

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-81038; File No. SR-NYSEMKT-2016-103)

June 28, 2017

Self-Regulatory Organizations; NYSE MKT LLC; Order Granting Approval of Proposed Rule Change, as Modified by Amendments No. 1, 2, and 3, to Allow the Exchange to Trade, Pursuant to Unlisted Trading Privileges, any NMS Stock Listed on Another National Securities Exchange; Establish Rules for the Trading Pursuant to UTP of Exchange-Traded Products; and Adopt New Equity Trading Rules Relating to Trading Halts of Securities Traded Pursuant to UTP on the Pillar Platform

I. Introduction

On November 17, 2016, NYSE MKT LLC (“Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“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 stock³ listed on another national securities exchange; (2) establish rules for the trading pursuant to UTP of certain exchange-traded products (“ETPs”); and (3) adopt new equity trading rules relating to trading halts of securities traded pursuant to UTP on the Exchange’s new trading platform, Pillar. The proposed rule change was published for comment in the Federal Register on December 1, 2016.⁴ On January 4, 2017, pursuant to Section 19(b)(2) of the Act,⁵ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ The term “NMS stock” is defined in Rule 600 of Regulation NMS. See 17 CFR 242.600(b)(47).

⁴ See Securities Exchange Act Release No. 79400 (Nov. 25, 2016), 81 FR 86750 (Dec. 1, 2016).

⁵ 15 U.S.C. 78s(b)(2).

the proposed rule change.⁶ On February 24, 2017, the Commission instituted proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change.⁸ On March 28, 2017, the Exchange filed Amendment No. 1 to the proposed rule change, and Amendment No. 1 was published for comment in the Federal Register on April 27, 2017.⁹ On April 27, 2017, the Exchange filed Amendment No. 2 to the proposed rule change.¹⁰ On May 23, 2017, the Commission designated a longer period for Commission action on the

⁶ See Securities Exchange Act Release No. 79738, 82 FR 3068 (Jan. 10, 2017).

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 80097 (Feb. 24, 2017), 82 FR 12251 (Mar. 1, 2017). Specifically, the Commission instituted 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.” See id. at 12252.

⁹ See Securities Exchange Act Release No. 80500 (Apr. 21, 2017), 82 FR 19416 (Apr. 27, 2017) (“Notice of Amendment No. 1”).

¹⁰ In Amendment No. 2, the Exchange: (1) corrected the cross-reference in footnote 66 of the filing to read “See supra note 63”; (2) amended proposed Rule 5.2E(j)(6)(B)(V)(2)(a) to read “may” instead of “will”; (3) amended proposed Rule 5.5E(m)(1)(c) to clarify that the regulatory function described therein would be exercised by “the Exchange” instead of “Regulation”; (4) amended Supplementary Material .01 to proposed Rule 8.200E to erase the repetitive words “are satisfied” at the end of the introductory paragraph; and (5) amended proposed Rule 8.700E(h) to add at the beginning of the paragraph the sentence “The Exchange will file separate proposals under Section 19(b) of the Securities Exchange Act of 1934 before listing and trading separate and distinct Managed Trust Securities.” Amendment No. 2 is available at: <https://www.sec.gov/comments/sr-nysemkt-2016-103/nysemkt2016103-1724667-150689.pdf>. Because Amendment No. 2 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 2 is not subject to notice and comment.

proposed rule change.¹¹ On May 31, 2017, the Exchange filed Amendment No. 3 to the proposed rule change.¹² The Commission has received no comments on the proposed rule change.

The Commission is granting approval of the proposed rule change, as modified by Amendments No. 1, 2, and 3.

II. Description of the Proposal, As Modified by Amendments No. 1, 2, and 3¹³

NYSE MKT proposes to trade on its Pillar trading platform,¹⁴ pursuant to UTP, any NMS stock listed on another national securities exchange.¹⁵ NYSE MKT also proposes to establish

¹¹ See Securities Exchange Act Release No. 80746, 82 FR 24763 (May 30, 2017) (designating July 29, 2017, as the date by which the Commission must either approve or disapprove the proposed rule change).

