SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-71609; File Nos. SR-NYSE-2013-72; SR-NYSEMKT-2013-91)

February 25, 2014

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; Order Instituting Proceedings to Determine Whether to Disapprove Proposed Rule Changes to Establish an Institutional Liquidity Program on a One-Year Pilot Basis

I. Introduction

On November 7, 2013, New York Stock Exchange LLC ("NYSE") and NYSE MKT LLC ("NYSE MKT" and together with NYSE, the "Exchanges") each 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 establish an Institutional Liquidity Program ("ILP" or "Program") on one-year pilot basis. The proposed rule changes were published for comment in the Federal Register on November 27, 2013.[3] The Commission received three comments on the NYSE Proposal.[4] On January 9, 2014, the Commission designated a longer period for Commission action on the proposed rule changes,

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 See Securities Exchange Act Release Nos. 70909 (November 21, 2013), 78 FR 71002 (SR-NYSE-2013-72) ("NYSE Proposal"); and 70910 (November 21, 2013), 78 FR 70992 (SR-NYSEMKT-2013-91) ("NYSE MKT Proposal") (collectively, the "Proposals").

4 See Letters to the Commission from James Allen, Head, and Rhodri Pierce, Director, Capital Markets Policy, CFA Institute (Dec. 18, 2013) ("CFA Letter"); Clive Williams, Vice President and Global Head of Trading, Andrew M. Brooks, Vice President and Head of U.S. Equity Trading, and Christopher P. Hayes, Vice President and Legal Counsel, T. Rowe Price Associates, Inc. (Dec. 18, 2013) ("T. Rowe Price Letter"); and Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (Dec. 20, 2013) ("SIFMA Letter"). The Commission notes that these comment letters address the NYSE Proposal only. However, since the Proposals are nearly identical, the Commission will consider the letters to address the NYSE MKT Proposal as well.

until February 25, 2014.[5] The Exchanges submitted a consolidated response letter on January 14, 2014.[6] This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to disapprove the proposed rule changes.

II. Description of the Proposals

A. Overview

Each Exchange is proposing to establish, for a pilot term of one year, an Institutional Liquidity Program intended to attract buying and selling interest in greater size to the NYSE for NYSE-listed securities and to NYSE MKT for NYSE MKT-listed securities and securities listed on the Nasdaq Stock Market and traded pursuant to unlisted trading privileges. To do so, the Program would introduce two new order types to facilitate interactions between market participants with block-size trading interest and liquidity providers that submit orders that meet certain size thresholds. The Exchanges have characterized the Program as a "targeted size discovery mechanism" that would enable market participants to execute trades that are larger than the average size of trades executed on the Exchanges or in most dark pools.[7]

B. Proposed New Order Types – ILOs and OLOs

The two proposed order types are the "Institutional Liquidity Order" ("ILO") and the "Oversize Liquidity Order" ("OLO"). Generally, ILOs would represent non-displayed block-size interest: a limit order of at least 5,000 shares with a market value of at least $50,000 or a "child" order of an original "parent order" meeting these size requirements.[8] OLOs would

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5 See Securities Exchange Act Release No. 71267, 79 FR 2738 (January 15, 2014).

6 See Letter to the Commission from Janet McGinnis, EVP & Corporate Secretary, NYSE Euronext (Jan. 14, 2014) ("Response Letter").

7 See, e.g., NYSE Proposal, 78 FR at 71002.

8 Where an ILO represented the child order of recorded parent instructions, the parent instruction would not need to be submitted in whole to the Program; instead, parts of the

represent non-displayed orders of at least 500 shares (or at least 300 shares for less liquid securities) submitted to provide liquidity to ILOs. ILOs could be submitted with a Minimum Triggering Volume ("MTV") instruction and would interact first with displayed interest at the Exchanges before interacting with other interest in the Program (i.e., OLOs and other resting ILOs) or routing to other markets. OLOs would interact only with ILOs. Orders within the Program would be executed according to price-size-time priority, rather than the Exchanges' parity allocation.

To qualify as an ILO, an order would need to be submitted to establish, increase, liquidate, or decrease a position in the subject security and could not be part of an expression of two-sided (i.e., market making) interest on the part of the account that originated the order. An ILO, or the recorded parent instruction of a child order, would need to satisfy applicable size requirements independently, meaning that interest could not be aggregated across multiple member organizations[9] to become eligible for participation in the Program. An ILO, or recorded parent order instruction, that initially met the minimum size requirements would not become ineligible to stay in the Program if it received a partial execution that reduced its size below the minimum size requirements. If an ILO or its recorded parent instruction were partially cancelled so that it became smaller than the Program's minimum size requirements, the ILO would no longer be eligible to participate in the Program but would maintain its time priority in the Exchanges' systems.

