

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80097; File No. SR-NYSEMKT-2016-103)

February 24, 2017

Self-Regulatory Organizations; NYSE MKT LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Allowing the Exchange to Trade, Pursuant to Unlisted Trading Privileges, Any NMS Stock Listed on Another National Securities Exchange; Establishing Rules for the Trading Pursuant to UTP of Exchange-Traded Products; and Adopting New Equity Trading Rules Relating to Trading Halts of Securities Traded Pursuant to UTP on the Pillar Platform

On November 17, 2016, NYSE MKT LLC (“Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act” or “Exchange Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to (1) allow the Exchange to trade, pursuant to unlisted trading privileges (“UTP”), any NMS Stock listed on another national securities exchange; (2) establish rules for the trading pursuant to UTP of exchange-traded products (“ETPs” or “Exchange-Traded Products”); and (3) adopt new equity trading rules relating to trading halts of securities traded pursuant to UTP on the Exchange’s Pillar trading platform. The proposed rule change was published for comment in the Federal Register on December 1, 2016.³

On January 4, 2017, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 79400 (Nov. 25, 2016), 81 FR 86750 (Dec. 1, 2016) (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁵ The Commission has received no comments on the proposed rule change.

This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposed rule change.

I. Summary of the Proposed Rule Change

The Exchange states that it does not currently trade any securities on a UTP basis. The Exchange proposes new rules to trade all Tape A and Tape C symbols, on a UTP basis, on its new trading platform, Pillar.⁷ In addition, the Exchange proposes to adopt rules for the trading of the following types of Exchange-Traded Products:⁸ Equity Linked Notes; Investment Company Units; Index-Linked Exchangeable Notes; Equity Gold Shares; Equity Index-Linked Securities; Commodity-Linked Securities; Currency-Linked Securities; Fixed-Income Index-Linked Securities; Futures-Linked Securities; Multifactor-Index-Linked Securities; Trust Certificates; Currency and Index Warrants; Portfolio Depositary Receipts; Trust Issued Receipts; Commodity-Based Trust Shares; Currency Trust Shares; Commodity Index Trust Shares;

⁵ See Securities Exchange Act Release No. 79738, 82 FR 3068 (Jan. 10, 2017). The Commission designated March 1, 2017, as the date by which it should approve, disapprove, or institute proceedings to determine whether to approve or disapprove the proposed rule change.

⁶ 15 U.S.C. 78s(b)(2)(B).

⁷ According to the Exchange, on January 29, 2015, the Exchange announced the implementation of Pillar, which is an integrated trading technology platform designed to use a single specification for connecting to the equities and options markets operated by the Exchange and its affiliates, NYSE Arca, Inc. (“NYSE Arca”) and New York Stock Exchange LLC. See Trader Update dated January 29, 2015, available at https://www.nyse.com/publicdocs/nyse/markets/nyse/Pillar_Trader_Update_Jan_2015.pdf.

⁸ The Exchange is proposing to define the term “Exchange Traded Product” to mean a security that meets the definition of “derivative securities product” in Rule 19b-4(e) under the Exchange Act. This proposed definition is identical to the definition of “Derivatives Securities Product” in NYSE Arca Equities Rule 1.1(bbb).

Commodity Futures Trust Shares; Partnership Units; Paired Trust Shares; Trust Units; Managed Fund Shares; and Managed Trust Securities.⁹

The Exchange represents that the proposed rules for these ETPs are substantially identical (other than with respect to certain non-substantive and technical amendments) to the rules of the NYSE Arca Equities exchange for the qualification, listing, and trading of these ETPs.¹⁰

According to the Exchange, it will trade securities pursuant to UTP only on its Pillar platform, not on its current trading platform. Further, the Exchange states that it does not at this time intend to list ETPs pursuant to the proposed rules. The Exchange does not propose to change any of the current rules of the Exchange pertaining to the listing and trading of ETPs in the NYSE MKT Company Guide or in its other rules.

II. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEMKT-2016-103 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹¹ to determine whether the proposed rule change should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

⁹ See Notice, supra note 3.

¹⁰ See Notice, supra note 3, at 86750, n.6 (citing NYSE Arca Equities Rules 5 (Listings) and 8 (Trading of Certain Equities Derivatives)).

¹¹ 15 U.S.C. 78s(b)(2)(B).

Pursuant to Section 19(b)(2)(B) of the Act,¹² the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act, 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," and "to protect investors and the public interest."¹³

III. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, or arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.¹⁴

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's

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Id.

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15 U.S.C. 78f(b)(5).

¹⁴

Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding – either oral or notice and opportunity for written comments – is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,¹⁵ in addition to any other comments they may wish to submit about the proposed rule change.

In particular, the Commission seeks comment on whether the proposed rules regarding ETPs, which would not expressly apply on a continuing basis, are consistent with the Act.¹⁶

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-2016-103 on the subject line.

¹⁵ See Notice, *supra* note 3.

¹⁶ The Commission has recently approved an exchange proposal to amend its listing standards to specify continued listing requirements for ETPs, to add issuer-notification requirements related to failures to comply with the continued listing requirements, and to incorporate specific delisting procedures for ETPs. See Securities Exchange Act Release No. 79784 (Jan. 12, 2017), 82 FR 6664 (Jan. 19, 2017) (SR-NASDAQ-2016-135). In addition, the Commission's orders approving the generic listing and trading of actively managed ETFs relied upon, among other things, the listing exchanges' representations that the listing criteria would apply on a continuing basis. See, e.g., Securities Exchange Act Releases No. 78396 (July 22, 2016), 81 FR 49698, 49701 (July 28, 2016) (File No. SR-BATS-2015-100); No. 78397 (July 22, 2016), 81 FR 49320, 49324 (July 27, 2016) (File No. SR-NYSEArca-2015-110); and No. 78918 (Sept. 23, 2016), 81 FR 67033, 67035 (Sept. 29, 2016) (File No. SR-NASDAQ-2016-104). Recent Commission orders approving the listing and trading of individual ETPs have similarly relied upon representations by the listing exchange that all statements and representations made regarding (a) the description of the portfolio, (b) limitations on portfolio holdings or reference assets, or (c) the applicability of exchange rules and surveillance procedures shall constitute continued listing requirements. See, e.g., Securities Exchange Act Release No. 77920 (May 25, 2016), 81 FR 35086, 35090 (June 1, 2016) (SR-NYSEArca-2016-46; approving listing and trading of shares of the AdvisorShares Cornerstone Small Cap ETF); No. 78847 (Sept. 15, 2016), 81 FR 64560, 64562 (Sept. 20, 2016) (File No. SR-BATS-2016-34; approving listing and trading of shares of the ProShares Crude Oil Strategy ETF).

Paper comments:

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

All submissions should refer to File Number SR-NYSEMKT-2016-103. 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 these filings 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-2016-103 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of 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)(57).