

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68186; File No. SR-NYSEMKT-2012-58)

November 8, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Deleting NYSE MKT Rules 95(c) and (d) – Equities and Related Supplementary Material

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 October 26, 2012, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III 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 delete NYSE MKT Rules 95(c) and (d) – Equities and related Supplementary Material. 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

statements may be examined at the 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to delete NYSE MKT Rules 95(c) - Equities and (d) – Equities and related Supplementary Material concerning restrictions on the ability of a Floor broker to engage in intra-day trading.⁴

Background

NYSE MKT Rule 95(c) - Equities provides that:

If a Floor broker acquires a position for an account during a particular trading session while representing at the same time, on behalf of that account, market or limit orders at the minimum variation on both sides of the market, the broker may liquidate or cover the position established during that trading session only pursuant to a new order (a liquidating order) which must be time-recorded upstairs and upon receipt on the trading Floor.

As a related matter, NYSE MKT Rule 95(d) - Equities requires that a Floor broker must execute the liquidating order entered pursuant to NYSE MKT Rule 95(c) - Equities before the Floor broker can execute any other order for the same account on the same side of the market as that liquidating order. The Supplementary Material sets forth examples illustrating the operation of NYSE MKT Rules 95(c) - Equities and (d) -

⁴ The Exchange notes that parallel changes are proposed to be made to the rules of New York Stock Exchange LLC. See SR-NYSE-2012-57.

Equities along with examples indicating the type of buy and sell orders that a member may and may not represent for the same customer at the same time pursuant to NYSE MKT Rule 95 - Equities.

The New York Stock Exchange LLC (“NYSE”) adopted NYSE Rules 95(c) and (d) and related Supplementary Material .20 and .30 in 1994.⁵ NYSE MKT Rule 95 - Equities, an almost identical version of NYSE Rule 95, was adopted at the time of acquisition of The Amex Membership Corporation by NYSE Euronext.⁶ Implicit in its mirroring, the rationale for the adoption of NYSE MKT Rules 95(c) - Equities and (d) - Equities was the same as the rationale for the adoption of NYSE Rules 95(c) and (d) in 1994. As noted in the NYSE filing, the NYSE adopted the rule to address “intra-day trading” by Floor brokers, the practice whereby a market participant places orders on both sides of the market and attempts to garner the spread by buying at the bid and selling at the offer. In particular, NYSE Rule 95(c) was meant to address situations where a Floor broker may have been perceived as having an advantage over other market participants, such as individual investors, because the Floor broker could trade on both sides of the market without leaving the Crowd.⁷ Requiring the Floor broker to obtain a new liquidating order was designed, therefore, to reduce the immediacy with which a

⁵ Securities Exchange Act Release No. 34363 (July 13, 1994), 59 FR 36808 (July 19, 1994) (“NYSE Rule 95(c) Adopting Release”).

⁶ See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008); Securities Exchange Act Release No. 58265 (July 30, 2008), 73 FR 46075 (August 7, 2008) (SR-Amex-2008-63).

⁷ NYSE Rule 95(c)’s requirement that a liquidating order be “new” effectively required that a Floor broker leave the Crowd before entering a liquidating order (selling what had been bought, for example) because there was no way for the Floor broker to receive the new order (or otherwise communicate with a customer) from the Crowd.

Floor broker could react to changing market conditions on behalf of an intra-day trading account by requiring him or her to leave the Crowd in order to receive a new liquidating order. The restriction was meant to “enhance investors’ confidence in the fairness and orderliness of the Exchange market.”⁸ The Commission specifically noted that the intra-day trading strategy employed by professionals “provide[d] the perception that public customer orders [were] being disadvantaged by the time and place advantage of intra-day traders.”⁹ Notably, some public customers who used Floor brokers strongly criticized the restrictions of NYSE Rules 95(c) and (d) as favoring specialists because specialists were not subject to the restrictions.¹⁰ As discussed below, the Exchange believes that the current prevalence of virtually instantaneous and fully automated executions both on and off the floor have diminished substantially any such advantage and rendered the new liquidating order requirements obsolete.

