

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-78238; File No. SR-NYSEMKT-2016-13)

July 7, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Rule 955NY(c) by Revising the Clearing Member Requirement for Entering an Order into the Electronic Order Capture System

I. Introduction

On March 22, 2016, NYSE MKT LLC (the “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 amend Rule 955NY(c) to change the timing for recording the name of the Clearing Member³ in the Electronic Order Capture system (“EOC”). On March 29, 2016,⁴ the Exchange filed Amendment No. 1 to the proposed rule change. The Commission published the proposed rule change, as modified by Amendment No. 1, for comment in the Federal Register on April 11, 2016.⁵ The Commission received no comments on the proposed rule change. On May 25, 2016 the Commission extended the time period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Rule 900.2NY defines “Clearing Member” as an Exchange ATP Holder which has been admitted to membership in the Options Clearing Corporation pursuant to the provisions of the Rules of the Options Clearing Corporation.

⁴ The Commission notes that the amendment date of March 30, 2016 in the SR-NYSEMKT-2016-13 Notice is incorrect and the proper date is March 29, 2016.

⁵ See Securities Exchange Act Release No. 34-77518 (April 5, 2016), 81 FR 21415 (“Notice”). Amendment No.1 was included in the Notice and provided the clarification that the CMTA Information and the name of the clearing ATP Holder would be entered into the EOC “as the events occur and/or during trade reporting procedures which may occur after the representation and execution of the order.”

disapprove the proposed rule change to July 10, 2016.⁶ The Commission did not receive any comments on the proposed rule change. This order institutes proceedings under Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1 thereto.

II. Description of the Proposal, as Modified by Amendment No. 1

The Exchange proposes to amend Rule 955NY(c) by revising the timing for an ATP holder to record the name of the Clearing Member in the EOC.⁸ In 2000, the Commission issued an order, which required the Exchange, in coordination with other exchanges, to “design and implement a consolidated options audit trail system (‘COATS’),” that would “enable the options exchanges to reconstruct markets promptly, effectively surveil them and enforce order handling, firm quote, trade reporting and other rules.”⁹ The Commission Order requires the Exchange to incorporate into the audit trail all non-electronic orders “such that the audit trail provides an accurate, time-sequenced record of electronic and other orders, quotations and transactions on such respondent exchange, beginning with the receipt of an order by such respondent exchange and further documenting the life of the order through the process of execution, partial execution, or cancellation of that order, which audit trail shall be readily retrievable in the common computer format.”¹⁰ To comply with the Commission Order, the Exchange developed the EOC

⁶ See Securities Exchange Act Release No. 34-77910 (May 25, 2016), 81 FR 35098 (June 1, 2016).

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Notice, supra note 5, 81 FR at 21415.

⁹ See Section IV.B.e.(v) of the Commission’s Order Instituting Public Administrative Proceedings Pursuant to Sections 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions (“Commission Order”), Securities Exchange Act Release No. 43268 (September 11, 2000) and Administrative Proceeding File No. 3-10282.

¹⁰ See id.

system for ATP holders.¹¹

The EOC is the Exchange’s floor-based electronic audit trail and order tracking system that provides an accurate time-sequenced record of all orders and transactions represented on the Exchange’s trading floor.¹² Rule 955NY(c) sets forth the EOC entry requirements and requires every ATP holder that receives an order for execution on the Exchange to “immediately, prior to representation in the trading crowd, record the details of the order (including any modification of the terms of the order or cancellation of the order) into the EOC, unless such order has been entered into the Exchange’s other electronic order processing facilities.”¹³ The pre-trade EOC requirements under current Rule 955NY(c)(1) include “the name of the clearing ATP Holder.”¹⁴ Rule 955NY(c)(1) further states that “[t]he remaining elements prescribed in Rule 956NY and any additional information with respect to the order shall be recorded as the events occur and/or during trade reporting procedures which may occur after the representation and execution of the order.”¹⁵

The Exchange proposes to amend Rule 955NY(c)(1) to allow an ATP Holder to record the name of the Clearing Member in the EOC “as the events occur and/or during trade reporting

¹¹ See Notice, supra note 5, 81 FR at 21415.

¹² See id.; see also Rule 955NY(c).

¹³ See Rule 955NY(c).

¹⁴ See Rule 955NY(c)(1)(vii).

