

SECURITIES AND EXCHANGE COMMISSION

(Release No. 34-59755; File Nos. SR-NYSE-2009-18 and SR-NYSEAltr-2009-15)

April 13, 2009

Self-Regulatory Organizations; New York Stock Exchange LLC and NYSE Alternext US LLC (n/k/a NYSE Amex LLC); Order Granting Approval of Proposed Rule Changes Amending Rule 123C to Provide the Exchanges with the Ability to Temporarily Suspend Certain Requirements Relating to the Closing of Securities on the Exchange

I. Introduction

On February 19, 2009, the New York Stock Exchange LLC (“NYSE”) 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 amend NYSE Rule 123C to provide the Exchange with the ability to temporarily suspend certain NYSE requirements relating to the closing of securities at the Exchange. On February 20, 2009, NYSE Alternext US LLC (n/k/a NYSE Amex LLC) (“NYSE Amex” and, with NYSE, each an “Exchange” and collectively, the “Exchanges”) filed with the Commission, pursuant to Section 19(b)(1) of the Act³ and Rule 19b-4 thereunder,⁴ a substantively identical proposed rule change to amend NYSE Amex Equities Rule 123C. The proposed rule changes were published for comment in the Federal Register on March 10, 2009.⁵ The Commission received no comments regarding the proposals. This order approves the proposed rule changes, as amended.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(1).

⁴ 17 CFR 240.19b-4.

⁵ See Securities Exchange Act Release Nos. 59489 (March 3, 2009), 74 FR 10330 (SR-NYSE-2009-18) and 59488 (March 3, 2009), 74 FR 10334 (SR-NYSEAltr-2009-15) (each a “Notice” and collectively, the “Notices”).

II. Description of the Proposal

A. NYSE's October 2, 2008 Amendments to Rule 48

On October 2, 2008, NYSE filed for immediate effectiveness to amend NYSE Rule 48 to provide NYSE with the ability to suspend certain rules at the close when extremely high market volatility could negatively affect the ability to ensure a fair and orderly close.⁶ NYSE amended Rule 48 on a temporary basis in order to respond swiftly to market conditions at that time. The Rule 48 amendments are scheduled to end on April 30, 2009.⁷

On December 1, 2008, NYSE Amex (then known as NYSE Alternext US LLC) relocated its equities trading to facilities located at NYSE's main trading floor at 11 Wall Street, New York, New York (the "Equities Relocation"). NYSE Amex's equity trading systems and the facilities at 11 Wall Street are operated by NYSE on behalf of NYSE Amex. In connection with the Equities Relocation, NYSE Amex adopted NYSE Rules 1-1004, subject to such changes as necessary to apply the rules to NYSE Amex, to govern trading on the NYSE Alternext Trading System beginning on December 1, 2008.⁸ In particular, among the rules adopted in substantively identical form were the rules at issue in this proposal—most notably, NYSE Rules 48, 52, and 123C.

The temporary provisions of Rule 48 provide that a qualified Exchange officer could declare an extreme market volatility condition before the scheduled close of trading in cases

⁶ See Securities Exchange Act Release No. 58743 (October 7, 2008), 73 FR 60742 (October 14, 2008) (SR-NYSE-2008-102) (referred to herein as "NYSE's October 2, 2008 filing").

⁷ Rule 48.10. See also Securities Exchange Act Release Nos. 59168 (December 29, 2008), 74 FR 483 (January 6, 2009) (SR-NYSE-2008-139) and 59666 (March 31, 2009), 74 FR 15792 (April 7, 2009) (SR-NYSE-2009-35).

