

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-65865; File No. SR-NYSE-2011-58)

December 2, 2011

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change to Amend NYSE Rule 104(a)(1)(A) to Reflect that Designated Market Maker Unit Quoting Requirements Are Based On Consolidated Average Daily Volume

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 18, 2011, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Exchange has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal effective upon filing with the Commission. 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] [sic] NYSE Rule 104(a)(1)(A) to reflect that, when determining the specific percentage quoting requirement applicable to a Designated Market Maker unit (“DMM unit”), volume for the particular security is based on consolidated average daily volume (“CADV”). The text of the proposed rule change is available at the Exchange, the Commission’s Public Reference Room, and [www.nyse.com](http://www.nyse.com).

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

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 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 proposes to amend NYSE Rule 104(a)(1)(A)<sup>4</sup> to reflect that, when determining the specific percentage quoting requirement applicable to a DMM unit,<sup>5</sup> volume for the particular security is based on CADV.<sup>6</sup>

A DMM unit must maintain a bid or an offer at the National Best Bid and National Best Offer (“inside”) a minimum of either 10% or 15% of the trading day, depending on trading volume for the security. NYSE Rule 104(a)(1)(A) currently reflects for one of the calculations,

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<sup>4</sup> NYSE Rule 104 is currently in effect during a pilot period (“New Market Model Pilot” or “NMM Pilot”). See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46) (the “NYSE NMM Approval”). The Exchange has extended the operation of the NMM Pilot several times and it is currently set to expire on January 31, 2012. See Securities Exchange Act Release No. 64761 (June 28, 2011), 76 FR 39147 (July 5, 2011) (SR-NYSE-2011-29).

<sup>5</sup> See NYSE Rule 98(b)(2). “DMM unit” means any member organization, aggregation unit within a member organization, or division or department within an integrated proprietary aggregation unit of a member organization that (i) has been approved by NYSE Regulation pursuant to section (c) of NYSE Rule 98, (ii) is eligible for allocations under NYSE Rule 103B as a DMM unit in a security listed on the Exchange, and (iii) has met all registration and qualification requirements for DMM units assigned to such unit.

<sup>6</sup> Given the multitude of venues where equity securities trade, CADV is more reflective of the trading characteristics of a security than the volume on any single market.

but not the other, that, when determining the specific percentage quoting requirement applicable to a DMM unit, trading volume for the particular security is based on volume “on the Exchange.” The reference to “on the Exchange” was inadvertently included in the Exchange’s proposal to implement the NMM Pilot.<sup>7</sup> In this regard, and as reflected in the NYSE NMM Approval, the Exchange intended that trading volume for a particular security would be based on CADV when determining the specific percentage quoting requirement applicable to a DMM unit.<sup>8</sup>

As proposed, NYSE Rule 104(a)(1)(A) would reflect that, with respect to maintaining a continuous two-sided quote with reasonable size, DMM units must maintain a bid or an offer at the inside at least 15% of the trading day for securities in which the DMM unit is registered with a consolidated average daily volume of less than one million shares, and at least 10% for

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<sup>7</sup> NYSE Amex LLC has filed a similar proposal to similarly change the text of NYSE Amex Equities Rule 104(a)(1)(A), which is based on NYSE Rule 104(a)(1)(A), from volume “on the Exchange” to “consolidated” volume.

<sup>8</sup> See NYSE NMM Approval at 64381, which states that “[f]or securities that have a consolidated average daily volume of less than one million shares per calendar month, a DMM Unit must maintain a bid or an offer at the NBBO for at least 10% of the trading day (calculated as an average over the course of a calendar month). For securities that have a consolidated average daily volume of equal to or greater than one million shares per calendar month, a DMM Unit must maintain a bid or an offer at the NBBO for at least 5% or more of the trading day (calculated as an average over the courts (sic) of a calendar month.” See also NYSE NMM Approval at n.71. A subsequent NYSE rule change similarly noted that, “with respect to maintaining a continuous two-sided quote with reasonable size, DMMs must maintain a bid or offer at the NBBO...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 [DMM] 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 [DMM] 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.” See Securities Exchange Act Release No. 58971 (November 17, 2008), 73 FR 71070 (November 24, 2008) (SR-NYSE-2008-115) at n.5. CADV is similarly used to differentiate between “more active” and “less active” securities under NYSE Rule 103B.

securities in which the DMM unit is registered with a consolidated average daily volume equal to or greater than one million shares.

2. Statutory Basis

The Exchange believes that its proposal is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>9</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>10</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, 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. Specifically, the proposed change would align the text of NYSE Rule 104(a)(1)(A) with the previously approved manner by which to measure trading volume of a particular security, as set forth in NYSE Rule 103B, and consistent with the NMM Approval order, which also discussed the use of CADV, and not just trading volume on the Exchange, for purposes of measuring the quoting requirement applicable to a DMM unit.

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 does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by

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<sup>9</sup> 15 U.S.C. 78f(b).

<sup>10</sup> 15 U.S.C. 78f(b)(5).

its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6) thereunder.<sup>12</sup>

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission believes that waiver of the operative delay is consistent with the protection of investors and the public interest. Such waiver will allow the Exchange's Rules to immediately reflect the fact that DMM unit quoting requirements are calculated based on CADV rather than trading volume on the Exchange. Therefore, the Commission designates the proposal operative upon filing.<sup>13</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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.

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<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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. The Exchange has satisfied this requirement.

<sup>13</sup> For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

#### 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-2011-58 on the subject line.

##### Paper comments:

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

All submissions should refer to File Number SR-NYSE-2011-58. 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 will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at [www.nyse.com](http://www.nyse.com). 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 publicly available. All submissions should refer to File Number SR-NYSE-2011-58 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>14</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>14</sup> 17 CFR 200.30-3(a)(12).