

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69751; File No. SR-NYSE-2013-29)

June 13, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Approving Proposed Rule Change Deleting NYSE Rule 476(a)(8), Which Addresses Wash Sales, in Order to Harmonize the Exchange's Rules with the Rules of the Financial Industry Regulatory Authority

I. Introduction

On April 10, 2013, New York Stock Exchange LLC ("NYSE" or the "Exchange") filed with the Securities and Exchange Commission (the "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to delete NYSE Rule 476(a)(8) to harmonize the Exchange's rules with the rules of the Financial Industry Regulatory Authority, Inc. ("FINRA"). The proposed rule change was published for comment in the Federal Register on April 30, 2013.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

On July 30, 2007, FINRA's predecessor, the National Association of Securities Dealers, Inc. ("NASD"), and NYSE Regulation, Inc. ("NYSER") consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d-2 under the Act, NYSE, NYSER and FINRA entered into an agreement (the "Agreement") to reduce regulatory duplication for their members by allocating to FINRA certain regulatory responsibilities for certain NYSE rules and rule interpretations ("FINRA Incorporated NYSE

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 69441 (April 24, 2013), 78 FR 25327 ("Notice").

Rules”). NYSE MKT LLC (“NYSE MKT”) became a party to the Agreement effective December 15, 2008.⁴

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA, NYSE, and NYSE MKT of conflicting or unnecessary regulatory burdens, FINRA is now engaged in the process of reviewing and amending the NASD and FINRA Incorporated NYSE rules in order to create a consolidated FINRA rulebook.⁵ In this proposal, the Exchange has proposed to delete NYSE Rule 476(a)(8) in order to harmonize the NYSE’s rules with the rules of FINRA.

Proposed Rule Change

NYSE Rule 476(a)(8) prohibits a member, member organization, principal executive, approved person, registered or non-registered employee of a member or member organization, or person otherwise subject to the jurisdiction of the Exchange from making a fictitious bid, offer, or transaction; or giving an order for the purchase or sale of securities the execution of which would involve no change of beneficial ownership; or executing such an order with knowledge of its character.

⁴ See Securities Exchange Act Release Nos. 56148 (July 26, 2007), 72 FR 42146 (August 1, 2007) (order approving the Agreement); 56147 (July 26, 2007), 72 FR 42166 (August 1, 2007) (SR-NASD-2007-054) (order approving the incorporation of certain NYSE Rules as “Common Rules”); and 60409 (July 30, 2009), 74 FR 39353 (August 6, 2009) (order approving the amended and restated Agreement, adding NYSE MKT LLC as a party). Paragraph 2(b) of the Agreement sets forth procedures regarding proposed changes by FINRA, NYSE or NYSE MKT to the substance of any of the Common Rules.

⁵ FINRA’s rulebook currently has three sets of rules: (1) NASD Rules, (2) FINRA Incorporated NYSE Rules, and (3) consolidated FINRA Rules. The FINRA Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (“Dual Members”), while the consolidated FINRA Rules apply to all FINRA members. For more information about the FINRA rulebook consolidation process, see FINRA Information Notice, March 12, 2008.

In 2009, the Exchange adopted NYSE Rule 6140(a)-(b),⁶ which is substantially the same as FINRA Rule 6140(a)-(b) and which also addresses wash sale activity. NYSE Rule 6140(a) provides that no member or member organization shall execute or cause to be executed or participate in an account for which there are executed purchases of any NMS stock as defined in Rule 600(b)(47) of Regulation NMS⁷ (“designated security”) at successively higher prices, or sales of any such security at successively lower prices, for the purpose of creating or inducing a false, misleading or artificial appearance of activity in such security or for the purpose of unduly or improperly influencing the market price for such security or for the purpose of establishing a price that does not reflect the true state of the market in such security.

NYSE Rule 6140(b) prohibits a member or member organization, for the purpose of creating or inducing a false or misleading appearance of activity in a designated security or creating or inducing a false or misleading appearance with respect to the market in such security, from (1) executing any transaction in such security which involves no change in the beneficial ownership thereof; (2) entering any order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties; or (3) entering any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

In the filing, the Exchange represented that NYSE Rule 476(a)(8), which was adopted at a time when the Exchange was operating in a manual, on-floor trading environment, differs from

⁶ See Securities Exchange Act Release No. 59965 (May 21, 2009), 74 FR 25783 (May 29, 2009) (SR-NYSE-2009-25).

⁷ 17 CFR 242.600(b)(47).

