

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-58971; File No. SR-NYSE-2008-115)

November 17, 2008

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by New York Stock Exchange LLC Amending Exchange Rule 104T to Make Certain Technical Amendments to the Rule to Conform it to the Exchange's Recently Instituted New Market Model Pilot

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 November 4, 2008, New York Stock Exchange LLC ("NYSE" or the "Exchange") 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 Rule 104T (Dealings by DMMs) to make certain technical amendments to the rule to conform it to the Exchange's recently instituted New Market Model Pilot.

The text of the proposed rule change is available at [www.nyse.com](http://www.nyse.com), NYSE's principal office, and 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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange seeks to make certain technical amendments to: (i) NYSE Rule 104T (Dealings by DMMs) to include rule language governing DMM quoting requirements that was inadvertently not included in the rule text; (ii) conform the rule language of NYSE Rule 104T governing price improvement with changes approved by the Securities and Exchange Commission ("SEC" or "Commission") in a separate filing; and (iii) clarify the rule text of NYSE Rules 70, 104T and 104 as it pertains to Floor brokers and DMMs reserve functionality.

On October 24, 2008, the Commission approved the operation of a pilot for the Exchange's New Market Model.<sup>4</sup> As part of this new model the functions formerly carried out by specialists on the Exchange will be replaced by a new market participant, to be known as a Designated Market Maker ("DMM"). While there are some similarities in the manner in which DMMs will operate, there are some major differences as well. For example, DMMs will continue to be assigned individual NYE-listed [sic] securities as they were under the specialist system, and have an affirmative obligation with respect to maintaining a fair and orderly market for trading those assigned securities. Unlike the specialist system, each DMM will also have a

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<sup>4</sup> See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46) (approving certain rules to operate as a pilot scheduled to end October 1, 2009.)

minimum quoting requirement<sup>5</sup> in its assigned securities but will no longer have a negative obligation.

The implementation of these changes required the Exchange to amend its previous rule governing specialist conduct, former NYSE Rule 104 (Dealings by Specialists). As approved, the New Market Model will be phased<sup>6</sup> into the Exchange's marketplace to allow for the careful monitoring of technological and trading pattern changes that are the core of its operation. The Exchange therefore created transitional NYSE Rule 104T in order to govern DMM conduct during the first phase of the pilot. DMMs were subject to the quoting requirement upon implementation of the Pilot; however, the language imposing the quoting requirement was inadvertently not included in NYSE Rule 104T. Through this filing the Exchange seeks to correct that oversight and add subparagraph "k" to Rule 104T which will read as follows:

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<sup>5</sup> DMMs will be required to maintain displayed bids and offers at the National Best Bid or Offer ("NBBO") for a certain percentage of the trading day in assigned securities. Specifically, with respect to maintaining a continuous two-sided quote with reasonable size, DMMs must maintain a bid or offer at the NBBO ("inside") for securities in which the DMM is registered at a prescribed level based on the average daily volume of the security. Securities that have a consolidated average daily volume of less than one million shares per calendar month are defined as Less Active Securities and securities that have a consolidated average daily volume of equal to or greater than one million shares per calendar month are defined as More Active Securities.

For Less Active Securities, a specialist unit must maintain a bid or an offer at the NBBO for at least 10% of the trading day during a calendar month. For More Active Securities, a specialist unit must maintain a bid or an offer at the NBBO for at least 5% or more of the trading day during a calendar month. DMMs will be expected to satisfy the quoting requirement for both volume categories in their assigned securities.

<sup>6</sup> Pursuant to the implementation schedule, no later than five weeks after Commission approval, DMMs will still receive information about orders that are at or between the Exchange quote. DMMs must continue to abide by their affirmative obligations, meeting his or her requirements to maintain displayed bids and offers at the NBBO and re-enter liquidity pursuant to NYSE Rule 104T ("Phase 1"). After the fifth week of the operation of the Pilot, Phase 1 will be completed and NYSE Rule 104T will cease operation. Once NYSE Rule 104T ceases operation, DMMs will be subject to new NYSE Rule 104 (Dealings and Responsibilities of DMMs) in Phase 2.

With respect to maintaining a continuous two-sided quote with reasonable size, DMM units must maintain a bid or an offer at the National Best Bid and National Best Offer (“inside”) at least 10% of the trading day for securities in which the DMM unit is registered with an average daily volume on the Exchange of less than one million shares, and at least 5% for securities in which the DMM unit is registered with an average daily trading volume equal to or greater than one million shares. Time at the inside is calculated as the average of the percentage of time the DMM unit has a bid or offer at the inside. In calculating whether a DMM is meeting the 10% and 5% measure, credit will be given for executions for the liquidity provided by the DMM. Reserve or other hidden orders entered by the DMM will not be included in the inside quote calculations.

The Exchange further seeks to amend Exchange Rule 104T(e) to remove legacy language related to a requirement that specialists be represented in the quote in a “meaningful amount” before they can send a trading message that will provide price improvement to arriving marketable orders (i.e., those orders capable of trading in the current market upon arrival).

