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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77605; File No. SR-NYSEMKT-2016-43]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 72 - Equities Relating to Setting Interest

April 13, 2016

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 March 29, 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 72 - Equities relating to setting interest. 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

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1 15 U.S.C.78s(b)(1).

2 15 U.S.C. 78a.

3 17 CFR 240.19b-4.

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 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 proposes to amend NYSE MKT Rule 72 – Equities ("Rule 72") relating to setting interest to provide that interest that establishes a new Exchange best bid or offer ("BBO") would be considered setting interest even if a Limit Order designated Add Liquidity Only ("ALO") or sell short order during a Short Sale Period, as defined in Rule 440B(d) - Equities, is re-priced and displayed at the same price as such interest that became the Exchange BBO.

Background

Under Rule 72(a)(ii), a bid or offer, including pegging interest, is considered the "setting interest" when it is established as the only displayable bid or offer made at a particular price and is the only displayable interest when such price is or becomes the Exchange BBO. Setting interest is entitled to priority for allocation of executions at that price, as provided for under Rule 72. If there is no setting interest, all interest is allocated on parity pursuant to Rule 72(c).[4]

In 2008, when the Exchange added the current form of Rule 72, current paragraph (a)(ii)(G) of the rule provided that if, at the time non-pegging interest becomes the

[4] See Rule 72(c)(v).

Exchange BBO, an e-Quote is pegging to such non-pegging interest, all such interest was considered to be entered simultaneously and, therefore, no interest was considered the setting interest.[5] Because the Exchange believed that permitting pegging e-Quotes to eliminate the priority to which a non-pegging e-Quote might otherwise be entitled could disincentivize aggressive displayed quoting, the Exchange amended Rule 72(a)(ii)(G) to provide that non-pegging interest that becomes the Exchange BBO will be considered the setting interest even if an e-Quote is pegging to such non-pegging interest.[6] The Exchange's goal in providing priority to setting interest was to create an incentive for participants to display aggressive prices. The Exchange amended Rule 72(a)(ii)(G) in 2011 because it believed a participant may be reluctant to enter such displayed interest if a non-displayed pegging e-Quote could deny priority to such displayed interest.[7] Because pegging interest cannot peg to other pegging interest, the current rule specifies that non-pegging interest would retain priority if pegging interest is pegging to such non-pegging interest.

Proposed Rule Change

The Exchange believes there are additional circumstances when orders that are re-priced due to an external pricing change may similarly disincentivize aggressive

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5 See Securities Exchange Act Release No. 59022 (Nov. 26, 2008), 73 FR 73683 (Dec. 3, 2008) (SR-NYSEALTR-2008-10) (adopting the New York Stock Exchange LLC's New Market Model rules, including Rule 72). See also Rule 70 - Equities (defining e-Quotes and d-Quotes).

6 See Securities Exchange Act Release No. 65884 (Dec. 5, 2011), 76 FR 77038 (Dec. 9, 2011) (SR-NYSEAmex-2011-91) (Notice of filing and immediate effectiveness of proposed rule change amended Rule 72).

7 Because the Exchange does not publicly identify interest as pegging interest that is eligible to re-price based on changes to the PBBO, a participant seeking to set the Exchange BBO would be unaware that one or more pegging interest could join it at the Exchange BBO.

displayed quoting by permitting such re-priced interest to eliminate the setting priority to which non-pegging interest may otherwise be entitled. For example, similar to pegging interest,[8] which is re-priced based on changes to the PBBO, a Limit Order to buy (sell) designated ALO may be re-priced and re-displayed based on changes to the best-priced sell (buy) interest at the Exchange.[9] Likewise, sell short orders that are re-priced to a Permitted Price during a Short Sale Period may be re-priced and re-displayed as the national best bid ("NBB") moves.[10] In both these scenarios, the participant sending aggressive display interest would be unaware that when it sets a new Exchange BBO, existing interest on the Exchange may be eligible to be re-priced to that new Exchange BBO price.

For the same reason as the Exchange filed to change Rule 72(a)(ii)(G) in 2011, the Exchange is proposing that Limit Orders designated ALO or sell short orders during a Short Sale Period that are re-priced and displayed based on changes to the best-priced sell (buy) interest or NBB would not deny priority to displayed interest that sets a new Exchange BBO. In addition, the Exchange proposes to amend Rule 72(a)(ii)(G) to provide that if interest becomes the Exchange BBO, it would retain its priority (i.e., considered setting interest) even if pegging interest, Limit Orders designated ALO, or sell

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8 Pegging interest is defined in Rule 13(f)(1) - Equities as displayable or non-displayable interest to buy or sell at a price set to track the PBBO as the PBBO changes and must be an e-Quote or d-Quote.

9 See Rule 13(e)(1) - Equities (defining ALO modifier) and Supplementary Material .10 to Rule 13 - Equities (defining the term "best-priced sell (buy) interest" to be the lowest-priced sell (highest-priced buy) interest against which incoming buy (sell) interest would be required to execute with and/or route to, including Exchange displayed offers, Non-Display Reserve Orders, Non-Display Reserve e-Quotes, odd-lot sized sell (buy) interest, and protected offers (bids) on away markets).

10 See Rule 440B(e) - Equities.

short orders during a Short Sale Period under Rule 440B(e) are re-priced and displayed at the same price as such interest. Finally, the Exchange proposes a non-substantive amendment to delete the cross-reference to Rule 13 – Equities – Pegging Interest.

