

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-79283; File No. SR-NYSEMKT-2016-99)

November 10, 2016

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Amending Rule 104 – Equities to Delete Subsection (g)(i)(A)(III) Prohibiting Designated Market Makers from Establishing a New High (Low) Price on the Exchange in a Security the DMM has a Long (Short) Position During the Last Ten Minutes Prior to the Close of Trading

Pursuant to Section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b-4 thereunder,³ notice is hereby given that, on October 27, 2016, NYSE MKT LLC (“Exchange” or “NYSE MKT”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III 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 Rule 104 – Equities to delete subsection (g)(i)(A)(III) prohibiting Designated Market Makers (“DMM”) from establishing a new high (low) price on the Exchange in a security the DMM has a long (short) position during the last ten minutes prior to the close of trading. The proposed rule change is available on the Exchange’s website at 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

¹ 15 U.S.C.78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

concerning the purpose of, and basis for, the proposed rule change and discussed any comments it 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 Rule 104 – Equities (“Rule 104”) to delete subsection (g)(i)(A)(III), which prohibits DMMs with a long (short) position in a security from making a purchase (sale) in such security during the last ten minutes prior to the close of trading that results in a new high (low) price on the Exchange in that security for that day.

Background

Rule 104 sets forth the obligations of Exchange DMMs. Under Rule 104(a), DMMs registered in one or more securities traded on the Exchange are required to engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market insofar as reasonably practicable. Rule 104(a) also enumerates the specific responsibilities and duties of a DMM, including: (1) maintenance of a continuous two-sided quote, which mandates that each DMM maintain a bid or an offer at the National Best Bid (“NBB”) and National Best Offer (“NBO,” together the “NBBO”) for a certain percentage of the trading day,⁴ and (2) the facilitation of, among other things, openings, re-openings, and the close of trading for the DMM’s assigned securities, all of which may include supplying liquidity as needed.⁵ Rule

⁴ See Rule 104(a)(1).

⁵ See *id.* at (2)-(3). Rule 104(e) further provides that DMM units must provide contra-side liquidity as needed for the execution of odd-lot quantities eligible to be executed as part of the opening, reopening, and closing transactions but that remain unpaired after the

104(f) imposes an affirmative obligation on DMMs to maintain, insofar as reasonably practicable, a fair and orderly market on the Exchange in assigned securities, including maintaining price continuity with reasonable depth and trading for the DMM's own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated.

Rule 104(g) governs transactions by DMMs. NYSE Rule 104(g) provides that transactions on the Exchange by a DMM for the DMM's account must be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock. Rule 104(g) describes certain permitted transactions, including neutral transactions and Non-Conditional Transactions, as defined therein. Rule 104(g)(i)(A)(III) provides that, except as otherwise permitted by Rule 104, during the last ten minutes prior to the close of trading, a DMM with a long or short position in a security is prohibited from making a purchase or sale in such security that results in a new high or low price, respectively, on the Exchange for the day at the time of the DMM's transaction ("Prohibited Transactions"). Finally, Rule 104(h) addresses DMM transactions in securities that establish or increase the DMM's position. Rule 104(h)(ii) permits certain "Conditional Transactions"⁶ without restriction as to price if they are followed by appropriate re-entry on the opposite side of the market commensurate with the size of the DMM's transaction.⁷ This requirement assures that if a DMM

DMM has paired all other eligible round lot sized interest.

⁶ Rule 104(h)(i) defines a Conditional Transaction as a DMM transaction in a security that establishes or increases a position and reaches across the market to trade as the contra-side to the Exchange published bid or offer. A DMM reaches across the market when the DMM buys from the Exchange offer or sells to the Exchange bid.

⁷ The Exchange's re-entry obligations for Conditional Transactions are set forth in Rule 104(h)(iii). However, Rule 104(h)(iv) permits certain other Conditional Transactions without restriction as to price, and Rule 104(i) provides that re-entry obligations following such Conditional Transactions would be the same as the re-entry obligations

establishes or increases a long position by buying from the Exchange best offer, which would likely be the new high price, or establishes or increases a short position by selling to the Exchange best bid, which would likely be the new low price, such transaction would be followed by the DMM quoting on the opposite side of the last transaction in order to dampen the impact of that transaction on the market.

Proposed Rule Change

The Exchange proposes to delete subsection (g)(i)(A)(III) of Rule 104.⁸ As discussed below, in today's electronic marketplace where specialists have become DMMs and control of pricing decisions has moved away from market participants on the Exchange trading Floor,⁹ retaining a prohibition designed to prevent specialists from setting a price in the final ten minutes of trading in a security in which the specialist had a position is no longer necessary. Eliminating the prohibition would not weaken existing safeguards against DMMs inappropriately influencing or manipulating the close because existing DMM obligations, including the obligation not to destabilize the market when buying or selling to increase a position or reaching across the

for Non-Conditional Transactions pursuant to Rule 104(g).

