

Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<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 Web site 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 a.m. and 3 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 publicly available. All submissions should refer to File Number SR-NASDAQ-2012-104 and should be submitted on or before October 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

**Kevin M. O'Neill,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-67838; File No. SR-NYSEMKT-2012-46]

### Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 993NY by Adding a New Paragraph (c) That Addresses the Authority of the Exchange or Archipelago Securities LLC ("Arca Securities") To Cancel Orders When a Technical or Systems Issue Occurs and To Describe the Operation of an Error Account for Arca Securities

September 12, 2012.

Pursuant to Section 19(b)(1) <sup>1</sup> of the Securities Exchange Act of 1934 (the

"Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that on August 31, 2012, 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 and II 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 993NY by adding a new paragraph (c) that addresses the authority of the Exchange or Archipelago Securities LLC ("Arca Securities") to cancel orders when a technical or systems issue occurs and to describe the operation of an error account for Arca Securities. The text of the proposed rule change is available on the Exchange's Web site at [www.nyse.com](http://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 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 Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

The Exchange proposes to amend Rule 993NY by adding a new paragraph (c) that addresses the authority of the Exchange or Arca Securities to cancel orders when a technical or systems issue occurs and to describe the operation of an error account for Arca Securities.<sup>4</sup>

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> Arca Securities is a facility of the Exchange. Accordingly, under Rule 993NY, the Exchange is responsible for filing with the Commission rule changes and fees relating to Arca Securities' functions. In addition, the Exchange is using the phrase "Arca Securities or the Exchange" in this

Arca Securities is an approved routing broker of the Exchange, subject to the conditions listed in Rule 993NY.<sup>5</sup> When necessary, the Exchange may utilize Arca Securities to provide outbound routing services from itself to routing destinations of Arca Securities ("routing destinations").<sup>6</sup> When Arca Securities routes orders to a routing destination, it does so by sending a corresponding order in its own name to the routing destination. In the normal course, routed orders that are executed at routing destinations are submitted for clearance and settlement in the name of Arca Securities, and Arca Securities arranges for any resulting securities positions to be delivered to the ATP Holder that submitted the corresponding order to the Exchange. However, from time to time, the Exchange and Arca Securities encounter situations in which it becomes necessary to cancel orders and resolve error positions.<sup>7</sup>

rule filing to reflect the fact that a decision to take action with respect to orders affected by a technical or systems issue may be made in the capacity of Arca Securities or the Exchange depending on where those orders are located at the time of that decision.

<sup>5</sup> The Exchange currently relies on non-affiliate third-party broker-dealers to provide outbound routing services (*i.e.*, third-party Routing Brokers). In those cases, orders are submitted to the third-party Routing Broker through Arca Securities, the third-party Routing Broker routes the orders to the routing destination in its name, and any executions are submitted for clearance and settlement in the name of Arca Securities so that any resulting positions are delivered to Arca Securities upon settlement. As described above, Arca Securities normally arranges for any resulting positions to be delivered to the ATP Holder that submitted the corresponding order to the Exchange. If error positions (as defined in proposed Rule 993NY(c)(2)) result in connection with the Exchange's use of a third-party Routing Broker for outbound routing, and those positions are delivered to Arca Securities through the clearance and settlement process, Arca Securities would be permitted to resolve those positions in accordance with proposed Rule 993NY(c). If the third-party Routing Broker received error positions in connection with its role as a routing broker for the Exchange, and the error positions were not delivered to Arca Securities through the clearance and settlement process, then the third-party Routing Broker would resolve the error positions itself, and Arca Securities would not be permitted to accept the error positions, as set forth in proposed Rule 993NY(c)(2)(B).

<sup>6</sup> The Exchange has also been approved to receive inbound routes of option orders by Arca Securities from NYSE Arca, Inc. ("NYSE Arca"). See Rule 993NY(b).

<sup>7</sup> The examples described in this filing are not intended to be exclusive. Proposed Rule 993NY(c) would provide general authority for the Exchange or Arca Securities to cancel orders in order to maintain fair and orderly markets when technical and systems issues are occurring, and Rule 993NY(c) also would set forth the manner in which error positions may be handled by the Exchange or Arca Securities. The proposed rule change is not limited to addressing order cancellation or error positions resulting only from the specific examples described in this filing.

<sup>15</sup> 17 CFR 200.30-3(a)(12).

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

### Examples of Circumstances That May Lead to Canceled Orders

A technical or systems issue may arise at Arca Securities, a routing destination, or the Exchange that may cause the Exchange or Arca Securities to take steps to cancel orders if the Exchange or Arca Securities determines that such action is necessary to maintain a fair and orderly market. The examples set forth below describe some of the circumstances in which the Exchange or Arca Securities may decide to cancel orders.

