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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-66421; File No. SR-NYSE-2012-05)

February 17, 2012

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change Amending NYSE Rule 476A to Update Its “List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A”

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on February 7, 2012, New York Stock Exchange LLC (“NYSE” or the “Exchange”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I and II 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 NYSE Rule 476A to update its “List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A” Rule XX [sic]. 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).

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 Statutory Basis for, the Proposed Rule Change

1. Purpose

The Exchange proposes to amend NYSE Rule 476A to update its “List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A” (“Rule 476A List”) to (i) make technical, non-substantive changes to conform the list to previously-approved changes in Exchange rules, (ii) update the rules relating to conduct by Designated Market Makers (“DMM”), and (iii) add rules relating to conduct by DMMs.

Background

Under the Exchange’s Minor Rule Violation Plan, NYSE Rule 476A, the Exchange may impose a fine, not to exceed \$5,000, on any member, member organization, approved person or registered or non-registered employee<sup>4</sup> of a member or member organization for a minor violation of certain specified Exchange rules (a “summary fine”). Summary fines provide a meaningful sanction for rule violations when the violation calls for stronger discipline than an admonition or cautionary letter, but the facts and circumstances of the violation do not warrant initiation of a formal disciplinary proceeding under Rule 476.<sup>5</sup>

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<sup>4</sup> Rule 476A(a) includes a reference to “allied member”. The Exchange proposes to replace that term with “principal executive,” which is consistent with a prior rule change eliminating the category of “allied member” on the Exchange. See Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR-NYSE-2008-80).

<sup>5</sup> The Exchange’s Minor Rule Violation Plan, Rule 476A, was originally adopted by the Exchange and approved by the Commission in 1985. See Exchange Act Release No. 34-

### Proposed Non-Substantive Changes to Rule 476A List

The Exchange proposes the following non-substantive changes to update the Rule 476A List to conform it to approved changes to Exchange rules, as follows:

- Update the titles of Rules 15, 15A, and 105
- Update rule references that have been renumbered or harmonized with a FINRA rule: Rule 72(b) to 72(d); 79A.30 to 79A.20; 103.12 to 103.11; and 346(b) to 3270
- Delete references to rules that have been deleted: Rules 97.40 (reporting rule violation); 104.12 (DMM investment account rule); 107A.30 (reporting rule violation); 112A.10 (reporting rule violation); 123A.30 (percentage orders); 304(h)(2) (reporting rule violation); 346(c), (e), and (f) (Limitations on member organization employment and failure to obtain Exchange approval rule violations); 421 (reporting rule violation); 440F (reporting rule violation); and 440G (reporting rule violation)<sup>6</sup>
- Update the description to rules that have been amended: Rules 123C<sup>7</sup> (deleting references to expiration Fridays and quarterly expiration days); 411(b) (replacing the description to reflect the amended rule); and 345(a) (deleting the reference to Securities Trader Supervisor)

### Proposed Updates to Rule 476A List for DMM Conduct Rules

The current Rule 476A List includes rules that govern DMM conduct, e.g., Rules 104(a)(1)(A), 104.10, and Exchange policies regarding procedures to be followed in delayed opening situations. The Exchange proposes to update the Rule 476A List with current rules governing DMM conduct, and in particular, to include Rules 104 and 123D in the Rule 476A List. The Exchange further proposes to expand the references to Rules 104 and 123D to add new elements to the Rule 476A List [sic]

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21688 (January 25, 1985), 50 FR 5025 (February 5, 1985). It has been amended numerous times since its adoption.

<sup>6</sup> The Exchange also proposes to fix a typographical error in the entry concerning Rule 343 and replace the term “officer” with “office.”

The Exchange believes that the updates proposed below will provide the Exchange with sufficient flexibility to address DMM failure to meet their obligations. The Exchange recognizes that DMMs may, for many reasons, fail to meet their affirmative obligations as prescribed under Rules [sic] 104 or duties under Rule 123D. In some circumstances, formal disciplinary measures in accordance with Rule 476 are warranted. However, in other instances, formal discipline may be unwarranted, and the Exchange believes that the addition of these Rules to Rule 476A List will provide a more flexible and appropriate tool to enforce potential failure by DMMs to adhere to the requirements set forth in those rules, while preserving the Exchange's discretion to seek formal discipline under the appropriate circumstances. The Exchange believes that the proposed updated rule references cover the same subject matter as are already addressed in the Rule 476A List, albeit in outdated references. In addition, the Exchange believes it is also appropriate to add new elements relating to Rule [sic] 104 and 123D to the Rule 476A List.

