

### III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>16</sup> and paragraph (f) of Rule 19b-4<sup>17</sup> thereunder. 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. If the Commission takes such action, the Commission will institute proceedings 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2015-058 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 Number SR-CBOE-2015-058. 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 such filing will also 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-CBOE-2015-058 and should be submitted on or before July 14, 2015.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Brent J. Fields,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-75190; File No. SR-NYSEMKT-2014-86]

### Self-Regulatory Organizations; NYSE MKT LLC.; Order Disapproving Proposed Rule Change To Remove the Exchange's Quote Mitigation Plan as Provided in Exchange Rule 970.1NY

June 17, 2015.

#### I. Introduction

On October 2, 2014, NYSE MKT LLC, ("NYSE MKT" or "Exchange") filed with the Securities and Exchange Commission ("Commission"), pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to remove the Exchange's quote mitigation plan as provided by NYSE MKT Rule 970.1NY. The proposed rule change was published for comment in the **Federal Register** on October 21, 2014.<sup>3</sup> On December 2, 2014, pursuant to section 19(b)(2) of the Act,<sup>4</sup> 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 approve or disapprove the proposed rule change.<sup>5</sup>

<sup>18</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 73367 (October 15, 2014), 79 FR 63009 ("Notice").

<sup>4</sup> 15 U.S.C. 78s(b)(2).

<sup>5</sup> See Securities Exchange Act Release No. 73718, 79 FR 72748 (December 8, 2014). The Commission designated January 19, 2015, as the date by which it should approve, disapprove, or institute

On January 8, 2015, the Exchange submitted a comment letter in further support of its proposal.<sup>6</sup> On January 16, 2015, the Commission issued an Order Instituting Proceedings to Determine Whether to Approve or Disapprove the proposed rule change.<sup>7</sup> On February 27, 2015 and June 4, 2015, the Exchange submitted comment letters in further support of its proposal.<sup>8</sup> No additional comment letters were submitted. This order disapproves the proposed rule change.

#### II. Description of the Proposal

In 2007, the Exchange adopted a quote mitigation plan in connection with the Options Penny Pilot Program ("Penny Pilot").<sup>9</sup> The Exchange's quote mitigation plan consisted of several different strategies used together to mitigate quotes.<sup>10</sup> In 2009, the Exchange adopted the quote mitigation plan used by NYSE Arca.<sup>11</sup> According to the Exchange, the quote mitigation plan was designed to reduce the number of quotation messages sent by the Exchange to the Options Price Reporting Authority ("OPRA") by only submitting

proceedings to determine whether to approve or disapprove the proposed rule change.

<sup>6</sup> See Letter from Elizabeth King, Secretary & General Counsel, Exchange, to Kevin O'Neill, Deputy Secretary, Commission, dated January 8, 2015 ("NYSE MKT Letter 1") available at <http://www.sec.gov/comments/sr-nysemkt-2014-86/nysemkt201486-1.pdf>.

<sup>7</sup> See Securities and Exchange Release No. 74087, 80 FR 3697 (January 23, 2015) (Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposal Rule Change to Remove the Exchange's Quote Mitigation Plan as Provided by Exchange Rule 970.1NY) ("OIP").

<sup>8</sup> See Letters from Elizabeth King, Secretary & General Counsel, Exchange, to Kevin O'Neill, Deputy Secretary, Commission, dated February 27, 2015 ("NYSE MKT Letter 2") available at <http://www.sec.gov/comments/sr-nysemkt-2014-86/nysemkt201486-2.pdf> and to Brent Fields, Secretary, Commission, dated June 4, 2015 ("NYSE MKT Letter 3") available at <http://www.sec.gov/comments/sr-nysemkt-2014-86/nysemkt201486-3.pdf>.

<sup>9</sup> See Securities and Exchange Release No. 55162 (January 24, 2007), 72 FR 4738 (February 1, 2007) (Order Granting Approval of SR-Amex-2006-106) ("Quote Mitigation Approval Order"). In this Order, the Commission approved a proposed rule change to amend the American Stock Exchange LLC (n/k/a NYSE MKT) rules to (i) permit thirteen options classes to be quoted in pennies on a pilot basis and (ii) adopt various quote mitigation strategies. In approving the Penny Pilot, the Commission analyzed data provided by the options exchanges to assess the potential impact the Penny Pilot would have on, among other things, the increase in quotation message traffic. The Exchange subsequently adopted the quote mitigation plan used by NYSE Arca. See Securities and Exchange Release No. 59472 (February 27, 2009), 74 FR 9843 (March 6, 2009) (SR-ALTR-2008-14) ("Quote Mitigation Approval Order No. 2").

