

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-78228; File No. SR-NYSE-2016-24)

July 5, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Partial Amendment No. 3 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendments No. 2 and 3, Relating to Pre-Opening Indications and Opening Procedures

I. Introduction

On March 17, 2016, New York Stock Exchange LLC (“Exchange” or “NYSE”) filed with the Securities and Exchange Commission (“Commission”), 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> a proposed rule change to amend its rules relating to pre-opening indications and opening procedures. On March 30, 2016, the Exchange filed Amendment No. 1 to the proposed rule change.<sup>3</sup> On March 31, 2016, the Exchange filed Amendment No. 2 to the proposed rule change.<sup>4</sup> The proposed rule change, as modified by Amendment No. 2, was published for comment in the Federal Register on April 6, 2016.<sup>5</sup> On May 13, 2016, the Commission designated a longer period for action on the proposed rule change.<sup>6</sup> The Commission has received no comments on the proposed rule change.

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

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

<sup>3</sup> Amendment No. 1 superseded the original filing in its entirety.

<sup>4</sup> Amendment No. 2 superseded the original filing, as modified by Amendment No. 1, in its entirety.

<sup>5</sup> See Securities Exchange Act Release No. 77491 (Mar. 31, 2016), 81 FR 20030 (“Notice”).

<sup>6</sup> See Securities Exchange Act Release No. 77829, 81 FR 31670 (May 19, 2016).

On June 23, 2016, the Exchange filed Partial Amendment No. 3 to the proposed rule change.<sup>7</sup> The Commission is publishing this notice to solicit comments on Partial Amendment No. 3 from interested persons, and is approving the proposal, as modified by Amendments No. 2 and 3, on an accelerated basis.

## II. Description of the Proposal, As Modified by Amendment Nos. 2 and 3

The Exchange proposes to amend its rules relating to pre-opening indications and other opening procedures. With respect to pre-opening indications, the Exchange proposes to consolidate requirements for publication of pre-opening indications in a single rule and to modify the circumstances under which a Designated Market Maker (“DMM”) is required to publish pre-opening indications in a security. The Exchange also proposes to allow the Exchange CEO, under certain circumstances, to temporarily suspend the requirement for DMMs to publish pre-opening indications.

With respect to the opening process, the Exchange proposes to specify in its rules that a DMM may open a security electronically only within specified price and volume parameters, which would be doubled during periods of extreme market-wide volatility. The Exchange also proposes to allow the Exchange CEO, under certain circumstances, to temporarily suspend these

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<sup>7</sup> In Partial Amendment No. 3, the Exchange: (1) stated its belief that securities with an average daily volume of over 500,000 shares at the open warrant manual openings because such a high volume is likely to involve block-sized trades, and a manual opening allows the Exchange’s Floor brokers to solicit block-sized interest to participate in the opening; (2) replaced the term “order” with “orderly” in proposed Rules 15(d)(2) and 123D(a)(1)(B)(ii); (3) replaced the term “consult with” with the term “notify” in proposed Rules 15(f)(2)(B) and 123D(c)(2)(B) to describe the action the Exchange CEO must take if a determination is made to suspend the requirements under those rules; and (4) clarified that the filing’s previous reference to “consult with” the Chief Regulatory Officer (“CRO”) of the Exchange did not intend to create a requirement for the Exchange CEO to obtain the CRO’s approval to make a determination under proposed Rules 15(f)(2)(B) and 123D(c)(2)(B). Partial Amendment No. 3 is available at: <https://www.sec.gov/comments/sr-nyse-2016-24/nyse201624-2.pdf>.

price and volume parameters, as well as the existing requirement to obtain Floor official approval before opening or reopening a security.

Finally, the Exchange proposes to delete NYSE Rule 48, and to make conforming and technical amendments to several of its rules.

A. Current Pre-Opening Indications and Opening Process on the Exchange

1. Pre-Opening Indications and Mandatory Indications

Exchange rules currently provide for two types of published indications before the open: pre-opening indications and mandatory indications.

