

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-75322; File No. SR-NYSEMKT-2015-17)

June 29, 2015

Self-Regulatory Organizations; NYSE MKT LLC; Order Approving Proposed Rule Change Amending Rule 923NY to Modify the Appointment Process Utilized by the Exchange

I. Introduction

On March 20, 2015, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) 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 modify the Market Maker appointment and withdrawal process used by the Exchange. The proposed rule change was published for comment in the Federal Register on April 8, 2015.³ On May 21, 2015, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.⁵ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend Rule 923NY to modify the options Market Maker appointment and withdrawal process used by the Exchange. Under the proposal, once an Amex trading permit (“ATP”) holder has been approved as a Market Maker under Exchange Rule

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 74636 (April 2, 2015), 80 FR 18884 (“Notice”).

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 75033, 80 FR 30519 (May 28, 2015).

9.21NY,⁶ the Market Maker would, subject to certain conditions, be permitted to register rather than apply for an appointment in one or more option classes, and would be permitted to select or withdraw option issues included in its appointment using an Exchange-approved electronic interface. The Exchange also proposes to include a Market Maker’s available financial resources and operational capability as considerations in its periodic evaluation of Market Maker performance, which factors currently are considered when a Market Maker applies for an appointment.

A. Background

Currently, a registered Market Maker may seek an appointment in one or more option classes pursuant to Rule 923NY. Specifically, Rule 923NY provides that “[o]n a form or forms prescribed by the Exchange, a Market Maker must apply for an appointment in one or more classes of option contracts.”⁷ In addition to having the authority to appoint one Specialist per option class and to designate e-Specialists to fulfill certain obligations required of Specialists,⁸ Rule 923NY(b) provides that “[t]he Exchange may appoint an unlimited number of Market Makers in each class unless the number of Market Makers appointed to a particular option class should be limited” based on the Exchange’s judgment.⁹ Further, current Rule 923NY(c) provides that “Market Makers may select from among any option issues traded on the Exchange

⁶ See Rule 921NY (“Registration of Market Makers”). See also Rule 920NY(a) (defining “Market Maker”). The Exchange is not proposing any changes to Rule 921NY.

⁷ See Notice, supra note 3, at 18885.

⁸ See Rule 900.2 NY(76) (defining “Specialist”). Any ATP Holder registered as a Market Maker with the Exchange is eligible to be qualified as a Specialist. See id. Rule 923NY(b) also provides that “[t]he Exchange may designate e-Specialists in an option class in accordance with Rule 927.4NY[e-Specialists].” See Rule 923NY(b). The Exchange is not proposing to change Rule 923NY(b) regarding Specialists and e-Specialists.

⁹ See Notice, supra note 3, at 18885.

for inclusion in their appointment, subject to the approval of the Exchange.”¹⁰ In considering the approval of the appointment of a Market Maker in each security, “the Exchange will consider the Market Maker’s preference; the financial resources available to the Market Maker; the Market Maker’s experience, expertise and past performance in making markets, including the Market Maker’s performance in other securities; the Market Maker’s operational capability; and the maintenance and enhancement of competition among Market Makers in each security in which they are appointed.”¹¹ Current Rule 923NY also states that, in order to have a trading appointment on the Exchange, Market Makers must have the number of ATPs required under the Amex Options Fee Schedule.¹² In addition, Floor Market Makers¹³ must also apply for appointment to a Trading Zone¹⁴ on the floor, subject to approval by the Exchange.¹⁵

Under current Rule 923NY, “Market Makers may change the option issues in their appointment, subject to the approval of the Exchange,” provided such requests are “made in a form and manner prescribed by the Exchange.”¹⁶ In addition, “Market Makers may withdraw from trading an option issue that is within their appointment by providing the Exchange with

¹⁰ See id.

¹¹ See Notice, supra note 3, at 18885.

¹² See Notice, supra note 3, at 18885. See also NYSE Amex Options Fee Schedule (Section III.A., Monthly ATP Fees) (describing “Number Of Issues Permitted In A Market Makers Quoting Assignment” based on the number of permits held and the associated costs), available here, https://www.nyse.com/publicdocs/nyse/markets/amex-options/NYSE_Amex_Options_Fee_Schedule.pdf.