¹² In Amendment No. 3, the Exchange deleted footnote 10 of the filing, which stated that “[t]he Exchange currently lists five ETPs on its current trading platform. These ETPs will continue to be listed and traded pursuant to the NYSE MKT Company Guide and the other rules of the Exchange that do not apply to the Pillar platform.” The Exchange also deleted the sentence that followed footnote 10, which stated that “[t]herefore, the Exchange is only proposing ETP rules in this rule filing that would apply to the Pillar platform and trading pursuant to UTP. Since the Exchange does not plan to trade ETPs on the Pillar platform that would be listed under these proposed rules, the Exchange is not proposing 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.” The Exchange also deleted footnote 11, which was attached to the deleted sentence, and which provided a website address for the NYSE MKT Company Guide. Amendment No. 3 is available at <https://www.sec.gov/comments/sr-nysemkt-2016-103/nysemkt2016103-1780346-152834.pdf>. Because Amendment No. 3 to the proposed rule change does not materially alter the substance of the proposed rule change or raise unique or novel regulatory issues, Amendment No. 3 is not subject to notice and comment.

¹³ Additional information regarding the proposal can be found in the Notice of Amendment No. 1, supra note 9.

¹⁴ On January 29, 2015, the Exchange announced the implementation of Pillar, which, according to the Exchange, 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 (“NYSE”). See Trader Update dated January 29, 2015, available at https://www.nyse.com/publicdocs/nyse/markets/nyse/Pillar_Trader_Update_Jan_2015.pdf. See also Securities Exchange Act Release No. 79242 (Nov. 4, 2016), 81 FR 79081 (Nov. 10, 2016) (SR-NYSEMKT-2016-97) (“Pillar Framework Filing”).

listing and trading requirements for certain types of ETPs on Pillar.¹⁶ The Exchange’s proposed rules for the qualification, listing, and trading of these ETPs are substantively identical to the rules of NYSE Arca and NYSE.¹⁷ Finally, the Exchange proposes to adopt new equity trading rules relating to trading halts of securities traded pursuant to UTP on Pillar.

Under the proposal, the Exchange represents that it will only trade securities pursuant to UTP on its Pillar trading platform, and will not trade securities pursuant to UTP on its Existing Platform. Furthermore, the Exchange does not intend to list ETPs on Pillar or on its Existing Platform. Therefore, the Exchange represents that the proposed rules apply only to Pillar, and the rules pertaining to the Existing Platform will remain unchanged.

A. New Definitions

The Exchange proposes to define the term “Exchange Traded Product” in Rule 1.1E(bbb) to mean a security that meets the definition of “derivative securities product” in Rule 19b-4(e) under the Act, and a “UTP Exchange Traded Product” to mean an ETP that trades on the

¹⁵ The Exchange represents that it will continue to trade the symbols for which it is the listing venue on its separate, existing trading platform (“Existing Platform”) and will not trade securities pursuant to UTP on the Existing Platform.

¹⁶ Specifically, the Exchange proposes to establish listing and trading rules for the following: 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, and 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; Commodity Futures Trust Shares; Partnership Units; Paired Trust Shares; Trust Units; Managed Fund Shares; and Managed Trust Securities.

¹⁷ See NYSE Arca Equities Rules 5 (Listings) and 8 (Trading of Certain Equities Derivatives); and NYSE Rules 5P (Securities Traded) and 8P (Trading of Certain Exchange Traded Products).

Exchange pursuant to UTP.¹⁸ The Exchange also proposes to add Rule 1.1E(kk) to define “UTP Regulatory Halt” as a trade suspension, halt, or pause called by the primary listing market for a UTP security that requires all market centers to halt trading in that security.

B. Proposal to Trade Securities Pursuant to UTP

The Exchange proposes new Rule 5.1E(a) to extend UTP to Pillar for securities listed on other national securities exchanges. Specifically, proposed Rule 5.1E(a)(1) would allow the Exchange to trade securities eligible for UTP under Section 12(f) of the Act.¹⁹ Proposed Rule 5.1E(a) provides that the securities the Exchange would trade pursuant to UTP would be traded on Pillar under the rules applicable to UTP trading.

Proposed Rule 5.1E(a)(1) makes clear that the Exchange would not list any ETPs unless it files a proposed rule change under Section 19(b)(2) under the Act.²⁰ Therefore, the Exchange represents that the provisions of proposed Rules 5E and 8E described below, which also permit the listing of ETPs, would not be effective until the Exchange files a proposed rule change to amend its rules to comply with Rules 10A-3 and 10C-1 under the Act and to incorporate qualitative listing criteria, and the proposed rule change is approved by the Commission.²¹

C. ETP Trading Pursuant UTP on the Exchange

The Exchange proposes Rule 5.1E(a)(2) to govern the trading of ETPs pursuant to UTP and Rule 19b-4(e) under the Act. Specifically, proposed Rule 5.1E(a)(2)(A) provides that, within

¹⁸ These proposed definitions are identical to the definitions of the same terms in NYSE Rule 1.1(bbb), and to the definition of “Derivative Securities Product” in NYSE Arca Equities Rule 1.1(bbb).

