

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-71245; File No. SR-NYSEMKT-2013-107)

January 7, 2014

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 123C(7)(b) - Equities to Provide that G Orders with A Price Equal to the Closing Price Are the Last Interest Eligible To Be Used to Offset A Closing Imbalance

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (the “Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that on December 26, 2013, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend Rule 123C(7)(b) - Equities to provide that G orders with a price equal to the closing price are the last interest eligible to be used to offset a closing imbalance. The text of the proposed rule change is available on the Exchange’s website at 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

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend Rule 123C(7)(b) - Equities to modify the hierarchy of pending interests that may be used to offset a closing imbalance, specifically by switching the priority in the execution of CO orders with G orders with a price equal to the closing price.

Background

Rule 123C – Equities (“Rule 123C”) sets forth the closing procedures for trading in stock on the Exchange. Rule 123C(7) sets forth the order of execution of pending interest on the close. Rule 123C(7)(a) lists the pending interest that must be executed or cancelled as part of the closing transaction. Rule 123C(7)(b) sets forth the execution hierarchy of the pending interest that may be used to offset a closing imbalance. Currently, Rule 123C(7)(b) provides that the following order of execution for pending interest may be used to offset a closing imbalance:

- (i) limit orders represented in the Display Book with a price equal to the closing price and DMM interest;
- (ii) LOC orders with a price equal to the closing price;
- (iii) MOC orders that have tick restrictions that limit the execution of the MOC to the price of the closing transaction;
- (iv) LOC orders that have tick restrictions that are capable of being executed based on the closing price and the price of such limit order is equal to the price of the closing transaction;
- (v) G orders with a price equal to the closing price; and

(vi) CO orders.

A “G order” is an order entered for a member’s own account or an account in which the member has an interest, as permitted under Section 11(a)(1)(G) of the Act.⁴ A “CO order” is a conditional-instruction limit-type order that is eligible to participate in the closing transaction only when there is an imbalance of orders to be executed on the opposite side of the market from the CO order. A CO order may be used in the closing transaction only to offset an imbalance and may not add to or flip an imbalance. The CO order is defined in Rule 13 - Equities. The creation of the CO order was approved by the SEC in 2009.⁵ An “LOC order” is a limit at-the-close order, and an “MOC order” is a market at-the-close order.

Exchange’s Approval Request

The current execution hierarchy of pending interest that may be used to offset a closing imbalance was approved by the SEC in 2009.⁶ In November 2009, the Exchange filed proposed amendments with the SEC to modify its closing procedures as well as to make conforming changes to other rules.⁷ In the filing, the Exchange proposed, among other things, to add subsection (b)(vi) to Rule 123C(7) that would include a new type of customer order, called a CO order, to the list of orders that may be executed when there is an imbalance at the close of the market.⁸ In proposed Rule 123C(7)(b), CO orders were listed as the final order type in the

⁴ 15 U.S.C. 78k(a)(1)(G). See also Rule 13 - Equities (defining a “G order” as an order entered pursuant to Subsection (G) of Section 11(a)(1) of the Act).

⁵ See Securities Exchange Act Release No. 61244 (Dec. 28, 2009), 75 FR 479 (January 5, 2010) (File No. SR-NYSEAmex-2009-81).

⁶ See id.

⁷ See Securities Exchange Act Release No. 60973 (Nov. 9, 2009), 74 FR 59308 (Nov. 17, 2009) (File No. SR-NYSEAmex-2009-81).

⁸ See id.

sequence of transactions that may be executed to offset an imbalance.⁹ G orders were expressly identified as taking priority over CO orders in the closing rotation.¹⁰

The proposal described in detail the mechanics of how the CO order type would operate.¹¹ It proposed that CO orders would be contingent on an imbalance on the opposite side of the market when the market closed.¹² If no imbalance existed, these orders would not be activated and would be cancelled.¹³ The Exchange further stated that the execution of CO orders would never add to, or result in, a flip of the imbalance to the other side of the market.¹⁴ Rather, if the aggregate number of shares comprising outstanding CO orders was larger than the number of shares required to offset the imbalance, only the amount of shares necessary to correct any actual imbalance in full would be triggered and executed.¹⁵

Significantly, the Exchange explained that, until all other orders have been considered and until an imbalance can be calculated, CO orders are not active orders.¹⁶ Because of the contingent nature of the order type, CO orders were to be executed after all other types of orders have been executed, including G orders.¹⁷ The CO orders were meant to supplement, not supplant, any existing orders on the book to provide additional liquidity in the event of an imbalance.¹⁸ As the Exchange explicitly stated in its proposal:

⁹ See id. at 59314.