First, “pre-opening indications” pursuant to Exchange Rule 15<sup>8</sup> indicate the security and the price range for the anticipated opening transaction and are published by the Exchange or by the DMM<sup>9</sup> if the opening transaction on the Exchange is anticipated to be more than a specified price range away from the reference price.<sup>10</sup> The pre-opening indications are published on the Exchange’s proprietary data feeds rather than through the securities information processor (“SIP”).<sup>11</sup>

The current price ranges for pre-opening indications under Rule 15 are:

<u>Exchange Closing Price</u>	<u>Applicable Price Change (More Than)</u>
Under \$20.00	\$0.50
\$20 - \$49.99	\$1.00

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<sup>8</sup> See NYSE Rule 15(a).

<sup>9</sup> If a DMM issues a pre-opening indication or a mandatory indication (as discussed below), the Exchange shall not publish a pre-opening indication in that security. See NYSE Rule 15(a).

<sup>10</sup> Generally, the reference price is the security’s last reported sale price on the Exchange. In the case of an initial public offering (“IPO”), the reference price would be the offering price. In the case of a transferred listing, the reference price would be the last reported sale price on the prior listing market. See NYSE Rule 15(a).

<sup>11</sup> See Notice, *supra* note 5, at 20031. The Exchange may also publish order imbalance information on its proprietary data feeds. The order imbalance information contains the price at which opening interest may be executed in full. See NYSE Rule 15(c).

\$50.00 - \$99.99	\$2.00
\$100 - \$500	\$5.00
Above \$500	1.5%

Second, under Exchange Rule 123D, the Exchange also requires that a “mandatory indication” be published if the opening price would result in a significant price change from the previous close or if the opening is delayed past 10:00 a.m.<sup>12</sup> The applicable price parameters for the Rule 123D mandatory indication are:

<u>Previous NYSE Closing Price</u>	<u>Price Change (equal to or greater than)</u>
Under \$10.00	1 dollar
\$10 - \$99.99	lesser of 10% or 3 dollars
\$100 and Over	5 dollars

Exchange Rule 123D provides that all mandatory indications require the supervision and approval of a Floor official and that subsequent indications are required if a security will open outside the range of the previous indication or if the previous indication had a wide spread. Exchange Rule 123D also requires that a minimum period of time elapse between the publication of the last indication and the commencement of trading. Mandatory Indications are published to the SIP and the Exchange’s proprietary data feeds.<sup>13</sup>

During extreme market volatility, NYSE Rule 48 provides that the Exchange may suspend the requirements to publish pre-opening or mandatory indications.<sup>14</sup>

## 2. Opening Process

Currently, the Exchange’s rules provide that a DMM has the responsibility to open its assigned securities as close to the opening bell as possible, but that, when there is a price disparity from the prior close, the DMM should not open trading in an “unduly hasty” manner.

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<sup>12</sup> See NYSE Rule 123D(b). When mandatory indications under Rule 123D are published, pre-opening indications under Rule 15 are not required.

<sup>13</sup> See Notice, supra note 5, at 20032.

<sup>14</sup> See NYSE Rule 48.

Openings on the Exchange may be done manually or electronically, and securities may open on a quote or on a trade. Currently, Exchange systems prevent a DMM from opening a security electronically if the price parameters of Exchange Rule 15 (discussed above) are exceeded or if the volume in the opening cross will exceed 100,000 shares.<sup>15</sup>

B. Proposed Changes

1. Pre-Opening Indications

The Exchange proposes to consolidate pre-opening indications under Rule 15 and mandatory indications under Rule 123D into a single type of pre-opening indication under amended Rule 15.<sup>16</sup> The Exchange also proposes to make changes to the applicable price parameters that would trigger a pre-opening indication, to provide for wider price parameters on volatile trading days, and to prescribe detailed procedures for publication of pre-opening indications. The Exchange further proposes to authorize its CEO, in certain Floor-wide events, to temporarily suspend the publication of pre-opening indications. The proposed pre-opening indications would be published via both the SIP and the Exchange's proprietary data feeds.

While the Exchange would retain the current definition of the reference price used for determining when a pre-opening indication is required, the Exchange would use different parameters for the price movement that would trigger a pre-opening indication. Instead of the current parameters, which vary depending on a security's previous closing price and use both dollar figures and percentages, the Exchange proposes to require a pre-opening indication

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<sup>15</sup> In the Notice, the Exchange represented that DMM generally opens manually when there is a pre-opening indication or a mandatory indication. Further, the Exchange represented that its systems prevents a DMM electronic open if a pre-opening indication is required or if the size of the opening transaction would exceed 100,000 shares.

