

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-70832; File No. SR-NYSEMKT-2013-88)

November 7, 2013

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Certain Rules that Address Wash Sales in Order to Harmonize the Exchange's Rules with the Rules of New York Stock Exchange LLC and the Financial Industry Regulatory Authority

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 29, 2013, 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 and II 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 amend certain rules that address wash sales in order to harmonize the Exchange's rules with the rules of New York Stock Exchange LLC ("NYSE") and the Financial Industry Regulatory Authority ("FINRA"). The text of the proposed rule change is available on the Exchange's website at [www.nyse.com](http://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

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

received on the proposed rule change. The text of those 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 amend certain rules that address wash sales in order to harmonize the Exchange’s rules with the rules of NYSE and FINRA.

Background on Harmonization

On July 30, 2007, FINRA’s predecessor, the National Association of Securities Dealers, Inc. (“NASD”), and NYSE Regulation, Inc. (“NYSE”) consolidated their member firm regulation operations into a combined organization, FINRA. Pursuant to Rule 17d-2 under the Act, NYSE, NYSE, 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 Rules”). The Exchange became a party to the Agreement effective December 15, 2008.<sup>4</sup>

As part of its effort to reduce regulatory duplication and relieve firms that are members of FINRA and NYSE 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

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<sup>4</sup> 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.

order to create a consolidated FINRA rulebook.<sup>5</sup> In furtherance of this harmonization process, NYSE recently deleted NYSE Rule 476(a)(8) and amended NYSE Rule 6140, both of which address wash sales.<sup>6</sup> To facilitate further the rule harmonization among exchanges, the Exchange proposes to make corresponding changes to its wash sale rules for equities and options.<sup>7</sup>

#### Background on Wash Sales Rules

Since at least 1970, Rule 4 in Part 1 of the General Rules has provided that no member or member organization shall execute or cause to be executed, or participate in an account for which there is executed on the Exchange, the purchase of any security at successively higher prices or the sale of any 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 of such security or for the purpose of making a price which does not reflect the true state of the market in such security. Rule 4 applies to both the Exchange's equities and options markets.

When the Exchange was acquired by NYSE Euronext, it adopted the text of certain NYSE rules, including NYSE Rule 476. Exchange Rule 476(a)(8) currently 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

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<sup>5</sup> 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.

<sup>6</sup> See Securities Exchange Act Release No. 69751 (June 13, 2013), 78 FR 36611 (June 18, 2013) (SR-NYSE-2013-29).

<sup>7</sup> All references to rules herein are to NYSE MKT rules unless otherwise noted.

the Exchange from (i) making a fictitious bid, offer, or transaction, (ii) giving an order for the purchase or sale of securities the execution of which would involve no change of beneficial ownership, or (iii) executing such an order with knowledge of its character. Because Rule 476 generally governs disciplinary procedural matters, Rule 476(a)(8) appears in Section 9A of the Office Rules, and as such, by its terms applies to both the Exchange's equities and options markets.

In 2009, the Exchange adopted Rules 6140(a) – Equities and 6140(b) – Equities,<sup>8</sup> which are substantially the same as FINRA Rules 6140(a) and (b) and NYSE Rules 6140(a) and (b), and also address wash sale activity. Rule 6140(a) – Equities is substantially the same as Rule 4 and provides that no member or member organization may 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 SEC Regulation NMS (“designated security”)<sup>9</sup> 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. Rule 6140(b) – Equities 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;

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<sup>8</sup> See Securities Exchange Act Release No. 59975 (May 26, 2009), 74 FR 26449 (June 2, 2009) (SR-NYSEALTR-2009-26).

<sup>9</sup> Under Rule 600(b)(47), an NMS stock means any national market system security other than an option.

(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.