¹⁰ Id.

¹¹ See id.

¹² See id.

¹³ See id.

¹⁴ See id.

¹⁵ See id.

¹⁶ See id.

¹⁷ See id.

¹⁸ See id.

The CO order will not be guaranteed to participate in the closing transaction. CO orders will be eligible to participate in the closing transaction when there is an imbalance of orders to be executed on the opposite side of the market from the CO order and there is no other interest remaining to trade at the closing price. This order type must yield to all other eligible interest (emphasis added).¹⁹

The Exchange proposal also detailed the benefits of this new order type. The proposal explained how the addition of CO orders would provide an added opportunity for investors to take advantage of closing prices and would encourage greater customer participation in the market.²⁰ Specifically, the Exchange noted that CO orders:

[W]ill add greater efficiency to the closing process by providing an additional source of liquidity to offset an imbalance going into the closing transaction. The proposed modifications will provide investors with a more accurate depiction of the market interest prior to the closing transaction thereby allowing them to make better informed trading decisions.²¹

SEC's Approval Order

In December 2009, the SEC issued an order approving amended Rule 123C(7)(b) in the form proposed by the Exchange.²² In its approval order, the SEC reiterated the mechanics of CO orders as described by the Exchange in its proposal.²³ More significantly, however, the SEC

¹⁹ Id.

²⁰ See id. at 59317.

²¹ Id.

²² See Securities Exchange Act Release No. 61244 (Dec. 28, 2009), 75 FR 479 (January 5, 2010) (File No. SR-NYSEAmex-2009-81).

²³ See id. at 481.

explicitly acknowledged and approved the timing and priority of execution of CO orders.²⁴ The SEC explicitly stated that CO orders would be executed after all other orders, including G orders.²⁵ The SEC approval order stated:

The Exchange further proposes to create a CO order type, which would provide all market participants an additional method to offset an order imbalance at the close. The CO order would not be guaranteed to participate in the closing transaction. CO orders would only be eligible to participate in the closing transaction when there is an imbalance of orders to be executed on the opposite side of the market from the CO order and there is no other interest remaining to trade at the closing price. CO orders must yield to all other eligible interest (emphasis added).²⁶

The SEC approval order further stated:

If there is an imbalance at the close and the price of the closing transaction is at or within the limit of the CO order, the CO order would be eligible to participate in the closing transaction, subject to strict time priority of receipt in Exchange systems among such eligible CO orders and after yielding to all other interest in the closing execution, including MOCs, marketable LOCs, “G” orders, DMM interest, and at-priced LOCs (emphasis added).²⁷

The SEC endorsed the Exchange’s assertion that CO orders are beneficial to investors and to the marketplace.²⁸ The SEC stated in the approval order, “[t]he creation of the CO order

²⁴ See id. at 481 - 482.

²⁵ See id. at 481.

²⁶ Id. at 481.

²⁷ Id. at 481.

²⁸ See id. at 482.

provides an additional source of liquidity to offset an imbalance going into the closing transaction, and thus should increase the greater efficiency of the closing process.”²⁹

The SEC found the amendments to Rule 123C, including the addition of CO orders and the execution priority, to be “consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.”³⁰ In support of this determination, the Commission stated that it:

[B]elieves that these proposed modifications are consistent with the Act because, taken as a whole, they should enhance the efficiency and transparency of the closing transaction and provide customers with a more accurate depiction of market conditions prior to the closing transaction, and therefore allow them to make better-informed trading decisions.³¹

Subsequently, the SEC staff questioned whether the priority of execution of orders at the close was consistent with Section 11(a) of the Act and the rules promulgated thereunder. In particular, the SEC staff questioned whether G orders should take priority over CO orders. The Exchange began discussions with the SEC staff regarding a potential exemption from Section 11(a) of the Act or no-action relief for the limited purposes of priority of the CO order type on the close. After significant discussion with the SEC staff, the Exchange determined that rather than seek such an exemption or no-action relief, it would file a proposed rule change to change the order of execution in the closing rotation.