An ILO could be designated Immediate-or-Cancel or entered as a Reserve Order, in which case the order or any residual unexecuted portion would remain executable against contra-

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recorded parent order instruction could be executed in the Program, on the Exchanges outside of the Program, or at other venues.

9 The term "member organization" is defined in NYSE Rule 2(b) and NYSE MKT Rule 2(b) – Equities, respectively, and includes Floor brokers acting as agents.

side interest in accordance with the Program's rules. An ILO could also be submitted with an MTV requirement that would be a necessary condition for the order's execution.

ILOs could be submitted with one of two designations to dictate how and where they could execute. A Type-1 designated ILO would interact with other interest at the Exchange to which it was submitted, but it would not route to other markets. A Type-1 ILO would interact, at each price level, first with displayed interest in the respective Exchange's systems, then available contra-side OLOs and ILOs in size-time priority, and then with any remaining non-displayed interest in the Exchange's systems – except that a Type 1-designated ILO would not trade through a protected quotation.[10]

A Type-2 ILO would interact with other interest at the Exchange to which it was submitted, but it could also route to away markets. The Type-2 ILO would interact, at each price level, first with displayed interest in the respective Exchange's systems, then available contra-side OLOs and ILOs in size-time priority, and then with any remaining non-displayed interest in the Exchange's systems; it would then route to away markets as necessary to avoid trading through a protected quotation.[11]

The Program would require member organizations that submit ILOs to maintain policies and procedures reasonably designed to ensure that applicable Program requirements are satisfied.

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[10] Any remaining portion of a Type-1 ILO would be cancelled if designated as a Regulation NMS-compliant Immediate or Cancel Order pursuant to NYSE Rule 13 or NYSE MKT Rule 13 - Equities, or if it were designated as a Reserve Order, it would rest on the Exchange's book and be available to interact with other incoming contra-side OLOs, ILOs, and other available interest in the Exchange's systems, provided it does not trade through a protected quotation.

[11] Any remaining portion of a Type-2 ILO would be cancelled if designated as an Immediate or Cancel Order pursuant to NYSE Rule 13 or NYSE MKT Rule 13 - Equities, or if designated as a Reserve Order, rest on the Exchange's book and be available to interact with other incoming contra-side OLOs, ILOs, and other available interest in the Exchange's systems.

The member organizations would further need to maintain records sufficient to reconstruct, in a time-sequenced manner, all orders routed to the Exchanges as ILOs, including how parent order instructions from which child-order ILOs were derived met the Program's size requirements and related to the child-order ILOs.

The Exchanges would allow a member organization to presume that an account's intent to establish, increase, liquidate, or decrease a position was bona fide, absent concrete indications to the contrary. According to the Exchanges, examples of such contrary indications include: (1) an account attempting to enter contemporaneous orders in the same security on both sides of the market; (2) an account entering a pattern of orders and cancellations apparently designed to implement a market-making or spread-trading strategy; and (3) an account entering a pattern of cancellations that consistently produced positions that were smaller that the Program's minimum size requirements.

In addition to the ILO, the Program would create a second new order type, the OLO. The OLO would be a non-displayed limit order with a minimum size of 500 shares, except for securities that trade with an Average Daily Volume of less than one million shares, in which case the minimum size would be 300 shares. An OLO that met the minimum size requirement and received a partial execution that reduced its size below the size requirement would still be eligible to interact with incoming ILOs. An OLO would become size ineligible if the size of the OLO was reduced below the minimum size requirement because of a partial cancellation. An OLO could be priced at, inside, or outside the Exchange's protected best bid or offer ("PBBO"), or as non-displayed Primary Pegging Interest pursuant to NYSE Rule 13 or NYSE MKT Rule 13 – Equities. As noted above, OLOs would be eligible to interact only with ILOs.

The Exchanges, along with the Financial Industry Regulatory Authority ("FINRA"), would monitor activity in the Program and conduct surveillance for non-compliance with Program rules. The Exchanges would exclude non-compliant member organizations from participation in the Program when necessary to ensure that the Program functions properly.