⁸ See Securities Exchange Act Release Nos. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63) and 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10).

where the Exchange noted volatility during the day’s trading session and evidence of significant order imbalances at the close.⁹ A declaration of extreme market volatility at the close under Rule 48 permits each Exchange to temporarily suspend Rule 52 (Hours of Operation) to allow the DMM to solicit and enter into Exchange systems additional orders in order to offset any imbalance in a security at the close.¹⁰ Rule 48 requires that any additional interest be represented manually on the Floor by an Exchange Floor broker.¹¹ A declaration of extreme market volatility at the close also permits each Exchange to temporarily suspend NYSE Rules 123C(1) and (2) (Market on the Close Policy and Expiration Policy) in order to allow cancellation or reduction of market-at-the-close (“MOC”) and limit-at-the-close (“LOC”) orders after 3:50 p.m. if such orders are the result of a legitimate error and would cause significant price dislocation at the close, among other requirements.¹² Each Exchange is required to make a reasonable effort to consult with Commission staff before declaring an extreme market volatility condition and granting a suspension of NYSE rules or procedures.¹³

The Exchanges now propose to adopt the amendments to Rule 48 on a permanent basis by deleting these provisions from Rule 48 and moving them to Rule 123C. As part of the amendments to Rule 123C, the Exchanges further propose modifying the terms of the temporary suspensions by permitting the Exchange to invoke such relief on a security-by-security basis without first declaring a Floor-wide extreme market volatility condition and codifying certain practices for the entry of orders after 4 p.m.

⁹ Rule 48(c)(1)(A).

¹⁰ Rule 48(b)(2)(A).

¹¹ Rule 48(b)(2)(A)(ii).

¹² Rule 48(b)(2)(B).

¹³ Rule 48(c)(2).

B. Proposed Amendments to Rule 123C

1. Modification of the Requirements for Temporary Suspensions

As noted above, the amendments to Rule 48 were adopted by NYSE as an emergency measure to respond to the extreme market volatility that the markets experienced in September and October 2008. Under current Rule 48, each Exchange must first declare a Floor-wide extreme market volatility condition before it can consider, on a security-by-security basis, whether to temporarily suspend either Rule 52 or Rule 123C(1) or (2). The Exchanges stated in their respective Notices that they believe the requirement to declare a Floor-wide extreme market volatility condition before 4 p.m. could hamper their ability to invoke the temporary suspensions when they are needed most—for example, when during normal market conditions that would not otherwise warrant a Rule 48 condition at the close, Exchange systems receive in the seconds before the close a large market order in a security that by itself creates the type of extreme imbalance that would merit a temporary suspension of Rule 52. The Exchanges therefore believe that the ability to temporarily suspend rules at the close should be available on a security-by-security basis as part of Rule 123C, which governs the closing process at the Exchange.¹⁴ The Exchanges therefore propose deleting the extreme market volatility at the close condition from Rule 48 and returning Rule 48 to a form substantively identical to the form of NYSE Rule 48 prior to NYSE's October 2, 2008 filing amending that rule.

2. Temporary Suspension of Rule 52

Proposed Rule 123C(8)(a)(1) would permanently establish the temporary provisions of Rule 48(b)(2)(A) that give each Exchange the ability to temporarily suspend Rule 52 for the sole purpose of allowing the entry of orders after 4:00 p.m. to offset an extreme order imbalance at

¹⁴ See proposed Rule 123C(8)(c).

the close. The Exchanges propose to adopt without change the language of Rule 48(b)(2)(A)(i) and (iii) (proposed as Rule 123C(8)(a)(1)(i) and (v)) concerning, respectively, the purpose of soliciting orders after 4:00 p.m. and the use of a “designated Exchange database”¹⁵ on an “as of” basis following execution of an order.

The Exchanges propose to codify in Rule 123C(8)(a)(1)(ii) the requirement that when soliciting orders to offset an imbalance in a security that may exist after 4:00 p.m., such interest will be solicited from off-Floor participants directly and via their Floor broker representatives. Such solicitation requests shall be transmitted electronically both off-Floor and on-Floor and shall include, at a minimum, information about the security symbol, the imbalance amount and side, the last sale price, and an order acceptance cut-off time (which in no event may be later than 4:30 p.m.). The Exchanges also propose adding conditions on the type of order that may be entered in response to a solicitation request. As proposed in Rule 123C(8)(a)(1)(iii), any offsetting interest received in response to a solicitation request must be a limit order priced no worse than the last sale and must be irrevocable.