⁸ The principles embodied in Rule 104 are based on New York Stock Exchange LLC ("NYSE") Rule 104. On October 1, 2008, the Commission approved the Exchange's rule proposal to establish new membership, member firm conduct, and equity trading rules that were based on the existing NYSE rules to reflect that equities trading on the Exchange would be supported by the NYSE's trading system. See Securities Exchange Act Release Nos. 58705 (Oct. 1, 2008), 73 FR 58995 (Oct. 8, 2008) (SR-Amex-2008-63) (approval order) and 59022 (Nov. 26, 2008), 73 FR 73683 (Dec. 3, 2008) (SR-NYSEALTR-2008-10) (amending equity rules to conform to NYSE New Market Model Pilot rules) ("Release No. 59022"). Because the Exchange's rules are based on existing NYSE rules, the Exchange believes that pre-October 1, 2008 NYSE rule filings provide relevant guidance concerning Exchange equity rules.

⁹ See, e.g., Securities Exchange Act Release No. 56209 (August 6, 2007), 72 FR 45290, 45291 (August 13, 2007) (SR-NYSE-2007-65) (noting in connection with the NYSE trading Floor that changes in the marketplace have included, among other things, "the decentralization of control of pricing decisions away from the specialist and Floor broker").

market, would govern DMM trading during the final ten minutes of trading. Specifically, to the extent a Prohibited Transaction is also a Conditional Transaction, with the elimination of Prohibited Transactions, the obligation to re-enter the market following a Conditional Transaction, which is designed to ensure that DMMs do not inappropriately influence or manipulate the close, would become applicable in the last ten minutes of trading for such transactions,¹⁰ thereby achieving the same goal without an outright prohibition.

In 2006, the Commission approved the NYSE's "hybrid market" under which Exchange systems assumed the function of matching and executing electronically-entered orders, but specialists remained the responsible broker-dealer for orders on the Exchange's limit order book.¹¹ Rule 104(g)(III), adopted at the same time, was intended to prevent NYSE specialists from setting the closing price.¹² However, specialists were permitted to effect transactions during the last ten minutes of trading that resulted in a new high or low for the day in order to match another market's better bid or offer or to bring the price of the security into parity with an underlying or related security or asset.¹³ This exception was considered appropriate because in those situations an independent party and not the specialist had set the price.¹⁴

With the increasing automation of trading and the accompanying decentralization of pricing decisions away from specialists, in 2008, the NYSE and the Exchange proposed and the

¹⁰ Currently, Conditional Transactions by DMMs during the last ten minutes of trading that establish a new high or low price on the Exchange are prohibited under Rule 104 (g)(i)(A)(III).

¹¹ See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR-NYSE-2004-05).

¹² See Securities Exchange Act Release No. 54860 (December 1, 2006), 71 FR 71221 (December 8, 2006) (SR-NYSE-2006-76) ("Release No. 54860"). At the time, Prohibited Transactions were set forth in Supplementary Material .10 of NYSE Rule 104.

¹³ See id., 71 FR at 71223.

¹⁴ See id. at 71229.

Commission approved its New Market Model, which transformed specialists into DMMs, who are no longer agents for the Exchange's limit order book and whose trading activity on the Exchange is limited to proprietary trading.¹⁵ Nevertheless, the Exchange retained the obligations set forth in Rule 104(g) and (h), even though Regulation NMS was implemented prior to the Exchange proposing the New Market Model.

In light of these developments, Rule 104(g)(i)(A)(III) has lost its original purpose and utility. The rationale behind preventing specialists from setting the price of a security on the Exchange in the final ten minutes of trading was to prevent specialists from inappropriately influencing the price of a security at the close to advantage a specialist's proprietary position.¹⁶ In today's fragmented marketplace, a new high or low price for a security on the Exchange in the last ten minutes of trading does not have a significant effect on the market price for such security. For example, a new high or low price on the Exchange may not be the new high or low for a security because prices may be higher or lower in away markets, where the majority of intra-day trading in NYSEMKT-listed securities takes place. Indeed, any advantage to a DMM by establishing a new high or low on the Exchange during the last ten minutes can rapidly evaporate following trades in away markets, which happen very quickly and over which the DMM has no control. In short, since DMMs do not have the ability to direct or influence trading or control intra-day prices as specialists had before the implementation of Regulation NMS, Prohibited Transactions are anachronistic.

Moreover, although Prohibited Transactions would be eliminated, DMMs would still have the obligation under Rule 104 to ensure that they do not destabilize the market when they

¹⁵ See Securities Exchange Act Release No. 58845(October 24, 2008), 73 FR 64379, 64381 (October 29, 2008) (SR-NYSE-2008-46). See also Release No. 59022, supra note 8.

