

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-76290; File No. SR-NYSE-2015-49)

October 28, 2015

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 123D to Specify that Exchange Systems may Open One or More Securities Electronically if a Designated Market Maker Registered in a Security or Securities Cannot Facilitate the Opening of Trading as Required by Exchange Rules

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> notice is hereby given that on October 16, 2015, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. 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 123D to specify that Exchange systems may open one or more securities electronically if a Designated Market Maker registered in a security or securities cannot facilitate the opening of trading as required by Exchange rules. The text of the proposed rule change is available on the Exchange’s website 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

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

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

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 Rule 123D to specify that Exchange systems may open one or more securities electronically if a Designated Market Maker ("DMM") registered in a security or securities cannot facilitate the open of trading as required by Exchange rules.<sup>3</sup>

Currently, Rule 123D provides that openings may be effected manually or electronically. However, the current rule contemplates that openings would be facilitated by a DMM, as provided for in Rule 104(a)(2). The Exchange proposes to re-number Rule 123D to provide that current Rule 123D(1) would be re-numbered as Rule 123D(a), and the heading would be amended to be referred to as "Openings."<sup>4</sup> Proposed Rule 123D(a)(1) would include the current first paragraph of Rule 123D(1).

The Exchange proposes to add a new paragraph (a)(2) to Rule 123D to provide that, if a DMM cannot facilitate the open of trading for one or more securities for which the DMM is registered, the Exchange would open those securities electronically on a quote or a trade as

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<sup>3</sup> The proposed amendment contemplates that a DMM's inability to open securities either manually or electronically would be related to business continuity disruptions such as the physical closing of the Exchange Trading Floor or equipment and connectivity breakdowns that prevent the DMM from opening a security either manually or electronically. When a DMM is unable to open securities manually or electronically, the DMM's affirmative obligations under Rule 104 would not apply.

<sup>4</sup> The Exchange would also delete the terms "Delayed" and "Halts in trading" from the current Rule 123D(1) heading. The Exchange further proposes to add a new subparagraph (b) to Rule 123D, before the current second paragraph of Rule 123D(1), which would be named "Delayed Openings/Halts in Trading." The Exchange proposes further non-substantive amendments to re-number current Rule 123D(2) as 123D(c) and Rule 123D(4) as Rule 123D(d). As discussed below, the Exchange proposes to delete current Rule 123D(3) and related Supplementary Material .24.

provided for in paragraphs (a)(3) – (a)(6) of the proposed Rule. Proposed Rule 123D(a)(2) would further provide that manually-entered Floor interest would not participate in any open effected electronically by the Exchange and if previously entered, would be ignored. Finally, proposed Rule 123D(a)(2) would provide that, unless otherwise specified, references to an open or opening in proposed Rules 123D (a)(3) – (a)(6) would also mean a reopening following a trading halt or pause.

Proposed Rule 123D(a)(3) would specify when the Exchange would open a security on a trade and would provide that the Exchange would open a security on a trade if there is buy and sell interest that can trade a round lot or more at a price that is no greater than or no less than a specified range (“Opening Price Range”) away from the last sale price on the Exchange (“Reference Price”). Proposed Rule 123D(a)(3) would further provide that the Exchange would determine the Opening Price Range parameters upon advance notice to market participants.

Unlike DMMs, who have the obligation to trade for their own account to supply liquidity as needed to facilitate openings,<sup>5</sup> the Exchange would not supply any liquidity when effecting an electronic open. Without the addition of liquidity to offset an imbalance, pricing the opening based on a significant imbalance could result in an opening price that may not be reasonably related to the last sale price on the Exchange. To avoid opening a security at a price too far away from the last sale, the Exchange proposes to establish numerical guidelines to provide parameters regarding the price a security may open when the Exchange opens such security on a trade. The Exchange proposes to establish the Opening Price Range parameters from time to time upon advance notice to market participants, which is similar to how other markets function.<sup>6</sup>

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<sup>5</sup> See Rule 104(a)(2) & 104(f)(ii).

<sup>6</sup> See, e.g., Nasdaq Stock Market LLC (“Nasdaq”) Rule 4752(b)[sic](2)(E) (Nasdaq management sets and modifies benchmarks and thresholds for the Nasdaq Opening Cross

Proposed Rule 123D(a)(3)(A) – (C) would specify how orders would participate if the Exchange opens a security on a trade. Proposed Rule 123D(a)(3)(A) would provide that if all interest guaranteed to participate in an opening trade under Rule 115A(b)<sup>7</sup> could trade at a price consistent with the Opening Price Range, the opening trade would be at the price at which all such interest could trade. Proposed Rule 123D(a)(3)(B) would provide that if there are only Market Orders on both sides of the market, the opening price would be the Reference Price.

