

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68923; File Nos. SR-NYSE-2012-57; SR-NYSEMKT-2012-58)

February 13, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes Deleting NYSE Rules 95(c) and (d) and NYSE MKT Rules 95(c) and (d) – Equities and Related Supplementary Material

I. Introduction

On October 26, 2012, the New York Stock Exchange LLC (“NYSE”) and NYSE MKT LLC (“NYSE MKT”) (collectively, the “Exchanges”), each filed with the Securities and Exchange Commission (“Commission”), 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> proposed rule changes (“Proposals”) to delete NYSE Rules 95(c) and (d) and related Supplementary Material and NYSE MKT Rules 95(c) and (d) – Equities and related Supplementary Material, respectively. The Proposals were published for comment in the Federal Register on November 15, 2012.<sup>3</sup> The Commission received no comment letters on the Proposals.

On December 21, 2012, the Commission extended the time period in which to either approve, disapprove, or to institute proceedings to determine whether to disapprove the Proposals, to February 13, 2013.<sup>4</sup> This order institutes proceedings under Section 19(b)(2)(B) of the Act to determine whether to approve or disapprove the Proposals.

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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> See Securities Exchange Act Release No. 68185 (November 8, 2012), 77 FR 68188 (November 15, 2012) (SR-NYSE-2012-57) (“NYSE Notice”); Release No. 68186 (November 8, 2012), 77 FR 68191 (SR-NYSEMKT-2012-58) (“NYSE MKT Notice”).

<sup>4</sup> See Securities Exchange Act Release No. 68522 (December 21, 2012), 77 FR 77160 (December 31, 2012) (SR-NYSE-2012-57); Release No. 68521 (December 21, 2012), 77 FR 77152 (SR-NYSEMKT-2012-58).

## II. Description of the Proposals

The Exchanges propose to delete NYSE Rules 95(c) and (d) and related Supplementary Material, and NYSE MKT Rules 95(c) and (d) – Equities and related Supplementary Material concerning restrictions on the ability of a Floor broker to engage in intra-day trading.<sup>5</sup>

Currently, NYSE Rule 95(c) states that if a Floor broker acquires a position for an account during a particular trading session, while at the same time on behalf of that same account, representing market or limit orders at the minimum variation on both sides of the market, the Floor broker may liquidate or cover the position only pursuant to a new order, which must be time-recorded upstairs and upon receipt on the Floor.<sup>6</sup>

NYSE Rule 95(d) defines an account as any account in which the same person or persons is directly or indirectly interested.<sup>7</sup> NYSE Rule 95(d) further states that a Floor broker representing an order to liquidate or cover a position, which was established during the same trading session at a time when the broker represented orders at the minimum variation on both sides of the market for the same account, must execute that liquidating or covering order before any other order on the same side of the market for that account.<sup>8</sup> NYSE Rule 95 Supplementary

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<sup>5</sup> As noted by NYSE MKT, NYSE MKT Rule 95 – Equities is an almost identical version of NYSE Rule 95, and was adopted at the time of acquisition of The Amex Membership Corporation by NYSE Euronext. See NYSE MKT Notice, 77 FR at 68191. NYSE MKT stated that the rationale for the adoption of NYSE MKT Rules 95(c) – Equities and (d) – Equities was the same as the rationale for the adoption of NYSE Rules 95(c) and (d) in 1994. Id. Given that the NYSE and NYSE MKT rules are virtually identical, and that the rationale for the adoption of the rules is the same, references to the text of NYSE Rule 95 in this order and the rationale for its adoption, unless otherwise noted, apply equally to NYSE MKT Rule 95 – Equities.

<sup>6</sup> See NYSE Rule 95(c). NYSE Rule 95(c) further provides that all liquidating orders must be marked as “BC” when covering a short position, or “SLQ” when liquidating a long position.

<sup>7</sup> See NYSE Rule 95(d).

<sup>8</sup> See NYSE Rule 95(d).

Material .20 and .30 sets forth examples applicable to NYSE Rule 95(c) and (d).