<sup>10</sup> See Order Granting Approval of SR-Amex-2006-106, *supra* note 9, at 4739.

<sup>11</sup> See Quote Mitigation Approval Order No. 2, *supra* note 9.

<sup>16</sup> 15 U.S.C. 78s(b)(3)(A).

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

quote messages for “active” series.<sup>12</sup> The Exchange defines active series under the quote mitigation plan in Exchange Rule 970.1NY as: (i) Series that have traded on any options exchange in the previous 14 calendar days; or (ii) series that are solely listed on the Exchange; or (iii) series that have been trading ten days or less; or (iv) series for which the Exchange has received an order.<sup>13</sup> In addition, under the Exchange’s quote mitigation plan, the Exchange may define a series as active on an intraday basis if: (i) the series trades at any options exchange; (ii) the Exchange receives an order in the series; or (iii) the Exchange receives a request for quote from a customer in that series.<sup>14</sup>

The Exchange proposes to remove its quote mitigation plan from its rules by deleting Exchange Rule 970.1NY.<sup>15</sup> The Exchange states that its quote mitigation plan is no longer necessary primarily for three reasons. First, the Exchange states that its incorporation of select provisions of the Options Listing Procedures Plan (“OLPP”)<sup>16</sup> in Exchange Rule 903A serves to reduce the potential for excess quoting because the OLPP limits the number of options series eligible to be listed, which, according to the Exchange, reduces the number of options series a market maker would be obligated to quote.<sup>17</sup> Second, the Exchange states its view that Exchange Rule 925.1NY Commentary .01, which removes certain options series from market makers’ continuous quoting obligations, reduces the number of quote messages that the Exchange sends to OPRA.<sup>18</sup> The Exchange states

that reliance on the OLPP, via Exchange Rule 903A, and the refined market maker quoting obligations, pursuant to Commentary .01 to Exchange Rule 925.1NY, is sufficient as a quote mitigation plan.<sup>19</sup> Third, the Exchange states that both the Exchange’s systems capacity and OPRA’s systems capacity are more than sufficient to accommodate any additional increase in quote message traffic that might be sent to OPRA as a result of the deletion of the quote mitigation plan.<sup>20</sup> The Exchange represents that it continually assesses its capacity needs and ensures that the capacity that it requests from OPRA is sufficient and compliant with the requirements established in the OPRA Capacity Guidelines.<sup>21</sup>

The Exchange further represents that it has in place certain measures that act as additional safeguards against excessive quoting.<sup>22</sup> According to the Exchange, these safeguards include monitoring and alerting market makers disseminating an unusual number of quotes, a business plan designed to ensure that new listings are actively traded,<sup>23</sup> and a ratio threshold fee designed to encourage the efficient use of orders.<sup>24</sup>

### III. Summary of Comment Letters

NYSE MKT submitted three comment letters in which it: (1) supports its position that Rule 903A of the OLPP together with the current exceptions from a market maker’s continuous quoting obligations for certain options series would be sufficient as a quote mitigation plan,<sup>25</sup> (2) provides additional information to support its argument that relying on the OLPP requirements in Rule 903A would suffice as a quote mitigation plan; and (3) supports its argument that the Exchange and OPRA have sufficient capacity to accommodate an increase in

a time to expiration of twelve months or greater for Index options.” See also Notice, *supra* note 3, at 63009–10.

<sup>19</sup> See Notice, *supra* note 3, at 63010. The Exchange states its view that limiting the number of options series listed on the Exchange is preferable to suppressing the quotes of inactive options series, as required under current Exchange Rule 970.1NY, because all quotes sent by Exchange market makers are actionable even if not displayed. See *id.*

<sup>20</sup> See Notice, *supra* note 3, at 63010.

<sup>21</sup> See *id.*

<sup>22</sup> See *id.*

<sup>23</sup> See *id.* (citing to Commentary .09(b) to Exchange Rule 915).

