

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-90371; File No. SR-NYSE-2020-66)

November 6, 2020

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend to NYSE Rule 122 related to Orders with More than One Broker

I. Introduction

On August 3, 2020, New York Stock Exchange LLC (“Exchange”) 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 to amend to NYSE Rule 122 (Orders with More than One Broker). The proposed rule change was published for comment in the Federal Register on August 12, 2020.³ On September 22, 2020, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ The Commission has received no comment letters on the proposal. On November 3, 2020, the Exchange filed Amendment No. 1 to the proposed rule change, which replaced and superseded the proposed rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 89500 (Aug. 6, 2020), 85 FR 48738 (Aug. 12, 2020).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 89962 (Sept. 22, 2020), 85 FR 60854 (Sept. 28, 2020).

change in its entirety.⁶ The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons, and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

1. Overview

Currently, NYSE Rule 122 (Orders with More than One Floor Broker) provides that a member organization may not maintain orders with more than one Floor broker to purchase the same security at the same price. Because each Floor broker is a separate Participant in a parity allocation,⁷ NYSE Rule 122 prevents member organizations from circumventing the parity allocation rules to obtain preferential execution by splitting a single order among multiple Floor brokers.

NYSE Rule 122 currently contains an exception, and the main purpose of the proposed amendment is to clarify this exception. The exception is: if the orders are not for the account of the same principal, then it is permissible for the member organization to maintain such orders with different Floor brokers. This exception reflects the Exchange's understanding that some member organizations, or customers of member organizations, have multiple trading desks that do not coordinate trading strategies and are separated by information barriers. In such circumstances, because there is no coordination between such trading desks, maintaining those separate orders with more than one Floor broker would not be circumventing the parity allocation rules. The proposed amendment to NYSE Rule 122 would add Commentary to add

⁶ In Amendment No. 1, the Exchange added the representation that it will monitor, via examination-based surveillance, member organization compliance with its supervisory obligation

⁷ See Rule 7.36(a)(5) (defining the term "Floor Broker Participant" to mean a Floor Broker trading license).

specificity about this exception with respect to both member organizations' proprietary orders and orders that member organizations represent on an agency basis for customers.

Both member organizations and the customers of member organizations may consist of multiple trading units that are separated by information barriers that restrict the trading units from coordinating trading strategies, sharing capital, and sharing profits and losses. The proposed amended rule would provide that, if a member organization has knowledge and can verify that it or its customer is organized in this way, the member organization may route orders for the same security at the same price from its independent units to more than one Floor broker in a manner that is consistent with NYSE Rule 122.

In addition, the Exchange proposes to amend the text of NYSE Rule 122 to remove certain obsolete language and to provide greater specificity to the rule text, without changing its meaning.

2. Proposed Changes to Text of Rule 122

The Exchange proposes to amend NYSE Rule 122 to remove certain obsolete language and to provide greater specificity to the rule text, without changing its meaning.

Because the text of current NYSE Rule 122 addresses two distinct topics, the Exchange proposes to reorganize the existing rule text into new subsections (a) and (b), which the Exchange believes will enhance comprehension of the rule.

The Exchange proposes that new subsection (a) would include the current first sentence of NYSE Rule 122. Because the term "member" refers to the natural person associated with a member organization who has been designated by such member organizations to effect

transactions on the Floor of the Exchange, e.g., a Floor broker,⁸ and Floor brokers do not originate orders,⁹ and because the term “allied member” no longer exists in Exchange rules,¹⁰ the Exchange proposes to delete the extraneous language “member” and “or any allied member therein.”

The Exchange further proposes to amend new subsection (a) to specify that the rule applies both to orders “sent to” – as well as those “maintained with” – more than one Floor broker, and to insert the word “Floor” before “broker” to enhance the clarity of the sentence. The Exchange also proposes to replace the phrase “market orders or orders at the same price” in new subsection (a) with the phrase “orders that may execute at the same price,” to specify that the rule applies to multiple orders of any resting order type that may execute at the same price.

