

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-85367; File No. SR-NYSE-2019-09)

March 20, 2019

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Amend Rules 104 and 36 to Require and Facilitate Routine Communications Between Designated Market Makers (“DMMs”) and Designated Representatives of Listed Issuers

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (“Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on March 8, 2019, 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 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 Rules 104 and 36 to require and facilitate routine communications between Designated Market Makers (“DMMs”) and designated representatives of listed issuers. The proposed rule change is available on the Exchange’s website at [www.nyse.com](http://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 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend [sic] 104 (Dealings and Responsibilities of DMMs) and Rule 36 (Communication Between Exchange and Members’ Offices) to require and facilitate routine DMM communication with designated representatives of listed issuers.

Proposed Rule Change

As described below, the Exchange proposes to amend Rule 104 to require DMM units to communicate with designated individuals at each issuer of listed securities in whose securities DMMs associated with the DMM unit are registered and would describe how the communication requirement can be met. The Exchange also proposes to amend Rule 36 to facilitate written electronic communications with issuers from the Floor of the Exchange (the “Floor”)<sup>4</sup> pursuant to proposed Rule 104(l) during specified time periods and subject to certain restrictions.

Rule 104

Rule 104 sets forth the obligations of Exchange DMMs. The Exchange proposes to add a new paragraph (l) to Rule 104 titled “Communication with Issuers of Listed Securities” that would set forth the obligation of DMMs to communicate with their listed issuers.

Proposed Rule 104(1)(1) would provide that, on at least a quarterly basis, each DMM unit

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<sup>4</sup> Rule 6 defines the Floor as the trading Floor of the Exchange and the premises immediately adjacent thereto, such as the various entrances and lobbies of the 11 Wall Street, 18 New Street, 8 Broad Street, 12 Broad Street and 18 Broad Street Buildings, and also means the telephone facilities available in these locations.

must communicate with one or more senior officials of each issuer of listed securities in whose securities DMMs associated with the DMM unit are registered, with the exception of American Depositary Receipts (“ADR”).<sup>5</sup> The proposed rule would also provide that the senior official designated by the listed issuer for the proposed contacts must be of the rank of Corporate Secretary or higher and must not be involved in market or trading operations for or on behalf of the listed issuer or with respect to the listed security. The Exchange proposes to provide the senior officials at the issuer with the option to designate an individual to communicate with the DMMs on their behalf by including the clause “or a designee thereof” following “Corporate Secretary or above,” which the Exchange believes would enable issuers to more efficiently manage the communication process. As proposed, the designee would also have to be a person at the issuer who is not be involved in market or trading operations for or on behalf of the listed issuer or with respect to the listed security.

This proposed obligation would be on the DMM units only. DMM units would be required to communicate with the listed issuer contact, but the listed issuer contact would not be required to reciprocate. For example, a DMM unit could meet its obligation by sending an email communication to the listed issuer contact. However, the listed issuer contact would not be obligated to respond to that communication in writing or otherwise.

To address the possibility that a DMM unit may not have contact information for any individuals at a listed issuer, proposed Rule 104(1)(A) would provide that if a DMM unit does not have contact information for a listed issuer, the DMM unit can seek to communicate with the

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<sup>5</sup> ADRs are certificates representing a specified number of shares in non-U.S. issuers that are deposited and issued through U.S. banks. The shares underlying ADRs are primarily listed and traded on non-U.S. markets. The Exchange believes that the purpose for the proposed change is not furthered by requiring DMMs to contact foreign issuers whose ordinary listing is not on the Exchange and therefore proposes to exclude ADRs from the periodic communication requirement.

Corporate Secretary most recently named on a public filing by such issuer.

Proposed Rule 104(1)(2) would describe the ways in which the periodic communication requirement set forth in proposed subparagraph (1)(1) can be met. Specifically, proposed subparagraph (1)(2) would provide that the communication requirement may be met by either in-person meetings, telephone calls, or written communications.

