate exchange and would designate Nasdaq only if its affiliated exchanges were also impacted by the systems or technical issue.

an official closing price.⁷ If Nasdaq were designated as the alternate exchange, the Official Closing Price would be the official closing price established in Nasdaq Rule 4754.

The proposed 3:00 p.m. cut off time was selected in part based on discussions with market participants regarding their capability to re-direct closing-only interest in Exchange-listed securities in time to participate in the closing auction of an alternate venue. By designating an alternate exchange before 3:00 p.m. Eastern Time, the Exchange therefore believes that market participants would be more likely to have sufficient notice to direct any closing-only interest in Exchange-listed securities to the designated alternate exchange. By providing market participants sufficient time, when possible, to route closing-only interest to an alternate venue for participation in that exchange's closing auction process, that alternate exchange's closing auction would be more likely to result in a closing price that reflects market value for such security.

If there were insufficient interest for a closing auction on the designated alternate exchange, the Exchange believes that the respective rules of NYSE Arca and Nasdaq provide for an appropriate hierarchy of which price to use to determine the Official Closing Price. For example, under NYSE Arca Rule 1.1(ggP)(1), if there is no closing auction of one round lot or more on a trading day, the official closing price under that rule is the most recent consolidated last sale eligible trade

⁷ NYSE Arca Equities will be filing a rule proposal to amend Rule 1.1(ggP)(1) to provide that the manner by which NYSE Arca determines the Official Closing Price under that rule for securities listed on NYSE Arca would also be applicable to any securities for which NYSE Arca conducts a closing auction, including securities that trade on an unlisted trading privileges basis.

during Core Trading Hours on that trading day. That rule further provides that if there were no consolidated last sale eligible trades during Core Trading Hours on that trading day, NYSE Arca's official closing price will be the prior day's Official Closing Price. This hierarchy is similar to how the Exchange determines the Official Closing Price pursuant to Rule 123C(1)(e)(i) when there is no closing transaction of a round lot or more, except that in lieu of a closing auction, NYSE Arca uses the last consolidated last sale eligible trade rather than the last Exchange last-sale eligible trade.

- Proposed Rule 123C(1)(e)(ii)(B) would provide if the designated alternate exchange does not have an official closing price in a security, the Official Closing price would be the volume-weighted average price ("VWAP") of the consolidated last-sale eligible prices of the last five minutes of trading during regular trading hours up to the time that the VWAP is processed. The VWAP would include any closing transactions on an exchange and would take into account any trade breaks or corrections up to the time the VWAP is processed. Because the VWAP would include any last-sale eligible trades, busts, or corrections that were reported up to the time that the SIP calculates the VWAP, the Exchange believes that the VWAP price would reflect any pricing adjustments that may be reported after 4:00 p.m. ET.

As discussed above, the manner by which exchanges calculate their respective official closing prices provide for an official closing price in the absence of a closing transaction. Accordingly, the Exchange believes that in circumstances when the Exchange designates an alternate exchange, the VWAP calculation

would rarely be used to determine the Official Closing Price for an Exchange-listed security.

- Proposed Rule 123C(1)(e)(ii)(C) would provide that if the designated alternate exchange does not have an official closing price in a security and there were no consolidated last-sale eligible trades in the last five minutes of trading during regular trading hours in such security, the Official Closing Price would be the last consolidated last-sale eligible trade during regular trading hours on that trading day.
- Proposed Rule 123C(1)(e)(ii)(D) would provide that if the designated alternate exchange does not have an official closing price in a security and there were no consolidated last-sale eligible trades in a security on a trading day in such security, the Official Closing Price would be the prior day's Official Closing Price.
- Finally, proposed Rule 123C(1)(e)(ii)(E) would provide that if an Official Closing Price for a security cannot be determined under (A), (B), or (C) of proposed Rule 123C(1)(e)(ii) and there is no prior day's Official Closing Price, the Exchange would not publish an Official Closing Price for such security.

The Exchange would use the hierarchy set forth in proposed Rule 123C(e)(ii)(B) – (E) only if the designated alternate exchange did not disseminate an official closing price in a security. In such case, the proposed hierarchy is based on current Rule 123C(1)(e)(i), which provides that, if the Exchange is unable to conduct a closing transaction, the Official Closing Price will be the last consolidated last-sale eligible trade for such security during regular trading hours on that trading day, and if there were no consolidated last-sale eligible trades in a security,

the Official Closing Price of such security will be the prior day's Official Closing Price. In addition, the Exchange proposes to add as paragraph (E) of Rule 123C(e)(ii) what would happen if there were no Official Closing Price published on the prior trading day (i.e., the Exchange would not publish an Official Closing Price). The Exchange believes not publishing an Official Closing Price would be a rare occurrence, and is most likely to occur for a thinly-traded security, such as a when issued security, right, or warrant, that has been listed for trading but does not have any consolidated last-sale eligible trades.