¹⁶ See Release No. 54860, 71 FR at 71229.

are buying or selling to increase a position or reaching across the market during the final ten minutes of trading.

As noted, DMMs have affirmative obligations under Rule 104(a) to engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market insofar as reasonably practicable. Specifically, Rule 104(f)(ii) sets forth the DMM's obligation to act as reasonably necessary to ensure appropriate depth and maintain reasonable price variations between transactions (also known as price continuity) and prevent unexpected variations in trading. Further, under Rule 123D(a), openings and reopenings must be fair and orderly, reflecting the DMM's professional assessment of market conditions at the time, and appropriate consideration of the balance of supply and demand as reflected by orders represented in the market. The Exchange supplies DMMs with suggested Depth Guidelines for each security in which a DMM is registered, and DMMs are expected to quote and trade with reference to the Depth Guidelines.¹⁷

Further, the DMM's affirmative obligation includes obligations to re-enter the market when reaching across to execute against available interest. Under Rule 104(h), DMMs that engage in Conditional Transactions must follow up with appropriate re-entry on the opposite side of the market commensurate with the size of the DMM's transaction.¹⁸ The Exchange issues guidelines, called price participation points ("PPP"), that identify the price at or before which a DMM is expected to re-enter the market after effecting a conditional transaction.¹⁹ Currently, a Conditional Transaction that is also a Prohibited Transaction would not be permitted in the last

¹⁷ See Rule 104(f)(iii).

¹⁸ See Rule 104(h)(iii). Immediate re-entry is required after certain Conditional Transactions.

¹⁹ See NYSE Rule 104(h)(iii)(A).

ten minutes of trading. With the proposed deletion of Rule 104(g)(i)(A)(III), what is currently defined as a Prohibited Transaction would be permitted, however, such transactions would be subject to re-entry obligations associated with Conditional Transactions. As such, in lieu of Rule 104(g)(i)(A)(III), in the last ten minutes of trading, DMMs would instead be subject to affirmative obligations specified under Rule 104(h).

Finally, DMM pricing decisions at the close would remain subject to specific DMM obligations with respect to the quality of the markets in securities to which they are assigned. In general, as noted above, transactions on the Exchange by a DMM for the DMM's account must be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock, and DMMs must refrain from causing or exacerbating excessive price movements.

DMM trading activity on the Exchange is actively surveilled for compliance with each of these obligations. The Exchange currently employs a suite of surveillances for trading by DMMs and other market participants in and around the close of trading. The Exchange believes that the existing DMM obligations and the Exchange's regulatory program for reviewing DMM trading provides an appropriate framework in today's market structure for ensuring that DMMs are not establishing a price to benefit their own account.

For all of the foregoing reasons, the Exchange believes that retaining Prohibited Transactions is no longer necessary.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of the Act,²⁰ in general, and furthers the objectives of Section 6(b)(5) of the Act,²¹ in particular,

²⁰ 15 U.S.C. 78f(b).

because it is designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and protect investors and the public interest.

In particular, the Exchange believes that eliminating Rule 104(g)(III) would remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting DMMs to enter trades in the last ten minutes of trading that establish a new high or low in a security even though the DMM has a position in that security. As proprietary traders without the ability to direct or influence trading or control the quote, restricting DMM trading in the final ten minutes of trading is no longer necessary.

The Exchange believes that eliminating Prohibited Transactions would not be inconsistent with the public interest and the protection of investors because DMM trading decisions going into the closing trade would continue to be evaluated from the perspective of their obligations to the marketplace, including the obligation to arrange a fair and orderly close, as set forth in Exchange rules. Further, the Exchange believes that eliminating Rule 104(g)(i)(A)(III) would not be inconsistent with the public interest and the protection of investors because existing safeguards would remain in place to ensure that DMMs do not inappropriately influence or manipulate the close, thereby establishing substantially the same result without an outright prohibition. As noted above, DMM trading would remain subject to Exchange rules, including the obligation to maintain a fair and orderly market under Rule 104. More specifically, in lieu of the obligations associated with Rule 104(g)(i)(A)(III), in the last ten minutes of trading the DMMs would be subject to the reentry obligations associated with Conditional Transactions. Accordingly, during that period, DMMs would have an obligation to

²¹ 15 U.S.C. 78f(b)(5).

reenter the market if their trading both reaches across the market and increases or establishes a position.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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 eliminate redundant approvals of manual trades on its trading Floor.

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 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. Please include File Number SR-NYSEMKT-2016-99 on the subject line.

Paper comments:

- Send paper comments in triplicate to Brent J. Fields, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2016-99. 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. Copies of the 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 Number SR-NYSEMKT-2016-99 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.²²

Brent J. Fields
Secretary

²² 17 CFR 200.30-3(a)(12).