

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-71157; File No. SR-NYSEMKT-2013-88)

December 20, 2013

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving 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

I. Introduction

On October 29, 2013, NYSE MKT LLC ("NYSE MKT" 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 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 proposed rule change was published for comment in the Federal Register on November 14, 2013.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposal

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

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 70832 (November 7, 2013), 78 FR 68488 ("Notice").

Exchange stated that it believes that the scienter requirement in Exchange 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, and that such conduct should not always be treated as a wash sale violation if the market participant did not act with purpose – for example, 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 Rule 476(a)(8).

Second, so that there is no change in the scope of equity market participants subject to disciplinary action for wash sales, the Exchange proposed a conforming amendment to Rule 6140(a) and (b) – Equities to provide that the rule applies not only to members and member organizations, but also to 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.⁴

The Exchange also proposed to delete Rule 4,⁵ marking it “Reserved.” Finally, the Exchange proposed to add substantially the same text of Rule 6140(a) and (b) – Equities to (options) Rule 995NY, in new subparagraphs (e) and (f). As such, the Exchange is extending the substance of the specific wash sale prohibitions in Rule 6140(a) and (b) – Equities to trading on

⁴ These persons were subject to Rule 476(a)(8).

⁵ Rule 4 in Part 1 of the General Rules provides that “[n]o 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.

the Exchange's options market.⁶ The Exchange stated that locating these provisions in the options rules will give options market participants better notice of this prohibited conduct.⁷

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 Rule 476(a)(8), a rule which the Exchange explained was originally adopted by the NYSE (and subsequently adopted by the Exchange) to address manual, floor-based trading activity. In its place, the Exchange proposes to use Rule 6140 – Equities for wash sale disciplinary actions in its equities market. The Exchange stated that Rule 6140 –

⁶ The references to a “designated security” in the text of Rule 6140(a) and (b) – Equities 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.”

⁷ The Exchange also proposed 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 proposed to move the text of the definition of “related instrument” to Rule 995NY(c).

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).

Equities, which has a scienter standard that the second prong of Rule 476(a)(8) lacks, recognizes that certain inadvertent trading activity, such as algorithmic trading, that results unintended executions with no change in beneficial ownership should not always be treated as a wash sale violation. In addition, the Exchange is amending Exchange Rule 6140(a) and (b) – Equities to cover the same persons that Exchange Rule 476(a)(8) covered. Finally, the Exchange is proposing to delete Rule 4, and to add substantially the same text as Rule 6140(a) and (b) – Equities to Exchange Rule 995NY so that the substance of the wash sale prohibitions in Rule 6140(a) and (b) – Equities also applies to trading on the Exchange’s options market.

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) – Equities or proposed Rule 995NY(f) 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 Rule 342 – Equities or Rule 922, or a violation of just and equitable principles of trade or could otherwise constitute unethical activity under Rule 476(a)(6) or Rule 2010 – Equities. Accordingly, the Commission expects the Exchange to continue to surveil for potential wash sale activity and to take necessary action as appropriate.

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

The Commission believes that the proposed deletion of Rule 476(a)(8) and Rule 4 promotes harmonization, consistency and clarity with respect to the Exchange's rules¹² by resolving the current inconsistent scienter standards of Exchange Rule 476(a)(8) and Exchange Rule 4,¹³ Exchange Rule 6140 – Equities, NYSE Rule 6140 and FINRA Rule 6140, as well as extending the breadth of persons covered by Rule 6140 – Equities to those persons covered by Rule 476(a)(8). The Commission also believes that the additions to Exchange Rule 995NY to apply the specific provisions of Rule 6140(a) and (b) – Equities to the Exchange's options market are appropriate because the Exchange's ATP Holders will be subject to a rule that prohibits wash sales that were designed to create or induce a false or misleading appearance of activity in a designated security. The change will provide clear notice to the ATP Holders of such prohibited activity, as well as make the prohibited activity consistent across both the Exchange's equities and options markets, as well as across NYSE and FINRA. The Commission believes that the proposed rule change should result in less burdensome and more efficient regulatory compliance for firms that are members of the Exchange, NYSE and FINRA. As such, the Exchange's rules would continue to protect investors and the public interest.

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act¹⁴ and the rules and regulations thereunder applicable to a national securities exchange.

¹² The Exchange stated 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).

¹³ The Exchange noted that Rule 4 is substantially the same as Rule 6140(a) – Equities.

¹⁴ 15 U.S.C. 78f(b)(5).

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Exchange Act,¹⁵ that the proposed rule change (SR-NYSEMKT-2013-88) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

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Deputy Secretary

¹⁵ 15 U.S.C. 78s(b)(2).

¹⁶ 17 CFR 200.30-3(a)(12).