NYSE adopted NYSE Rule 95(c) and (d) and related Supplementary Material .20 and .30 in 1994 to address “intra-day trading” by Floor brokers.<sup>9</sup> Intra-day trading occurs when a market participant places orders on both sides of the market and attempts to garner the spread by buying at the bid and selling at the offer. According to NYSE, NYSE Rule 95(c) was meant to address situations where a Floor broker may have been perceived as having an advantage over other market participants, such as individual investors, because the Floor broker could trade on both sides of the market without leaving the Crowd.<sup>10</sup> NYSE stated that requiring the Floor broker to obtain a new liquidating order was designed to reduce the immediacy with which a Floor broker could react to changing market conditions on behalf of an intra-day trading account by requiring him or her to leave the Crowd in order to receive a new liquidating order.<sup>11</sup> The restriction was meant to “enhance investors’ confidence in the fairness and orderliness of the Exchange

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<sup>9</sup> See Securities Exchange Act Release No. 34363 (July 13, 1994), 59 FR 36808 (July 19, 1994) (“Rule 95(c) Adopting Release”). NYSE Rule 95(c) provides that, “[i]f a Floor broker acquires a position for an account during a particular trading session while representing at the same time, on behalf of that account, market or limit orders at the minimum variation on both sides of the market, the broker may liquidate or cover the position established during that trading session only pursuant to a new order (a liquidating order) which must be time-recorded upstairs and upon receipt on the trading Floor.” As a related matter, NYSE Rule 95(d) requires that a Floor broker must execute the liquidating order entered pursuant to Rule 95(c) before the Floor broker can execute any other order for the same account on the same side of the market as that liquidating order. The Supplementary Material sets forth examples illustrating the operation of Rules 95(c) and (d) along with examples indicating the type of buy and sell orders that a member may and may not represent for the same customer at the same time pursuant to Rule 95.

<sup>10</sup> See NYSE Notice, 77 FR at 68189. The NYSE states that Rule 95(c)’s requirement that a liquidating order be “new” effectively required that a Floor broker leave the Crowd before entering a liquidating order (selling what had been bought, for example) because there was no way for the Floor broker to receive the new order (or otherwise communicate with a customer) from the Crowd. See id., 77 FR at 68189 n.6.

<sup>11</sup> See NYSE Notice, 77 FR at 68189.

market.”<sup>12</sup> In approving this proposal, the Commission noted that the intra-day trading strategy employed by professionals “provide[d] the perception that public customer orders [were] being disadvantaged by the time and place advantage of intra-day traders.”<sup>13</sup>

NYSE contends that NYSE Rules 95(c) and (d) and related Supplementary Material are outdated in today’s market structure and an unnecessary restriction on the ability of Floor brokers to represent orders on behalf of their customers and, therefore, should be deleted.<sup>14</sup>

According to NYSE, in 1994, orders entered in the NYSE specialist’s book experienced greater latency than did orders handled by Floor brokers. At that time, the NYSE specialist’s book orders could not be executed until the specialist manually executed them, and Floor brokers could stand at the point of sale and trade more quickly than specialists.<sup>15</sup> NYSE represents that with the current marketplace, incoming electronic orders are executed automatically in microseconds, and “book” orders receive immediate limit order display. As a result, NYSE argues that the rationale for NYSE Rules 95(c) and (d) with respect to how Floor broker customers could “crowd out small customer limit orders and delay or prevent their execution,”<sup>16</sup> no longer applies in the current market structure.<sup>17</sup>

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<sup>12</sup> Rule 95(c) Adopting Release at 36809.

<sup>13</sup> Id. at 36810.

<sup>14</sup> See NYSE Notice, 77 FR 68189.

<sup>15</sup> See id.

<sup>16</sup> Rule 95(c) Adopting Release at 38611.

