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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-68340; File No. SR-NYSEMKT-2012-65)

December 3, 2012

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Rule 123C(9)(a)(1)(ii) - Equities to Delete the Requirement that the Order Acceptance Cut-Off Time Cannot be past 4:30 p.m.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on November 20, 2012, NYSE MKT LLC ("NYSE MKT" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the 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 Rule 123C(9)(a)(1)(ii) - Equities to delete the requirement that the order acceptance cut-off time cannot be past 4:30 p.m. The text of 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 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

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

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

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 Rule 123C(9)(a)(1)(ii) - Equities to delete the requirement that the order acceptance cut-off time cannot be past 4:30 p.m. (or 30 minutes after the scheduled close in the case of an earlier close).<sup>3</sup>

Background

Pursuant to Rule 123C(9)(a)(1) – Equities, the Exchange may suspend Rule 52 – Equities (Hours of Operation) to resolve an extreme order imbalance that may result in a price dislocation at the close as a result of an order entered into Exchange systems, or represented to a Designated Market Maker (“DMM”) orally at or near the close. Rule 123C(9)(a)(1) - Equities was intended to be and has been invoked to attract offsetting interest in rare circumstances where there exists an extreme imbalance at the close such that a DMM is unable to close the security without significantly dislocating the price.

Pursuant to Rule 123C(9)(a)(1)(ii) - Equities, once it has been determined to suspend Rule 52 and solicit offsetting interest, the Exchange is responsible for soliciting such offsetting interest from both on-Floor and off-Floor participants. Such solicitation requests include, at a minimum, the security symbol, the imbalance amount and side, the last sale price, and an order acceptance cut-off time. The Exchange designates the order acceptance cut-off time, but the Rule currently provides that in no event shall the order acceptance cut-off time be later than 4:30 p.m. (or 30 minutes after the scheduled close in the case of an earlier close).

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<sup>3</sup> The Exchange notes that parallel changes are proposed to be made to the rules of New York Stock Exchange LLC (“NYSE”). See Securities Exchange Act Release No. 68282 (Nov. 21, 2012), 77 FR 71023 (Nov. 28, 2012) (SR-NYSE-2012-63).

Currently, the Exchange uses Trader Updates to solicit interest from off-Floor participants. The Exchange's Trader Updates are posted on the Exchange's website and are distributed both by RSS feed and by email to anyone who subscribes to receive such free updates.

Since January 3, 2011, when the Rule, which was previously operated on a pilot bases, became a permanent rule, the Exchange and NYSE, which has an identical rule, have invoked the relief available pursuant to the Rule only once, on September 21, 2012. In 2010, Rule 123C(9)(a)(1) - Equities was invoked only three times on both markets.

#### Proposed Amendment

The Exchange proposes to amend Rule 123C(9)(a)(1)(ii) - Equities to delete the requirement that the order acceptance cut-off time shall be no later than 4:30 p.m., or in the case of an early scheduled close, 30 minutes after the closing time. The Exchange believes it is appropriate to delete the bright-line cut off time because it hinders the ability of the Exchange to ensure a fair and orderly close if adhering to the 4:30 p.m. order acceptance cut-off time is not possible under the particular circumstances.

In particular, the Exchange notes that for two of the four times that the rule has been invoked since 2010 on both the Exchange and the NYSE, the NYSE has extended the order acceptance cut-off time past 4:30 p.m. The reasons for the extensions differed, but the Exchange believes that given the rarity of the need to invoke the provisions of Rule 123C(9)(a)(1) – Equities in the first instance, together with what the NYSE has experienced in those few events with its parallel rule, it is appropriate to delete the bright-line 4:30 p.m. cut-off time.

For example, on February 12, 2010, due to corporate actions in Berkshire Hathaway (BRK) Class A and B securities, an NYSE-listed security, there was significant trading volume

in those securities, including at the close. In the circumstances, it was determined that the most efficient manner to effect the close of trading in those securities was to effect the closing transaction in BRK-B before closing the BRK-A shares. After closing the BRK-B security at 4:19 p.m., the DMM assessed the shares eligible to be executed for the BRK-A close and determined that the imbalance was significant enough to invoke the procedures of NYSE Rule 123C(9)(a)(1). Due to the complexity of the situation, the NYSE was not able to issue its solicitation of offsetting interest until 4:27 p.m. Because three minutes was not sufficient time to receive incoming offsetting interest and close the security, the NYSE accepted order flow past the 4:30 p.m. order acceptance cut-off time. The NYSE filed with the Commission a rule proposal that permitted the temporary suspension of NYSE Rule 123C(9)(a)(1)(ii) 4:30 p.m. order acceptance cut-off time.<sup>4</sup>