The Exchange proposes that new subsection (b) would include the current second and third sentences of Rule 122, relating to how a Floor broker can represent an order that already has a portion transmitted to the Exchange Book. Because this text addresses a different topic than proposed Rule 122(a), the Exchange proposes to delete the extraneous “However” at the start of the first sentence of this new subsection. The Exchange also proposes to delete from new subsection (b) several phrases – including “manually or from a hand-held terminal,” “in the auction market or via the Floor broker agency interest file,” and “as part of an auction market transaction or automatic execution” – because they are extraneous, use obsolete text, and are not

⁸ See Rule 2(a) (definition of the term “member”).

⁹ See Rule 112(a).

¹⁰ See Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR-NYSE-2008-80) (Approval order).

necessary to a clear understanding of the rule. The Exchange believes that making these deletions will have no substantive effect on the meaning of subsection (b).

Finally, the Exchange proposes to delete from new subsection (b) several references to the “Display Book® system,” which is an obsolete system formerly used by the Exchange, and to replace them with references to the Exchange’s current “Exchange Book.”¹¹

3. Proposed Rule Commentary

In addition to the proposed amendments to the rule text listed above, the Exchange proposes to amend Rule 122 by adding new Rule Commentary to provide greater specificity as to the rule’s application and to enhance comprehension of the rule.

The Exchange proposes to add Rule Commentary .01 to specify that, for the purposes of Rule 122, sending to, maintaining with, or using “more than one Floor broker” would mean more than one Floor broker member organization, or two different individual Floor brokers at the same Floor broker member organization. This proposed rule text is not intended to add new functionality, but rather to add clarity regarding the current Rule text.

The Exchange proposes to add Rule Commentary .02 to provide more specificity as to when a member organization’s own orders are not presumed to be for the account of the same principal. As proposed, for purposes of Rule 122, when a member organization uses more than one Floor broker, multiple orders originating from the member organization would be presumed not to be for the account of the same principal if each order is from a separate trading unit that is separated by information barriers or other barriers that restrict the trading unit from coordinating trading strategies, sharing capital, and sharing profits and losses with other trading units (an “Independent Unit”), as defined in proposed Commentary .02(a). Proposed Rule Commentary

¹¹ See Rule 1.1(k).

.02(b) would require a member organization to have supervisory systems and written policies and procedures reasonably designed to ensure that it is not using more than one Floor broker for its orders that are for the account of the same principal.

Proposed Rule Commentary .03 would apply the same concepts to circumstances when a member organization uses more than one Floor broker for multiple orders that it represents on an agency basis. Proposed Rule Commentary .03(a) would specify that orders that the member organization represents on an agency basis from a single customer are presumed not to be for the account of the same principal if the member organization's customer maintains Independent Units and the orders are from Independent Units. Proposed Rule Commentary .03(b) would specify that if a member organization is representing a customer on an agency basis and uses more than one Floor broker for such customer, the member organization's written policies and procedures must be reasonably designed to ensure that the orders it receives from the customer are from Independent Units of the customer. The proposed Rule Commentary would specify that the member organization must: (1) use reasonable diligence to know and retain the essential facts relating to the operation and supervision of its customer's information barriers to ensure there is a prohibition against the coordination of trading strategies and that there is in fact no coordination of trading strategies, and that the orders are from Independent Units (see proposed Rule Commentary .03(b)(1)); (2) review and document such reviews that the orders received from its customers originated from Independent Units (see proposed Rule Commentary .03(b)(2)); and (3) obtain an annual written representation, in a form acceptable to the Exchange, from each customer that such orders originate from Independent Units (see proposed Rule Commentary .03(b)(3)). The Exchange believes that, taken together, these measures will provide the member organization and the Exchange with reasonable assurance that the orders are not for

the account of the same principal, and member organizations are operating in compliance with Rule 122.

The Exchange states that The requirements of proposed Commentary .03(b) are not the first time that the Exchange has imposed obligations on its member organizations with respect to orders that they represent on an agency basis on behalf of their customers. For example, the Exchange states, Rule 7.44(b)(6), relating to the Exchange's Retail Liquidity Program, provides that if the Retail Member Organization does not itself conduct a retail business but instead routes Retail Orders on behalf of another broker-dealer, the Retail Member Organization's supervisory procedures must be reasonably designed to ensure that the orders it receives from such other broker-dealer meet the definition of a Retail Order. According to the Exchange, that Rule further provides that to fulfill this supervisory requirement, the Retail Member Organization must obtain an annual written representation, in a form acceptable to the Exchange, from the broker-dealer sending the orders that the orders comply with Rule 7.44, and by monitoring whether Retail Order flow routed on behalf of such other broker-dealer meets the applicable requirements. Here, the Exchange asserts, the proposed amended rule would require a similar supervisory obligation for member organizations to ensure that orders placed by their customers in fact originate from Independent Units. The Exchange represents that it will monitor member organization compliance with these proposed requirements via examination-based surveillance.¹²

