

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57236; File No. SR-NYSE-2008-03)

January 30, 2008

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Rescind Rule 97 (Limitation on Member's Trading Because of Block Positioning)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on January 11, 2008, the New York Stock Exchange LLC ("NYSE" or "Exchange") 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 substantially prepared by the Exchange. 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

NYSE proposes to rescind NYSE Rule 97 (Limitation on Member's Trading Because of Block Positioning). The text of the proposed rule change is available at NYSE, the Commission's Public Reference Room, and www.nyse.com.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NYSE included statements concerning the purpose of, and basis for, the proposed rule change. The text of these 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 aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Through this filing, the Exchange seeks to rescind Exchange Rule 97. Exchange Rule 97 prevents a member organization that holds a long position in a security that resulted from a block transaction with a customer from effecting, within twenty minutes of the close of trading on the Exchange, a purchase on a "plus" tick in that security at a price higher than the lowest price at which any block was acquired in a previous transaction on that day, if the person responsible for the entry of such order to purchase the security had knowledge of the block position.

The Exchange has from time to time reviewed the applicability of the rule and made amendments in an attempt to maintain the rule's relevance as the nature of trading has significantly evolved over the years. Notwithstanding those efforts, the Exchange believes that the practical application of the rule in today's market no longer addresses the concerns that prompted its implementation. The Exchange therefore proposes to rescind Exchange Rule 97 in its entirety.

Background

Exchange Rule 97 focuses on the trading of member organizations while they hold positions in a security as a result of a block transaction with customer(s). The rule was originally adopted to address concerns that a member organization might engage in manipulative practices by attempting to "mark-up" the price of a stock to enable the position acquired in the course of block positioning to be liquidated at a profit, or to maintain the market at the price at which the position was acquired.

In 2002, the rule was amended to narrow the scope of the prohibitions solely to transactions executed within the last twenty minutes of the trading day, and to provide

exceptions to the rule for member organizations that establish information barriers and for certain hedging transactions.³ The rationale behind the rule change was to limit the rule's "tick" restriction to the most sensitive part of the trading day (where it was thought that manipulation was most likely to occur so that the member firm could unwind its position at the opening of trading the next day).

The implementation of Regulation NMS in March 2007 necessitated an additional amendment to the rule in July 2007 to create an exemption to resolve a conflict between compliance with Rule 97 and Regulation NMS.⁴ Specifically, if during the last 20 minutes of trading a member organization facilitates a customer order that trades through protected bids or offers, and in compliance with Rules 600(b)(30)(ii) and 611(b)(6) of Regulation NMS,⁵ the member organization simultaneously routes proprietary intermarket sweep orders to execute against the full displayed size of any protected quotation in that security ("ISO facilitation"), the ISO facilitation could violate Rule 97 if the ISO orders would trade on a plus tick, at a price above the lowest facilitation price. In essence, the implementation of Regulation NMS required firms to choose between violating Regulation NMS or violating Rule 97. The exemption to Rule 97 was added so that when facilitating a customer order that would otherwise require a member organization to either violate Rule 97 or trade through protected quotations, member

³ See Securities Exchange Act Release No. 46566 (September 27, 2002), 67 FR 62278 (October 4, 2002) (SR-NYSE-2001-24).

⁴ See Securities Exchange Act Release No. 56024 (July 6, 2007), 72 FR 38643 (July 13, 2007) (SR-NYSE-2007-61).

⁵ 17 CFR 242.600(b)(30)(ii) and 17 CFR 242.611(b)(6).

organizations can comply with their Regulation NMS obligations without also violating Rule 97.⁶

Rescission of Rule 97

NYSE states that this proposed rescission of the rule highlights the extent to which trading has changed and how the operation of Rule 97 hinders the ability of member organizations to legitimately conduct their business and facilitate their customers' orders. Today, compliance with Regulation NMS means that the liquidation of a block position typically occurs on many different market centers. Additionally, the Exchange believes that, in active and volatile market conditions, incremental movements of a penny or more occur almost instantaneously, lessening the ability to influence the closing price of a security.

Rule 97 was established at a time when the majority of block transactions were executed on the Exchange. However, in the present competitive trading environment, there are now many other venues available for market participants to effect block position transactions without the strictures of such a rule. The Exchange believes that, in order to encourage consistency throughout the industry with respect to the execution of block positions and to encourage market participants to continue to effect their block transactions on the Exchange, Rule 97 should be rescinded. NYSE represents that NYSE Regulation, Inc. will continue to surveil in NYSE-listed securities for possible manipulative activity, including marking the close, which could be in

⁶ This exemption would be available only when: (1) the firm has acquired a proprietary position as a result of a previous block facilitation for a customer; (2) the facilitation trade during the last 20 minutes of trading would cause the firm to trade through a better priced offer on another market, such that the firm is obligated by Regulation NMS Rule 611 to send proprietary ISOs when it facilitates the customer's order; (3) the customer has declined better-priced ISO executions; and (4) the better-priced offers in away markets are such that NYSE Rule 97 would prohibit the firm from sending a proprietary buy order. See NYSE Information Memo 07-67 (July 6, 2007).

violation of federal securities laws or Exchange Rules, including Rule 10b-5 under the Act,⁷ Section 9(a) of the Act,⁸ and Exchange Rules 476(a) and 435.⁹

2. Statutory Basis

NYSE believes that the proposed rule change is consistent with Section 6(b) of the Act,¹⁰ in general, and the requirement in Section 6(b)(5) of the Act,¹¹ in particular, that the rules of an exchange are, among other things, designed 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. NYSE asserts that the proposed rule change also is designed to support the principles of Section 11A(a)(1)¹² in that it seeks to assure economically efficient execution of securities transactions, and make it practicable for brokers to execute investors' orders in the best market.

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.

⁷ 17 CFR 240.10b-5.

⁸ 15 U.S.C 78i(a).

⁹ See e-mail from Gillian Rowe, Senior Counsel, NYSE, to Jennifer Dodd, Special Counsel, Division of Trading and Markets, Commission, dated January 29, 2008.

¹⁰ 15 U.S.C. 78f(b).

¹¹ 15 U.S.C. 78f(b)(5).

¹² 15 U.S.C. 78k-1(a)(1).

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which NYSE consents, the Commission will:

- (A) by order approve such 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-NYSE-2008-03 on the subject line.

Paper comments:

- Send paper comments in triplicate to Nancy M. Morris, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2008-03. 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 Web site (<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 inspection and copying 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 offices 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-NYSE-2008-03 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.¹³

Florence E. Harmon
Deputy Secretary

¹³ 17 CFR 200.30-3(a)(12).