The required communications would be explicitly subject to existing restrictions on DMMs. First, as set forth in proposed Rule 104(1)(2)(A), during the required communications, employees of the DMM unit would have to comply with the requirements of Rule 98<sup>6</sup> with respect to the information that may be shared with the listed issuer contact. Second, as described in proposed Rule 104(1)(2)(B), an employee of a DMM unit may not communicate with a listed issuer contact from the Floor via telephone. However, the Exchange proposes that an employee of a DMM unit would be able to communicate with a listed issuer contact from the Floor using electronic written communications, subject to the requirements and safeguards set forth in proposed Rule 36.31, described below. Finally, proposed Rule 104(1)(2)(C) would provide that DMM units must establish written policies and procedures reasonably designed to ensure that DMMs are in compliance with the requirements of the proposed rule.

Proposed Rule 104(1)(3) would describe the non-regulatory penalties to be imposed if DMMs fail to initiate the required contacts with listed issuers. Specifically, if a DMM unit fails to initiate the required communication with the listed issuer for a single quarter, the Exchange would issue an initial warning letter to the DMM unit. If a DMM unit fails to initiate the required communication with the listed issuer for a two or more quarters, that DMM unit would

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<sup>6</sup> Rule 98 governs the operation of DMM units and imposes certain restrictions on DMM trading including, among other things, requiring that DMM units to protect against the misuse of Floor-based non-public order information. See, e.g., Rule 98(c)(3).

be ineligible to participate in the allocation process for a minimum of one month following the second quarter of its failure to meet its contact requirement.

The proposed rule is substantively similar to former NYSE Rule 106(a), which provided that “[d]uring each quarter, each Exchange specialist unit shall contact one or more senior officials, of the rank of Corporate Secretary or above, of each company in whose stock specialists associated with the specialist unit are registered.” NYSE Rule 106 was deleted in 2008.<sup>7</sup> At the time, the Exchange determined that the requirement in former Rule 106 that specialist units make themselves available for contact with their listing companies periodically throughout the year was unnecessary to ensure that listed issuers were informed about trading in their listed securities given the availability of public information and the fact that specialist units had internal departments responsible for communicating with issuers during the trading day.<sup>8</sup> Following the deletion of Rule 106, the internal departments responsible for communicating with issuers were largely dismantled, and DMM communications with issuers have become less regular.

Because each listed security is assigned to a single DMM, the Exchange believes that one of the core functions of the DMM units is to maintain regular communications with listed issuers about trading activity in their securities. While DMM firms may no longer be structured as they were when former Rule 106 was in place, DMM units still regularly communicate with their listed issuers. The Exchange proposes to reinstate the mandated interaction between DMMs and listed issuers<sup>9</sup> because the Exchange believes that this would ensure that a minimum level of

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<sup>7</sup> See Securities Exchange Act Release No. 83540 (October 24, 2008), 73 FR 65435 (November 3, 2008) (SR-NYSE-2008-52).

<sup>8</sup> See *id.*, 73 FR at 65437.

<sup>9</sup> Former Rule 106 also required, for instance, that the specialist unit makes itself available to the Exchange’s fifteen (15) largest member organizations through required semiannual

communication is occurring between DMM units and all listed issuers. The proposed rule would therefore establish a minimum level of required contacts. The Exchange understands that most DMM units have more frequent communications with their listed issuers.

### Rule 36

Rule 36 governs the establishment of telephone or electronic communications connections between the Floor and other locations, which requires Exchange approval. Supplementary Material .31 to Rule 36 (“DMM Electronically Transmitted Written Communications”) permits DMM units to install and maintain certain written electronic communications applications. Specifically, Rule 36.31(a) permits a DMM unit, subject to Exchange approval and the conditions set forth in Rule 36.31, to install and maintain a wired or wireless device capable of sending and receiving written communications electronically through an Exchange-approved connection (a “Permitted Communications Device”).<sup>10</sup> Under Rule 36.31(b), DMM units can connect Floor-based personnel via a Permitted Communications Device to persons with whom they are otherwise permitted to communicate pursuant to Rules 36.30 and 98, i.e., certain personnel in the off-Floor offices of the DMM unit, the DMM unit’s clearing operations, and persons who are permitted to provide non-trading related services to the DMM unit under Rule 98. Once connected, on-Floor and off-Floor personnel are permitted to use the Permitted Communications Device for two-way written electronic communications as permitted by Rules 36.30 and 98.

