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NYSE

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VIA E-MAIL

Brent J. Fields
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: **File Nos. SR-NYSE-2016-71 and SR-NYSEMKT-2016-99 (the "Proposal")**

Dear Mr. Fields:

The New York Stock Exchange LLC (the "NYSE") and NYSE MKT LLC ("NYSE MKT") (together, the "Exchange") appreciate the opportunity to respond to the February 15, 2017, Orders Instituting Proceedings to Determine Whether to Disapprove the Proposal (the "Order").[1] The Commission received no comments on the Proposal before issuing the Order.

For the reasons set forth in the Proposal and in this response, the Exchange believes that the Proposal is consistent with Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Securities Exchange Act of 1934, as amended (the "Act"), and that the Commission should therefore approve the Proposal.[2]

Background

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1 See Securities Exchange Act Release No. 80044 (Feb. 15, 2017), 82 FR 11388 (Feb. 22, 2017) (SR-NYSE-2016-71) ("NYSE Order"); Securities Exchange Act Release No. 80043 (Feb. 15, 2017), 82 FR 11379 (Feb. 22, 2017) (SR-NYSEMKT-2017-99) ("NYSE MKT Order"). The Proposal was filed with the Commission on October 27, 2016 and published in the Federal Register on November 17, 2016. See Securities Exchange Act Release No. 79284 (Nov. 10, 2016), 81 FR 81222 (Nov. 17, 2016) (SR-NYSE-2016-71); Securities Exchange Act Release No. 79283 (Nov. 10, 2016), 81 FR 81210 (Nov. 17, 2016) (SR-NYSEMKT-2016-99). On December, 20, 1016, the Commission extended to February 15, 2017, the time period in which to approve the proposal, disapprove the Proposal, or institute proceedings to determine whether to approve or disapprove the proposal. See Securities Exchange Act Release No. 79612 (Dec. 20, 2016), 81 FR 95205 (Dec. 27, 2016) (SR-NYSE-2016-71); Securities Exchange Act Release No. 79611 (Dec. 20, 2016), 81 FR 95205 (Dec. 27, 2016) (SR-NYSEMKT-2016-99).

2 15 U.S.C. 78f(b)(4), 78f(b)(5) and 78f(b)(8).

The Proposal seeks to amend Rule 104, which sets forth the obligations of Exchange Designated Market Makers ("DMMs"), to delete subsection (g)(i)(A)(III) prohibiting DMMs from establishing, during the last ten minutes of trading before the close, a new high (low) price for the day on the Exchange in a security in which the DMM has a long (short) position ("Prohibited Transactions").

The Order states that the prohibition set forth in Rule 104(g)(i)(A)(III) was "originally" approved as part of the New Market Model pilot program in 2008.[3] However, Rule 104(g)(III) was originally adopted in 2006, at the same time the Commission approved the Exchange's "hybrid market" proposal under which Exchange systems assumed the function of matching and executing electronically-entered orders, but specialists remained the responsible broker-dealer for orders on the Exchange's limit order book.[4] The prohibition was designed to prevent Exchange specialists from setting the closing price.[5] Exceptions to the prohibition were permitted, which allowed specialists to effect transactions during the last ten minutes of trading that resulted in a new high or low for the day either to match another market's better bid or offer or to bring the price of the security into parity with an underlying or related security or asset.[6] These exceptions were considered appropriate because, in those situations, an independent party and not the specialist had set the price.[7]

The chronology is important because, at the time rule the on Prohibited Transactions was approved in 2006, Regulation NMS had not been implemented and Exchange specialists were still the responsible broker-dealer for orders on the Exchange's limit order book. A year later, equity market structure was fundamentally transformed by the implementation of Regulation NMS. The New Market Model, which was proposed and approved after implementation of Regulation NMS, ushered in the end of the specialist system by converting specialists into DMMs, who are no longer agents for the Exchange's limit order book and whose trading activity on the Exchange is limited to proprietary trading.[8] The Exchange retained the obligations now set forth in Rule 104(g) and (h), even though

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3 See NYSE Order, 82 FR at 11388; NYSE MKT Order, 82 FR at 11380.