#### Rule 104

NYSE Rule 104 requires, inter alia, DMMs registered in one or more securities traded on the Exchange to engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market, insofar as reasonably practicable, by contributing liquidity when lack of price continuity and depth, or disparity between supply and demand exists or is reasonably to be anticipated.<sup>8</sup>

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<sup>7</sup> The Exchange also proposes to add a reference to "Rule 123C" to the amended description, and move it up on the Rule 476A List.

<sup>8</sup> Rule 104 currently operates on a pilot basis, set to end on July 31, 2012. The Exchange believes that the Rule 476A List should reference those rules that are currently operational, even if operating on a pilot basis.

The Rule 476A List currently includes Rule 104(a)(1)(A), which requires DMMs to maintain a bid or an offer at the National Best Bid and National Best Offer (“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 securities in which the DMM unit is registered with a consolidated average daily volume equal to or greater than one million shares.

The Rule 476A List also includes an outdated reference to Rule 104.10. When the Exchange adopted the New Market Model, it adopted current Rule 104 (on a pilot basis), which does not include a rule reference of 104.10 that is the same as the former Rule 104.10.<sup>9</sup> However, the subject matter formerly covered in Rule 104.10 continues in the current Rule 104. For example, the text of former Rules 104.10(5) and (6) has been moved in substantially similar form to current Rules 104(g), (h), and (i).

More generally, although the Exchange has deleted former Rule 104.10(1) – (3), the subject matter of those rules has been carried forward in various sections of current Rule 104. For example, former Rule 104.10 specified the functions of DMMs, including the maintenance, in so far as reasonably practicable, of a fair and orderly market. This topic is now covered by Rules 104(a) and (f).

More specifically, former Rule 104.10(1) stated that the maintenance of a fair and orderly market implies the maintenance of price continuity with reasonable depth and the minimizing of the effects of temporary disparity between supply and demand. This subject matter is now covered in Rule 104(f)(ii). Former Rule 104.10(2) concerned a DMM trading for his or her own

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<sup>9</sup> See Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46).

account when there is [sic] lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated. This subject matter is similarly covered in Rule 104(f)(ii). Finally, former Rule 104.10(3) provided that DMM dealings for his own account must constitute a course of dealings reasonably calculated to contribute to the maintenance of price continuity with reasonable depth, and to minimizing the effects of temporary disparity between supply and demand. This is similarly covered in Rule 104(f)(ii). The Exchange further believes that Rule 104(f)(iii), which provides more details about Depth Guidelines, is also related to former Rule 104.10(3). In particular, the Exchange was publishing Depth Guidelines when Rule 104.10 was in effect and the only change in the New Market Model's version of the rule is to codify this aspect of DMM obligations.

The Exchange also believes that the subject matter of former Rules 104.10(1) - (3) is now covered in current Rules 104(a)(2) - (5). Current Rules 104(a)(2) - (5) describe with specificity how a DMM can meet his or her responsibilities and duties to maintain a fair and orderly market, including facilitating openings and re-openings, the close of trading, trading when a liquidity replenishment point is reached, and trading when a "gap" quote procedure is being used. These rule provisions simply provide detail of how a DMM is to meet its fair and orderly obligation. These were functions that specialists formerly performed when they were subject to former Rule 104.10(1) - (3), the difference now being that these functions have been codified in the rule text.

The Exchange further proposes to add to the Rule 476A list Rules 104(b), (c), (d), and (e). The Exchange believes that, similar to Rule 104(a), (f), (g), (h), and (i), the requirements applicable to DMMs in Rules 104(b), (c), (d), and (e) relate to the functions of the DMMs. Because these are DMM obligations for which potential violations can range in severity, including these elements of Rule 104 in the Rule 476A List is consistent with the current

inclusion of other aspects of Rule 104.

In addition, the Exchange believes it is appropriate to add Rule 104(a)(1)(B) to the Rule 476A List. Rule 104(a)(1)(B) governs the DMM's new pricing obligations, which were implemented by all equities markets on December 6, 2010.<sup>10</sup> Accordingly, this provision was not previously included in the Minor Rule Violation Plan. The Exchange believes it is appropriate to add this element of Rule 104 to the Minor Rule Violation Plan to provide greater flexibility with respect to the type of disciplinary measures that may be invoked if there were a violation of this rule. For example, a potential situation that may warrant a summary fine rather than formal disciplinary action could be if a DMM fails to maintain a quote consistent with Rule 104(a)(1)(B), but which does not result in any harm to the market.

