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SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-69983; File Nos. SR-NYSE-2012-57; SR-NYSEMKT-2012-58)

July 12, 2013

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE MKT LLC; Order Approving 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”)¹ and Rule 19b-4 thereunder,² 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, 2012.³

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, 2013.⁴ On February 13, 2013, the Commission instituted proceedings to determine whether to approve or disapprove the Proposals.⁵ On May 14, 2013, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 68185 (November 8, 2012), 77 FR 68188 (SR-NYSE-2012-57) (“NYSE Notice”); Release No. 68186 (November 8, 2012), 77 FR 68191 (SR-NYSEMKT-2012-58) (“NYSE MKT Notice”).

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

⁵ See Securities Exchange Act Release No. 68923 (February 13, 2013), 78 FR 11928 (February 20, 2013) (“Order Instituting Proceedings”).

Commission designated July 12, 2013, as the date by which the Commission would either approve or disapprove the Proposals.⁶ The Commission received no comment letters regarding the Proposals. This order approves the Proposals.

II. Background

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.⁷ 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.⁸

NYSE Rule 95(d) defines an account as any account in which the same person or persons

⁶ See Securities Exchange Act Release No. 69575, 78 FR 29406 (May 20, 2013). The Commission noted that July 13, 2013 is a Saturday and, therefore, designated July 12, 2013 as the date by which the Commission would either approve or disapprove the Proposals. See id.

⁷ 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.

⁸ 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.

is directly or indirectly interested.⁹ 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.¹⁰ NYSE Rule 95 Supplementary Material .20 and .30 sets forth examples applicable to NYSE Rule 95(c) and (d).

NYSE adopted Rules 95(c) and (d) and related Supplementary Material .20 and .30 in 1994 to address “intra-day trading” by Floor brokers.¹¹ 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, 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.¹² At the time the rule was adopted, according to NYSE, orders entered in the NYSE specialist’s book experienced greater latency than orders handled by Floor brokers. Specifically, the NYSE specialist’s book orders could not be executed until the specialist manually executed them, while Floor brokers could stand at the point of sale and trade more quickly than specialists.¹³ According to NYSE, requiring the Floor broker to

⁹ See NYSE Rule 95(d).

¹⁰ See NYSE Rule 95(d).

¹¹ See Securities Exchange Act Release No. 34363 (July 13, 1994), 59 FR 36808 (July 19, 1994) (“Rule 95(c) Adopting Release”).

¹² 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.

¹³ See NYSE Notice, 77 FR at 68189.

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 the Floor broker to leave the crowd in order to receive a new liquidating order.¹⁴ The restriction was meant to “enhance investors’ confidence in the fairness and orderliness of the Exchange market.”¹⁵ 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.”¹⁶

In support of its proposal to eliminate Rule 95(c) and (d), NYSE stated that incoming electronic orders are now executed automatically in microseconds, and “book” orders receive immediate limit order display. As a result, NYSE argued that the concern that Floor broker customers could “crowd out small customer limit orders and delay or prevent their execution,”¹⁷ no longer applied in the current market structure.¹⁸ In support of its proposal to eliminate Rule 95(c) and (d), NYSE also argued that there is no longer a competitive advantage to being on the Floor when engaging in the type of intra-day trading addressed by those rules.¹⁹ According to NYSE, many off-Floor participants are able to synthesize market information across multiple markets faster than a Floor broker could while located on the Floor.²⁰ Accordingly, even if there continues to 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

¹⁴ See NYSE Notice, 77 FR at 68189.

¹⁵ Rule 95(c) Adopting Release at 36809.

¹⁶ Id. at 36810.

¹⁷ Rule 95(c) Adopting Release at 38611.

¹⁸ See NYSE Notice, 77 FR 68189.

¹⁹ See id.

²⁰ See NYSE Notice, 77 FR at 68189.

would provide Floor brokers with an advantage in connection with intra-day trading.²¹

As a result of these changes to its market and to overall market structure, NYSE contended that 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.²² According to NYSE, deleting 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. Discussion and Commission Findings

After careful review, the Commission finds that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.²³ Specifically, the Commission finds that the Proposals are consistent with Section 6(b)(5) of the Act,²⁴ in that they are designed to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest, and Section 6(b)(8) of the Act,²⁵ in that they do not impose any burden on competition not necessary or appropriate in furtherance of the Act. In particular, the Commission believes that the Proposals are consistent with these provisions because they are designed to place Floor brokers on more equal footing with other market participants that enter interest electronically.

²¹ See id. at 68189-68190.

²² See id., 77 FR at 68190.

²³ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

²⁴ 15 U.S.C. 78f(b)(5).

²⁵ 15 U.S.C. 78f(b)(8).

The Commission notes that the Exchanges have undergone fundamental changes since the adoption of Rules 95(c) and (d), and that these changes have largely allayed the specific concerns that these rules were designed to address. For example, given the increasing automation of the Exchanges, the Commission believes that there is a diminished concern that Floor brokers engaging in intra-day trading could “crowd out” public customer orders by virtue of their location on the trading Floor in relation to Designated Market Makers (formerly specialists). The Commission also notes that these rules only apply to instances where a Floor broker is representing both sides of an order at the minimum variation; to the extent that securities trading at the minimum variation are typically more liquid and have a higher trading volume, this further reduces the concern that Floor brokers could crowd out other market participants through intra-day trading.

In the Order Instituting Proceedings, the Commission expressed concern that the elimination of Rules 95(c) and (d) may not be consistent with the requirements of the Act. Specifically, given benefits conferred by the Exchanges upon Floor brokers, such as preferential parity allocation of executed shares, the Commission noted that removing the restrictions imposed by Rule 95(c) and (d) could produce unfair advantages for Floor brokers. While the Commission recognizes that the deletion of Rules 95(c) and (d) may competitively benefit Floor brokers, the Commission believes that, on balance, the Proposals are consistent with the Act because the specific concerns that these rules were originally designed to address have been largely allayed.

For the reasons stated above, the Commission finds that the Proposals are consistent with the requirements of the Act.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,²⁶ that the proposed rule changes (SR-NYSE-2012-57 and SR-NYSEMKT-2012-58) be, and hereby are, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.²⁷

Elizabeth M. Murphy
Secretary

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²⁶ 15 U.S.C. 78s(b)(2).

²⁷ 17 CFR 200.30-3(a)(12).