<sup>17</sup> See NYSE Notice, 77 FR 68189. NYSE also argues that, since adopting the rule, the equities markets in general, and NYSE in particular, have undergone market structure changes that obviate the need for this rule-based restriction on how a Floor broker represents orders on behalf of customers. For example, the NYSE adopted its “Hybrid Market” structure in part to meet the requirements of Regulation NMS that were implemented in July 2007. The NYSE states that, since it has undergone a dramatic shift “from a floor-based auction market with limited automated order interaction to a more automated market with limited floor-based auction market availability.” See id.

NYSE also argues that the market structure and trading strategies have evolved since the enactment of NYSE Rule 95(c). For example, off-Floor participants regularly engage in buy and sell side trading strategies (i.e., “intra-day trading”) so that, according to NYSE, in today’s micro-second market there is no longer a competitive advantage to being on the Floor when engaging in the type of intra-day trading addressed by NYSE Rules 95(c) and (d).<sup>18</sup> Rather, in the view of NYSE, due to the increase in the speed of trading, the increased fragmentation of the equity markets, and the dissemination of market information available to off-Floor participants, many off-Floor participants are able to synthesize market information across multiple markets faster than a Floor broker could while located on the Floor.<sup>19</sup> Accordingly, NYSE claims, to the extent there may still be a time and place advantage for Floor brokers by virtue of their presence on the Floor, the type of information available to Floor brokers is no longer the type of information that would provide Floor brokers with an advantage in connection with intra-day trading.<sup>20</sup>

As a result of these changes, NYSE contends that NYSE Rules 95(c) and (d) are no longer operating to place Floor brokers on equal footing with other market participants, but instead are placing them at a disadvantage in the largely automatic market that has developed in the almost twenty years since the restrictions were put in place.<sup>21</sup> NYSE believes that deleting NYSE Rules 95(c) and (d) and the related Supplementary Materials would place Floor brokers on a more equal footing with other market participants utilizing automatic executions.

III. Proceedings to Determine Whether to Approve or Disapprove SR-NYSE-2012-57 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act to

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<sup>18</sup> See id.

<sup>19</sup> See NYSE Notice, 77 FR at 68189.

<sup>20</sup> See id. at 68189-68190.

<sup>21</sup> See id., 77 FR at 68190.

determine whether the Proposals should be approved or disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposals that are discussed below. Institution of these proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described in greater detail below, the Commission seeks and encourages interested persons to provide additional comment to inform the Commission's analysis of whether to approve or disapprove the Proposals.

Pursuant to Section 19(b)(2)(B), the Commission is providing notice of the grounds for disapproval under consideration. In particular, Section 6(b)(5) of the Act<sup>22</sup> requires that the rules of an exchange be designed, among other things, 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; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Section 6(b)(8) of the Act<sup>23</sup> requires that the rules of an exchange do not impose any burden on competition not necessary or appropriate in furtherance of the Act.

The Proposals would delete rules originally designed to ensure that Floor brokers, and by extension their customers, did not have an unfair advantage over other market participants through "intra-day trading," where the trader seeks to garner the spread by both buying at the bid and selling at the offer. If the Exchanges were to eliminate Rule 95(c), there would no longer be a requirement that, when a Floor broker is representing orders at the minimum variation on both sides of the market for the same account and acquires a position for that account, the Floor

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<sup>22</sup> 15 U.S.C. 78f(b)(5).

<sup>23</sup> 15 U.S.C. 78f(b)(8).

broker obtain a new order to liquidate or cover a position established during that trading session. One of the original justifications for adopting this “speed bump” in 1994 was that Floor brokers, by virtue of their presence on the NYSE Floor, could have a time and place advantage over other market participants because they could trade on both sides of the market without leaving the Crowd.