As noted above, summary fines provide the Exchange with flexibility to impose an appropriate level of discipline for violations that are more serious than an admonition letter, but for which the facts and circumstances do not warrant formal discipline. The Exchange believes that providing flexibility for violations related to the DMM's new pricing obligations and Rules 104(b), (c), (d), and (e) is in keeping with the spirit of the existing Rule 476A List, which already includes DMM conduct rules.

To reflect these changes, the Exchange proposes to include a single reference to "Rule 104 requirements for the dealings and responsibilities of DMMs" to the Rule 476A List, which would include all of the subsections of Rule 104 as described above.<sup>11</sup> The Exchange further

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<sup>10</sup> See Exchange Act Release No. 63255 (Nov. 5, 2010), 75 FR 69484 (Nov. 12, 2010) (SR-NYSE-2010-69).

<sup>11</sup> The Exchange notes that it has separately proposed to delete NYSE Rule 104(a)(6). See Securities Exchange Act Release No. 65736 (Nov. 10, 2011) (SR-NYSE-2011-56). The Exchange further notes that other elements of Rule 104, i.e., Rule 104(j) and

notes that these summary fines may be imposed, as applicable, on either an individual DMM, or the DMM unit, as specified in the subsections to Rule 104.

### Rule 123D

The Exchange also proposes to update the reference relating to delayed openings in the Rule 476A list to instead reference a specific rule, i.e., Rule 123D, and to add all elements of Rule 123D as they relate to DMM conduct as being eligible under the Minor Rule Violation Plan.

The Rule 476A List currently provides that “violations of Exchange policies regarding procedures to be followed in delayed opening situations” are eligible for summary fines under the Minor Rule Violation Plan. Such Exchange policies are codified in Rule 123D.

Accordingly, the Exchange proposes to delete the general statement of “violations of Exchange policies regarding procedures to be followed in delayed opening situations” and replace it with a reference to Rule 123D. In so doing, the Exchange further proposes to add the other requirements of DMMs that are set forth in Rule 123D relating to openings, re-openings, trading halts, and tape indications. The Exchange believes that the additional flexibility of determining the appropriate level of discipline for DMM violations of Rule 123D conforms to the purpose of the existing Rule 476A List. In particular, the Exchange notes that adding Rule 123D in its entirety as it relates to DMM conduct is consistent with the existing inclusion of Rule 15 in the Rule 476A List, which similarly governs DMM’s conduct with respect to pre-opening indications.

## 2. Statutory Basis

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supplementary material .05 and .10, are not related to DMM obligations, but rather reflect operational aspects of the Exchange.



The Exchange believes that the proposed rule changes are consistent with, and further the objectives of, Section 6(b)(5) of the Securities Exchange Act of 1934, as amended,<sup>12</sup> (the “Act”), in that they are 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. The proposed rule changes also further the objectives of Section 6(b)(6),<sup>13</sup> in that they provide for appropriate discipline for violations of provisions of the Act, the rules and regulations thereunder, and Exchange rules and regulations.

The Exchange believes that the proposed rule changes are designed to prevent fraudulent and manipulative acts and practices because they will provide the Exchange with greater regulatory flexibility to enforce the DMM requirements set forth in NYSE Rules 104 and 123D in a more informal manner while also preserving the Exchange’s discretion to seek formal discipline for more serious transgressions as warranted. In addition, the proposed rule change removes impediments to and perfects the mechanism of a free and open market by updating the Minor Rule Violation Plan by updating rule cite references, deleting references to obsolete rules, and for DMM-related rules, both updating the rule references to reflect the current rules that govern the topics currently identified in outdated rule references in the Minor Rule Violation Plan as well as adding additional elements of the rules governing DMM conduct.

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.

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<sup>12</sup> 15 U.S.C. 78f(b)(5).

<sup>13</sup> 15 U.S.C. 78f(b)(6).

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 within such longer period (i) as the Commission may designate up to 90 days of such date 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 such proposed rule change, or
- (B) Institute proceedings to determine whether the proposed rule change should be disapproved.

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-2012-05 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-2012-05. 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; 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-2012-05 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).