<sup>24</sup> See *id.* (citing to NYSE Amex Options Fee Schedule, available at, [https://www.theice.com/publicdocs/nyse/markets/amex-options/NYSE\\_Amex\\_Options\\_Fee\\_Schedule.pdf](https://www.theice.com/publicdocs/nyse/markets/amex-options/NYSE_Amex_Options_Fee_Schedule.pdf)).

<sup>25</sup> See NYSE MKT Letter 1, *supra* note 6, at 1. See also NYSE MKT Letter 2, *supra* note 8, at 1–2. The Exchange also supplies an actual illustration of how the Rule results in quote mitigation. *Id.* at 2.

quote message traffic resulting from elimination of the Exchange’s quote mitigation plan.<sup>26</sup>

The Exchange states that at least one other options exchange primarily relies on the OLPP requirements in Rule 903A as a quote mitigation plan.<sup>27</sup> The Exchange explains that OLPP Rule 903A puts a restriction on the range of permissible strike prices based on the price of the underlying security.<sup>28</sup> The Exchange states its view that reliance on the OLPP requirements is consistent with the Act and would sufficiently limit the number of options series listed on the Exchange.<sup>29</sup>

Next, the Exchange argues that eliminating its quote mitigation plan is consistent with the Act because refined market maker quoting obligations currently in place on the Exchange, which exempt certain options series from market makers’ continuous quoting obligations, reduce the universe of series in which a market maker is required to quote.<sup>30</sup> The Exchange notes that these refined obligations were adopted following implementation of its quote mitigation plan,<sup>31</sup> and believes that as a result, market makers do not need to quote in approximately 5,000 options series, thereby decreasing quote message traffic.<sup>32</sup>

The Exchange argues that it has sufficient capacity to handle quoting in all options series, including quotes in those series that are inactive and not currently disseminated pursuant to the Exchange’s quote mitigation plan.<sup>33</sup> In support of this statement, the Exchange explains that although quotes in inactive series do not generate quote traffic from NYSE MKT, the Exchange

<sup>26</sup> See NYSE MKT Letter 1 *supra* note 6.

<sup>27</sup> See NYSE MKT Letter 1, *supra* note 6, at 1–2. The comment letter further notes that the Miami International Securities Exchange, LLC (“MIAX”) stated in a response to comments on a proposed rule change relating to increasing the number of options series associated with Short Term Options Series that it was not using a quote mitigation strategy, but instead employs a listing policy that mitigates the number of classes and series listed on its exchange by not listing illiquid options classes and products that are not already trading on another market. (See NYSE MKT Letter 1, *supra* note 6, at 2 (citing Letter to Elizabeth Murphy, Secretary, U.S. Securities Exchange Commission, from Brian O’Neill, VP and Senior Counsel, MIAX, dated June 2, 2013, available at <http://www.sec.gov/comments/sr-miax-2013-23/miax201323-2.pdf>)). NYSE MKT notes that it has a similar policy designed to help ensure that the Exchange does not list options that generate quote volume without providing the benefit of trading volume. See NYSE MKT Letter 1, *supra* note 6, at 2 and 4.

<sup>28</sup> See NYSE MKT Letter 2, *supra* note 8, at 1–2.

<sup>29</sup> See NYSE MKT Letter 1, *supra* note 6, at 1.

<sup>30</sup> See NYSE MKT Letter 1, *supra* note 6, at 3.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> See NYSE MKT Letter 1, *supra* note 6, at 2.

<sup>12</sup> See Notice, *supra* note 3, at 63009.

<sup>13</sup> See Exchange Rule 970.1NY, and Notice, *supra* note 3, at 63009.

<sup>14</sup> See Exchange Rule 970.1NY.

<sup>15</sup> See Notice, *supra* note 3, at 63010. In addition, the Exchange proposes to amend paragraphs (b)(1) and (b)(2) of Exchange Rule 970.1NY (Firm Quotes) to delete references to the “Quote Mitigation Plan.” *Id.*

<sup>16</sup> See Amendment to Plan for the Purpose of Developing and Implementing Procedures Designed to Facilitate the Listing and Trading of Standardized Options Submitted Pursuant to Section 11A(a)(3)(B) of the Securities Exchange Act available at <http://www.theocc.com/clearing/industry-services/olpp.jsp> (providing for the most current OLPP). See also Securities and Exchange Release No. 44521 (July 6, 2001), 66 FR 36809 (July 13, 2001) (order approving the OLPP).