To facilitate the DMM unit’s proposed obligation to maintain regular communications with listed issuers, the Exchange proposes to amend Rule 36.31(b) to permit Floor-based DMM

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“off the Exchange Floor” contact. See id.

<sup>10</sup> Examples of Permitted Communications Devices include email and instant messaging via a desktop or laptop computer.

personnel to utilize Permitted Communications Devices for written electronic communications with the listed issuer representative designated under Rule 104(l)(1).

To effectuate this change, the Exchange would replace “shall only permit written electronic communications” before “Permitted Communications Device” in Rule 36.31(b) with “may be used while on the Trading Floor for written electronic communications” and add new subparagraphs (1) and (2).

Proposed Rule 36(b)(1) would reflect the current rule that Permitted Communications Devices may be used for electronic written communications between individuals located at the DMM unit's post on the Floor and persons with whom they are otherwise permitted to communicate pursuant to Rules 36.30 and 98.

Proposed Rule 36(b)(2) would reflect the proposed rule that Permitted Communications Devices may be used for written electronic communications with the listed issuer representative designated under proposed Rule 104(l)(1), subject to the content restrictions set forth in that rule as described above and provided that a DMM unit may not use a Permitted Communications Device for this purpose for the periods 9:15 a.m. Eastern Time (“E.T.”) until the security is opened, and again beginning 15 minutes before the scheduled close of trading until the security is closed.

The proposed time restrictions are designed to limit communications between the DMM and listed issuer during the period when a DMM would need to access non-public trading information to facilitate the opening or closing transactions, i.e., the fifteen minutes prior to a security being opened and closed by the DMM.<sup>11</sup> The Exchange believes that this proposed

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<sup>11</sup> In connection with opening and closing a security, DMMs have access to non-public order information, specifically, the aggregate amount of specified Reserve Orders that are eligible to participate in the opening and closing transactions. See Rule 104(a)(2) and (3)

bright-line restriction on communications would eliminate any potential for non-public information to be shared by the DMM with a listed issuer in advance of the opening or closing of trading. The Exchange further believes that the Rule 98 requirements for the DMM to have policies and procedures reasonably designed to protect against the misuse of Floor-based non-public order information would restrict the DMMs from being able to share any non-public information the rest of the trading day.<sup>12</sup>

Finally, the requirements in current Rule 36.31(c) that a DMM unit must maintain records of all written communications sent from or to the DMM via the Permitted Communications Device in accordance with Rule 440 and SEC Rule 17a-4(b)(4)<sup>13</sup> and in such format as may be prescribed by the Exchange, and the requirement in current Rule 36.31(d) that a DMM's member organization must establish policies and procedures reasonably designed to ensure that use of the Permitted Communications Device is consistent with all SEC rules and Exchange rules, policies and procedures, would remain unchanged.

The Exchange believes that allowing DMM units to use a Permitted Communications Device to communicate with issuers from the Floor is appropriate because the DMM units would continue to be subject to the requirements of Rule 98 and existing restrictions on the use of Permitted Communications Devices.

The proposed rule change would in no way alter the obligations of a DMM unit to meet existing requirements under Rule 98 to, among other things, protect non-public order information and maintain appropriate information barriers in accordance with Rule 98. Because DMM units

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(specifying that DMMs and DMM unit algorithms have access to aggregate order information in order to comply with their requirement to facilitate openings and closings).

<sup>12</sup> See Rule 98(c)(3)(A).

<sup>13</sup> See Rule 440 (Books and Records) & 17 CFR 240.17a-4(b)(4).

would continue to be subject to Rule 98, while on the Floor, DMM unit personnel could not use the Permitted Communications Device to communicate with issuers in violation of Rule 98. For example, DMM units would continue to be subject to the provisions of Rule 98 governing restrictions on communications with off-Floor individuals or systems responsible for making trading decisions in related products. The Exchange also believes that prohibiting written electronic communications from the Floor before the open and going into the close further assists DMM units in protecting non-public order information when communicating with issuers from the Floor.