In their Proposals, the Exchanges argue, among other things, that the automation of the markets in the intervening years, including the increased speed of trading on the Exchanges and elsewhere, along with the fragmentation of the equity markets and the wide dissemination of market information to off-Floor participants, have substantially reduced Floor brokers’ time and place advantage and left the rationale underlying Rules 95(c) and (d) obsolete. In fact, the Exchanges take the position that, “[i]n today’s micro-second market, there is no longer a competitive advantage to being on the trading Floor when engaging in the type of intra-day trading” that is addressed by Rules 95(c) and (d).<sup>24</sup> Accordingly, in the Exchanges’ view, the Proposals would “serve to place Floor brokers on a more equal footing with other market participants utilizing automatic executions.”<sup>25</sup>

Although the Commission acknowledges that increased automation and other market structure changes are likely to have substantially reduced the time and place advantage historically enjoyed by those on the floor of the Exchanges, the Commission is concerned that elimination of the Rule 95(c) restriction on Floor brokers in connection with intra-day trading, as contemplated by the Proposals, may not be consistent with the Act in light of other benefits currently conferred by the Exchanges upon Floor brokers. For example, under the Exchanges’ rules, a Floor broker is entitled to a potentially preferential “parity” allocation of shares of an

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<sup>24</sup> See NYSE Notice, 77 FR at 68189; NYSE MKT Notice, 77 FR at 68192.

<sup>25</sup> See NYSE Notice, 77 FR at 68190; NYSE MKT Notice, 77 FR at 68192.

Exchange execution, as compared with off-Floor market participants that place orders on the Exchanges' respective books.<sup>26</sup> Accordingly, a customer of a Floor broker engaged in intra-day trading, through an algorithmic proprietary trading strategy or otherwise, may have an advantage over market participants pursuing similar strategies directly on the Exchanges' respective books, by virtue of the Floor broker's parity status. The restrictions contained in Rules 95(c) and (d) today may serve to help counterbalance those advantages.

The Commission therefore believes that questions are raised as to whether the Proposals are consistent with (1) the requirements of Section 6(b)(5) of the Act, including whether they would not be designed to permit unfair discrimination, or would promote just and equitable principles of trade, or protect investors and the public interest; and (2) the requirements of Section 6(b)(8) of the Act, including whether they would impose an unnecessary or inappropriate burden on competition.

#### IV. Solicitation of Comments

The Commission requests that interested persons provide written submissions of their views, data and arguments with respect to the concerns identified above, as well as any others they may have with the Proposals. In particular, the Commission invites the written views of interested persons concerning whether the Proposals are inconsistent with Section 6(b)(5), Section 6(b)(8) or any other provision of the Act, or the rules and regulation thereunder.

Although there do not appear to be any issues relevant to approval or disapproval which would

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<sup>26</sup> See NYSE Rule 72(c)(ii) ("For the purpose of share allocation in an execution, each single Floor broker, the DMM and orders collectively represented in Exchange systems (referred to herein as "Book Participant") shall constitute individual participants. The orders represented in the Book Participant in aggregate shall constitute a single participant and will be allocated shares among such orders by means of time priority with respect to entry."); see also NYSE MKT Rule 72(c)(ii) (same).

be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4, any request for an opportunity to make an oral presentation.<sup>27</sup>

Interested persons are invited to submit written data, views and arguments regarding whether the Proposals should be disapproved by [insert date 21 days from publication in the Federal Register]. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by [insert date 35 days from publication in the Federal Register].

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-2012-57 and SR-NYSEMKT-2012-58 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-2012-57 and SR-NYSEMKT-2012-58.

These file numbers 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 Proposals that are filed with the Commission, and all

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<sup>27</sup> Section 19(b) (2) of the Act, as amended by the Securities Act Amendments of 1975, Pub. L. 94-29 (June 4, 1975), grants the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular Proposals by a self-regulatory organization. See Securities Act Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94<sup>th</sup> Cong., 1<sup>st</sup> Sess. 30 (1975).

written communications relating to the Proposals 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 such filings also will be available for inspection and copying at the principal office of the Exchanges. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2012-57 and SR-NYSEMKT-2012-58 and should be submitted on or before [insert date 21 days from publication in the Federal Register]. Rebuttal comments should be submitted by [insert date 35 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>28</sup> 17 CFR 200.30-3(a)(57).