<sup>17</sup> See Notice, *supra* note 3, at 63009. See also Securities and Exchange Release No. 61978 (April 23, 2010), 75 FR 22886 (April 30, 2010) (NYSEAmex–2010–39) (in which the Exchange adopted select provisions of the OLPP into Exchange Rule 903A).

<sup>18</sup> Commentary .01 to Exchange Rule 925.1NY provides that Exchange market makers continuous quoting obligations do not apply “to adjusted option series, and series with a time to expiration of nine months or greater, for options on equities and Exchange Traded Fund Shares, and series with

must nonetheless receive and process quotes in such series, and perform additional processing to suppress quotes in these series to comply with their quote mitigation plan.<sup>34</sup> The Exchange states that because it is already processing the quotes it suppresses, it is “confident that its own systems capacity is more than sufficient to accommodate any increase in the traffic that might be sent to OPRA.”<sup>35</sup> The Exchange notes that in its requests for capacity submitted to the Independent Systems Capacity Advisory (“ISCA”) (which OPRA uses to ensure overall aggregate capacity), NYSE MKT assumes that (1) options series that are inactive at that time could become active in the future, thereby increasing overall message traffic sent to OPRA, and (2) that all options series that it lists, including those without continuous quoting obligations for market makers, will generate message traffic to OPRA.<sup>36</sup> The Exchange further states its belief that OPRA also would be able to accommodate any increase in quote message traffic resulting from NYSE MKT no longer suppressing quotes in inactive series.<sup>37</sup>

The Exchange further argues that eliminating its quote mitigation plan is consistent with the Act because the Exchange actively monitors market maker quoting activity and alerts market makers to heightened levels of quoting activity, which could result from systems issues or an incorrectly set parameter that generates erroneous quotes.<sup>38</sup> The Exchange notes that NYSE MKT’s requests for capacity to the ISCA are adjusted to account for “some level” of erroneous quoting.<sup>39</sup>

The Exchange also states that the landscape regarding quote message traffic and capacity has changed since the adoption of the Penny Pilot.<sup>40</sup> NYSE MKT represents that in January 2007, using the quote mitigation plan currently in place on the Exchange, 15% of quotes received by the NYSE Arca, were not sent to OPRA, compared to 4.3% received by the Exchange as of April 2015.<sup>41</sup> The Exchange also states that at the time the Penny Pilot was adopted, OPRA’s total capacity was set

to 359,000 messages per seconds (“mps”), and that by July 2015, OPRA’s peak capacity is anticipated to be 42,100,000 mps.<sup>42</sup> In addition, the Exchange states, based on peak message traffic figures on the Exchange for one day in May 2015,<sup>43</sup> that if the quotes the Exchange suppressed on that day had been sent to OPRA, industry quotes published by OPRA would have increased by no more than 1.5%, and that this would use less than .05% of total OPRA capacity.<sup>44</sup>

#### IV. Discussion

Under section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization if the Commission finds that such proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization.<sup>45</sup> The Commission shall disapprove a proposed rule change if it does not make such a finding.<sup>46</sup> Rule 700(b)(3) of the Commission’s Rules of Practice states that the “burden to demonstrate that a proposed rule change is consistent with the [Act] . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”<sup>47</sup>

After careful consideration, the Commission cannot find that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.<sup>48</sup> In particular, the

Commission cannot find that the proposed rule change is consistent with section 6(b)(5) of the Act,<sup>49</sup> 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 to protect investors and the public interest.

In conjunction with the adoption of the Penny Pilot in 2007 that permitted the options exchanges to quote certain options series in one and five cent increments, and in response to a letter sent by the then Chairman of the Commission,<sup>50</sup> the options exchanges, including NYSE MKT, adopted quote mitigation plans.<sup>51</sup> The Commission emphasized the importance of options exchanges’ quote mitigation strategies in connection with the Penny Pilot in its orders approving an expansion of the Penny Pilot in 2007. In those orders, the Commission noted that options exchanges participating in the Penny Pilot would continue to use quote mitigation strategies.<sup>52</sup> Likewise, when the Commission approved NYSE Arca’s proposal to again expand the Penny Pilot in 2009, the Commission reiterated that the NYSE Arca would retain and continue to employ its quote mitigation strategy.<sup>53</sup>

impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>49</sup> 15 U.S.C. 78f(b)(5).