Because the Exchange would open a security within specified guidelines, not all interest that is intended for the open may participate in such an open. Proposed Rule 123D(a)(3)(C) would therefore provide that if interest that is otherwise guaranteed to participate in an opening trade under Rule 115A(b) would cause an opening price to be outside the Opening Price Range, such interest would not be guaranteed to participate in the opening trade. In that case, the Exchange proposes that the opening trade would be at the price at which the maximum volume

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from time to time upon prior notice to market participants); NYSE Arca Equities, Inc. (“NYSE Arca Equities”) Rule 1.1(s)(A) (NYSE Arca Equities sets and modifies price collar thresholds for the Market Order Auction from time to time upon prior notice to ETP Holders).

<sup>7</sup> Rule 115A(b) provides that when arranging an opening or reopening price, except as provided for in Rule 115A(b)(2) which concerns opening a security on a quote, market interest would be guaranteed to participate in the opening or reopening transaction and have precedence over limit interest that is priced equal to the opening or reopening price of a security and DMM interest. For purposes of the opening or reopening transaction, market interest includes (1) market and Market on Open (“MOO”) orders, (2) tick-sensitive market and MOO orders to buy (sell) that are priced higher (lower) than the opening or reopening price, (3) limit interest to buy (sell) that is priced higher (lower) than the opening or reopening price, and (iv) Floor broker interest entered manually by the DMM. See Rule 115A(b)(1)(A). For purposes of the opening or reopening transaction, limit interest would include (2) limited-priced interest, including-Quotes, Limit on Open (“LOO”) orders, and G orders; and (ii) tick-sensitive market and MOO orders that are priced equal to the opening or reopening price of a security. See Rule 115A(b)(1)(C). In addition, G orders that are priced equal to the opening or reopening price of a security would yield to all other limit interest priced equal to the opening or reopening price of a security except DMM interest.

of shares is tradable that is closest to the Reference Price and that orders would be allocated in the following priority, which is based on the priority of orders set forth in Rule 115A(b):

- Proposed Rule 123D(a)(3)(C)(i) would provide that Market and Market-on-Open (“MOO”) orders would trade first in time priority, provided that, during a Short Sale Period, sell short market orders and MOO orders would be adjusted to a Permitted Price<sup>8</sup> and would be considered limit orders for purposes of determining allocation priority.
- Proposed Rule 123D(a)(3)(C)(ii) would provide that Stop Orders that would be elected based on the opening price would trade second in time priority. As further proposed, during a Short Sale Period, sell short Stop Orders that are priced to a Permitted Price that would be lower than the opening price would trade after all other Stop Orders and before all other interest priced equal to or lower than the opening price.
- Proposed Rule 123D(a)(3)(C)(iii) would provide that Limit Orders (including Reserve Orders) to buy (sell) and e-Quotes (including Reserve e-Quotes) to buy (sell) priced higher (lower) than the opening price would trade third on parity by agent under Rule 72(c).<sup>9</sup>

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<sup>8</sup> As set forth in Rule 440B, a short sale price test is activated if the price of a listed security declines by 10% or more from the previous day’s last sale on the listing market and continues through the end of the following trading day (the “Short Sale Period”). Pursuant to Rule 440B(e), Exchange systems will re-price short sale orders that are limited to the current national best bid (“NBB”) or lower and short sale market orders by one minimum price increment above the NBB (the “Permitted Price”). The Permitted Price for securities for which the NBB is \$1 or more is \$.01 above the NBB; the Permitted Price for securities for which the NBB is below \$1 is \$.0001 above the NBB.

<sup>9</sup> Rule 72(c) describes the allocation of executions on the Exchange and Rule 72(c)(ii) provides that for purposes of share allocation in an execution, each single Floor broker,

- Proposed Rule 123D(a)(3)(C)(iv) would provide that G-quotes<sup>10</sup> to buy (sell) priced higher (lower) than the opening price will trade fourth on parity by agent under Rule 72(c).
- Finally, proposed Rule 123D(a)(3)(C)(v) would provide that all other limit interest that is priced equal to the opening price will trade last and be allocated consistent with Rule 115A(b)(1).