On September 11, 2008, the Commission approved the amendment of former NYSE Rule 104(e) to remove the requirement that specialists be represented in the quote in a “meaningful amount” before he or she may send a trading message that will provide price improvement to arriving marketable orders (i.e., those orders capable of trading in the current market upon arrival).<sup>7</sup> Pursuant to that amendment specialists were able to provide algorithmically-generated price improvement to all or part of a marketable incoming order provided that the price improvement to be supplied by the specialist is at least one cent. NYSE Rule 104T was not

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<sup>7</sup> See Securities Exchange Act Release No. 58517 (September 11, 2008), 73 FR 53914 (September 17, 2008) (SR-NYSE-2008-61).

updated to reflect this change and the Exchange seeks to update the language to reflect that amendment through this filing.

Pursuant to the changes approved in the New Market Model, Floor brokers and DMMs may maintain reserve interest consistent with the Exchange Rules governing Reserve Orders.<sup>8</sup> NYSE Rule 104T(d)(1) was not conformed to reflect this language. NYSE Rules 70(b)(ii) and 104(c) have language to express this concept; however, the language in the two rules is inconsistent. Specifically, NYSE Rule 70 states in pertinent part, “A Floor broker shall have the ability to maintain undisplayed reserve interest consistent with Exchange rules governing Reserve Orders.” NYSE Rule 104 states, “A DMM unit may maintain non displayed reserve interest consistent with Exchange Rules governing Reserve Orders.” The Exchange seeks to revise the rule language of NYSE Rules 70(b)(ii), 104T(d)(1) and 104(c) to make them consistent and to clarify that Floor brokers and DMMs may maintain reserve interest consistent with Exchange rules governing Reserve Orders.

The Exchange further seeks to amend typographic errors in NYSE Rules 123A, 123B and 1000. Specifically, in NYSE Rule 123A Supplementary Material .32, the NYSE deleted the word “specialist” from the first sentence and did not insert “DMM” in its place. Additionally, the Exchange did not delete the word “specialist” from the last paragraph of the same section and insert “DMM.” The Exchange now proposes to insert “DMM” in the first sentence of NYSE Rule 123A Supplementary Material .32 so that it will read, “If a report has not been received from a DMM on an order which he or she should have executed, the DMM is responsible for any loss which may be sustained up to and including the next opening price.” The Exchange further seeks to amend the last sentence of the last paragraph to read, “In no case where it is deemed that

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<sup>8</sup> See NYSE Rule 13.

a DMM did not send out a report shall the liability of the DMM extend beyond the closing price on the business day following the day of the transaction.”

Finally, NYSE Rule 123B as approved in the New Market Model, contains two subparagraphs lettered “d”. The Exchange seeks to change the second subparagraph “d” to “e” in order to correct the lettering. Similarly, NYSE Rule 1000, as approved in the New Market Model deleted the provisions of subparagraph (e)(ii)(D) and did not change the letter of the subsequent subparagraph (e)(ii)(E) to “(D)”. As such NYSE Rule subparagraph (e)(ii) is lettered “A” through E without a “D” letter designation. The Exchange therefore seeks to change the current letter “E” of that provision to “D” to allow for accurate consecutive lettering of the rule.

## 2. Statutory Basis

The bases under the Securities Exchange Act of 1934 (the “1934 Act”) for this proposed rule change are the requirements under Section 6(b)(5) that the rules of an exchange be 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. The Exchange believes that the instant proposal is consistent with the above principals [sic] in that it conforms the rule language to the approved New Market model which the Exchange anticipates will enhance the liquidity in the market and foster increased competition among Exchange market participants thus providing Exchange customers with additional opportunities for price improvement.

### 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.

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

Because the foregoing proposed rule change: (1) does not significantly affect the protection of investors or the public interest; (2) does not impose any significant burden on competition; and (3) by its terms, does not become operative for 30 days after the date of filing, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup>

A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative for 30 days after the date of filing.<sup>11</sup> However, Rule 19b-4(f)(6)(iii) permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. NYSE requested that the Commission waive the 30-day operative delay, as specified in Rule 19b-4(f)(6)(iii),<sup>12</sup> which would make the rule change effective and operative upon filing.

The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest because it will conform the rule text to what was

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<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> 17 CFR 240.19b-4(f)(6)(iii). In addition, Rule 19b-4(f)(6)(iii) requires the self-regulatory organization to give the Commission notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. NYSE has satisfied this requirement.

<sup>12</sup> 17 CFR 240.19b-4(f)(6)(iii).

previously approved by the Commission in prior Exchange proposed rule changes.<sup>13</sup> Waiving the operative delay will ensure that the rule text of the Exchange is accurate and will avoid potential confusion by eliminating technical errors.<sup>14</sup> Accordingly, the Commission designates the proposed rule change effective and operative upon filing with the Commission.

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.<sup>15</sup>

#### 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 Number SR-NYSE-2008-115 on the subject line.

##### Paper comments:

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

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<sup>13</sup> See *supra* notes 4 and 7.

<sup>14</sup> For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>15</sup> 15 U.S.C. 78s(b)(3)(C).



All submissions should refer to File Number SR-NYSE-2008-115. 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 am and 3:00 pm. Copies of such filing also will be available for inspection and copying at the principal office of the NYSE. 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-2008-115 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>16</sup>

Florence E. Harmon  
Acting Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).