<sup>50</sup> In a letter sent to the options exchanges on June 7, 2006, encouraging the implementation of a penny pilot program, then Chairman Cox noted that quoting options in pennies would increase quote message traffic, which the systems of exchanges, market data vendors, and securities firms must be able to manage, and for that reason, quoting options in pennies would begin in a small number of options. To assist in managing the anticipated increase in quote traffic, Chairman Cox asked that the options exchanges include a workable quote mitigation strategy in any proposal to allow quoting in pennies. See Commission Press Release 2006–91, “SEC Chairman Cox Urges Options Exchanges to Start Limited Penny Quoting,” June 7, 2006.

<sup>51</sup> See Quote Mitigation Approval Order, *supra* note 9.

<sup>52</sup> See Securities Exchange Act Release No. 56568, 72 FR 56422 (October 3, 2007) (SR–NYSEArca–2007–88); 56567 (September 27, 2007), 72 FR 56307 (October 3, 2007) (Amex–2007–96); 56565 (September 27, 2007), 72 FR 56403 (October 3, 2007) (CBOE–2007–98); 56564 (September 27, 2007), 72 FR 56412 (October 3, 2007) (ISE–2007–74); 56563 (September 27, 2007), 72 FR 56429 (October 3, 2007) (Phlx–2007–62); and 56566 (September 27, 2007), 72 FR 56400 (October 3, 2007) (BSE–2007–40).

<sup>53</sup> See Securities Exchange Act Release No. 60711, 74 FR 49419 (September 28, 2009) (SR–NYSEArca–2009–44). See also Securities Exchange Act Nos. 60373 (October 23, 2009), 74 FR 56675 (November 2, 2009) (Phlx–2009–91); 60864 (October 22, 2009), 74 FR 55876 (October 29, 2009) (CBOE–2009–076);

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* The Exchange represents that as of Friday May 29, 2015, peak message traffic for the Exchange was 3,121,570 mps, measured over a 100 millisecond period. Based on this, the Exchange believes that if the highest percentage of quotes suppressed by the Exchange during this period (6.7%) had been published at the same rate as quotes the Exchange had not suppressed during this time, the mps rate would instead be 3,330,715. *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> 15 U.S.C. 78s(b)(2)(C)(i).

<sup>46</sup> 15 U.S.C. 78s(b)(2)(C)(i); see also 17 CFR 201.700(b)(3) and note 47 *infra*, and accompanying text.

<sup>47</sup> 17 CFR 201.700(b)(3). The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. See *id.* Any failure of a self-regulatory organization to provide the information solicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization. *Id.*

<sup>48</sup> In disapproving the proposed rule change, the Commission has considered the proposed rule’s

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See NYSE MKT Letter 1, *supra* note 6, at 2–3.

<sup>37</sup> See NYSE MKT Letter 1, *supra* note 6, at 1–2.

<sup>38</sup> See NYSE MKT Letter 1, *supra* note 6, at 3–4.

<sup>39</sup> *Id.* at 4.

<sup>40</sup> See NYSE MKT Letter 3, *supra* note 8, at 2.

<sup>41</sup> *Id.* Although the Exchange had not yet adopted its current quote mitigation plan in January 2007, it provided data from NYSE Arca from this time period for comparative purposes. *Id.*

In approving NYSE MKT's proposal in February 2007, the Commission stated that because it expected that the Penny Pilot would increase quote message traffic, the Commission also approved the Exchange's proposal to reduce the number of quotations it disseminates.<sup>54</sup> In 2009, the Commission approved NYSE MKT's implementation of a quote mitigation strategy identical to that in place on NYSE Arca.<sup>55</sup>

In 2007 and 2009, the Commission approved rule changes expanding the number of classes eligible to participate in the Penny Pilot.<sup>56</sup> In so approving, the Commission reviewed data provided by the options exchanges, including data relating to OPRA's capacity to process the increase in quotes resulting from the expansion of the Penny Pilot and the effectiveness of its quote mitigation plan.<sup>57</sup> In approving each of these expansions, the Commission noted that it relied, in part, on the Exchange's representation that it would continue to use its quote mitigation plan to suppress certain quotation traffic that would otherwise be sent to OPRA.<sup>58</sup> The Commission also relied on data provided by the options exchanges to support representations that capacity was not a concern, and that the quote mitigation plans in place were successful.<sup>59</sup>

60865 (October 22, 2009), 74 FR 55880 ((ISE-2009-82); 60886 (October 27, 2009), 74 FR 56897 (November 3, 2009); 60874 (October 23, 2009), 74 FR 56682 (November 2, 2009) (NASDAQ-2009-091); and 61106 (December 3, 2009), 74 FR 65193 (December 9, 2009) (NYSEAmex-2009-74).