NYSE Rule 6140 and FINRA Rule 6140 in that the second prong of NYSE Rule 476(a)(8), which prohibits giving an order for the purchase or sale of securities the execution of which would involve no change of beneficial ownership, can be read as having no scienter standard. On the other hand, NYSE Rule 6140 and FINRA Rule 6140 provide that a market participant is prohibited from engaging in wash sales that have the purpose of creating or inducing a false or misleading appearance of activity in a designated security.

The Exchange stated that it believes that the scienter requirement in NYSE Rule 6140 and FINRA Rule 6140 recognizes that in today's markets there can be certain instances of trading activity that may inadvertently and unknowingly result in executions with no change in beneficial ownership, and that such conduct should not always be treated as a wash sale violation if the market participant did not act with purpose. The Exchange noted that activity involving an off-floor market participant's algorithmic orders that inadvertently execute against themselves due to latency issues could be deemed a violation of the second prong of NYSE Rule 476(a)(8), thus the Exchange has proposed to eliminate NYSE Rule 476(a)(8) because it believes that such conduct should not be treated as a wash sale violation in all instances, and stated that it will instead utilize NYSE Rule 6140 for disciplinary actions involving wash sales.

The Exchange also proposes to make a conforming amendment to NYSE Rule 6140(a) and (b) to expand its coverage to include principal executives, approved persons, registered or non-registered employees of a member or member organization or persons otherwise subject to the jurisdiction of the Exchange. The change to NYSE Rule 6140 will cover the persons originally covered by NYSE Rule 476(a)(8) who would be subject to disciplinary action for wash sales.

III. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change and finds that it is consistent with the requirements of Section 6 of the Act⁸ and the rules and regulations thereunder applicable to a national securities exchange.⁹ In particular, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,¹⁰ which requires, among other things, that the Exchange's rules be designed 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.

The Exchange is deleting NYSE Rule 476(a)(8), a rule which the Exchange explained was adopted to address manual, floor-based trading activity. The Exchange stated that NYSE Rule 6140, which has a scienter standard that the second prong of NYSE Rule 476(a)(8) lacks, substantively covers the same conduct as NYSE Rule 476(a)(8). The Exchange has explained that in today's markets, algorithmic trading can result in unintended executions with no change in beneficial ownership. The Exchange believes that such executions should not be treated as wash sale violations because they lack the intent to create or induce a false or misleading appearance of activity in a security. In addition, the Exchange is amending NYSE Rule 6140 to cover the same persons that NYSE Rule 476(a)(8) covered.

⁸ 15 U.S.C. 78f.

⁹ 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).

¹⁰ 15 U.S.C. 78f(b)(5).

The Commission understands that algorithmic trading can result in inadvertent executions with no change in beneficial ownership.¹¹ The Exchange has represented that the proposed rule change would not result in any material change in the surveillance of potentially violative activity nor any material diminution of the Exchange’s enforcement authority as it may still bring a disciplinary action in cases where a market participant engages in a significant number of trades without a change of beneficial ownership, even if such activity does not per se violate Rule 6140(b) because the participant did not act with “purpose.” The Exchange further represented that such unintended activity could also give rise to other violations, such as a failure to supervise under NYSE Rule 342, or a violation of just and equitable principles of trade or could otherwise constitute unethical activity under NYSE Rule 2010. Accordingly, the Commission expects the Exchange to continue to surveil for potential wash sale activity and to take necessary action as appropriate.

The Commission believes that the proposed deletion of NYSE Rule 476(a)(8) promotes harmonization, consistency and clarity with respect to the Exchange’s rules¹² by resolving the inconsistent scienter standards of NYSE Rule 476(a)(8) and NYSE Rule 6140 and FINRA Rule 6140, as well as extending the breadth of persons covered by NYSE Rule 6140 to those persons covered by NYSE Rule 476(a)(8). The Commission further believes that the proposed rule change would result in less burdensome and more efficient regulatory compliance for firms that are members of FINRA and the NYSE. As such, the Exchange’s rules would continue to protect investors and the public interest.

¹¹ The Commission notes that algorithmic trading resulting in executions with no change in beneficial ownership, even if unintended, raises concerns.

¹² The Exchange stated that it can bring disciplinary actions under NYSE Rule 476(a)(8) for conduct that occurred prior to the time the rule is deleted. Thus, the proposed rule change would have no impact on ongoing disciplinary actions involving violations of NYSE Rule 476(a)(8).

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act¹³ and the rules and regulations thereunder applicable to a national securities exchange.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,¹⁴ that the proposed rule change (SR-NYSE-2013-29) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Kevin M. O'Neill
Deputy Secretary

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 15 U.S.C. 78s(b)(2).

¹⁵ 17 CFR 200.30-3(a)(12).