The Exchange notes that Rule 476(a)(8), which the NYSE adopted when it was operating in a manual on-Floor trading environment, has a different scienter standard than Rule 6140 – Equities, NYSE Rule 6140, FINRA Rule 6140, and Rule 4. These latter rules 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 “purpose” or scienter requirement in Rule 6140 – Equities, 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, for example trades entered from an off-Floor participant that experience latency issues over which the participant has little or no control, and that such conduct should not always be treated as a wash sale violation if the market participant did not act with purpose.

On the other hand, Rule 476(a)(8) prohibits (i) making a fictitious bid, offer, or transaction, (ii) giving an order for the purchase or sale of securities the execution of which would involve no change of beneficial ownership, or (iii) executing such an order with

knowledge of its character. The second prong can be read as having no scienter requirement.<sup>10</sup>

As such, the example given above 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 Rule 476(a)(8).

#### Proposed Rule Change

The Exchange proposes to amend its wash sale rules to achieve a greater level of internal consistency as well as consistency with FINRA's and NYSE's rules. The Exchange believes that the proposed rule change would promote harmonization, consistency, transparency, and clarity with respect to the Exchange's rules and thereby facilitate FINRA's enforcement of them.<sup>11</sup>

First, the Exchange proposes to eliminate Rule 476(a)(8). The Exchange believes that the conduct described in that rule should not be treated as a wash sale violation in all instances. The Exchange would instead utilize Rule 6140 – Equities for wash sale disciplinary actions in its equities market.

Second, so that there is no change in the scope of equity market participants subject to disciplinary action for wash sales, the Exchange proposes to make a conforming amendment to Rules 6140(a) – Equities and 6140(b) – Equities to provide that the rules apply not only to members and member organizations but also to principal executives, approved persons,

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<sup>10</sup> In at least one case involving the Exchange's affiliate, NYSE, a hearing panel was divided as to whether scienter is required in order to find a violation of the second prong of NYSE Rule 476(a)(8), which is identical to Rule 476(a)(8), and adjudged the respondent not guilty. See In the Matter of X, NYSE Hearing Panel Decision 92-163 (October 23, 1992).

<sup>11</sup> The Exchange notes that it can bring disciplinary actions under 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 Rule 476(a)(8).

registered or non-registered employees of a member or member organization or persons otherwise subject to the jurisdiction of the Exchange.

Finally, the Exchange proposes to delete Rule 4, marking it “Reserved,” and add substantially the same text as Rules 6140(a) – Equities and 6140(b) – Equities to Rule 995NY as new subparagraphs (e) and (f) so that the substance of the wash sale prohibitions in Rules 6140(a) – Equities and 6140(b) – Equities also applies to trading on the Exchange’s options market, thereby creating greater consistency in the prohibitions against wash sale trading between the Exchange’s equities and options markets. The references to a “designated security” in the text of these equities rules would be replaced with “listed option” in proposed Rule 995NY and similarly references to a “member” or “member organization” would be replaced with “ATP Holder.” The Exchange believes that locating these provisions in the options rules will give options market participants better notice of this prohibited conduct.<sup>12</sup>

The Exchange believes that the proposed rule change would not result in any material diminution of the Exchange’s enforcement authority or any material change in surveillance of potentially violative activity. The Exchange may still bring a disciplinary action in appropriate cases where a market participant engages in a significant amount of trades without change of beneficial ownership, even if such activity does not violate proposed Rule 6140(b) – Equities or proposed Rule 995NY(f) per se because the participant did not act with “purpose.” Such conduct could also give rise to other violations, such as a failure to supervise under Rule 342 – Equities

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<sup>12</sup> The Exchange also proposes a technical amendment to move a definition of a term that is used in Rule 995NY(c) to that subparagraph of the rule. Specifically, the definition of the term “related instrument” currently appears at the end of the rule following the designation of subparagraph (d) and the text thereof, although that term is used in subparagraph (c). As such, the Exchange proposes to move the text of the definition of “related instrument” to Rule 995NY(c).