*Example 1.* If Arca Securities or a routing destination experiences a technical or systems issue that results in Arca Securities not receiving responses to immediate or cancel (“IOC”) orders that it sent to the routing destination, and that issue is not resolved in a timely manner, Arca Securities or the Exchange would seek to cancel the routed orders affected by the issue.<sup>8</sup> For instance, if Arca Securities experiences a connectivity issue affecting the manner in which it sends or receives order messages to or from routing destinations, it may be unable to receive timely execution or cancellation reports from the routing destinations, and Arca Securities or the Exchange may consequently seek to cancel the affected routed orders. Once the decision is made to cancel those routed orders, any cancellation that an ATP Holder submitted to the Exchange on its initial order during such a situation would be honored.<sup>9</sup>

*Example 2.* If the Exchange experiences a systems issue, the Exchange may take steps to cancel all outstanding orders affected by that issue and notify affected ATP Holders of the cancellations. In those cases, the Exchange would seek to cancel any routed orders related to the ATP Holders’ initial orders.

<sup>8</sup> In a normal situation (*i.e.*, one in which a technical or systems issue does not exist), Arca Securities should receive an immediate response to an IOC order from a routing destination, and would pass the resulting fill or cancellation on to the ATP Holder. After submitting an order that is routed to a routing destination, if an ATP Holder sends an instruction to cancel that order, the cancellation is held by the Exchange until a response is received from the routing destination. For instance, if the routing destination executes that order, the execution would be passed on to the ATP Holder and the cancellation instruction would be disregarded.

<sup>9</sup> If an ATP Holder did not submit a cancellation to the Exchange, however, that initial order would remain “live” and thus be eligible for execution or posting on the Exchange, and neither the Exchange nor Arca Securities would treat any execution of that initial order or any subsequent routed order related to that initial order as an error.

### Examples of Circumstances That May Lead to Error Positions

In some instances, the technical or systems issue at Arca Securities, a routing destination, the Exchange, or a non-affiliate third-party Routing Broker may also result in Arca Securities acquiring an error position that it must resolve. The examples set forth below describe some of the circumstances in which error positions may arise.

*Example A.* Error positions may result from routed orders that the Exchange or Arca Securities attempts to cancel but that are executed before the routing destination receives the cancellation message or that are executed because the routing destination is unable to process the cancellation message. Using the situation described in Example 1 above, assume that the Exchange seeks to cancel orders routed to a routing destination because it is not receiving timely execution or cancellation reports from the routing destination. In such a situation, Arca Securities may still receive executions from the routing destination after connectivity is restored, which it would not then allocate to ATP Holders because of the earlier decision to cancel the affected routed orders. Instead, Arca Securities would post those positions into its error account and resolve the positions in the manner described below.

*Example B.* Error positions may result from an order processing issue at a routing destination. For instance, if a routing destination experienced a systems problem that affects its order processing, it may transmit back a message purporting to cancel a routed order, but then subsequently submit an execution of that same order to the OCC for clearance and settlement. In such a situation, the Exchange would not then allocate the execution to the ATP Holder because of the earlier cancellation message from the routing destination. Instead, Arca Securities would post those positions into its error account and resolve the positions in the manner described below.

*Example C.* Error positions may result if Arca Securities receives an execution report from a routing destination but does not receive clearing instructions for the execution from the routing destination. For instance, assume that an ATP Holder sends the Exchange an order to buy 100 contracts overlying ABC stock, which causes Arca Securities to send an order to a routing destination that is subsequently executed, cleared and closed out by that routing destination, and the execution is ultimately communicated back to that ATP Holder. If the routing destination

does not provide clearing instructions for that execution, Arca Securities would still be responsible for settling that ATP Holder’s purchase, but would be left with a short position in its error account.<sup>10</sup> Arca Securities would resolve the position in the manner described below.

*Example D.* Error positions may result from a technical or systems issue that causes orders to be executed in the name of Arca Securities and are not related to any corresponding orders of ATP Holders. As a result, Arca Securities would not be able to assign any positions resulting from such an issue to ATP Holders. Instead, Arca Securities would post those positions into its error account and resolve the positions in the manner described below.

*Example E.* Error positions may result from a technical or systems issue through which the Exchange does not receive sufficient notice that an ATP Holder that has executed trades on the Exchange has lost the ability to clear trades through OCC. In such a situation, the Exchange would not have valid clearing information, which would prevent the trade from being processed pursuant to Rule 960. Accordingly, Arca Securities would assume that ATP Holder’s side of the trades so that the counterparties can settle the trades. Arca Securities would post those positions into its error account and resolve the positions in the manner described below.