4 See Securities Exchange Act Release No. 54860 (December 1, 2006), 71 FR 71221 (December 8, 2006) (SR-NYSE-2006-76) ("Release No. 54860") (order approving amendments to Rule 104 that included Prohibited Transactions, which at the time were set forth in Supplementary Material .10 of Rule 104); Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR-NYSE-2004-05) (approval of "hybrid market" proposal).

5 See, e.g., Release No. 54860, 71 FR at 71221.

6 See id. at 71223.

7 See id. at 71229.

8 See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379, 64381 (October 29, 2008) (SR-NYSE-2008-46).

Regulation NMS was implemented prior to the Exchange proposing the New Market Model. When the Exchange filed to make the New Market Model permanent in 2015, it did not at that time propose to make any changes to that model. The Exchange is now proposing to adapt its market model, which dates to 2008, and its rule for Prohibited Transactions to 2006, to respond to the significant changes in equity market structure over the last decade. Specifically, as set forth in the Proposal, in light of developments in equity market structure and the Exchange's trading model in response to those developments, Rule 104(g)(i)(A)(III) has lost its original purpose and utility, which was to prevent specialists from inappropriately influencing the price of a security at the close to advantage the specialist's proprietary position.[9]

Response to Order

The Order seeks public comment on whether the Proposal "would maintain an appropriate balance between the benefits and obligations of being a DMM on the Exchange and whether the obligations of DMMs under remaining Exchange rules are reasonably designed to prevent DMMs from inappropriately influencing or manipulating the close in light of DMMs' special responsibility for closing auctions under Exchange rules."[10] More specifically, the Commission expressed concern about eliminating an "obligation" that is distinct for the last ten minutes of trading out of concern that DMMs should be subject to a different obligation during this period.

Eliminating the rule on Prohibited Transactions would not alter or disrupt the balance between DMM benefits and obligations, as the Commission asserts in the Order. In the decade since the rule on Prohibited Transactions was implemented for specialists, the rationale for restricting DMM trading in the last ten minutes of trading has not withstood the changes in market structure and the movement of pricing decisions away from market participants on the Trading Floor. Specifically, unlike how specialists traded before the implementation of Regulation NMS, in today's electronic marketplace, DMMs do not have the ability to direct or influence trading or control intra-day prices, even during the last ten minutes of trading. Therefore, retaining a prohibition designed to prevent specialists from setting a price in the final ten minutes of trading in a security is anachronistic and unnecessary. Indeed, given that the majority of intra-day trading in NYSE-listed or NYSE MKT-listed securities takes place on trading venues other than the listing exchange, a DMM establishing a new high or low price for a security on the Exchange in the last ten minutes of trading (or at any other time of the trading day) does not have the same effect on the market price for such security as it did before implementation of Regulation NMS. A DMM that establishes a new high or low on the Exchange during the last ten minutes of trading incurs substantial risk because trading in away markets or on the Exchange, over which the DMM has no control, may be at very

[9] See Notice, 81 FR at 81223.

[10] See NYSE Order, 82 FR 11389; NYSE MKT Order, 82 FR 11380.

different prices.

Further, as noted in the Proposal, the DMM's obligation not to destabilize the market when buying or selling to increase a position or reaching across the market would govern DMM trading during the final ten minutes of trading. Rule 104(h)(ii) permits certain "Conditional Transactions"[11] without restriction as to price if they are followed by appropriate re-entry on the opposite side of the market commensurate with the size of the DMM's transaction.[12] This existing obligation is not currently in effect during the final ten minutes of trading because the rule on Prohibited Transactions prohibits such new highs or lows. However, in the absence of a rule on Prohibited Transactions, the Conditional Transaction obligation would apply until the close.