The Exchanges propose to maintain in Rule 123C(8)(a)(1)(iii) that any offsetting interest must be represented by a Floor broker. As noted in the NYSE’s October 2, 2008 filing to amend Rule 48, Exchange systems do not have the capability to receive electronic interest after 4:00 p.m. The Exchanges stated in their respective Notices that the time and cost necessary to reconfigure Exchange systems to electronically accept orders after 4:00 p.m. for this limited purpose would far outweigh any benefit that may accrue from such technology changes. In any event, the Exchanges believe that more information is necessary before they undertake to implement any such technology change. The Exchanges therefore propose that six months after

¹⁵ In the Notices, the Exchanges refer to FESC as the relevant “designated Exchange database.”

the approval of this proposed rule change, the Exchanges will provide the Commission with information regarding how many times a Rule 52 temporary suspension under proposed Rule 123C(8)(a)(1) has been invoked. At that time, the Exchanges and the Commission can make a more informed decision of whether the benefit in accepting orders electronically after 4:00 p.m. outweighs the costs associated with making such changes. To provide both the Exchange and the Commission with time to evaluate the proposed rule, the Exchange proposes that Rule 123C(8)(a)(1) be approved on a Pilot basis, to end six months after the date of this order.

The Exchanges also propose to add to the rule certain parameters regarding the timing of the closing of a security when such offsetting interest is solicited. As proposed in Rule 123C(8)(a)(1)(iv), in such circumstances, the DMM should close the security the earlier of the order acceptance cut-off time or the time that the imbalance is paired off at or reasonably contiguous to the last sale price.¹⁶ This provision is intended to require the DMM to arrange for a fair and orderly close that is as close to 4:00 p.m. as possible, notwithstanding the fact that the Exchange seeks additional offsetting interest after 4:00 p.m. Finally, the Exchanges propose that any offsetting interest entered after 4:00 p.m., but before the DMM closes the security, would trade on parity.¹⁷

¹⁶ A “reasonably contiguous to the last sale price” means a price point that is within cents of the last sale price, and would be a price point that during a regular closing auction would not be considered a dislocating closing price as compared to the last sale price. See Rule 123C(8)(a)(1)(iv).

¹⁷ The Exchange notes that all MOC and marketable LOC orders entered before 4:00 p.m. that otherwise would have participated in the close will continue to participate in the close. Because the MOC/LOC imbalance dictates the closing price (see Rule 123C(3)), any additional interest solicited after 4:00 p.m. under proposed Rule 123C(8)(a)(1) is simply to ensure that the existing imbalance of MOC and marketable LOC orders can be filled at a price that does not cause a significant price dislocation from the last sale price.

3. Temporary Suspensions under Rule 123C(1) and (2)

The Exchanges propose to adopt permanently the provisions of Rule 48(b)(2)(B) as proposed Rule 123C(8)(a)(2), without any change. Therefore, each Exchange would continue to have the ability to temporarily suspend, on a security-by-security basis, the Rule 123C(1) and (2) requirements that MOC and LOC orders cannot be cancelled or reduced after 3:50 p.m. for MOC and LOC orders that are the result of a legitimate error and would cause significant price dislocation at the close.

4. Parameters for Obtaining Temporary Rule Suspensions

The Exchanges propose codifying the practices concerning how a temporary suspension under proposed Rule 123C(8)(a) would be invoked and who should be involved. As proposed in Rule 123C(8)(b), only the DMM assigned to a particular security may request a temporary suspension under proposed section 8(a) of the Rule. The Exchanges argued in their respective Notices that because the DMM is responsible for facilitating the close of trading in its registered securities, the DMM is in the unique position to know whether he or she would need additional interest to ensure a fair or orderly close.