In the circumstances described above, Arca Securities may not learn about an error position until T+1, either: (1) During the clearing process when a routing destination has submitted to OCC a transaction for clearance and settlement for which Arca Securities never received an execution confirmation; or (2) when a routing destination does not recognize a transaction submitted on behalf of Arca Securities to OCC for clearance and settlement. Moreover, the affected ATP Holders’ trade may not be nullified absent express authority under Exchange rules.<sup>11</sup>

### Proposed Amendments to Rule 993NY

The Exchange proposes to amend Rule 993NY to add new paragraph (c) to address the cancellation of orders due to technical or systems issues and the use of an error account by Arca Securities.

Specifically, under paragraph (c)(1) of the proposed rule, the Exchange or Arca

<sup>10</sup> To the extent that Arca Securities incurred a loss in covering its position, it may submit a reimbursement claim to that routing destination.

<sup>11</sup> See, e.g., Rule 975NY (regarding obvious and catastrophic errors).

Securities would be expressly authorized to cancel orders as may be necessary to maintain fair and orderly markets if a technical or systems issue occurred at the Exchange, Arca Securities, or a routing destination.<sup>12</sup> The Exchange or Arca Securities would be required to provide notice of the cancellation to affected ATP Holders as soon as practicable.

Paragraph (c)(2) of the proposed rule would permit Arca Securities to maintain an error account for the purpose of addressing positions that result from a technical or systems issue at Arca Securities, the Exchange, a routing destination, or a non-affiliate third-party Routing Broker that affects one or more orders (“error positions”). By definition, an error position would not include any position that results from an order submitted by an ATP Holder to the Exchange that is executed on the Exchange and processed pursuant to Rule 960.<sup>13</sup> Arca Securities also would not be permitted to accept any positions in its error account from an account of an ATP Holder and could not permit any ATP Holder to transfer any positions from the ATP Holder’s account to Arca Securities’ error account under the proposed rule.<sup>14</sup> However, if a technical or systems issue results in the Exchange not having valid

clearing instructions for an ATP Holder to a trade, Arca Securities may assume that ATP Holder’s side of the trade so that the trade can be processed pursuant to Rule 960.<sup>15</sup>

Under paragraph (c)(3), in connection with a particular technical or systems issue, Arca Securities or the Exchange would be permitted to either (i) assign all resulting error positions to ATP Holders, or (ii) have all resulting error positions liquidated, as described below. Any determination to assign or liquidate error positions, as well as any resulting assignments, would be required to be made in a nondiscriminatory fashion.

Arca Securities or the Exchange would be required to assign all error positions resulting from a particular technical or systems issue to the applicable ATP Holders affected by that technical or systems issue if Arca Securities or the Exchange:

- Determined that it has accurate and sufficient information (including valid clearing information) to assign the positions to all of the applicable ATP Holders affected by that technical or systems issue;
- Determined that it has sufficient time pursuant to normal clearance and settlement deadlines to evaluate the information necessary to assign the positions to all of the applicable ATP Holders affected by that technical or systems issue; and
- Had not determined to cancel all orders affected by that technical or systems issue.

For example, a technical or systems issue of limited scope or duration may occur at a routing destination, and the resulting trades may be submitted for clearance and settlement by such routing destination to OCC. If there were a small number of trades, there may be sufficient time to match positions with ATP Holder or orders and avoid using the error account.

There may be scenarios, however, where Arca Securities determines that it is unable to assign all error positions resulting from a particular technical or systems issue to all of the affected ATP Holders, or determines to cancel all affected routed orders. For example, in some cases, the volume of questionable executions and positions resulting from a technical or systems issue might be such that the research necessary to determine which ATP Holder to assign those executions to could be expected to extend past the normal settlement cycle for such executions. Furthermore, if a routing destination experiences a technical or systems issue after Arca

Securities has transmitted IOC orders to it that prevents Arca Securities from receiving responses to those orders, Arca Securities or the Exchange may determine to cancel all routed orders affected by that issue. In such a situation, Arca Securities or the Exchange would not pass on to the ATP Holders any executions on the routed orders received from the routing destination.

The proposed rule also would require Arca Securities to liquidate error positions as soon as practicable.<sup>16</sup> In liquidating error positions, Arca Securities would be required to provide complete time and price discretion for the trading to liquidate the error positions to a third-party broker-dealer and could not attempt to exercise any influence or control over the timing or methods of trading to liquidate the error positions. Arca Securities also would be required to establish and enforce policies and procedures reasonably designed to restrict the flow of confidential and proprietary information between the third-party broker-dealer and Arca Securities/the Exchange associated with the liquidation of the error positions.