If the Exchange determines that it is impaired before 3:00 p.m. and the Official Closing Price for an Exchange-listed security is determined pursuant to proposed Rule 123C(1)(e)(ii), the SIP would publish the Official Closing Price for such security no differently than how the SIP publishes the Official Closing Price for an Exchange-listed security pursuant to Rule 123C(1)(e)(i).⁸ Accordingly, if the Official Closing Price is determined pursuant to proposed Rule 123C(1)(e)(ii), recipients of SIP data would not have to make any changes to their systems because the SIP would publish the "M" last sale condition as an Exchange Official Closing Price for any impacted Exchange-listed securities.

As further proposed, Rule 123C(1)(e)(iii) would describe how the Exchange would determine the Official Closing Price for a security if the Exchange determines after 3:00 p.m. Eastern Time that it is unable to conduct a closing transaction in one or more securities due to a systems or technical issue. Based on input from market participants, the Exchange believes that,

⁸ The Operating Committees of the CTA Plan, CQ Plan, and the Joint Self-Regulatory Organization Plan Governing the Collection, Consolidation, and Dissemination of Quotation and Transaction Information for Nasdaq-Listed Securities Traded on Exchanges on an Unlisted Trading Privileges Basis approved the Impaired Market Contingency Plan under which the SIPs would print an impaired primary listing exchange's contingency Official Closing Price as the Official Closing Price of that primary listing exchange as provided for in the rules of respective primary listing exchanges.

if the Exchange were to announce after 3:00 p.m. Eastern Time that it is impaired and unable to conduct a closing transaction, market participants would not have sufficient time to re-direct closing-only orders to an alternate venue. The proposed hierarchy would be similar to proposed Rule 123C(1)(e)(ii), but would not contemplate a closing transaction on a designated alternate exchange. Accordingly, in such scenario, the Exchange proposes to use the following hierarchy for determining the Official Closing Price for a security:

- Proposed Rule 123C(1)(e)(iii)(A) would provide that the Official Closing Price would be the VWAP of the consolidated last-sale eligible prices of the last five minutes of trading during regular trading hours up to the time that the VWAP is processed, including any closing transactions on an exchange. The VWAP would take into account any trade breaks or corrections up to the time of the VWAP is processed. This VWAP would be calculated in the same manner as set forth in proposed in Rule 123C(1)(e)(ii)(B), described above. However, if the Exchange's determination that it is unable to conduct a closing transaction is after 3:00 p.m. ET, the proposed VWAP calculation would be the primary means for determining the Official Closing Price for a security. In such case, the Exchange believes that the VWAP would appropriately reflect the pricing of a security because it would include, in a volume-weighted manner, the price and volume of closing transactions on other exchanges if market participants are able to route closing interest in Exchange-listed securities to an alternate venue for participation in a closing auction.
- Proposed Rule 123C(1)(e)(iii)(B) would provide that if there were no consolidated last-sale eligible trades in the last five minutes of trading during

regular trading hours in such security, the Official Closing Price would be the last consolidated last-sale eligible trades during regular trading hours on that trading day. This proposed rule text is the same as proposed Rule 123C(1)(e)(ii)(C).

- Proposed Rule 123C(1)(e)(iii)(C) would provide that if there were no consolidated last-sale eligible trades in such security on a trading day, the Official Closing Price would be the prior day's Official Closing Price. This proposed rule text is the same as proposed Rule 123C(1)(e)(ii)(D).
- Finally, proposed Rule 123C(1)(e)(iii)(D) would provide that if an Official Closing Price for a security cannot be determined under (A), (B), or (C) of proposed Rule 123C(1)(e)(iii) and there is no prior day's Official Closing Price, the Exchange would not publish an Official Closing Price for such security. This proposed rule text is based on proposed Rule 123C(1)(e)(ii)(E).

Similar to how the Official Closing Price would be published under proposed Rule 123C(1)(e)(ii), if the Exchange determines that it is impaired after 3:00 p.m. and the Official Closing Price is determined pursuant to proposed Rule 123C(1)(e)(iii), the SIP would publish the Official Closing Price for such security no differently than how the SIP publishes the Official Closing Price for an Exchange-listed security pursuant to Rule 123C(1)(e)(i). Accordingly, if the Official Closing Price is determined pursuant to proposed Rule 123C(1)(e)(iii), recipients of SIP data would not have to make any changes to their systems because the SIP would publish the "M" last sale condition as an Exchange Official Closing Price for any impacted Exchange-listed securities.