Proposed Rule Change

The Exchange proposes to delete NYSE MKT Rules 95(c) - Equities and (d) - Equities and related Supplementary Material as outdated in today’s market structure and an unnecessary restriction on the ability of Floor brokers to represent orders on behalf of their customers.

The Exchange believes that the rationale and approach underlying current NYSE MKT Rules 95(c) - Equities and (d) - Equities no longer exists in today’s trading

⁸ NYSE Rule 95(c) Adopting Release at 36809.

⁹ Id. at 36810.

¹⁰ See, e.g., Letter from Daniel P. Barry, to Ms. Luka-Hopson, Branch Chief, Division of Market Regulation, Securities and Exchange Commission, dated November 11, 1993 (arguing that the proposed amendment to Rule 95 unfairly singled out “the small public investor” in its application of intra-day trading restrictions to Floor brokers alone).

environment. At the time NYSE Rules 95(c) and (d) were adopted, orders entered in the specialist's book experienced greater latency than did orders handled by Floor brokers. In particular, neither immediate limit order display nor auto execution existed at that time and, as a result, "book" orders could not be executed until the specialist manually executed them. Floor brokers in 1994, in other words, could stand at the point of sale and trade more quickly because of that position. Currently, incoming electronic orders are executed automatically in microseconds, and "book" orders receive immediate limit order display. Moreover, the passage of Floor broker orders through Floor systems today adds an additional layer of latency relative to the prior context. While the rationale for NYSE Rules 95(c) and (d), and therefore also NYSE MKT Rules 95(c) - Equities and (d) – Equities, was that Floor broker customers could "crowd-out small customer limit orders and delay or prevent their execution,"¹¹ in the current market structure, it is more likely that electronic order flow would "crowd-out" Floor broker customer orders.

Additionally, since the adoption of NYSE Rules 95(c) and (d), the equities markets in general, and the Exchange in particular, have undergone market structure changes that obviate the need for this rule-based restriction on how a Floor broker represents orders on behalf of customers. For example, the Commission adopted Regulation NMS in 2005¹² and in 2006, the NYSE adopted its "Hybrid Market" structure in part to meet the requirements of Regulation NMS that were implemented in July 2007.¹³ Since that time, the NYSE, and because NYSE MKT has the same trading

¹¹ Rule 95(c) Adopting Release at 38611.

¹² See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 Fed. Reg. 37496 (June 29, 2005) ("NMS Adopting Release").

¹³ See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 Fed. Reg. 16353 (March 31, 2006).

platform, has undergone a dramatic shift “from a floor-based auction market with limited automated order interaction to a more automated market with limited floor-based auction market availability.”¹⁴

Specifically, the changing role of the Floor broker can be seen in both the overall reduction in the Exchange’s market share in its listed securities, as well as the decline in the Floor broker’s share of Exchange volume and increased reliance on automatic execution. Prior to the adoption of the Hybrid Market, the NYSE had about an 80% market share in its listed securities and approximately 25% of that volume was from Floor broker transactions. Within a year of the approval of the Hybrid Market, automatic execution accounted for 82% of NYSE volume and Floor broker executions declined to 11% of overall Exchange volume.¹⁵ Currently, the NYSE MKT has approximately a 14% market share in its listed securities, and of that volume, Floor broker transactions represent approximately 5% of Exchange total volume. Less than 1% of those Floor broker transactions are represented in a manual, auction format. Furthermore, the average speed of execution has increased substantially to micro-second timing, which has significantly reduced the opportunities for Floor brokers to engage in manual transactions.

In addition, trading strategies have evolved since the enactment of NYSE Rule 95(c). Today one third of all equity trading takes place off-exchange and over 1,200 securities have more than 50% of their volume traded off-exchange, an increase of 143% in less than two years. Among other changes, off-Floor participants regularly engage in

¹⁴ Id.