The Exchange also proposes to amend Rule 72(a)(ii)(G) to reflect that any interest, and not just "non-pegging" interest, is eligible to be setting interest even if other interest re-prices and is displayed at the new Exchange BBO. As provided for in Rule 13(f)(1)(B)(iii) - Equities, pegging interest may establish an Exchange BBO, which would occur if pegging interest pegs to a PBBO that is more aggressively priced than the Exchange's current BBO. For example, if the PBB is higher than the Exchange BB and the Exchange receives pegging interest to buy with a limit price equal to or higher than such PBB price, the pegging interest would peg to the PBB and be displayed as a new Exchange BB. If there were no other interest when the pegging interest establishes the Exchange BBO, such pegging interest would be entitled to priority under Rule 72(a)(ii).[11] However, if more than one pegging interest is pegging to the PBBO and together they establish a new Exchange BBO, Rule 72(a)(ii) would not provide either pegging interest with priority. Current Rule 72(a)(ii)(G), which provides that "non-pegging interest" is considered setting interest if it becomes the Exchange BBO, even if pegging interest is pegging to such non-pegging interest, is consistent with Rule 72(a)(ii) because any such pegging interest would not be the only displayable interest.

As discussed above, the Exchange proposes to amend Rule 72(a)(ii)(G) to specify additional interest that could reprice without denying priority to interest that sets the

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[11] Rule 72(a)(ii) explicitly includes pegging interest as being setting interest entitled to priority for allocation of executions, when such interest is established as the only displayable bid or offer made at a particular price and is the only displayable interest when such price is or becomes the Exchange BBO.

Exchange BBO. As a result, such non-pegging interest could be repriced to join pegging interest that establishes the Exchange BBO and that otherwise would be entitled to be setting interest. The Exchange therefore proposes that if a single pegging interest establishes the BBO, it would be entitled to priority even if a Limit Order designated ALO or short sale order during a Short Sale Period is re-priced and displayed at that same price. In such scenario, the pegging interest would be the aggressively-priced interest that established the new Exchange BBO, and other interest that re-prices at that price would be the reactive orders. Accordingly, to address such scenario, the Exchange proposes to change the references in Rule 72(a)(ii)(G) from "non-pegging interest" to "interest."

Currently, in limited circumstances, Limit Orders designated ALO that are re-priced to a price other than its limit price to join interest that sets a new Exchange BBO do not deny priority to the interest that set the Exchange BBO.[12] Because of technology changes associated with implementing this rule change for all circumstances when Limit Orders designated ALO and sell short orders during a Short Sale Period reprice to join interest that sets a new Exchange BBO, the Exchange will announce by Trader Update the full implementation of this proposed rule change.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),[13] in general, and furthers the objectives of Section

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12 See Trader Update dated February 17, 2016, available here: https://www.nyse.com/publicdocs/nyse/markets/nyse/NYSE_Trader_Update_Priority_Allocation.pdf.

13 15 U.S.C. 78f(b).

6(b)(5),[14] in particular, because 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, 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 believes that the proposed rule change meets these requirements because it would permit interest that sets a new Exchange BBO, including pegging interest that establishes an Exchange BBO, to be considered the setting interest and therefore retain priority, as provided for under Rule 72, over other interest that reacts and re-prices based on such interest setting a new Exchange BBO. The current rule already provides for non-pegging interest to retain priority if pegging interest pegs to such price, and the proposed rule change would afford similar treatment to any interest that establishes an Exchange BBO if pegging interest, Limit Orders designated ALO, or sell short orders during a Short Sale Period are re-priced and displayed at the same price as such interest. In addition, the proposed rule change is consistent with current rules in that it would allow for pegging interest that is entitled to be setting interest, as provided for in Rules 13(f)(1)(B)(iii) - Equities and 72(a)(ii), to retain priority if joined at that price by a Limit Order designated ALO or a sell short order during a Short Sale Period. Accordingly, the proposal is designed to incentivize and reward aggressive displayed quoting by market participants, which would remove impediments to and perfect the mechanism of a free and open market and national market system by contributing to the market quality of the Exchange and the national market system in general. In this regard, the Exchange believes that this

[14] 15 U.S.C. 78f(b)(5).

proposed change would have positive impact on the Exchange's market, on the Exchange's members, and on investors generally by promoting the display of aggressively-priced liquidity on a registered exchange.

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 change is not designed to address any competitive issue but rather to promote the additional display of aggressively-priced liquidity on the Exchange by allowing interest that sets a new Exchange BBO to be considered setting interest even if other orders react and re-price based on such interest setting a new Exchange BBO.

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

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[15] and Rule 19b-4(f)(6) thereunder.[16] Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A)

15 15 U.S.C. 78s(b)(3)(A)(iii).

16 17 CFR 240.19b-4(f)(6).

of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)[17] normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b4(f)(6)(iii),[18] the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B)[19] of the Act to determine whether the proposed rule change should be approved or 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-2016-43 on the subject line.

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17 17 CFR 240.19b-4(f)(6).

18 17 CFR 240.19b-4(f)(6)(iii).

19 15 U.S.C. 78s(b)(2)(B).

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-2016-43. 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-2016-43 and should be submitted on or before [INSERT DATE 21 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[20]

Robert W. Errett,
Deputy Secretary.

[20] 17 CFR 200.30-3(a)(12).

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