

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-71085; File No. SR-NYSEMKT-2013-99)

December 16, 2013

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rules 104 - Equities and 123C - Equities to Specify that Closings May be Effectuated Manually or Electronically

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on December 3, 2013, NYSE MKT LLC (“NYSE MKT” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II 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 Rules 104 - Equities and 123C - Equities to specify that closings may be effectuated manually or electronically. 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes amend Rules 104 – Equities (“Rule 104”) and 123C – Equities (“Rule 123C”) to specify that closings may be effectuated manually or electronically.<sup>3</sup> Rule 104(a)(3) currently provides that designated market makers (“DMM”) have the responsibility, among other things, to facilitate the close of trading for each of the securities in which the DMM is registered as required by Exchange rules (including Rule 123C), which may include supplying liquidity as needed. Rule 104(b) further provides that DMM units shall have the ability to employ algorithms for quoting and trading consistent with Exchange and SEC regulations. As such, DMM units at the Exchange all use algorithms to engage in quoting and trading activity at the Exchange.

Rule 123D(1) - Equities specifies that openings may be effectuated manually or electronically. Accordingly, the Exchange currently provides DMM units with functionality to open a security, either on a trade or on a quote, algorithmically. The Exchange is in the process of making a technological change to enable DMM units to use algorithms to close a security as well, i.e., to effectuate a close electronically. The Exchange believes that such functionality would be consistent with current Rule 104(b) because the rule already permits algorithms to engage in quoting or trading activity. However, for the avoidance of doubt, the Exchange proposes to amend Rule 123C to add supplementary material that parallels the current Rule

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<sup>3</sup> Rule 104 is operating on a pilot basis as part of the Exchange’s New Market Model pilot and is in effect until January 31, 2014. See Securities Exchange Act Release No. 69812 (June 20, 2013), 78 FR 38766 (June 27, 2013) (SR-NYSEMKT-2013-51).

123D(1) - Equities rule provision governing the manner by which openings are effectuated to similarly provide that closings may be effectuated manually or electronically.

To assure that certain non-displayed interest that is eligible to participate in manual transactions is included in the opening transaction, Rule 104(a)(2) currently provides that the DMM and DMM unit algorithms will have access to aggregate order information in order to comply with their requirement to facilitate the opening.<sup>4</sup> Because such non-displayed interest is also eligible to participate in the closing transaction, the Exchange would similarly provide aggregate order information to the DMM and DMM unit algorithm in order for the DMM algorithm to close the security electronically. Accordingly, the Exchange proposes to amend Rule 104(a)(3) to add that DMM and DMM unit algorithms will have access to aggregate order information in order to comply with their requirement to facilitate the close of trading as required by Exchange rules. The proposed additional rule text mirrors the current rule text in Rule 104(a)(2).

Rule 104(b)(iii) provides that the DMM unit's system employing algorithms will have access only to publicly-available information. However, as noted above, certain non-displayed interest must be included in the opening or closing transaction. Currently, in order to both include such interest in an opening that is effectuated electronically and meet the Rule 104(b)(iii)

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<sup>4</sup> Minimum Display Reserve interest, which includes Minimum Display Reserve Orders pursuant to Rule 13 - Equities and Floor broker interest designated as reserve interest pursuant to Rule 70 - Equities, is eligible to participate in manual executions, which include the open and close. Exchange systems include all interest eligible to participate in the opening transaction in the aggregate order information available for execution at a price point when the DMM facilitates a manual transaction. See Securities Exchange Act Release No. 34-58184 (July 17, 2008), 73 FR 42853 at 42868 (July 23, 2008) (SR-NYSE-2008-45) (The Exchange's equity trading rules are based on the rules of the New York Stock Exchange LLC). See also Rule 115 - Equities (providing that the aggregated interest of Minimum Display Reserve Orders may be included in the information a DMM may provide to an inquiry from a Floor broker conducting a market probe in the normal course of business).