Proposed Rule 123D(a)(4) would describe when the Exchange would open a security electronically on a quote. First, proposed Rule 123D(a)(4)(A) would provide that if interest of less than a round lot pairs off at a price within the Opening Price Range, the Exchange would open on a quote. In this circumstance, after opening on a quote, interest of less than a round lot would trade at the price closest to the Reference Price (or at the Reference Price if the only interest is market orders), but would not be reported as an opening trade.

Proposed Rule 123D(a)(4)(B) would provide that the Exchange would open a security electronically on a quote if interest of any size pairs off at a price below (above) the lower (upper) boundary of the Opening Price Range, in which case, such paired-off interest would not trade.

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the DMM and orders collectively represented in Exchange systems shall constitute individual participants. Rule 72(c)(iv) provides that executed volume shall be allocated to each participant on parity.

<sup>10</sup> Section 11(a)(1) of the Act, 15 U.S.C. 78k(a)(1), generally prohibits a member of a national securities exchange from effecting transactions on that exchange for its own account, the account of an associated person, or any account over which it or an associated person exercises discretion. Subsection (G) of Section 11(a)(1) provides an exemption allowing an exchange member to have its own floor broker execute a proprietary transaction (“G order”). A G-Quote is an electronic method for Floor brokers to represent G orders. G orders on NYSE yield priority, parity and precedence based on size to all other non-G orders.

Proposed Rule 123D(a)(4)(C) would provide that the Exchange would open a security electronically on a quote if there is no interest that can be quoted on either or both sides of the market. The proposed Rule would further specify that if an opening quote has a zero bid and/or a zero offer, it would not constitute an “Opening Price” as defined in Section I(I) of the Regulation NMS Plan to Address Extraordinary Market Volatility (the “Plan”).<sup>11</sup> Accordingly, if the Exchange were to open on a quote with a zero bid and/or a zero offer, it would not calculate a midpoint of the quote for purposes of calculating Price Bands as provided for in Section V(B)(1) of the Plan.

Proposed Rule 123D(a)(5) would specify which information would be provided in advance of an opening or reopening. In order to provide transparency regarding the opening process, the Exchange proposes that during an opening effected by the Exchange, Order Imbalance Information pursuant to Rule 15(c) would be published.<sup>12</sup> However, because the Exchange would not open a security at a price outside of specified ranges, the Exchange would not issue pre-opening indications in a security pursuant to either Rule 15(a) or 123D.<sup>13</sup> The

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<sup>11</sup> See Securities Exchange Act Release No. 67091, 77 FR 33498 (June 6, 2012) (File No. 4-631).

<sup>12</sup> Order Imbalance Information reflects real-time order imbalances that accumulate prior to the opening transaction on the Exchange and the price at which interest eligible to participate in the opening transaction may be executed in full. Order Imbalance Information disseminated pursuant to Rule 15(c) includes all interest eligible for execution in the opening transaction of the security in Exchange systems, i.e., electronic interest, including Floor broker electronic interest, entered into Exchange systems prior to the opening. Order Imbalance Information is disseminated on the Exchange’s proprietary data feeds. See Rule 15(c)(1).

<sup>13</sup> See Proposed Rule 123D(a)(2) (F) [sic]. Rule 123D(1) requires the dissemination of one or more indications in connection with any delayed opening where a security has not opened or been quoted by 10 a.m. In addition, Rule 123D(1) provides that dissemination of one or more indication is mandatory for an opening which will result in a “significant” price change from the previous close. For securities priced under \$10, such indications are mandatory if the price change is one dollar or more; for securities between \$10 and \$99.99, indications are required for price movements of the lesser of 10% or three

Exchange further proposes that it would publish pre-opening indications pursuant to Rule 123D(b) for a re-opening following a regulatory halt.

Proposed Rule 123D(a)(6) would describe under which circumstances the Exchange would cancel orders after opening on a trade or quote. A proposed in new Rule 123D(a)(6)(A), all unexecuted Market Orders, MOO Orders, and LOO Orders would be cancelled. This would be new behavior following an Exchange-facilitated open because under a DMM-facilitated open, all Market and MOO Orders are guaranteed to participate and therefore there would not be any unexecuted Market Orders or MOO Orders following an opening. Proposed Rule 123D(a)(6)(B) would provide that after an opening on a trade, buy (sell) Limit Orders priced higher (lower) than the opening price would be cancelled. Lastly, proposed Rule 123D(a)(6)(C) would provide that if interest would have paired off at a price below (above) the lower (upper) boundary of the Opening Price Range, after opening on a quote, sell (buy) Limit Orders would be cancelled. The Exchange proposes to cancel only the side of the orders that would cause an opening price to be outside of the Opening Price Range parameters; the other side would not be cancelled and would be included in the opening quote.