<sup>54</sup> See Quote Mitigation Approval Order, *supra* note 9, at 4740.

<sup>55</sup> See Quote Mitigation Approval Order No. 2, *supra* note 9.

<sup>56</sup> The Commission approved thirteen classes to participate in the Penny Pilot on January 24, 2007. See Quote Mitigation Approval Order, *supra* note 9. On September 27, 2007, the Commission approved an expansion of the Penny Pilot, which raised the number of participating classes to 63. See Securities Exchange Act Release No. 56567, 72 FR 56396 (October 3, 2007) (Amex-2007-96) (Order Approving Expansion 1). On September 23, 2009, the Commission approved another expansion, raising the number of participating classes to 363. See Securities Exchange Act Release No. 60711, 74 FR 49419 (September 28, 2009) (NYSEArca-2009-44) (Order Approving Expansion 2). NYSE MKT filed a proposed rule change for immediate effectiveness, copying the expansion approved by the Commission in NYSE Arca-2009-44. See Securities Exchange Act Release No. 61106 (December 3, 2009), 74 FR 65193 (December 9, 2009) (Notice of Filing and Immediate Effectiveness of NYSEAmex-2009-74).

<sup>57</sup> See Order Approving Expansion 1 and Order Approving Expansion 2, *supra* note 56, at 56398 and 49422-23, respectively.

<sup>58</sup> *Id.*

<sup>59</sup> See Order Approving Expansion 2, *supra* note 56, at 49422. For example, in the order approving Expansion 2, the Commission noted that on June 2, 2009, the sustained message traffic peak of 852,350 messages per second reported by OPRA is still well

As noted above, the Exchange believes that its quote mitigation plan is no longer necessary because: (1) The Exchange has incorporated select provisions of the OLPP in Exchange Rule 903A, which the Exchange believes limits the number of series eligible to be traded; (2) current Exchange Rule 925.1 NY Commentary .01 removes certain options series from market makers' continuous quoting obligations, which the Exchange believes reduces the number of quote messages that the Exchange sends to OPRA; and (3) both the system capacity at the Exchange and at OPRA are more than sufficient to accommodate any additional increase in quote message traffic that might be disseminated if NYSE MKT's quote mitigation plan is eliminated. However, the Exchange has not provided the Commission with sufficient data regarding potential changes in quote message traffic if the Commission approves its proposal.

For example, the Exchange does not provide sufficient data about the number of quote messages that its quote mitigation plan currently suppresses relative to capacity at OPRA. Specifically, the Exchange provided data from May 29, 2015 that purports to show that if all quote messages suppressed by the Exchange were instead sent to OPRA, industry quotes published by OPRA would increase by no more than 1.5%. The Exchange asserts that this increase would use less than .05% of total OPRA capacity across all option exchanges. Importantly, however, the Exchange does not provide data that shows the excess capacity between peak quote message traffic sent from all options exchanges and OPRA's Peak Capacity for the May 29, 2015 sample. If peak quote message traffic sent to OPRA by all the options exchanges was at or approached OPRA's Peak Capacity, then potentially even a small increase in quote message traffic from one exchange could result in OPRA's capacity being exceeded.

In addition, the Exchange does not provide data or analysis demonstrating the potential impact the Exchange's proposal would have on market participants who consume the OPRA and/or the Exchange's quotation message feeds.<sup>60</sup> Nor does the Exchange

below the OPRA's current message per second capacity limit of 2,050,000. *Id.*

<sup>60</sup> See Order Approving Expansion 2, *supra* note 56, at 49421 (The Commission noted that several commenters expressed concerns that increased quotation message traffic imposes costs on exchanges and other market participants to process and store the additional quotations and they questioned the ability of market systems to effectively handle the increased quote message