requirements, the Exchange delivers aggregate order information that includes such non-displayed interest to DMM unit algorithms in a format that is accessible only for the purpose of the opening transaction. Stated otherwise, such information is not made available to the DMM algorithms that engage in intraday quoting and trading activity. The Exchange proposes to use similar mechanisms to deliver aggregate order information necessary for DMM units to effectuate a closing transaction electronically so that it is similarly restricted in its use and availability. In order to provide additional transparency in Exchange rules, the Exchange proposes to amend Rule 104(b)(iii) to add a qualifying statement that except as provided for in Rule 104(a)(2) and proposed Rule 104(a)(3), which as described above are of limited purpose, the DMM unit's system employing algorithms will not have access to order information that is not publicly available.

The Exchange notes that Rules 104(b)(i) and (v) require all functions performed by a DMM unit's algorithm operate consistent with Exchange and SEC regulations and this proposed rule change maintains that requirement. For example, if there is interest represented in the trading crowd that must be included in the closing transaction pursuant to Rule 123C(7)(a)(iii), the DMM would need to use a manner of closing the security that assures that such interest is properly represented in the closing transaction.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>5</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>6</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

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

<sup>6</sup> 15 U.S.C. 78f(b)(5).

in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system. The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market and a national market system because it provides clarity of under what circumstances a DMM unit may employ algorithms. The current rule already specifies that a DMM unit may use algorithms to engage in quoting and trading activity. Exchange rules also specify that such algorithms may be used to effectuate an opening electronically. The proposed rule change will provide transparency that DMM unit algorithms may also be used to effectuate a closing electronically. The Exchange further believes that the proposed rule changes to Rules 104(a)(3) and 104(b)(iii) provide further transparency regarding the manner by which information is made available to DMM units for the purpose of facilitating a closing transaction, which is consistent with current rules and practice regarding what information is made available to DMM units for the purpose of facilitating an opening transaction electronically. The Exchange believes that the proposed changes promote just and equitable principles of trade because the provision of such order information to DMM units assures that all electronically-entered interest that is eligible to participate in an opening or closing transaction would participate if such a transaction were to be effectuated electronically, while at the same time maintaining protections afforded to non-public order information.

The Exchange further notes that the proposed change removes impediments to and perfects the mechanism of a free and open market and a national market system because it provides greater flexibility for DMMs to operate remotely if the Exchange cannot open its lower Manhattan physical location. Currently, if the Exchange needs to close its physical location, as it did on October 29 and 30, 2012 during Superstorm Sandy, the Exchange cannot operate because the opening and closing transactions require manual intervention by a DMM located on the

Trading Floor, even when opening a security electronically. The Exchange is currently in the process of developing technology for such functions to be performed remotely by DMM units. The Exchange believes that the proposed rule change, which provides DMM units with the authority to effectuate a closing transaction either manually or electronically, will enable the Exchange to proceed with its disaster recovery plans to enable full remote access operations of the Exchange.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change would 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 designed to address any competitive issues but rather is designed to specify in Exchange rules that a DMM unit may use algorithms to effectuate a closing transaction electronically. Because there are no other market participants on the Exchange with the responsibilities and duties specified in Rule 104 to facilitate a closing transaction, the manner by which such responsibility is discharged does not create a competitive issue with any other market participant. The Exchange further notes that the manner by which information would be provided to the DMM unit in order to facilitate a closing transaction electronically is consistent with current rules and practice regarding what information is made available to DMM units for the purpose of facilitating an opening transaction electronically, including that such information would be restricted in its use and availability for intraday trading by the DMM unit.

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>7</sup> and Rule 19b-4(f)(6) thereunder.<sup>8</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.

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>9</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-NYSEMKT-2013-99 on the subject line.

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<sup>7</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>8</sup> 17 CFR 240.19b-4(f)(6).

<sup>9</sup> 15 U.S.C. 78s(b)(2)(B).

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-2013-99. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of 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- NYSEMKT-2013-99 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>10</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>10</sup> 17 CFR 200.30-3(a)(12).