¹⁹ 15 U.S.C. 78j(f).

²⁰ 15 U.S.C. 78s(b)(2).

²¹ In addition, the introductory note to each of proposed Rules 5E and 8E states that the provisions of the rules apply to the trading pursuant to UTP of ETPs on the Exchange and do not apply to the listing of ETPs on the Exchange.

five days after commencement of trading, the Exchange would file a Form 19b-4(e) with the Commission with respect to each ETP the Exchange trades pursuant to UTP.

The Exchange proposes certain other rules to support the trading of ETPs pursuant to UTP. For example, proposed Rule 5.1E(a)(2)(B) provides that the Exchange will distribute an information circular prior to the commencement of trading in an ETP, which would generally include the same information as the information circular provided by the listing exchange, including (a) the special risks of trading the ETP, (b) the Exchange's rules that will apply to the ETP, including Rules 2090-Equities and 2111-Equities,²² and (c) information about the dissemination of the value of the underlying assets or indices, as applicable.

In addition, proposed Rule 5.1E(a)(2)(C) establishes certain requirements for member organizations that have customers that trade ETPs on a UTP basis, including requirements pertaining to prospectus delivery and the provision of written description of terms and characteristics of the ETPs. Also, proposed Rule 5.1E(a)(2)(E) imposes restrictions on member organizations that are registered as market makers on the Exchange for certain ETPs. Finally, proposed Rule 5.1E(a)(2)(F) specifies certain surveillance mechanisms for ETPs traded on the Exchange pursuant to UTP. Namely, Rule 5.1E(a)(2)(F) provides that the Exchange will enter into comprehensive surveillance sharing agreements with markets that trade components of the index or portfolio on which the ETP is based to the same extent as the listing exchange's rules require the listing exchange to enter into comprehensive surveillance sharing agreements with those markets.²³

²² See NYSE MKT Rule 2090-Equities (the Exchange's Know Your Customer Rule) and NYSE MKT Rule 2111-Equities (the Exchange's Suitability Rule).

²³ In addition, the Exchange represents that its surveillance procedures for ETPs traded on the Exchange pursuant to UTP would be similar to the procedures used for equity

The Exchange also proposes to add certain definitions contained in NYSE Arca Equities Rule 5.1E(b) that are relevant to the proposed rules, including non-substantive changes to certain references to account for the minor differences of the Exchange and NYSE Arca and their respective rules.

D. Listing and Trading Requirements for ETPs

The Exchange proposes to adopt rules that are substantively identical to those of NYSE Arca and NYSE for the qualification, listing, and delisting of ETPs. The Exchange proposes to add Rule 5.2E(j), which would be substantively identical to NYSE Arca Equities and NYSE Rule 5.2(j). This proposed rule pertains to the following ETPs: Equity Linked Notes (Rule 5.2E(j)(2)); Investment Company Units (Rule 5.2E(j)(3)); Index-Linked Exchangeable Notes (Rule 5.2E(j)(4)); Equity Gold Shares (Rule 5.2E(j)(5)); Equity Index Linked Securities, Commodity-Linked Securities, Currency-Linked Securities, Fixed Income Index-Linked Securities, Futures-Linked Securities, and Multifactor Index-Linked Securities (Rule 5.2E(j)(6)); and Trust Certificates (Rule 5.2E(j)(7)). The Exchange also proposes to add Rules 5.5E(g)(2), which would provide additional continued listing standards for Investment Company Units; 5.5E(j)-1, which would provide additional continued listing standards for Equity Linked Notes; and 5.5E(m), which would provide delisting procedures for ETPs. Other than certain non-substantive and technical differences, the text of these proposed rules is identical to NYSE Arca and NYSE Rules 5.2(j)(2) – 5.2(j)(7), 5.5(g)(2), 5.5(j)-1, and 5.5(m).

Further, the Exchange proposes to add Rule 8E, which is substantively identical to Sections 1 and 2 of NYSE Arca Equities Rule 8 and of NYSE Rule 8P. This proposed rule pertains to the following ETPs: Currency and Index Warrants (Rules 8.1E – 8.13E); Portfolio

securities traded on the Exchange and would incorporate and rely upon existing Exchange surveillance systems. See Notice of Amendment No. 1, supra note 9, at 19418.

