

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-86163; File No. SR-NYSE-2019-09)

June 20, 2019

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, to Amend Exchange Rules 104 and 36 to Require Communications From a Designated Market Maker (“DMM”) to a Designated Senior Representative of an Issuer of Registered Listed Securities

I. Introduction

On March 8, 2019, the New York Stock Exchange LLC (“NYSE” or “Exchange”) 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 Rules 104 and 36 to require Designated Market Makers (“DMMs”) to communicate with a designated senior representatives of the issuers of the DMM’s assigned securities. The proposed rule change was published in the Federal Register on March 26, 2019.³

On May 10, 2019, the Commission designated a longer time period within which to approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.⁴ On June 18, 2019, the Exchange filed Amendment No. 1, which superseded the original filing, to the proposed rule change.⁵ The Commission has received no comments on the proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 85367 (Mar. 20, 2019), 84 FR 11382 (Mar. 26, 2019) (“Notice”).

⁴ See Securities Exchange Act Release No. 85826 (May 10, 2019), 84 FR 22173 (May 16, 2019).

⁵ In Amendment No. 1, the Exchange modified its original proposed rule change to clarify in proposed NYSE Rule 36.31 that a Permitted Communication Device shall only permit written electronic communications between individuals located at the DMM unit’s post

The Commission is publishing this notice to solicit comments on Amendment No. 1 from interested persons and is approving the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Self-Regulatory Organization's Description of the Proposed Rule Change, as Modified by Amendment No. 1

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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend 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

on the Floor with: (1) individuals with whom telephone communications are permitted under NYSE Rules 36.30 and 98, subject to the same content restrictions set forth in those rules or (2) the listed issuer representatives designated under NYSE Rules 104(l)(1), subject to the same content restrictions set forth in that rule, provided that a DMM unit may not use a Permitted Communications Device for this purpose from 9:15 a.m. Eastern Time until the security is opened and from 15 minutes before the scheduled closing time for a security until the security is closed.

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”)⁶ 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 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”).⁷ 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

⁶ 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.

⁷ 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.

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 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 98⁸ 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

⁸ 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).

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 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 2008.⁹ 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.¹⁰

⁹ See Securities Exchange Act Release No. 83540 (October 24, 2008), 73 FR 65435 (November 3, 2008) (SR-NYSE-2008-52).

¹⁰ See *id.*, 73 FR at 65437.

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 issuers¹¹ because the Exchange believes that this would ensure that a minimum level of 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

¹¹ 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 “off the Exchange Floor” contact. See id.

an Exchange-approved connection (a “Permitted Communications Device”).¹² Under Rule 36.31(b), the Permitted Communications Device shall only permit written electronic communications between Floor-based personnel and individuals 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.

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 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 amend Rule 36.31(b) to add new subparagraphs (1) and (2), which would describe the two circumstances when using a Permitted Communications Device would be permitted.

Proposed Rule 36.31(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 36.31(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

¹² Examples of Permitted Communications Devices include email and instant messaging via a desktop or laptop computer.

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.¹³ The Exchange believes that this proposed 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.¹⁴

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)¹⁵ 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

¹³ 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) (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).

¹⁴ See Rule 98(c)(3)(A).

¹⁵ See Rule 440 (Books and Records) & 17 CFR 240.17a-4(b)(4).

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 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,¹⁶ in general, and furthers the objectives of Section 6(b)(5) of the Act,¹⁷ 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

¹⁶ 15 U.S.C. 78f(b).

¹⁷ 15 U.S.C. 78f(b)(5).

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 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.¹⁸

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.

¹⁸ 15 U.S.C. 78f(b)(5).

III. Discussion and Commission Findings

After careful review of the proposal, as modified by Amendment No. 1, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹⁹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,²⁰ which requires that the rules of a national securities exchange are 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 regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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 has proposed to require that each DMM unit, on at least a quarterly basis, communicate with one or more senior officials of each issuer of listed securities in whose securities (with the exception of ADRs) DMMs associated with the DMM unit are registered. DMMs units that fail to initiate the required communication for two or more quarters will be ineligible to participate in the allocation process for securities for a minimum of one month.

The Exchange has also proposed certain provisions designed to prevent the misuse of material non-public information. First, only designated senior officials of the issuer who are at or above the rank of Corporate Secretary, and who are not involved in market or trading operations for or on behalf the issuer, may receive these communications. Second, employees of the DMM unit must comply with NYSE Rule 98, which requires DMM units to protect against the misuse

¹⁹ In approving the proposed rule change, as modified by Amendment No. 1, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

²⁰ 15 U.S.C. 78f(b)(5).

of floor-based non-public order information. Third, an employee of a DMM unit may not communicate with a listed issuer from the trading floor via telephone—any communications from the trading floor to the listed issuer must be made in writing via a Permitted Communications Device in accordance with proposed NYSE Rule 36.31 and cannot take place in the period before the open or the close of trading. Fourth, existing Rule 36.31(c) provides that a DMM’s member organization must maintain records of all written communications sent from or to the DMM via the Permitted Communications Device. And finally, the proposal requires DMM units to establish written policies and procedures reasonably designed to ensure that DMMs are in compliance with the proposed rule.

The Commission believes that the proposal is reasonably designed to prevent the misuse of material non-public information originating on the Exchange floor and notes that, prior to 2008, NYSE Rule 106 required specialist units (the precursors to DMMs) to make themselves available for contact with their listed issuers quarterly, with at least one in-person meeting.²¹ For the foregoing reasons, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act.

IV. Solicitation of Comments on Amendment No. 1 to the Proposed Rule Change

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether Amendment No. 1 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

²¹ See Securities and Exchange Commission Release No. 58857 (Oct. 24, 2008), 73 FR 65435, 65437 (Nov. 3, 2008) (SR-NYSE-2008-52) (approving NYSE proposal to, among other things, rescind NYSE Rule 106).

- Send an e-mail to 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].

V. Accelerated Approval of Amendment No. 1

As noted above, in Amendment No. 1, the Exchange proposes to clarify NYSE Rule 36.31 and how a DMM unit may use permitted communications devices. The Commission believes that the amendments to proposed NYSE rule 36.31 are consistent with the requirements of the Act and raise no novel regulatory issues. The amendments closely follow existing NYSE Rule 36.31 and clearly indicate that while on the trading floor, written communications can only come from a permitted communications device to the listed issuer. The Commission finds that Amendment No. 1 is reasonably designed to prevent fraudulent and manipulative acts and practices and to protect investors and the public. Accordingly, the Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposal, as modified by Amendment No. 1, on an accelerated basis.

VI. Conclusion

IT IS THEREFORE ORDERED that, pursuant to Section 19(b)(2) of the Act,²² the proposed rule change (SR-NYSE-2019-09), as modified by Amendment No. 1, be, and it hereby is, APPROVED on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²³

Vanessa A. Countryman
Acting Secretary

²² 15 U.S.C. 78s(b)(2).

²³ 17 CFR 200.30-3(a)(12).