quantify the number or percentage of quote messages that have been and would continue to be suppressed as a result of the implementation of Exchange Rule 903A<sup>61</sup> or current Exchange Rule 925.1 NY Commentary .01.<sup>62</sup> The Commission notes that the Exchange's comment letter stated its belief that as a result of refined quoting obligations, market makers do not need to quote in approximately 5,000 options series, and that this has resulted in a decrease in message traffic,<sup>63</sup> however, the Exchange did not provide data to quantify the decrease in message traffic for the Commission to consider. Absent sufficient information and data of this type, the Commission is not able to adequately evaluate the Exchange's assertion that "reliance on the OLPP, via Rule 903A, together with the refined market maker obligation, pursuant to Commentary .01 to Rule 925.1 NY, is sufficient as a quote mitigation strategy

traffic that would likely result from the expansion of the Penny Pilot to 363 classes. In approving the expansion, the Commission noted that NYSE Arca "had adopted and [would] continue to utilize quote mitigate strategies that should continue to mitigate the expected increase in quotation traffic." *Id.* at 49422-23.

<sup>61</sup> In 2009, the OLPP Participants, including NYSE MKT, represented that the new strategy they were proposing as Amendment No. 3 to the OLPP (which was subsequently codified as Rule 903A on the Exchange's rulebook) would be "an additional strategy" to be used to address overall capacity concerns in the industry. See Securities Exchange Act Release No. 60365 (July 22, 2009), 74 FR 37266 (July 28, 2009) (Notice of Filing of Amendment No. 3 to the OLPP proposing uniform standards to the range of options series exercise prices available for trading). Although it was anticipated that the exercise price limitation bands set forth in Amendment No. 3 would also have the attendant benefit of further reducing increases in quote message traffic, nothing in the language in the exchanges' OLPP filings suggest that the methodology set forth in Amendment No. 3 (to limit the number of option series available for trading) was intended to replace the options exchanges' quote mitigation strategies, nor does the language in those filings suggest that it was contemplated at the time that the options exchanges would eliminate their existing exchange-specific quote mitigation strategies.

<sup>62</sup> While NYSE MKT stated in its proposed rule change to adopt Commentary .01 to Exchange Rule 925.1 NY that the burden of continuous quoting in adjusted series is counter to efforts to mitigate the number of quotes collected and disseminated, and that the proposal would further the goal of quote mitigation, this was not a basis given for the proposed rule change, and the Exchange did not provide any data on what the impact of the proposal on quote volume would be. See Securities Exchange Act Release No. 65209 (August 26, 2011), 76 FR 54518 (September 1, 2011) (NYSEAmex-2011-61). Additionally, the Commission did not consider the potential impact of the proposal on quote mitigation as a basis for approving the elimination of continuous quoting obligation in certain series. See Securities Exchange Act Release No. 65572 (October 14, 2011), 76 FR 65310 (October 20, 2011) (NYSEAmex-2011-61).

<sup>63</sup> See NYSE MKT Letter 1, *supra* note 6, at 3.

and obviates the need for Rule 970.1.”<sup>64</sup> Other information or data may also be helpful for the Commission’s consideration of the proposed rule change. Without sufficient supporting data and analysis, the Commission is not able to adequately assess the impact of NYSE MKT’s proposed rule change to eliminate its quote mitigation plan and make a determination that the proposed rule change is consistent with the Act.

Given the limitations in the data provided by NYSE MKT, as described above, the Commission cannot find a sufficient basis to conclude that the proposal is consistent with the Act. The Commission notes, however, that the Penny Pilots for each of the options exchanges are anticipated to be extended for an additional year, until June 30, 2016. In connection with any future requests to extend the Penny Pilots after that date, the Commission intends to require each exchange to submit detailed information to allow for permanent approval or disapproval by the Commission. Such proposals should, among other things, provide detailed data and analysis to support the efficacy, or any proposed modification or elimination, of any exchanges’ quote mitigation plan.<sup>65</sup>

For the foregoing reasons, the Commission does not believe that NYSE MKT has met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder, including that the rules of an exchange be designed 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.<sup>66</sup>

#### IV. Conclusion

For the reasons set forth above, the Commission does not believe that NYSE MKT has met its burden to demonstrate that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange, and in particular, section 6(b)(5) of the Act.

*It is therefore ordered*, pursuant to section 19(b)(2) of the Act, that the proposed rule change (SR-NYSEMKT-2014-86) be, and hereby is, disapproved.

<sup>64</sup> See Notice, *supra* note 3, at 63010.

<sup>65</sup> In reviewing the quote mitigation plans in this manner, the Commission would be able to consider the market-wide impact of any proposed modification to or elimination of an exchange’s quote mitigation practices.