The Exchange also proposes to delete current Rule 123D(3) and related Supplementary Material .24. Rule 123D(3) sets forth a non-regulatory trading halt condition titled “Investment Company Units or Index-Linked Securities Trading Condition” adopted to facilitate the listing and trading of all index-linked securities and ETFs from the Exchange to its affiliate NYSE Arca, Inc. (“NYSE Arca”) by December 31, 2007.<sup>14</sup> The condition permits the Exchange to halt

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dollars; and for securities over \$100, indications are required for price movements of five dollars or more.

<sup>14</sup> See Securities Exchange Act Release No. 57035 (December 21, 2007), 72 FR 74386 (December 31, 2007) (SR-NYSE-2007-117).

ETFs or index-linked securities after January 1, 2008 that remain listed on the NYSE.<sup>15</sup> All NYSE-listed index-linked securities and ETFs have transferred to NYSE Arca and are no longer traded on the Exchange, rendering Rule 123D(3) and Supplementary Material .24 moot.

Because of the technology changes associated with the proposed rule change, the Exchange proposes to announce the implementation date via Trader Update.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,<sup>16</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>17</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest. The Exchange believes that permitting the Exchange to electronically open trading would remove impediments to and perfect the mechanism of a free and open market and a national market system by ensuring an orderly open if the registered DMM cannot manually or electronically facilitate the open of trading as required under Rule 104(a). Similarly, the proposal promotes just and equitable principles of trade and removes impediments to and perfects the mechanism of a free and open market by providing customers and the investing public with the certainty of an open in circumstances where business continuity disruptions or other emergencies would prevent the assigned DMMs from opening a security. For the same reasons, the proposal is also designed to protect investors as well as the public interest.

The Exchange believes that the proposed amendment to Rule 123D(a)(3) to provide that

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<sup>15</sup> See id.

<sup>16</sup> 15 U.S.C. 78f(b).

<sup>17</sup> 15 U.S.C. 78f(b)(5).

openings effected by the Exchange would be within a proposed numerical guideline would remove impediments to and perfect the mechanism of a free and open market because, similar to how Nasdaq and NYSE Arca Equities function, it would enable the Exchange to set parameters for an opening to assure that the potential prices that a security may open would not be significantly away from the Reference Price. Similarly, the Exchange believes that excluding interest eligible for the open that would cause an execution to occur outside the Opening Price Range parameters, even if such interest would otherwise be required to be included in an open effected by a DMM, would remove impediments to and perfect the mechanism of a fair and orderly market because it would assure that the Exchange could effect the open within the proposed specified price ranges. The proposed rule therefore promotes just and equitable principles of trade because it provides transparency to entering firms of whether interest would be eligible to participate in a closing transaction effected by the Exchange.

Finally, deleting an obsolete halt condition in 123D(3) and related Supplementary Material .24 removes impediments to and perfects the mechanism of a free and open market by removing confusion that may result from having obsolete references in the Exchange's rulebook. The Exchange further believes that the proposal removes impediments to and perfects the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public, can more easily navigate and understand the Exchange's rulebook. The Exchange believes that eliminating obsolete references would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency, thereby reducing potential confusion. Removing such obsolete references will also further the goal of transparency and add clarity to the Exchange's rules.

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 rule change is not intended to address competitive issues but rather enable the Exchange to open trading where circumstances would prevent a DMM from facilitating an open.

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<sup>18</sup> and Rule 19b-4(f)(6) thereunder.<sup>19</sup> 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) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

A proposed rule change filed under Rule 19b-4(f)(6)<sup>20</sup> normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-4(f)(6)(iii),<sup>21</sup> the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

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<sup>18</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>19</sup> 17 CFR 240.19b-4(f)(6).

<sup>20</sup> 17 CFR 240.19b-4(f)(6).

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

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)<sup>22</sup> 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](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2015-49 on the subject line.

##### 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-NYSE-2015-49. 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

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<sup>22</sup> 15 U.S.C. 78s(b)(2)(B).

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 such filing also will be available for inspection and copying at the principal offices 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-NYSE-2015-49, and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

Robert W. Errett  
Deputy Secretary

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<sup>23</sup> 17 CFR 200.30-3(a)(12).