For purposes of Rule 440B(b) - Equities, the Official Closing Price would still be determined based on Rule 123C and if the market is impaired, the Official Closing Price as

defined in proposed Rules 123C(1)(e)(ii) and (iii) would be used for purposes of determining whether a Short Sale Price Test is triggered in a security the next trading day.

Because of the technology changes associated with this proposed rule change, the Exchange will implement the proposed back-up procedures for determining an Official Closing Price no later than 120 days after approval of this proposed rule change and will announce the implementation date via Trader Update.

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, in that it is designed to prevent fraudulent and manipulative acts and practices, 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 Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide transparency in how the Exchange would determine the Official Closing Price in Exchange-listed securities when the Exchange is unable to conduct a closing transaction due to a systems or technical issue. The Exchange believes that the proposed amendments would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed determination of an Official Closing Price was crafted in response to input from industry participants and would:

⁹ 15 U.S.C. 78f(b).

¹⁰ 15 U.S.C. 78f(b)(5).

- provide a pre-determined, consistent solution that would result in a closing print to the SIP within a reasonable time frame from the normal closing time;
- minimize the need for industry participants to modify their processing of data from the SIP; and
- provide advance notification of the applicable closing contingency plan to provide sufficient time for industry participants to route any closing interest to an alternate venue to participate in that venue's closing auction

More specifically, the Exchange believes the proposed hierarchy for determining the Official Closing Price if the Exchange determines that it is impaired before 3:00 p.m. Eastern Time would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal, which is based on input from market participants, would provide sufficient time for market participants to direct closing-only interest to a designated alternate exchange in time for such interest to participate in a closing auction on such alternate venue in a meaningful manner. The Exchange further believes that relying on the official closing price of a designated alternate exchange would provide for an established hierarchy for determining an Official Closing Price for an Exchange-listed security if there is insufficient interest to conduct a closing auction on the alternate exchange. In such case, the rules of NYSE Arca and Nasdaq already provide a mechanism for determining an official closing price for securities that trade on those markets.

The Exchange further believes that if the Exchange determines after 3:00 p.m. that it is impaired and unable the [sic] conduct a closing transaction, the proposed VWAP calculation would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would provide for a mechanism to determine the value of an

affected security for purposes of determining an Official Closing Price. By using a volume-weighted calculation that would include the closing transactions on an affected security on alternate exchanges as well as any busts or corrections that were reported up to the time that the SIP calculates the value, the Exchange believes that the proposed calculation would reflect the correct price of a security. In addition, by using a VWAP calculation rather than the last consolidated last-sale eligible price as of the end of regular trading hours, the Exchange would reduce the potential for an anomalous trade that may not reflect the true price of a security from being set as the Official Closing Price for a security.

The Exchange further believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposal would have minimal impact on market participants. As proposed, from the perspective of market participants, even if the Exchange were impaired, the SIP would publish an Official Closing Price for Exchange-listed securities on behalf of the Exchange in a manner that would be no different than if the Exchange were not impaired. If the Exchange determines that it is impaired after 3:00 p.m., market participants would not have to make any system changes. If the Exchange determines that it is impaired before 3:00 p.m. Eastern Time and designates an alternate exchange, market participants may have to do systems work to re-direct closing-only orders to the alternate exchange. However, the Exchange understands, based on input from market participants, that such changes would be feasible based on the amount of advance notice. In addition, the Exchange believes that designating an alternate exchange when there is sufficient time to do so would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would allow for the price-

discovery mechanism of a closing auction to be available for impacted Exchange-listed securities.

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 designed to address any competitive issues, but rather to provide for how the Exchange would determine an Official Closing Price for Exchange-listed securities if it is impaired and cannot conduct a closing transaction due to a systems or technical issue. The proposal has been crafted with input from market participants, Nasdaq, and the SIPs, and is designed to reduce the burden on competition by having similar back-up procedures across all primary listing exchanges if such exchange is is [sic] impaired and cannot conduct a closing transaction.

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

Within 45 days of the date of publication of this notice in the Federal Register or up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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 e-mail to rule-comments@sec.gov. Please include File Number SR-NYSEMKT-2016-31 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-2016-31. 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-2016-31 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.¹¹

Robert W. Errett
Deputy Secretary

¹¹ 17 CFR 200.30-3(a)(12).