C. Proposed Priority and Allocation of Proposed Order Types

The Exchanges have proposed that, in the Program, competing OLOs and ILOs would be ranked and allocated according to price, then size, then the time of their entry into each Exchange's systems. The size priority of OLOs and ILOs would be based upon their initial size at time of entry, but any partial cancellations of OLOs or ILOs would reduce their original size for priority purposes.

Displayed orders would have priority over equally priced ILOs and OLOs. An incoming ILO would execute first against displayed interest, then against contra-side ILOs and OLOs, and finally against any non-displayed interest in Exchange systems. Any remaining unexecuted ILO interest would remain available to interact with other incoming OLOs or ILOs if that ILO interest were at an eligible price, unless that interest were designated IOC.

D. Proposed Liquidity Identifier

The presence of OLOs or the remainder of partially executed ILOs in Exchange systems would be advertised with a new indicator, the Liquidity Identifier ("Identifier"), which would be disseminated through the Consolidated Quotation System. The Identifier would communicate only the presence of liquidity in a symbol and would not state the side, size, or price. The Exchanges have stated that the Identifier would be disseminated first by the Exchanges' proprietary data feeds. The Exchanges have represented that the Identifier would be

disseminated through the publicly-available Consolidated Quotation System as soon as practicable.

E. Fees for the Program

The Exchanges have represented that, after approval of the Program by the Commission, they would each submit a proposed rule filing to set fees for the Program. The Exchanges have represented that the anticipated fee schedule would charge member organizations for executions of their ILOs against OLOs and, conversely, would provide credits or free executions to member organizations for executions of their OLOs against the ILOs of other member organizations. If two ILOs executed against each other, the Exchanges expect that they would charge both member organizations.

III. Comments Letters and the Exchanges' Response

As noted above, the Commission has received three comment letters on the proposed Program. One commenter was supportive of the Proposals.[12] This commenter stated its belief that the Program should improve the executions of institutional investors trading in large size and reduce transaction costs in such trades.[13] Additionally, the commenter stated its belief that the ability of ILOs to interact with displayed orders should not negatively affect, and may even positively affect, the incentives to use displayed markets.[14]

The two remaining commenters expressed concern with the Program. Both commenters suggested that the Program would add undue complexity to the public equity markets. For instance, one commenter argued that the Program's introduction of new order types would create

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[12] See CFA Letter.

[13] Id. at 2.

[14] Id.

another layer of quoting, additional messaging, and undue complexity to order routing.[15] The other commenter questioned whether it is appropriate to add additional message traffic to the Securities Information Processor, particularly message traffic that serves only one market and not the investing public at large.[16]

The two commenters also argued that the Program could segment order flow in a way that is inconsistent with the role that public exchanges are supposed to play in the marketplace. One commenter stated its belief that the Proposals would further chip away at the statutory mandate that exchanges provide fair, equal, non-discriminatory, and open access and that the Program would reflect a departure from the idea that exchanges are meant to provide interaction among all types of orders.[17] In this commenter's view, exchanges and dark pools serve distinct purposes and the Program could "further blur the lines" between exchanges and dark pools in a way that "will unnecessarily increase market fragmentation and dilute an investor's ability to gauge best execution."[18] The other commenter raised similar issues and stated its belief that the Commission should address how permitting an exchange to segment order flow is consistent with the exchanges' obligation under Section 6(b)(5) of the Act to prevent unfair discrimination among market participants.[19]

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15 See T. Rowe Price Letter at 1.

16 See SIFMA Letter at 5. This commenter also took the position that the Program's use of the Liquidity Identifier could implicate the same concerns that the Commission voiced in 2009 when it proposed a rule that would, among other things, address the use of privately transmitted actionable "indications of interest." See id. at 4 (citing Securities Exchange Act Release No. 60997 (November 13, 2009), 74 FR 61208 (November 23, 2009) ("Regulation of Non-Public Trading Interest")).