or Rule 922, and the Exchange's affiliate has brought at least one such case.<sup>13</sup> Such conduct could also violate just and equitable principles of trade or otherwise constitute unethical activity under Rule 476(a)(6) or Rule 2010 – Equities.<sup>14</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act,<sup>15</sup> in general, and furthers the objectives of Section 6(b)(5),<sup>16</sup> in particular, in that it is designed 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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. Specifically, the Exchange

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<sup>13</sup> See In the Matter of Goldman Sachs & Co., NYSE Hearing Board Decision 12-3 (April 4, 2012) (between January 2009 and at least September 2011, member firm violated NYSE Rule 342, which is substantially the same as Rule 342 – Equities, in its capacity as a NYSE Supplemental Liquidity Provider by failing to maintain supervisory procedures that were reasonably designed to detect and prevent potentially violative wash trading activity).

<sup>14</sup> See Calvin David Fox, 56 S.E.C. 1371, 1376 (2003) (“With respect to a charge that conduct was inconsistent with just and equitable principles of trade, we have held that a self-regulatory organization need not find that the respondent acted with scienter, but must find that the respondent acted in bad faith or unethically.”). Rule 2010 – Equities is a broad ethical concept that covers all unethical business-related conduct. See also In the Matter of Merrill Lynch, Pierce, Fenner & Smith Incorporated, NYSE Hearing Board Decision 10-13 (May 14, 2010) (firm violated just and equitable principles of trade in that it introduced prearranged or wash sales in the round-lot portion of a partial round lot order); In the Matter of Robert Cutter Matlock, Jr., NYSE Hearing Board Decision 06-19 (March 27, 2006) (Exchange need not prove scienter for violations of just and equitable principles of trade, but rather is required to show the respondent acted in bad faith or unethically); In the Matter of Mary Roy Wong, NYSE Hearing Board Decision 06-187 (February 13, 2007) (Exchange need not prove scienter for violations of just and equitable principles of trade, but rather is required to show the respondent acted in bad faith or unethically).

<sup>15</sup> 15 U.S.C. 78f(b).

<sup>16</sup> 15 U.S.C. 78f(b)(5).



believes that the proposed rule change supports the objectives of the Act by addressing an inconsistency in the scienter requirements between Rule 476(a)(8) on the one hand and Rule 4, Rule 6140 – Equities, NYSE Rule 6140, and FINRA Rule 6140 on the other. Eliminating this inconsistency would provide member organizations with better notice of prohibited wash sale activities in the Exchange’s equities and options markets and promote transparency and clarity with respect to the Exchange’s rules, thereby facilitating FINRA’s enforcement of them. The proposed rule change also would achieve greater consistency between the Exchange’s options and equities rules that prohibit wash sale activity. Moreover, the proposed rule change would not result in any material diminution of the Exchange’s overall enforcement authority or any material change in surveillance of potentially problematic trading activity. The Exchange may still bring a disciplinary action in appropriate cases where a market participant engages in a significant amount of trades without change of beneficial ownership, even if such activity does not violate proposed Rule 6140(b) – Equities or proposed Rule 995NY(f) per se because the participant did not act with “purpose,” because such conduct could violate supervision rules, just and equitable principles of trade, or other Exchange rules prohibiting unethical conduct. As such, the Exchange’s rules would continue to protect investors and the public interest.

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. The proposed rule change is not intended to address competitive issues but rather to achieve greater consistency both within the Exchange’s rules and among Exchange, NYSE, and FINRA rules.

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 up to 90 days (i) as the Commission may designate 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](mailto:rule-comments@sec.gov). Please include File No. SR-NYSEMKT-2013-88 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 No. SR-NYSEMKT-2013-88. 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 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 such filing also will be available for inspection and copying at the principal office of the Exchange. 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 No. SR-NYSEMKT-2013-88 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.<sup>17</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>17</sup> 17 CFR 200.30-3(a)(12).