<sup>16</sup> See Notice, supra note 5.

whenever a security is anticipated to open 5% away from its reference price, except on volatile trading days.

On volatile trading days, the Exchange proposal would double the applicable price range from 5% to 10%. The Exchange proposes to use this wider range under three circumstances: first, if as of 9:00 a.m. Eastern Time, the E-mini S&P 500 Futures price is more than 2% away from its prior day's closing price; second, when there is a reopening following a market-wide trading halt due to extraordinary market volatility; and third, if the Exchange determines that it is necessary or appropriate for the maintenance of a fair and orderly market.

The Exchange proposes procedures for the DMMs to follow when required to publish the pre-opening indications, including the requirement to obtain supervision and approval of a Floor governor, the requirement to update pre-opening indication under certain circumstances, the need to use best efforts to narrow the width of the spread, the need for a delay between publishing a pre-opening indication and opening trading, guidelines on trading halts, and the process for reopening after a trading pause due to the Limit-Up-Limit-Down mechanism.

The Exchange also proposes to allow the Exchange's CEO to temporarily suspend the requirement to publish pre-opening indications if the CEO determines that a Floor wide event is likely to impair the DMM's ability to arrange for a fair and orderly opening. When invoking this provision, the CEO must notify the Exchange's Chief Regulatory Officer ("CRO") and must inform Commission staff as promptly as possible. Even when relieved of the obligation to publish pre-opening indications, a DMM or the Exchange may publish a pre-opening indication for one or more securities.<sup>17</sup>

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<sup>17</sup> The Exchange also proposes to increase the frequency with which the Exchange disseminates Order Imbalance Information between 9:20 a.m. ET and the opening of trading for that security from every 15 seconds to every 5 seconds. Additionally, the

## 2. Opening Process

The Exchange proposes to codify in its rulebook the circumstances under which a DMM may not open a security electronically. Under the proposed amendments, a DMM would not be able to open a security electronically: (1) if there is manually entered Floor interest; or (2) if the opening transaction would be at a price more than 4% away from the reference price or the opening transaction volume would be more than: (a) 150,000 shares (for securities with average opening volume of 100,000 shares or less in the previous calendar quarter) or (b) 500,000 shares (for securities with average opening volume of over 100,000 shares in the previous calendar quarter). However, if the 9:00 a.m. E-mini S&P 500 Futures price is 2% away from the prior day's closing price, or if the Exchanges determines that it is necessary or appropriate for the maintenance of a fair and orderly market, then a DMM may open electronically at a price up to 8% away from the reference price, and no volume limitation would apply to the opening transaction.

The Exchange also proposes to allow the Exchange CEO to temporarily suspend (a) the price limits within which DMMs may open electronically and (b) the need to for a DMM to obtain prior Floor official approval to reopen trading electronically following a market-wide trading halt. As with the suspension of the requirement to publish a pre-opening indication, the CEO would need to consider the relevant facts and circumstances, to notify the Exchange's CRO, and to inform Commission staff.

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Exchange's proposal would provide that, unless otherwise specified, all references in Rule 15 to an opening transaction would also include a reopening transaction following a trading halt or pause in a security.

### 3. Conforming Changes

In addition to the changes described above, the Exchange proposes conforming changes to Exchange Rules 80C, 124, and 9217.

### III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendments No. 2 and 3, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>18</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>19</sup> which requires, among other things, that the rules of a national securities exchange be 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, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

In support of its proposal, the Exchange has provided statistics describing how the proposed modified rules for pre-opening indication and opening procedures would have affected market openings on selected periods in the past. In particular, the Exchange provided statistics describing how the modified rules would have affected the Exchange's opening on August 24, 2015, a day that featured unusual volatility in the equities markets surrounding the 9:30 a.m. opening.<sup>20</sup> According to the Exchange, on August 24, 2015, 638 stocks listed on the NYSE (or

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<sup>18</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>19</sup> 15 U.S.C. 78f(b)(5).

<sup>20</sup> See Research Note: Equity Market Volatility on August 24, 2015, prepared by the Staff of the Office of Analytics and Research, Division of Trading and Markets, Commission (available at [https://www.sec.gov/marketstructure/research/equity\\_market\\_volatility.pdf](https://www.sec.gov/marketstructure/research/equity_market_volatility.pdf)).