To ensure that such temporary suspensions are not invoked indiscriminately, the Exchanges propose that any such determination, as well as any entry or cancellation of orders or closing of a security under proposed Rule 123C(8)(a), must be approved by either an Executive Floor Governor or a qualified NYSE Euronext employee, as defined in Rule 46(b)(v). The Exchange also proposes requiring that any temporary suspensions under proposed Rule 123C(8)(a) should be under the supervision of a qualified Exchange Officer, as defined in Rule 48(d). To assist the DMM and Exchange officials, proposed Rule 123C(8)(b) identifies a number of factors that may be considered when making such a determination. Such factors

include, but are not limited to, when the order(s) that impacted the imbalance were entered into Exchange systems or orally represented to the DMM; the impact of such order(s) on the closing price of the security; the volatility of the security during the trading session; and the ability of the DMM to commit capital to dampen the price dislocation.

C. Proposed Amendment to Rule 48(c)(2)

In addition to the above-described amendments, the Exchanges also propose to amend Rule 48(c)(2), which concerns the method by which each Exchange notifies Commission staff when it declares a Rule 48 extreme market volatility condition.

The current rule provides that the qualified Exchange officer will make a reasonable effort to consult with Commission staff before declaring an extreme market volatility condition and granting a suspension of the Exchange's rules or procedures. In the event that the qualified Exchange officer cannot reach the Commission staff, the qualified Exchange officer will, as promptly as practicable in the circumstances, inform the Commission staff of such declaration.

Given the limited relief that can be granted during a Rule 48 condition – certain Floor Official approvals are suspended and mandatory indications can be suspended – the Exchanges argued in their respective Notices that the requirement to consult with Commission staff before declaring an extreme market volatility condition imposes an undue burden on regulatory resources. Accordingly, the Exchanges propose to amend Rule 48(c)(2) to delete the requirement that the qualified Exchange officer undertake reasonable efforts to consult with Commission staff before declaring an extreme market volatility condition. As required by the rule, each Exchange will continue to inform the Commission staff, as promptly as practicable under the circumstances, when it has declared a Rule 48 extreme market volatility condition.

III. Commission's Findings and Order Granting Approval of the Proposed Rule Change

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁸ In particular, the Commission finds that the proposed rule changes are consistent with Section 6(b)(5) of the Act¹⁹ in that they are 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 Exchanges propose to eliminate the requirement that an Exchange first declare a Floor-wide extreme market volatility condition before it can consider, on a security-by-security basis, whether to temporarily suspend either Rule 52 or Rule 123C(1) or (2). The Commission notes that an extreme order imbalance at the close may be the result of Floor-wide volatility, but may also be a result of isolated volatility in a particular security, or of a single large order received close to the scheduled close. Therefore, the Commission agrees that the requirement that a Floor-wide extreme market volatility condition precede the invocation of temporary suspensions pursuant to Rule 128(c)(8) could hamper the Exchanges' ability to use Rule 128(c)(8) to help ensure a fair and orderly close in a specific security.

The Exchanges propose to make permanent and move to Rule 123C(8)(a)(1) the temporary provisions permitting the Exchanges to suspend Rule 52, regarding hours of operation, to permit DMMs to solicit and enter orders into Exchange systems after the scheduled close in order to offset an extreme order imbalance. As described above, because Exchange

¹⁸ In approving these proposed rule changes, the Commission notes that it has considered the proposed rules' impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁹ 15 U.S.C. 78f(b)(5).

systems are not configured to accept orders electronically after 4:00 p.m., any offsetting interest submitted by Exchange members in response to a solicitation for offsetting interest are required by Rule 123C(8)(a)(iii) to be represented by a Floor broker.