<sup>66</sup> 15 U.S.C. 78f(b)(5).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>67</sup>

**Brent J. Fields,**

*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-75192; File No. 4-668]

**Joint Industry Plan; Order Approving Amendment No. 1 to the National Market System Plan Governing the Process of Selecting a Plan Processor and Developing a Plan for the Consolidated Audit Trail by BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, ISE Gemini, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.**

June 17, 2015.

### I. Introduction

On December 12, 2014, BATS Exchange, Inc., BATS-Y Exchange, Inc., BOX Options Exchange LLC, C2 Options Exchange, Incorporated, Chicago Board Options Exchange, Incorporated, Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., International Securities Exchange, LLC, ISE Gemini, LLC, Miami International Securities Exchange LLC, NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The NASDAQ Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc. (collectively, “SROs” or “Participants”) filed with the Securities and Exchange Commission (“Commission” or “SEC”) pursuant to section 11A of the Securities Exchange Act of 1934 (“Act”),<sup>1</sup> and Rule 608 thereunder,<sup>2</sup> an amendment (“Amendment No. 1”) to the National Market System (“NMS”) Plan Governing the Process of Selecting a Plan Processor and Developing a Plan

<sup>67</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78k-1.

<sup>2</sup> 17 CFR 242.608.

for the Consolidated Audit Trail (“Selection Plan”).<sup>3</sup> Amendment No. 1 was published for comment in the **Federal Register** on February 11, 2015.<sup>4</sup> The Commission received one comment letter<sup>5</sup> and the SROs submitted a response to that comment letter.<sup>6</sup> This order approves Amendment No. 1 to the Selection Plan.

## II. Background and Description of the Proposal

### A. Background

On July 11, 2012, the Commission adopted Rule 613 to require the SROs to jointly submit an NMS plan to create, implement, and maintain a consolidated audit trail (“CAT NMS Plan”).<sup>7</sup> In response, the SROs engaged in a request for proposal (“RFP”) process to help them develop an NMS Plan proposal and to solicit bids (“Bids”) for the role of Plan Processor<sup>8</sup> to build, operate, administer, and maintain the consolidated audit trail.<sup>9</sup> The Selection Plan, which was approved by the Commission on February 21, 2014, sets forth the process by which the Participants will review, evaluate, and narrow down the Bids, and ultimately select the Plan Processor, following Commission approval of the CAT NMS Plan.<sup>10</sup> Currently, the Participants have narrowed the universe of Bids received to a set of six “Shortlisted Bidders.” Under the Selection Plan, a Shortlisted Bidder is only eligible to revise its Bid following Commission approval of the CAT NMS Plan and approval of a majority of the Selection Committee.<sup>11</sup> Additionally, the Participants are not permitted to narrow the set of

<sup>3</sup> The Selection Plan is an NMS Plan approved by the Commission pursuant to Section 11A of the Act and Rule 608 thereunder. See Securities Exchange Act Release No. 71596 (Feb. 21, 2014), 79 FR 11152 (Feb. 27, 2014) (“Order Approving Selection Plan”); see also Securities Exchange Act Release No. 70892 (Nov. 15, 2013), 78 FR 69910 (Nov. 21, 2013) (“Notice of Selection Plan”).

<sup>4</sup> See Securities Exchange Act Release No. 74223 (Feb. 6, 2015), 80 FR 7654 (“Notice of Amendment No. 1”).

<sup>5</sup> See letter to Brent J. Fields, Secretary, Commission, from Manisha Kimmel, Managing Director, Financial Information Forum (“FIF”), dated March 13, 2015 (“FIF Letter”).

<sup>6</sup> See letter to Brent J. Fields, Secretary, Commission, from the SROs, dated March 27, 2015 (“SRO Response Letter”).

<sup>7</sup> Securities Exchange Act Release No. 67457 (July 18, 2012), 77 FR 45722 (Aug. 1, 2012).

<sup>8</sup> Unless otherwise noted, capitalized terms are used as defined in Rule 613, in the Selection Plan, or in this Order.

<sup>9</sup> See Notice of Amendment No. 1, *supra* note 4, at 7655.

<sup>10</sup> See Order Approving Selection Plan, *supra* note 3.

<sup>11</sup> See *id.* at 11154. The Selection Committee is composed of one senior officer from each SRO and is charged with evaluating the Bids and selecting the Plan Processor. *Id.* at 11153.