Under proposed paragraph (c)(4), Arca Securities and the Exchange would be required to make and keep records to document all determinations to treat positions as error positions and all determinations for the assignment of error positions to ATP Holders or the liquidation of error positions, as well as records associated with the liquidation of error positions through the third-party broker-dealer.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>17</sup> of the Securities Exchange Act of 1934 (the “Act”), in general, and furthers the objectives of Section 6(b)(5),<sup>18</sup> in particular, in that 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

<sup>16</sup> If Arca Securities determines in connection with a particular technical or systems issue that some error positions can be assigned to some affected ATP Holders but other error positions cannot be assigned, Arca Securities would be required under the proposed rule to liquidate all such error positions (including those positions that could be assigned to the affected ATP Holders).

<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

<sup>12</sup> Such a situation may not cause the Exchange to declare self-help against the routing destination pursuant to Rule 991NY(b)(1). If the Exchange or Arca Securities determines to cancel orders routed to a routing destination under proposed Rule 993NY(c), but does not declare self-help against that routing destination, the Exchange would continue to be subject to the trade-through requirements in the Options Order Protection and Locked/Crossed Markets Plan and Rule 991NY with respect to that routing destination.

<sup>13</sup> As provided in Rule 960, “[a]ll Exchange option transactions shall be submitted to the Exchange for comparison of trade information, and all compared transactions shall be cleared through the [OCC] and shall be subject to the rules of the [OCC].”

<sup>14</sup> The purpose of this provision is to clarify that Arca Securities may address error positions under the proposed rule that are caused by a technical or systems issue, but that Arca Securities may not accept from an ATP Holder positions that are delivered to the ATP Holder through the clearance and settlement process, even if those positions may have been related to a technical or systems issue at Arca Securities, the Exchange, a routing destination of Arca Securities, or a non-affiliate third-party Routing Broker. This provision would not apply, however, to situations like the one described above in which Arca Securities incurred a short position to settle an ATP Holder purchase, as the ATP Holder did not yet have a position in its account as a result of the purchase at the time of Arca Securities’ action (*i.e.*, Arca Securities’ action was necessary for the purchase to settle into the ATP Holder’s account). Moreover, to the extent an ATP Holder receives positions pursuant to Rule 960 in connection with a technical or systems issue, that ATP Holder may seek to rely on Rule 905NY if it experiences a loss. That rule provides ATP Holders with the ability to file claims against the Exchange “for the failure of its systems or facilities.”

<sup>15</sup> See Example E above.

general, to protect investors and the public interest, and it is not designed to permit unfair discrimination among customers, brokers, or dealers. The Exchange believes that this proposal is in keeping with those principles since Arca Securities' or the Exchange's ability to cancel orders during a technical and systems issue and to maintain an error account facilitates the smooth and efficient operations of the market. Specifically, the Exchange believes that allowing Arca Securities or the Exchange to cancel orders during a technical or systems issue would allow the Exchange to maintain fair and orderly markets. Moreover, the Exchange believes that allowing Arca Securities to assume error positions in an error account and to liquidate those positions, subject to the conditions set forth in the proposed amendments to Rule 993NY, would be the least disruptive means to correct these errors, except in cases where Arca Securities can assign all such error positions to all affected ATP Holders of the Exchange. Overall, the proposed amendments are designed to ensure full trade certainty for market participants and to avoid disrupting the clearance and settlement process. The proposed amendments are also designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among ATP Holders. The proposed amendments are also consistent with Section 6 of the Act insofar as they would require Arca Securities to establish controls to restrict the flow of any confidential information between the third-party broker and Arca Securities/the Exchange associated with the liquidation of error positions.

#### *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.

#### *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**

Because the foregoing 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 for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>19</sup> and Rule 19b-4(f)(6)<sup>20</sup> thereunder.

NYSE MKT has requested that the Commission waive the 30-day operative delay.<sup>21</sup> The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest. Such waiver would allow the Exchange, without delay, to implement the proposed rule change, which is designed to provide a consistent methodology for handling error positions in a manner that does not discriminate among ATP Holders. The Commission also notes that the proposed rule change is based on, and substantially similar to, NYSE Arca Equities Rule 7.45(d), which the Commission recently approved.<sup>22</sup> Accordingly, the Commission designates the proposal operative upon filing.<sup>23</sup>

At any time within 60 days of the filing of the 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.

### **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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File

<sup>19</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>20</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>21</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>22</sup> See Securities Exchange Act Release No. 66963 (May 10, 2012), 77 FR 28919 (May 16, 2012) (SR-NYSEArca-2012-22).

<sup>23</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule change's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

Number SR-NYSEMKT-2012-46 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File Number SR-NYSEMKT-2012-46. This file number should be included on the subject line if email 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 Web site (<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 Web site 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-2012-46 and should be submitted on or before October 9, 2012.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>24</sup>

**Kevin M. O'Neill,**

*Deputy Secretary.*

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<sup>24</sup> 17 CFR 200.30-3(a)(12).