¹³ See Rule 900.2NY(29) (defining “Floor Market Maker”).

¹⁴ A Trading Zone refers to the areas on the Floor designated by the Exchange in which issues are assigned for the purposes of open outcry trading. See Rule 900.2NY(83).

¹⁵ See Notice, supra note 3, at 18885. The current rule also provides that Specialists shall be appointed to the Trading Zone designated for their issues. See id. at 18885, n.13.

¹⁶ See Notice, supra note 3, at 18885. In considering the change request, the Exchange will consider the factors set forth in Rule 923NY(c). See id.

three business days' written notice of such withdrawal.”¹⁷ If a Market Maker fails to provide the required notice, the Market Maker “may be subject to formal disciplinary action pursuant to Section 9A of the Office Rules.”¹⁸ Moreover, the Exchange “may suspend or terminate any appointment of a Market Maker in one or more option issues under this Rule whenever, in the Exchanges' judgment, the interests of a fair and orderly market are best served by such action.”¹⁹ A Market Maker may seek review of any action taken by the Exchange.²⁰

The Exchange periodically evaluates whether Market Makers have fulfilled performance standards, relating to, among other things, quality of markets, competition of Market Makers, observance of ethical standards and administrative factors.²¹ If the Exchange finds that a Market Maker has not met the performance standards, the Exchange may take action, including suspending, terminating or restricting a Market Maker's appointment or registration, after providing the Market Maker an opportunity to be heard.²²

B. Proposed Modifications

¹⁷ See Notice, supra note 3, at 18885.

¹⁸ See id.

¹⁹ See id.

²⁰ See id. Per Rule 923NY(i), Market Makers are also subject to a trading requirement, such that “[a]t least 75% of the trading activity of a Market Maker (measured in terms of contract volume per quarter) must be in classes within the Market Maker's appointment and, in the case of Floor Market Makers, within their designated Trading Zone. A failure to comply with the 75% contract volume requirement may result in a fine pursuant to Rule 476A, however if aggravating circumstances are present, formal disciplinary action may be taken pursuant to Rule 9A.” The Exchange is not proposing any changes to Rule 923NY(i).

²¹ See Rule 923NY(j).

²² See Notice, supra note 3, at 18886, n.20 (describing current Rule 923NY(j)(2)) (“If a Market Maker's appointment in an option issue or issues has been terminated pursuant to Rule 923NY(j), the Market Maker may not be re-appointed as a Market Maker in that option issue or issues for a period not to exceed 6 months.”).

The Exchange proposes to modify the current appointment and withdrawal process. Specifically, the Exchange proposes to modify Rule 923NY(a) to provide that, rather than apply for an appointment, “a Market Maker may register for an appointment in one or more classes of option contracts,” in a form and manner prescribed the Exchange.²³ The Exchange would continue to have authority to appoint one Specialist per option class and to designate e-Specialists in option classes to fulfill certain obligations required of Specialists.²⁴ Similarly, an unlimited number of Market Makers could continue to be appointed to an options class, unless the Exchange restricts such appointments following Commission review and approval.²⁵ The Exchange would retain the ability to suspend or terminate any appointment of a Market Maker if necessary to maintain a fair and orderly market.²⁶

In addition, the Exchange proposes to modify Rule 923NY(c) to provide that “[a] Market Maker may select or withdraw option issues included in their appointment by submitting a request via an Exchange-approved electronic interface with the Exchange on a day when the Exchange is open for business.”²⁷ The modified rule would provide that a Market Maker’s requested appointment would become effective by no later than the following business day, whereas a Market Maker’s request to withdraw option issues from its appointment would not

²³ See proposed Rule 923NY(a). As discussed above, a Market Maker must have the designated number of ATPs set forth in the Amex Options Fee Schedule in order to have a trading appointment on the Exchange. See proposed Rule 923NY(d).

²⁴ See proposed Rule 923NY(b).

²⁵ The Exchange is proposing a conforming change to the text in Rule 923NY(b) to reflect the proposed changes in Rule 923NY(a), to provide that “[a]n unlimited number of Market Makers may register in each class,” subject to any limits imposed by the Exchange. See proposed Rule 923NY(b).