Proposed Rule Change

²⁹ Id.

³⁰ Id.

³¹ Id.

The Exchange now proposes to modify the hierarchy of interests that may be used to offset a closing imbalance, specifically by switching the positions in the hierarchy of G orders with a price equal to the closing price and CO orders. Accordingly, under the Exchange's proposed amendment to Rule 123C(7)(b), CO orders will be moved up in the execution hierarchy and G orders would give up execution priority to all other order types. The amended rule would allow execution in the following execution hierarchy to offset a closing imbalance:

- (i) limit orders represented in the Display Book with a price equal to the closing price and DMM interest;
- (ii) LOC orders with a price equal to the closing price;
- (iii) MOC orders that have tick restrictions that limit the execution of the MOC to the price of the closing transaction;
- (iv) LOC orders that have tick restrictions that are capable of being executed based on the closing price and the price of such limit order is equal to the price of the closing transaction;
- (v) CO orders; and
- (vi) G orders with a price equal to the closing price.

The Exchange believes that Rule 123C(7)(b), as proposed, would continue to provide Exchange participants with control of and flexibility with respect to the handling of their orders to be executed in the closing transaction. The Exchange also believes that the proposed change to the hierarchy of interest that may be used to offset a closing imbalance would help ensure that G orders yield priority, parity and precedence to CO orders. The Exchange also notes its continued belief that the CO order type provides an important source of liquidity to offset an imbalance going into the closing transaction, and thus increases the efficiency of the closing process. The Exchange believes that the proposed modification to the hierarchy balances the

requirement that G orders yield priority, parity and precedence to all non-G orders, with the important goal of preserving the role that CO orders play in increasing the efficiency of the closing process.

Because of the technology changes associated with this proposed rule change, the Exchange will announce by Trader Update when it will implement the proposed change.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,³² in general, and furthers the objectives of Section 6(b)(5) of the Act,³³ in particular, in that it is designed to “prevent fraudulent and manipulative acts and practices,” “promote just and equitable principals 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 the proposed modification to the execution hierarchy of pending interest that may be used to offset a closing imbalance would continue to advance the efficiency and transparency of the closing transaction and continue to provide customers with information regarding the hierarchy of interest that may be used to offset a closing imbalance, which would continue to allow customers to make better informed decisions. In addition, the Exchange believes that the proposed reordering is consistent with the Act as it would help ensure that G orders yield priority, parity and precedence in execution to CO orders, consistent with Section 11(a)(1)(G) of the Act.³⁴

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

³² 15 U.S.C. 78f(b).

³³ 15 U.S.C. 78f(b)(5).

³⁴ 15 U.S.C. 78k(a)(1)(G).

The proposed rule change would not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act because the proposal to modify the hierarchy of interest that may be used to offset a closing imbalance would help ensure that G orders yield priority, parity and precedence in execution to CO orders, consistent with Section 11(a)(1)(G) of the Act.³⁵ At the same time, the proposal would preserve the important benefits that CO orders provide as an additional source of liquidity to offset an imbalance going into the closing transaction.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days after the date of the filing, or such shorter time as the Commission may designate, it has become effective pursuant to 19(b)(3)(A) of the Act³⁶ and Rule 19b-4(f)(6)³⁷ 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

³⁵ 15 U.S.C. 78k(a)(1)(G).

³⁶ 15 U.S.C. 78s(b)(3)(A).

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

Commission shall institute proceedings to determine whether the proposed rule 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. Please include File Number SR-NYSEMKT-2013-107 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEMKT-2013-107. 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 the filing also will be available for inspection and copying at the principal office of the

Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2013-107 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.³⁸

Kevin M. O'Neill
Deputy Secretary

³⁸ 17 CFR 200.30-3(a)(12).