The Exchanges have argued in their respective Notices that requiring Floor brokers to represent offsetting interest does not unfairly discriminate against any market participants. The Exchanges state that the requirement to use a Floor broker, who would be acting only as an agent, does not deny anyone access to trading at the Exchange. And while the Commission notes that submitting order through a Floor broker might be more costly for some members than directly entering the offsetting interest orders electronically, the Exchanges assert that the Exchange customers that would typically respond to a solicitation request are sophisticated market participants who likely already have, or could easily arrange for, a relationship with a Floor broker to represent orders on their behalf, and that furthermore such customers have the wherewithal to enter into arrangements with Floor brokers that are financially competitive with entering orders directly into Exchange systems, e.g., via reduced commissions or pass through of Floor broker rebates.

The Exchanges also state that, though it would be possible to reconfigure Exchange systems to accept orders electronically after 4:00 p.m., to do so would be costly, and that the benefit to such a reconfiguration would be limited, since the temporary suspension of Rule 52 to attract offsetting interest is intended to be used for extreme, and likely rare, circumstances where there exists such a large imbalance at the close that the DMM could not close the security without significant price dislocation.²⁰ While the elimination of the Floor-wide declaration of an

²⁰ For example, NYSE reports that, in the period from October 2, 2008, when the Exchange adopted the amendments to Rule 48, to February 19, 2009, when NYSE filed their proposed rule change, NYSE invoked Rule 48 (i.e., declared a floor-wide extreme market

extreme market volatility condition as a prerequisite for suspending Rule 52 may increase the likelihood of Rule 52 suspensions on the Exchange, the Commission notes that other elements of Rule 128(c)(8), such as Executive Floor Governor oversight, are designed to restrict suspension of Rule 52 to situations where it is necessary to maintain a fair and orderly market.

The Commission notes that the Exchanges have proposed to implement Rule 128(c)(a)(1) for a six-month pilot period, and have agreed to provide to the Commission information regarding how many times a Rule 52 temporary suspension under proposed Rule 123C(8)(a)(1) has been invoked during such period. Such information should assist the Commission in making a determination as to whether the requirement that only Floor brokers may represent offsetting interest is appropriate. Thus, the Commission approves Rule 123C(8)(a)(1) on a Pilot basis, to end six months after the date of this order.

The Commission finds the proposal to permanently establish the provisions allowing for temporary suspension of Rule 123C's restriction on cancelling or reducing market-at-the-close and limit-at-the-close orders to be consistent with the Act. The Exchanges' ability to suspend these restrictions is narrowly drawn—it would only affect MOC or LOC orders that are both clearly erroneous and would cause a significant dislocation in the closing price—in order to ensure its use will be consistent with the removal of impediments to, and perfection of the mechanism of, free and open markets on the Exchanges. Similarly, the requirement for overview by an Executive Floor Governor or qualified NYSE Euronext employee should help to ensure that only in extreme situations involving significant price dislocation at the close are the provisions of Rule 128(C)(8) employed.

condition) at the close eight times. However, because the DMM does not know what the actual imbalance will be until 4:00 p.m., during that time NYSE solicited offsetting interest for only one security on one such trading day.

Finally, given that the Exchanges anticipate their uses of Rule 123C(8) to suspend Exchange rules will be infrequent and, moreover, given the quick decisions required in many cases where an extreme market condition is declared, the Commission accepts the Exchanges' assertion that requiring the Exchange to notify Commission staff in advance may be unduly burdensome. Accordingly, the Commission finds the proposed amendment to Rule 48(c)(2), requiring each Exchange to notify Commission staff of the declaration of an extreme market condition as soon as practicable after the fact, to be consistent with the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²¹ that the proposed rule changes, as amended (SR-NYSE-2009-18 and SR-NYSEAltr-2009-15) be, and they hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²²

Florence E. Harmon
Deputy Secretary

²¹ 15 U.S.C. 78s(b)(2).

²² 17 CFR 200.30-3(a)(12).