²⁶ See Rule 923NY(g).

²⁷ See proposed Rule 923NY(c).

become effective until the following business day.²⁸ Thus, a Market Maker could be appointed to an option issue on the same day it submits a request to the Exchange, depending on the availability of Exchange resources to process the request that day, but such request, if properly made and received, would be effective no later than the following business day. A Market Maker, however, would not be able to withdraw an option issue from its appointment on the same day that it submits the request; instead, the Exchange would only process such requests on an overnight basis for effectiveness on the following business day. Also, before any changes to a Market Maker's appointment would become effective, the Exchange would be required to confirm that the Market Maker's appointment would not exceed that permitted under paragraph (d) of the rule, pertaining to the number of ATPs a Market Maker would be required to have,²⁹ and also confirm receipt of the Market Maker's request.³⁰ According to the Exchange, the confirmation requirement, applicable to requests for additions, changes, and withdrawals, is designed to ensure that the request was properly made and also successfully transmitted to the Exchange.³¹ Market Makers would be able to select issues in their appointment or make changes thereto pursuant to proposed Rule 923NY(c) by submitting an email to the Exchange, which is currently "the Exchange-approved electronic interface."³²

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Id.

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Id. The Exchange proposed certain clarifying and conforming changes to Rule 923NY(d) to make it consistent with other changes discussed herein. See Notice, supra note 3, at 18886-87.

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See proposed Rule 923NY(c).

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See Notice, supra note 3, at 18886.

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The Exchange will announce by Trader Update the email address that Market Makers should utilize to make selections in, or changes to, their appointment pursuant to this Rule. See Notice, supra note 3, at 18886, n.27.

Proposed Rule 923NY(h) would provide that a Market Maker may seek review of any action taken by the Exchange under Rule 923NY.³³

Pursuant to current Rule 923NY(j), the Exchange conducts periodic evaluations of Market Makers to determine whether they have fulfilled performance standards. The Exchange proposes to modify Rule 923NY(j) to specify two additional factors it may consider in evaluating whether a Market Maker has fulfilled performance standards pursuant to Rule 923NY(j): (1) the financial resources available to the Market Maker and (2) the Market Maker's operational capability.³⁴ These factors are currently among the factors the Exchange considers when determining whether to approve a Market Maker's appointment.³⁵ In connection with the other proposed changes to the Market Maker appointment process, the Exchange proposes that these factors instead be considered as part of the Exchange's periodic evaluation of a Market Maker.

Further, the Exchange proposes to modify Rule 923NY(j)(2) to reflect the proposed changes to the Market Maker appointment process. Specifically, the Exchange proposes to change the reference to a Market Maker being "re-appointed" by the Exchange if an option issue or issues has been terminated pursuant to this subsection (j), and to instead provide that "the Exchange may restrict the Market Maker's registration as a Market Maker in that option issue or issues for a period not to exceed 6 months."³⁶ The Exchange would retain the discretion to suspend that Market Maker's appointment in the affected option issue(s) for a full six months, or

³³ See Rule 923NY(h). See also Notice, *supra* note 3, at 18887.

³⁴ See proposed Rule 923NY(j).

³⁵ See Notice, *supra* note 3, at 18887.

³⁶ See proposed Rule 923NY(j)(2) ("If a Market Maker's appointment in an option issue or issues has been terminated pursuant to this subsection (j), the Exchange may restrict the Market Maker's registration as a Market Maker in that option issue or issues for a period not to exceed 6 months."). See also Notice, *supra* note 3, at 18887.

to allow that Market Maker to resume that appointment earlier than the prescribed six-month period, based on the Exchange's evaluation of the facts and circumstances.³⁷

Finally, the Exchange proposes certain clarifying technical changes to Rule 923NY as well as certain conforming changes so that there is consistency throughout the rule text.

III. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act³⁸ and the rules and regulations thereunder applicable to a national securities exchange.³⁹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁴⁰ 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 foster cooperation and coordination with persons engaged in 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.