19.37% of all NYSE-listed stocks) were subject to NYSE Rule 123D mandatory indication requirements, but, under the new proposed parameters of NYSE Rule 15 applicable on a volatile trading day (i.e., the proposed 10% parameter) only 278 NYSE-listed stocks (or 8.44% of all NYSE-listed stocks) would have required the publication of pre-opening indications.<sup>21</sup>

Additionally, the Exchange's statistical analysis shows that, while 1,682 NYSE-listed stocks on August 24, 2015, exceeded the parameters within which Exchange systems would permit DMMs to conduct an electronic open, the new proposed parameters of NYSE Rule 123D would have permitted DMMs to open all but 573 NYSE-listed stocks electronically.<sup>22</sup>

The Commission believes that the Exchange's proposed modifications to its opening procedures are consistent with the requirements of the Act, because the proposed modifications should provide greater clarity to all market participants about the circumstances in which DMMs have the discretion to open trading electronically and because they are reasonably designed to enhance the ability of DMMs to open (and reopen) trading on the Exchange in a timely fashion, particularly on days with high market volatility, which should help to remove impediments to and perfect the mechanism of a free and open market and a national market system.<sup>23</sup>

The Exchange has also proposed procedures for publication of the pre-opening indications and proposed to provide the Exchange CEO with the power to temporarily suspend the publication of pre-opening indications. The Commission believes that the Exchange's proposed procedures for the publication of pre-opening publications are reasonably designed to ensure that pre-opening procedures are more expeditious. The Commission further believes that

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<sup>21</sup> See Table 2, Notice, supra note 5.

<sup>22</sup> See Table 5, Notice, supra note 5.

<sup>23</sup> The Commission also believes that providing for more frequent dissemination of the Order Imbalance Information to market participants during the period immediately before the open should assist the Exchange in conducting an orderly opening auction.

providing the Exchange CEO under certain circumstances with the ability to temporarily suspend the requirement for pre-opening indications, as well as the price and volume parameters surrounding electronic openings by DMMs, is reasonably designed to enhance the ability of the Exchange to conduct orderly openings (and reopenings) under conditions of extreme market-wide volatility.

For the above reasons, the Commission finds that the proposal, as modified by Amendment Nos. 2 and 3, is consistent with the requirements of the Act.

#### IV. Solicitation of Comments on Partial Amendment No. 3

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Partial Amendment No. 3 to 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2016-24 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-NYSE-2016-24. 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-NYSE-2016-24 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of Proposed Rule Change, as Modified by Amendments No. 2 and 3

The Commission finds good cause to approve the proposed rule change, as modified by Amendments No. 2 and 3, prior to the 30th day after the date of publication of notice of Partial Amendment No. 3 in the Federal Register. In Partial Amendment No. 3, the Exchange: (1) stated its belief that securities with an average daily volume of over 500,000 shares at the open warrant manual openings because such high volume is likely to involve block-sized trades and a manual opening allows the Exchange's Floor brokers to solicit block-sized interest to participate in the opening; (2) replaced the term "order" with "orderly" in proposed NYSE Rules 15(d)(2) and 123D(1)(a)(B)(ii); (3) replaced the term "consult with" with the term "notify" in proposed NYSE Rules 15(f)(2)(B) and 123D(c)(2)(B) to describe the action the CEO of the Exchange must take if a determination is made to suspend the requirements under those rules; and (4) clarified that the filing's previous reference to "consult with" the Chief Regulatory Officer ("CRO") of the

Exchange did not intend to create a requirement for the CEO of the Exchange to obtain the CRO's approval to make a determination under proposed NYSE Rules 15(f)(2)(B) and 123D(c)(2)(B).

The Commission believes that the revisions proposed in Partial Amendment No. 3 are designed to clarify the meaning of the proposed rules and do not raise any new novel regulatory issues. Therefore, the Commission finds that Partial Amendment No. 3 is consistent with the protection of investors and the public interest. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>24</sup> to approve the proposed rule change, as modified by Amendments No. 2 and 3, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,<sup>25</sup> that the proposed rule change (SR-NYSE-2016-24), as modified by Amendments No. 2 and 3, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>26</sup>

Brent J. Fields  
Secretary

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<sup>24</sup> 15 U.S.C. 78s(b)(2).

<sup>25</sup> Id.

<sup>26</sup> 17 CFR 200.30-3(a)(12).