With respect to the closing transaction, DMMs have an affirmative obligation to facilitate the closing transaction and add liquidity as necessary to maintain a fair and orderly market. However, any decisions about pricing such closing transaction cannot be made until after continuous trading concludes because, until such time, the DMM has no control over pricing. Moreover, DMM pricing decisions at the close would remain subject to specific DMM obligations regarding the quality of the markets in securities to which they are assigned. In general, as noted above, transactions on the Exchange by a DMM for the DMM's account must be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock, and DMMs must refrain from causing or exacerbating excessive price movements. In short, the effect of the Proposal would be to treat the last ten minutes of DMM trading in the same way as the rest of the trading day, and assess each DMM transaction from the perspective of the numerous obligations imposed by Rule 104, none of which would be altered or diminished by the Proposal.[13]

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11 Rule 104(h)(i) defines a Conditional Transaction as a DMM transaction in a security that establishes or increases a position and reaches across the market to trade as the contra-side to the Exchange published bid or offer. A DMM reaches across the market when the DMM buys from the NYSE offer or sells to the NYSE bid.

12 The Exchange's re-entry obligations for Conditional Transactions are set forth in Rule 104(h)(iii). However, Rule 104(h)(iv) permits certain other Conditional Transactions without restriction as to price, and Rule 104(i) provides that re-entry obligations following such Conditional Transactions would be the same as the re-entry obligations for Non-Conditional Transactions pursuant to Rule 104(g).

13 Under Rule 104, DMMs have the obligation to:

- engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market insofar as reasonably practicable (Rule 104(a));

- maintain a continuous two-sided quote, which mandates that each DMM maintain a bid or an offer at the National Best Bid ("NBB") and National Best Offer

More generally, the Exchange believes that its rules are reasonably designed to prevent DMMs from inappropriately influencing or manipulating the close. As noted, these Rules would not change as a result of the Proposal and would continue to require an evaluation of DMM trading activity, and in particular transactions for the DMM's own account, from the standpoint of the DMM's affirmative and other obligations to the marketplace, including the responsibility under Rule 123D(a) to ensure that openings and reopenings are fair and orderly, reflecting the DMM's professional assessment of market conditions at the time, and appropriate consideration of the balance of supply and demand as reflected by orders represented in the market.[14]

The Exchange currently employs a suite of surveillances for trading by DMMs and other market participants in and around the close of trading and actively examines trading patterns for potential violations, including appropriate re-entry on the opposite side commensurate with the size of the DMM transaction. In the absence of the rule on Prohibited Transactions, the Exchange would review DMM transactions executed in the last ten minutes of trading to assess whether a particular transaction was effectuated to manipulate the security's price going into the close to benefit the DMM's position. Because the Exchange would be monitoring DMM trading for such conduct and has ample scope under Rule 104 to address the conduct, the Exchange believes that an outright prohibition that was designed for specialists is no longer necessary.

("NBO," together the "NBBO") for a certain percentage of the trading day (Rule 104(a)(1));

- facilitate, among other things, openings, re-openings, and the close of trading for the DMM's assigned securities, all of which may include supplying liquidity as needed (See id. at (2)-(3))

- provide contra-side liquidity as needed for the execution of odd-lot quantities eligible to be executed as part of the opening, reopening, and closing transactions but that remain unpaired after the DMM has paired all other eligible round lot sized interest (Rule 104(e)); and

- maintain, insofar as reasonably practicable, a fair and orderly market on the Exchange in assigned securities, including maintaining appropriate depth and reasonable price variations between transactions (also known as price continuity) and preventing unexpected variations in trading, and trading for the DMM's own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated (Rule 104(f)).

14 The Exchange supplies DMMs with suggested Depth Guidelines for each security in which a DMM is registered, and DMMs are expected to quote and trade with reference to the Depth Guidelines. See Rule 104(f)(iii).

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For all of the foregoing reasons and the reasons set forth in the Proposal, the Exchange believes that the Proposal should be approved.

Sincerely,