DMM units would also continue to be obligated to program its communications system so that a Permitted Communications Device would not operate in a manner enabling written electronic communications to or from any location or individual other than as described in proposed amended Supplementary Material .31. Among other things, the DMM unit would be required to program its communications system to ensure that messages cannot be forwarded by DMM Floor personnel to anyone at the issuer with whom Floor personnel are not permitted to communicate.

Finally, the Exchange believes that use of auditable written electronic communications as the only permitted method for DMM units to communicate with issuers from the Floor and the related retention requirements would facilitate and enhance the Exchange's existing regulatory program. In particular, the Exchange would be able to review the email system operating the connections between the Floor and the issuer, the related written supervisory procedures, and both the content of, and participants in, any written communications.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with Section 6(b) of

the Act,<sup>14</sup> in general, and furthers the objectives of Section 6(b)(5) of the Act,<sup>15</sup> in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, and to remove impediments to and perfect the mechanism of a free and open market and a national market system.

In particular, the Exchange believes that the proposed requirement that DMMs maintain regular contact with listed issuers would foster cooperation and coordination with persons engaged in facilitating transactions in securities, and would remove impediments to and perfect the mechanism of a free and open market and a national market system by promoting a better understanding of the needs of listed issuers and fostering communications among DMMs and listed issuers. The Exchange believes that routine and regular contacts between DMMs and listed issuers should be encouraged and will help to foster an understanding of the DMM function, the operations of the Exchange market, and the markets that are maintained in the listed issuers' securities, as well as assisting DMMs to better perform their functions, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market system. Moreover, the Exchange believes that excluding ADRs from the proposed requirement is not inconsistent with this goal because the shares underlying ADRs are not primarily listed and traded on the Exchange. The Exchange also believes that the proposed amendments to Rule 36 support the mechanism of free and open markets by facilitating DMM communications with issuers from the Floor during the trading day, subject to the safeguards described above.

Further, the proposed rule change is designed to prevent fraudulent and manipulative acts and practices and would be consistent with the public interest and the protection of investors

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<sup>14</sup> 15 U.S.C. 78f(b).

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

because of the numerous safeguards surrounding the manner and form in which DMMs can communicate with listed issuers proposed for inclusion in Rules 104 and 36. The proposed safeguards would include:

- requiring communications to occur with a very senior official designated by the listed issuer;
- requiring that the official designated by the listed issuer not be involved in market or trading operations for or on behalf of the listed issuer or with respect to the listed security;
- requiring employees of the DMM unit to comply with the requirements of Rule 98 with respect to the information that may be shared with the listed issuer contact during the required communications, including written electronic communications from the Floor;
- preventing employees of the DMM unit from communicating with a listed issuer contact from the Floor via telephone;
- requiring that, while on the Floor, employees of the DMM unit only communicate with a listed issuer contact in written electronic form using a monitored Permitted Communications Device; and
- prohibiting written electronic communications from the Floor with the listed issuer contact during the busiest part of the trading day from 9:15 a.m. E.T. until the security is opened and beginning fifteen minutes before the scheduled close of trading until the security is closed.

The Exchange believes that these proposed safeguards establish an appropriate regulatory framework for supervising and monitoring mandated DMM communications with listed issuers

consistent with the objectives of Section 6(b)(5) of the Act.<sup>16</sup>

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 Exchange does not believe that the proposed rule change will impose any burden on competition because the proposed change relates to how DMMs communicate with their listed issuers and proposes no change for other market participants. In addition, the Exchange does not believe that the proposed changes will impose any competitive burden because DMMs will operate in the same manner, including from the Floor, when communicating with issuers.

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.

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<sup>16</sup> 15 U.S.C. 78f(b)(5).

#### 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-2019-09 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.

All submissions should refer to File Number SR-NYSE-2019-09. 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. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2019-09 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>17</sup>

Eduardo A. Aleman  
Deputy Secretary

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<sup>17</sup> 17 CFR 200.30–3(a)(12).