

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-80043; File No. SR-NYSEMKT-2016-99)

February 15, 2017

Self-Regulatory Organizations; NYSE MKT LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Amending Rule 104 – Equities to Delete Subsection (g)(i)(A)(III) Prohibiting Designated Market Makers from Establishing a New High (Low) Price on the Exchange in a Security the DMM has a Long (Short) Position During the Last Ten Minutes Prior to the Close of Trading

I. Introduction

On October 27, 2016, NYSE MKT LLC (“Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”) pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change amending Rule 104 – Equities to delete subsection (g)(i)(A)(III), which prohibits Designated Market Makers (“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 (“Rule 104(g)(i)(A)(III) Prohibition”). The proposed rule change was published for comment in the Federal Register on November 17, 2016.³

On December 20, 2016, 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.⁴ The Commission has received no comments on the proposal. This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 79283 (Nov. 10, 2016), 81 FR 81210 (Nov. 17, 2016) (“Notice”).

⁴ See Securities Exchange Act Release No. 79611 (Dec. 20, 2016), 81 FR 95205 (Dec. 27, 2016).

II. Description of the Proposal

Currently, under Exchange Rule 104 – Equities (g)(i)(A)(III), a DMM with a long (short) position in a security cannot, during the last ten minutes before the close of trading, make a purchase (sale) in that security that results in a new high (low) price on the Exchange for that day.⁵ The Exchange proposes to remove this prohibition from its rulebook.

The Exchange asserts that, in light of developments in the equity markets and in the Exchange’s own trading model, Rule 104(g)(i)(A)(III) has lost its original purpose and utility.⁶ Specifically, the Exchange asserts that, in today’s electronic marketplace, where DMMs have replaced specialists, and control of pricing decisions has moved away from market participants on the Exchange trading floor, the purpose behind the Rule 104(g)(i)(A)(III) Prohibition is no longer necessary, and eliminating the prohibition would not eliminate other existing safeguards that prevent DMMs from inappropriately influencing or manipulating the close.⁷

The Exchange argues that the rationale behind preventing specialists from setting the price of a security on the Exchange in the final ten minutes of trading was to prevent specialists from inappropriately influencing the price of a security at the close to advantage a specialist’s proprietary position.⁸ In today’s fragmented marketplace, according to the Exchange, a new high or low price for a security on the Exchange in the last ten minutes of trading does not have a significant effect on the market price for that security, because a new high or low price on the Exchange may not be the new high or low for a security – prices may be higher or lower in away markets, where the majority of intra-day trading in NYSEMKT-listed securities takes place – and

⁵ See Exchange Rule 104 – Equities (g)(i)(A)(III). Exchange Rule 104 – Equities (g)(i)(A)(III)(2) provides two exceptions to this general prohibition.

⁶ See Notice, 81 FR at 81211.

⁷ See id. at 81211-81212.

⁸ See id. at 81211.

because any advantage to a DMM by establishing a new high or low on the Exchange during the last ten minutes can rapidly evaporate following trades in away markets. Because DMMs do not have the ability to direct or influence trading, or to control intra-day prices, that specialists had before the implementation of Regulation NMS, the Exchange asserts, the Rule 104(g)(i)(A)(III) Prohibition is anachronistic.⁹

III. Proceedings to Determine Whether to Disapprove SR-NYSEMKT-2016-99 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁰ to determine whether the proposal should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment on the proposal.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act,¹¹ which requires that the rules of an 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, in general, to protect investors and the public interest. In addition, Section

⁹ See id.

¹⁰ 15 U.S.C. 78s(b)(2)(B).

¹¹ 15 U.S.C. 78f(b)(5).

6(b)(5) of the Act prohibits the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

The Rule 104(g)(i)(A)(III) Prohibition was originally approved as part of the New York Stock Exchange LLC (“NYSE”) pilot program called the “New Market Model”¹² which was subsequently incorporated into the Exchange’s rulebook.¹³ As the Commission stated when approving the NYSE proposal to conduct the New Market Model pilot, “[w]e carefully review trading rule proposals that seek to offer special advantages to market makers. Although an exchange may reward such participants for the benefits they provide to the exchange’s market, such rewards must not be disproportionate to the services provided.”¹⁴ In 2015, when the Commission approved the NYSE’s proposal to make the New Market Model permanent,¹⁵ the Commission noted the Rule 104(g)(i)(A)(III) Prohibition,¹⁶ among many aspects of the New Market Model, and reiterated that the pilot program had been conducted, among other reasons, to seek “further evidence that the benefits proposed for DMMs are not disproportionate to their obligations.”¹⁷

¹² See Securities Exchange Act Release No. 58845 (Oct. 24, 2008), 73 FR 64379 (Oct. 29, 2008) (SR-NYSE-2008-46) (approving NYSE New Market Model pilot program) (“NMM Pilot Approval Order”).

¹³ See Securities Exchange Act Release No. 59022 (Nov. 26, 2008), 73 FR 63683 (Dec. 3, 2008) (NYSEALTR-2008-10) (amending equity rules to conform to NYSE NMM pilot rules).

¹⁴ See NMM Pilot Approval Order, 73 FR at 64388.

¹⁵ See Securities Exchange Act Release No. 75578 (Jul. 31, 2015), 80 FR 47008 (Aug. 6, 2015) (SR-NYSE-2015-26) (“NMM Approval Order”). See also Securities Exchange Act Release No. 75952 (Sep. 18, 2015), 80 FR 57645 (Sep. 24, 2015) (SR-NYSEMKT-2015-64) (notice of filing and immediate effectiveness of proposed rule change to make permanent the rules of the New Market Model pilot).

¹⁶ See NMM Approval Order, 80 FR at 47010.

¹⁷ See id. at 47013.

Under the proposal, the Exchange seeks to eliminate the Rule 104(g)(i)(A)(III) Prohibition – an obligation imposed on DMMs – thereby altering the existing set of obligations and benefits of DMM status. Accordingly, the Commission seeks public comment on whether the Exchange’s 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.

IV. Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any others they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is inconsistent with Section 6(b)(5) or any other provision of the Act, or the rules and regulation thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.¹⁸

Interested persons are invited to submit written data, views and arguments regarding whether the proposal should be disapproved by [insert date 21 days from publication in the

¹⁸ Section 19(b) (2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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-2016-99 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 Numbers SR-NYSEMKT-2016-99. The 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 proposal that are filed with the Commission, and all written communications relating to the proposal 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 filings also will be available for inspection and copying at the principal office of the Exchanges. 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-2016-99 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Eduardo A. Aleman
Assistant Secretary

¹⁹ 17 CFR 200.30-3(a)(57).