¹⁵ See Technology squeezes out real, live traders, USA TODAY (July 12, 2007), available at http://www.usatoday.com/money/markets/2007-07-11-nyse-traders_N.htm.

buy and sell side trading strategies, i.e., “intra-day trading.” In today’s micro-second market, there is no longer a competitive advantage to being on the trading Floor when engaging in the type of intra-day trading addressed by NYSE MKT Rules 95(c) - Equities and (d) - Equities. Rather, due to the increase in the speed of trading, the increased fragmentation of the equity markets, and the dissemination of market information available to off-Floor participants, many off-Floor participants are able to synthesize market information across multiple markets faster than a Floor broker can do so from their physical presence on the Exchange trading Floor. Accordingly, to the extent there may still be a time and place advantage for Floor brokers by virtue of their presence on the Trading Floor, the Exchange believes that the type of information available to Floor brokers is no longer the type of information that would provide Floor brokers with an advantage in connection with intra-day trading.

As a result of the above-discussed changes, NYSE MKT Rules 95(c) - Equities and (d) - Equities are no longer operating to place Floor brokers on equal footing as other market participants, but instead are placing them at a disadvantage to other participants in the largely automatic market that has developed in the almost twenty years since the restrictions were put in place. Therefore, the Exchange believes it is appropriate to delete NYSE MKT Rules 95(c) - Equities and (d) - Equities and related Supplementary Material. By deleting a trading restriction that was adopted in response to a specific market structure that has fundamentally changed since 2005, the Exchange believes that the proposed rule changes will serve to place Floor brokers on a more equal footing with other market participants utilizing automatic executions.

Furthermore, the Exchange notes that the manner that the current rule requires a

Floor broker to comply with the rule is based on an auction market model where a rule-based speed bump that required a Floor broker to obtain a new time-stamped order from a customer was feasible.¹⁶ In today's market structure, where Floor brokers compete with off-Floor participants that are entering orders on a micro-second basis on both the buy and sell side of the market, such a speed bump is not only a disadvantage to Floor brokers, but also does not serve its original purpose. In particular, the 1994 approval order for NYSE Rules 95(c) and (d) notes that part of the rationale of implementing the speed bump for Floor brokers was to protect the public. However, even though the trading restrictions first enacted by the 1994 rule changes will no longer be in effect, the public will still be protected. Floor brokers, through their normal course of business, act as agents for customers and, pursuant to Exchange and Commission rules, are required to act in the best interests of their customers.

In addition to the above-referenced changes, the Exchange proposes to delete Supplementary Material .20 and .30 to NYSE MKT Rule 95 - Equities. The Exchange proposes to keep Supplementary Material .10 to NYSE MKT Rule 95 - Equities.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,¹⁷ in general, and Section 6(b)(5) of the Act,¹⁸ in particular, in that it is designed to remove impediments to and perfect the mechanism for

¹⁶ The Exchange notes that Exchange systems are not currently configured to accept the "BC" and "SLQ" order markings specified in Rule 95(c), as these are markings that were required to be included on manual order tickets that were completed by hand by a Floor broker rather than instructions submitted with electronic orders that customers transmit electronically to Floor brokers.

¹⁷ 15 U.S.C. 78f(b).

¹⁸ 15 U.S.C. 78f(b)(5).

a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed rule change would further the ability of Floor brokers to carry out their Trading Floor functions and, as a result, is designed to remove impediments to and perfect the mechanism of a free and open market through the efficient operation of the Exchange, specifically by placing Floor brokers on equal footing with other market participants utilizing automatic executions.

The fundamental changes that have occurred in the roughly twenty years since the adoption of NYSE Rules 95(c) and (d) have left the underlying rationale behind their adoption obsolete, and subsequently, the rationale behind NYSE MKT Rules 95(c) - Equities and (d) - Equities is also obsolete. The significant increase in market speed and the reduced role of Floor brokers have largely eliminated the concerns that NYSE MKT Rules 95(c) - Equities and (d) - Equities were intended to address. By deleting a trading restriction that was originally adopted in response to a specific market structure that has fundamentally changed since 2005, the Exchange believes that the proposed rule changes will serve to place Floor brokers on a more equal footing with other market participants utilizing automatic executions.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be 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-2012-58 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-2012-58. 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, on business days between the hours of 10 a.m. and 3 p.m., located at 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the Exchange's principal office and on its Internet website at www.nyse.com. 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-2012-58 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.¹⁹

Kevin M. O'Neill
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).