Depository Receipts (Rule 8.100E); Trust Issued Receipts (Rule 8.200E); Commodity-Based Trust Shares (Rule 8.201E); Currency Trust Shares (Rule 8.202E); Commodity Index Trust Shares (Rule 8.203E); Commodity Futures Trust Shares (Rule 8.204E); Partnership Units (Rule 8.300E); Paired Trust Shares (Rule 8.400E); Trust Units (Rule 8.500E); Managed Fund Shares (Rule 8.600E); and Managed Trust Securities (Rule 8.700E).

As mentioned above, the Exchange would not list any ETPs unless it files a proposed rule change under Section 19(b)(2) under the Act.²⁴ Therefore, the provisions of Rules 5E and 8E, which permit the listing of ETPs, would not be effective until the Exchange files a proposed rule change to amend its rules to comply with Rules 10A-3 and 10C-1 under the Act and to incorporate qualitative listing criteria, and the proposed rule change is approved by the Commission.

E. Proposed Rule 7.18E – Requirements for Halts on Pillar Platform

In conjunction with the implementation of Pillar for trading of securities pursuant to UTP, the Exchange proposes new Rule 7.18E which governs trading halts in symbols trading on Pillar. This rule is substantively identical to the rules of NYSE Arca and NYSE.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendments No. 1, 2, and 3, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²⁵ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁶ which requires,

²⁴ 15 U.S.C. 78s(b)(2).

²⁵ 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).

²⁶ 15 U.S.C. 78f(b)(5).

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.

The Exchange proposes to trade, pursuant to UTP, NMS stocks (including ETPs) on its Pillar platform. Section 12(f) of the Act²⁷ provides that any national securities exchange may extend UTP to securities listed and registered on other national securities exchanges, subject to Commission rules. In particular, in order to extend UTP to securities, Rule 12f-5 under the Act requires a national securities exchange to have in effect a rule or rules providing for transactions in the class or type of security to which the exchange extends unlisted trading privileges.²⁸ The Commission notes that the Exchange's proposed Rule 5.1E allows NYSE MKT to extend UTP in Pillar to any security that is an NMS stock that is listed on another national securities exchange.

The Commission has previously approved substantively identical rules for the listing and trading of ETPs on NYSE Arca and NYSE. The Exchange represents that it will not list, but only trade, ETPs on a UTP basis. The Exchange represents that to trade pursuant to UTP any ETP that is listed and traded on another national securities exchange, NYSE MKT would be required to file Form 19b-4(e) with the Commission.

The Commission believes that the Exchange's proposal does not raise any novel issues, and the proposed rules of the Exchange are consistent with the rules of other national securities

²⁷ 15 U.S.C. 78l.

²⁸ See 17 CFR 240.12f-5. See also Securities Exchange Act Release No. 35737 (Apr. 21, 1995), 60 FR 20891 (Apr. 28, 1995) (File No. S7-4-95) (adopting Rule 12f-5 under the Act).

exchanges that trade securities, including ETPs.²⁹ Additionally, the Exchange represents, and its proposed rules specify, that NYSE MKT will not list any ETPs unless it first obtains Commission approval of a proposed rule change under Section 19(b)(2) of the Act. Therefore, the provisions of proposed Rules 5E and 8E that permit the listing of ETPs would only be effective if the Commission approves a proposed rule change for the Exchange to amend its rules to comply with Rules 10A-3 and 10C-1 under the Act and to incorporate other applicable listing criteria. Finally, the Commission notes that NYSE MKT has represented that it will be responsible for accepting the obligations applicable to a UTP market, including specific requirements for registered market makers, books and records production, surveillance procedures, suitability and prospectus requirements, and requisite Exchange approvals.³⁰

The Commission believes that the UTP trading on NYSE MKT of NMS stocks, including ETPs, listed on other national securities exchanges is consistent with existing UTP trading of NMS stocks on other national securities exchanges and that is designed to increase competition among the different securities markets to the benefit of market participants. The Commission therefore finds that NYSE MKT's proposed rules governing trading on a UTP basis on its Pillar platform are consistent with the Act.

²⁹ See, e.g., Rule 14.1 of Bats BYX Exchange, Inc. and Rule 14.1 of Bats EDGA Exchange, Inc.

³⁰ See proposed Rule 5.1E.

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,³¹ that the proposed rule change (SR-NYSEMKT-2016-103), as modified by Amendments No. 1, 2, and 3, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³²

Robert W. Errett
Deputy Secretary

³¹ 15 U.S.C. 78s(b)(2).

³² 17 CFR 200.30-3(a)(12).