The Commission believes that the proposal to permit an ATP holder approved as a registered Market Maker pursuant to Exchange Rule 921NY to register for and withdraw from options appointments, subject to the proposed conditions and in accordance with the other provisions of Rule 923NY, is reasonably 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 facilitating transactions in securities, to remove

³⁷ See Notice, supra note 3, at 18887.

³⁸ 15 U.S.C. 78f.

³⁹ 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).

⁴⁰ 15 U.S.C. 78f(b)(5).

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 states that the proposed changes regarding how Market Makers select and modify their appointments would provide Market Makers with more efficient access to the securities in which they want to make markets, enabling them to quickly begin disseminating competitive quotations in those securities which would provide additional liquidity and enhanced competition in those securities on the Exchange.⁴¹ The Exchange notes that the proposed rule change would enable Market Makers to manage their appointments with more flexibility and in a timelier manner, but that Market Makers still will be required to comply with certain obligations to maintain their status as a Market Maker, including that they provide continuous, two-sided quotations in their appointed securities.⁴² The Exchange also believes that preventing Market Makers from being able to withdraw an option issue from its appointment on the same day that it submits the request (as such requests, if properly made and received, are processed on an overnight basis for effectiveness the following business day) will serve to promote just and equitable principles of trade and benefit investors and the public interest.⁴³ Further, before any changes to a Market Maker's appointment become effective, the Exchange will be required to confirm that the Market

⁴¹ See Notice, supra note 3, at 18887. In addition, the Exchange notes that other options exchanges permit market makers to select their appointments in a similar manner via exchange-approved electronic interfaces. See Notice, supra note 3, at 18886, n.31 (citing, BATS Exchange, Inc. Rule 22.3(b) (“An Options Market Maker may become registered in a series by entering a registration request via an Exchange approved electronic interface with the Exchange’s systems by 9:00 a.m. Eastern time. Registration shall become effective on the day the registration request is entered”); and NASDAQ Options Market Chapter VII, Section 3(b) (“An Options Market Maker may become registered in an option by entering a registration request via a Nasdaq approved electronic interface with Nasdaq’s systems. Registration shall become effective on the day the registration request is entered.”)).

⁴² See Notice, supra note 3, at 18888.

⁴³ See Notice, supra note 3, at 18887.

Maker's appointment will not exceed the number of ATPs a Market Maker is required to have and will also be required to confirm receipt of the Market Maker's request.⁴⁴

The Commission notes that the Exchange has proposed to add a Market Maker's available financial resources and operational capability as factors the Exchange may consider during its periodic evaluation of a Market Maker's performance, stating that these factors are important considerations in evaluating a Market Maker's performance, and that continued consideration of these factors would remove impediments to and perfect the mechanism of a free and open market and would benefit investors and the public interest.⁴⁵ The Commission further notes that the Exchange will continue to have authority to suspend or terminate any appointment of a Market Maker in one or more option issues whenever, in the Exchange's judgment, the interests of a fair and orderly market are best served by such action.⁴⁶ The Exchange will also retain the ability to restrict a Market Maker's registration in option issues for up to six months if a Market Maker's appointment in that option issue or issues has been terminated under the rule, and Rule 923NY will continue to give the Exchange discretion to allow the Market Maker to resume that appointment earlier than the prescribed six-month period or to maintain the suspension for the entire period. Finally, the Exchange is not proposing changes to the disciplinary and appeals process for Market Makers that do not meet minimum performance standards.⁴⁷

⁴⁴ See text accompany notes 29-30 supra.

⁴⁵ See Notice, supra note 3, at 18887.

⁴⁶ See Rule 923NY(g). See also Notice, supra 3, at 18888, n.43 and Rule 921NY (regarding the Exchange's ability to suspend or terminate a Market Maker's registration based on "a determination of any substantial or continued failure by such Market Maker to engage in dealings in accordance with Rules 925NY or 923NY," which outline the obligations of Market Makers).

⁴⁷ See Notice, supra note 3, at 18887.

Based on the foregoing, the Commission finds the proposed rule change is consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁴⁸ that the proposed rule change (SR-NYSEMKT-2015-17) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴⁹

Robert W. Errett
Deputy Secretary

⁴⁸ 15 U.S.C. 78s(b)(2).

⁴⁹ 17 CFR 200.30-3(a)(12).