Proposed Rule Commentary .04 would add that notwithstanding Commentary .02(a) and .03(a), that there is a presumption that orders are for the account of the same principal (i.e., not

¹² The Exchange represents that it and the Financial Industry Regulatory Authority, Inc. ("FINRA") have entered into a regulatory services agreement pursuant to which FINRA will conduct specified regulatory services on the Exchange's behalf, including examining member organizations' compliance with Exchange rules.

from Independent Units) if the trading strategies are run by the same desk, group, employee(s), or portfolio manager(s); are otherwise overseen or supervised by the same desk, group, employee(s), or portfolio managers; or share capital or roll up to the same profit and loss center.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to national securities exchanges.¹³ In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 6(b)(5) of the Act,¹⁴ 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 foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

Generally, NYSE Rule 122 provides that a member organization may not maintain orders with more than one Floor broker to purchase the same security at the same price. The intent of the rule is to prevent member organizations from by splitting a single order among multiple Floor brokers in order to circumvent the Exchange's parity allocation rules and obtain preferential executions. The Exchange has proposed to both (1) clarify the existing exception to NYSE Rule 122 that permits a member organization to maintain separate orders with more than one Floor broker if the member organization has multiple trading desks and there is no

¹³ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁴ 17 U.S.C. 78f(b)(5).

coordination between those trading desks, and (2) extend this exception to include customers of member organizations, provided that the orders originate from independent trading desks at the customer that do not coordinate their trading.¹⁵

The Commission finds that this proposed rule change is reasonably designed to prevent fraudulent and manipulative acts and practices. The Commission believes that the proposed rule change is consistent with the purpose and intent of NYSE Rule 122 to prevent the circumvention of the Exchange's parity allocation rules. Significantly, in extending the "account of the same principal" exception to the Independent Units of a member organization's customer, the proposed rule change would require that a member organization accepting such customer orders use reasonable diligence to know and retain essential facts relating to the operation and supervision of its customer's information barriers or other barriers to ensure that there is a prohibition against the coordination of trading strategies, that there is in fact no coordination of trading strategies, and that the orders are from Independent Units of the customer. Further, the Exchange has represented that it will monitor member organization compliance with these requirements via examination-based surveillance.¹⁶

Based on the foregoing, the Commission therefore finds that the proposed rule change is consistent with the Act.

¹⁵ The Exchange has also proposed non-substantive, technical and clarifying changes to the rule text to: (1) add subsection numbering and (2) remove references that are either extraneous or obsolete.

¹⁶ See Note 12 and accompanying text, *supra*.

IV. Solicitation of Comments on Amendments No. 1

Interested persons are invited to submit written data, views, and arguments concerning whether Amendments No. 1 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-NYSE-2020-66 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSE-2020-66. 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 this filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change.

Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2020-66 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

V. Accelerated Approval of the Proposed Rule Change, as modified by Amendment No. 1

The Commission finds good cause to approve the proposed rule change, as modified by Amendment No. 1, prior to the thirtieth day after the date of publication of Amendment No. 1 in the Federal Register. In Amendment No. 1, the Exchange added to its proposal the representation that it will monitor, via examination-based surveillance, member organization compliance with its supervisory obligation to ensure that orders placed by their customers in fact originate from Independent Units.¹⁷

The Commission finds that Amendment No. 1 is consistent with the Act in that is designed, among other things, to prevent fraudulent and manipulative acts and practices and to promote just and equitable principles of trade. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act,¹⁸ to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

¹⁷ See Note 12 and accompanying text, supra.

¹⁸ 15 U.S.C. 78s(b)(2).

VI. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁹ that the proposed rule change SR-NYSE-2020-66, as modified by Amendment No. 1 be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁰

J. Matthew DeLesDernier
Assistant Secretary

¹⁹ 15 U.S.C. 78s(b)(2).

²⁰ 17 CFR 200.30-3(a)(12).