¹⁵ See Rule 955NY(c)(1); see also Rule 956NY(a) (Record of Orders) (requiring that ATP Holders maintain a record of each order that includes that the following data elements: (1) CMTA Information and the name of the clearing ATP Holder; (2) options symbol, expiration month, exercise price and type of options; (3) side of the market and order type; (4) quantity of options; (5) limit or stop price or special conditions; (6) opening or closing transaction; (7) time in force; 8) account origin code; and (9) whether the order was solicited or unsolicited).

procedures” rather than prior to representation of the order in the trading crowd.¹⁶ The Exchange states that because the identity of the firm through which each trade will clear is not always initially provided when an order is presented, Floor Brokers waiting to receive this information and enter it into the EOC are delayed in representing and executing an order.¹⁷ The Exchange represents that the proposal would amend only the timing for the recording of the Clearing Member in the EOC while still maintaining the requirement to record the Clearing Member in the EOC for audit trail purposes.¹⁸ According to the Exchange, Floor Brokers would continue to be required to maintain proper order records, as part of each trade record, including the identity of the clearing ATP Holder, and would continue to be required to give up the responsible Clearing Member on each trade as part of each trade record.¹⁹

III. Proceedings to Determine Whether to Approve or Disapprove SR-NYSEMKT-2016-13 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act²⁰ 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, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as

¹⁶ See Notice, supra note 5, 81 FR at 21415-16.

¹⁷ See id. at 21416.

¹⁸ See id.

¹⁹ See Notice, supra note 5, 81 FR at 21416; see also Rule 956NY(a).

²⁰ 15 U.S.C. 78s(b)(2)(B). Section 19(b)(2)(B) of the Act also provides that proceedings to determine whether to disapprove a proposed rule change must be concluded within 180 days of the date of publication of notice of the filing of the proposed rule change. See id. The time for conclusion of the proceedings may be extended for up to 60 days if the Commission finds good cause for such extension and publishes its reasons for so finding. See id.

described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings because the proposal raises important issues that warrant further public comment and Commission consideration. Specifically, the Commission is instituting proceedings to allow for additional analysis of, and input from commenters with respect to, the proposed rule change's consistency with Section 6(b)(5) of the Act,²¹ which requires that the rules of a national securities exchange be designed, among other things, to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.

Under the Exchange's current rules, a floor broker must record the name of the Clearing Member in the EOC prior to representing an order on the floor. As discussed above,²² the Exchange developed the EOC and created the pre-trade Clearing Member requirement in response to the Commission Order. The Exchange justifies the proposed elimination of the pre-trade clearing requirement by stating that "Floor Brokers have told the Exchange that the identity of the firm through which each trade will clear is not always initially provided when an order is presented and that waiting to receive this information and enter it into EOC can delay the representation and execution of an order. In today's trading environment of rapidly moving markets and the need to execute an order and hedge a trade in real or near real time, even a slight

²¹ 15 U.S.C. 78f(b)(5).

²² See supra note 9.

delay can prove to be detrimental to the handling of an order.”²³ The Exchange further states that the “proposed change to eliminate the Give Up Requirement prior to execution of each trade would not impair the Exchange’s ability to comply with the [Commission] Order. Specifically, the EOC would still provide an accurate, time-sequenced record beginning with the receipt of an order and document the life of the order through the process of execution, partial execution, or cancellation. Entry of information pursuant to the Give Up Requirement would occur after the order had been represented and executed in the Trading Crowd. Thus, only the timing of the disclosure of such information would be affected by this proposal.”²⁴

The Exchange, however, does not explain why the identity of the Clearing Member may not be provided when an order is presented to a Floor Broker, how frequently this occurs, or why it is burdensome to identify the Clearing Member in advance. As a result, the Exchange does not appear to offer a credible justification for proposing to incur the risk of delaying the recording of this important information into the EOC. The Commission accordingly believes the proposal, as modified by Amendment No. 1, raises questions as to whether it consistent with the requirements of Section 6(b)(5) of the Act, including whether the proposal is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, 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.

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any other concerns they may have with the proposed rule change. In particular, the Commission invites

²³ See Notice, supra note 5, 81 FR at 21416.

²⁴ See id.

the written views of interested persons concerning whether the proposal, as modified by Amendment No. 1, is consistent with Sections 6(b)(5)²⁵ or any other provision of the Act, or the rules and regulations thereunder. Although there does not appear to be any issue relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,²⁶ any request for an opportunity to make an oral presentation.²⁷ 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 submission must file that rebuttal by [insert date 35 days from publication in the Federal Register]. In light of the concerns raised by the proposed rule change, as discussed above, the Commission invites additional comment on the proposed rule change as the Commission continues its analysis of the proposed rule change's consistency with Sections 6(b)(5) and 6(b)(8),²⁸ or any other provision of the Act, or the rules and regulations thereunder. The Commission asks that commenters address the sufficiency and merit of the Exchange's statements in support of the proposed rule change, in addition to any other comments they may wish to submit about the proposed rule change.

Comments may be submitted by any of the following methods:

²⁵ 15 U.S.C. 78f(b)(5).

²⁶ 17 CFR 240.19b-4.

²⁷ Section 19(b)(2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants to 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).

²⁸ 15 U.S.C. 78f(b)(5), (b)(8).

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 No. SR-NYSEMKT-2016-13 on the subject line.

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 No. SR-NYSEMKT-2016-13. 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, D.C. 20549 on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such 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 No. SR-NYSEMKT-2016-13, and should be submitted by [insert date 21 days from the date of 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.²⁹

Brent J. Fields
Secretary

²⁹ 17 CFR 200.30-3(a)(57).