More recently, on Friday, September 21, 2012, there was a buy imbalance in Weatherford International LTD (WFT), an NYSE-listed security, that could not be satisfied by sell orders on the Book. Accordingly, the NYSE invoked procedures pursuant to NYSE Rule 123C(9) to solicit interest from both off-Floor and on-Floor participants to offset that imbalance. While the Exchange initiated publication of solicitation for such offsetting interest immediately following 4:00 p.m., due to delays in the Exchange's web and email systems, the Exchange's two solicitations of interest, which were sent at 4:22 p.m. and 4:28 p.m., did not leave Exchange systems until 4:29 p.m. and 4:35 p.m., respectively, and were time-stamped accordingly. Because of these delays, the Exchange extended the order acceptance cut-off time to 4:35 p.m., which is past the time prescribed in NYSE Rule 123C(9)(a)(1)(ii). By extending the order acceptance cut-off time to 4:35 p.m., the Exchange was able to attract sufficient sell-side interest

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<sup>4</sup> See Securities Exchange Act Release No. 61549 (Feb. 19, 2010), 75 FR 9009 (Feb. 26, 2010) (SR-NYSE-2010-09).

to offset the buy imbalance and the stock was closed shortly thereafter on a transaction of 7.822 million shares, unchanged from the last sale price of \$13.54.<sup>5</sup>

Although the NYSE did not have rule authority to extend the order acceptance cut-off time in the WFT closing situation to 4:35 p.m., the NYSE believes that it acted appropriately under the circumstances to ensure that WFT could close in a fair and orderly manner at a price that was not significantly dislocated from the last sale price. In particular, the issue that the NYSE experienced with respect to its web and email system was unanticipated and the NYSE sought to respond in a manner that protected investors and the public interest by ensuring a fair and orderly close.

The Exchange believes it is appropriate to provide the Exchange with authority to designate an order acceptance cut-off time that is tailored to the particular situation, rather than have to adhere to the 4:30 p.m. time frame. The Exchange's ultimate goal is to ensure a fair and orderly close in a manner that is as close to the official 4:00 p.m. closing time as possible. However, depending on the circumstances, whether because of the complexity of the closing process for a particular security or because of a system or technology issue, requiring a bright-line order acceptance time may not be appropriate.

Moreover, the Exchange believes that adhering to such a bright-line cut-off time could harm investors and the public. For example, in both the BRK-A and WFT closes, if the NYSE had adhered to the 4:30 p.m. cut-off time, the NYSE would not have been able to complete its solicitation of offsetting interest. Without such offsetting interest, the Exchange had two alternatives, either close the stock at a price significantly dislocated from the last sale price, or

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<sup>5</sup> On September 27, 2012, the NYSE published a Trader Update that provided the public with notice of this issue:  
[http://traderupdates.nyse.com/2012/09/weatherford\\_international\\_ltd.html](http://traderupdates.nyse.com/2012/09/weatherford_international_ltd.html).

invoke an order imbalance halt and not hold a closing transaction. The Exchange does not believe that either alternative is in the best interest of investors or the public. Rather, the Exchange believes that ensuring that the closing price is not significantly dislocated from the last sale, even if that means a delayed closing time, would benefit investors and the public.<sup>6</sup>

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b)<sup>7</sup> of the Securities Exchange Act of 1934 (the “Act”), in general, and furthers the objectives of Section 6(b)(5),<sup>8</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, 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 it is not designed to permit unfair discrimination among customers, brokers, or dealers.

In particular, the Exchange believes that providing the Exchange with the authority to designate the order cut-off time as appropriately tailored to the particular situation removes impediments to and perfects the mechanism of a free and open market because it enables the Exchange to complete the process to solicit interest to offset an imbalance at the close that would otherwise result in a significant price dislocation. Without the relief requested herein, the Exchange may not be able to complete the process to solicit offsetting interest, which would

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<sup>6</sup> The Exchange proposes to make clarifying changes to paragraphs (a)(1), (a)(1)(v), (a)(2), and (b) of Rule 123C(9) - Equities and Supplementary Material .20 and .30 to Rule 123C – Equities to either add the phrase “Equities” or delete the term “NYSE” in connection with references to other equity rules in the rule text.

<sup>7</sup> 15 U.S.C. 78f(b).

<sup>8</sup> 15 U.S.C. 78f(b)(5).

result in either the stock closing at a dislocated price, or require the Exchange to invoke an order imbalance halt in the security. The Exchange believes such solutions could harm investors and the public because of either an unnecessarily dislocated closing price, or in the case of an imbalance halt, orders intended for the closing transaction would not be executed. The Exchange further believes that the proposed rule change would protect investors and the public interest because it would enable the Exchange to complete the process to ensure that the closing price that may be closer to the last sale price, rather than a closing price that is significantly dislocated from the last sale price.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The Exchange has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup> Because the proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative prior to 30 days from the date on which it was filed, or such shorter time as the Commission may designate, if consistent with the protection of investors and the public interest, the proposed rule change has become effective pursuant to Section 19(b)(3)(A) of the Act and Rule 19b-4(f)(6)(iii) thereunder.

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<sup>9</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

#### 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-NYSEMKT-2012-65 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-NYSEMKT-2012-65. 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 such 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-NYSEMKT-2012-65 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>11</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>11</sup> 17 CFR 200.30-3(a)(12).