17 See T. Rowe Price Letter at 1-2.

18 Id. at 1.

19 See SIFMA Letter at 3.

Additionally, both commenters disagreed with the Exchanges about the extent to which the Program could provide public benefit. One commenter questioned whether the Program would in fact encourage lit markets and increased price discovery, since the new order types would not be displayed.[20] The other commenter expressed doubt that the Program could attract block-size interest and instead thought it was more likely that the Program would only receive child orders from larger block-size parent orders.[21] The commenter then stated its belief that the goal of increasing exchange execution volumes does not support a change in legal and regulatory policy.[22]

In response to these comments, the Exchanges' Response Letter contended that the Program is justified by the potential benefits it could provide to the public markets. According to the Exchanges, the Program would improve market structure by addressing three concerns: (1) the migration toward dark venues of orders entered by investors who are less informed with respect to short-term price movements; (2) the related isolation of such orders from displayed liquidity; and (3) the selective pre-trade transparency and inadequate post-trade transparency of broker internalization venues and dark pools.[23] The Response Letter asserted that competition with dark pools would provide a more transparent and price-competitive environment for the interaction of large orders and would reduce transaction costs; in the Exchanges' view, Section 11A of the Act promotes such competition. Additionally, the Exchanges noted that the dissemination of the Identifier could bolster pre-trade transparency and stimulate further the

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[20] See T. Rowe Price Letter at 2.

[21] See SIFMA Letter at 3.

[22] See id.

[23] See Response Letter at 5.

expression of institutional interest and the interest of liquidity providers that seek to interact with institutional orders.[24]

The Exchanges further argued that, because ILO's must first interact with displayed orders, "the Program offers balanced and limited segmentation to enhance the discovery of size on the Exchanges and potentially increases the incentives for public price discovery."[25] Ultimately, the Exchanges argued, the Program "has the potential to enhance the transparency and price competition associated with the execution of larger orders and should be considered in the current competitive and regulatory context rather than deferred until the fundamental structural issues referenced [by the commenters] are addressed."[26]

IV. Proceedings to Determine Whether to Disapprove SR-NYSE-2013-72 and SR-NYSEMKT-2013-91 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[27] to determine whether the Proposals should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposals. 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

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24 See id. at 1.

25 Id. at 5-6.

26 Id. at 8. The Exchanges also responded to the point raised in the SIFMA Letter about whether the Liquidity Identifier could implicate the same concerns that the Commission has raised with respect to privately transmitted actionable indications of interest. The Exchanges noted that the Identifier is different than an actionable indication of interest because it communicates only the symbol, not the side, size or price of an OLO or ILO. Furthermore, the Exchanges noted that the identifier would not be private or limited to select market participants; rather, the Exchanges noted their intent to disseminate the identifier through the publicly available Consolidated Quotation System. See id. at 6-7.

27 15 U.S.C. 78s(b)(2)(B).

Commission seeks and encourages interested persons to provide additional comment on the Proposals.

Pursuant to Section 19(b)(2)(B),[28] the Commission is providing notice of the grounds for disapproval under consideration. The Commission believes that the Program, which would seek to attract larger trading interest to the Exchanges, raises important market-structure issues that warrant further public comment and Commission consideration. The Program would create a separate liquidity pool within each Exchange that would not be accessible to all market participants, and the Commission believes that proceedings are appropriate to consider (1) whether the Program's segmentation of order flow would inhibit price discovery and order interaction on an exchange, (2) whether the potential complexity of the Program would detract from the efficient execution of securities transactions or the maintenance of fair and orderly markets, (3) whether the Program would permit unfair discrimination, and (4) whether the Program would create an unnecessary or inappropriate burden on competition.

Accordingly, the Commission is instituting proceedings to allow for additional analysis of the proposed rule changes' consistency with Section 6(b)(5) of the Act,[29] which requires that the rules of a national securities exchange promote just and equitable principles of trade, perfect the mechanism of a free and open market and a national market system, protect investors and the public interest, and not permit unfair discrimination, and with Section 6(b)(8) of the Act,[30] which requires that the rules of an exchange not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act.

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28 See id.

29 15 U.S.C. 78f(b)(5).

30 15 U.S.C. 78f(b)(8).

V. Procedure: Request for Written 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 Proposals. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule changes are 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.[31]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule changes should be disapproved by [insert 21 days from publication in the 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-NYSE-2013-72 or SR-NYSEMKT-2013-91 on the subject line.

[31] 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).

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-NYSE-2013-72 or SR-NYSEMKT-2013-91. 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. 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 publicly available. All submissions should refer to File Number SR-NYSE-2013-72 or SR-NYSEMKT-2013-91 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 the date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority. [32]

Kevin M. O'Neill
Deputy Secretary

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[32] 17 CFR 200.30-3(a)(57).