

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-99511; File No. SR-NYSE-2023-36)

February 9, 2024

Self-Regulatory Organizations; New York Stock Exchange LLC; Order Instituting Proceedings to Determine Whether to Approve or Disapprove a Proposed Rule Change Regarding Enhancements to its DMM Program

I. Introduction

On October 23, 2023, 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 its Designated Market Maker (“DMM”) program. The proposed rule change was published for comment in the Federal Register on November 13, 2023.³

On December 13, 2023, the Commission extended to February 11, 2024, the time period in which to approve the proposal, disapprove the proposal, or institute proceedings to determine whether to approve or disapprove the proposal.⁴ The Commission has received one comment on the proposal.⁵ This order institutes proceedings under Section 19(b)(2)(B) of the Act⁶ to determine whether to approve or disapprove the proposal.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 98869 (November 6, 2023), 88 FR 77625 (November 13, 2023) (SR-NYSE-2023-36) (“Notice”).

⁴ See Securities Exchange Act Release No. 99161 (December 13, 2023), 88 FR 87829 (December 19, 2023).

⁵ See Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc. (“Virtu”) dated January 29, 2024. Virtu supports the proposed rule change and states that it will: (i) level the playing field regarding access to information among different market participants; (ii) eliminate restrictions on cell phone communication from the floor and the prohibition on aggressing transactions during the close that will ensure that all participants engaging in market making are on the same footing; and (iii) attract new DMMs.

⁶ 15 U.S.C. 78s(b)(2)(B).

II. Summary of the Proposal

As described in more detail in the Notice,⁷ the Exchange proposes changes to its DMM program by (1) amending Rule 7.35B(d)(2) (DMM-Facilitated Closing Auctions); Rule 36 (Access to and Communication with Floor); Rule 76 (“Crossing” Orders); Rule 98 (Operation of a DMM Unit); Rule 103 (Registration and Capital Requirements of DMMs and DMM Units); Rule 103B (Security Allocation and Reallocation); and Rule 104 (Dealings and Responsibilities of DMMs); (2) deleting Rule 104A (DMMs—General) and Rule 106A (Taking Book or Order of Another Member); and (3) adopting a new Rule 104B establishing the DMM Unit Introductory Program in ETPs.

The Exchange proposes to amend Rule 104 to eliminate DMMs’ access to aggregate order information during Core Trading Hours⁸ with exception for reopenings and to limit DMMs’ ability to utilize and disseminate this information to other market participants on the Trading Floor⁹ when it is provided by the Exchange.¹⁰ Specifically, in order to facilitate openings and reopenings, the Exchange proposes to limit DMMs’ access to non-public aggregate order information on an as-needed basis and only before the open or until a security opens for trading. Moreover, DMMs’ access to aggregate order information to facilitate the Closing Auction¹¹ would be only on an as-needed basis and outside Core Trading Hours. Further, revised Rule 104 would continue to permit DMMs to provide aggregate order information and post-trade information in response to an inquiry from a Floor broker, provided that aggregate order

⁷ See Notice, supra note 3.

⁸ See Rule 1.1(d) for the definition of “Core Trading Hours.”

⁹ See Rule 6A for the definition of “Trading Floor.”

¹⁰ See Notice, supra note 3 at 77631.

¹¹ See Rule 7.35(a)(1)(C) for the definition of “Closing Auction.”

information can only be provided in response to an inquiry before the open or until a security opens for trading, or while trading is halted and only until a security is reopened for trading.

The Exchange also proposes to amend Rule 76 to permit the Exchange to announce manual cross transactions. Namely, rather than perpetuating the current practice of a Floor broker verbally announcing a cross trade at a DMM post/panel and having a DMM acknowledge the Floor broker announcement, the Exchange would announce and acknowledge Floor broker cross transactions, thereby eliminating any interaction between a Floor broker and a DMM during cross transactions.

Based on these changes to Rules 104 and 76, the Exchange believes it would be appropriate to remove the restrictions in Rule 36 on a DMM unit's communications from the Trading Floor and the specific Rule 98 restrictions arising from the presence of Floor-based non-public order information. The Exchange also believes that these changes justify the elimination of the prohibition on Aggressing Transactions¹² in the final ten minutes of the trading day.

The Exchange proposes to amend Rule 36 to permit DMM units to use any telephone registered with the Exchange, including cellular or wireless telephones, to communicate with persons off the Trading Floor. A DMM would be permitted to engage in direct voice communication to an off-Floor location with any individual with whom telephone communications are permitted under Rule 98. DMM units would be required to: (i) register, prior to use any new telephone, including cellular or wireless phones, to be used on the Trading Floor; (ii) maintain records of the use of telephones and all other approved alternative communication devices, including logs of calls placed; and (iii) establish policies and procedures reasonably

¹² See Rule 104(d)(1)(A) for the definition of "Aggressing Transaction."

designed to ensure that use of telephones and alternative communication devices is consistent with all SEC rules and Exchange rules.

In addition, the Exchange proposes to delete current Rule 36.30 permitting DMMs to use a telephone connection or order entry terminal at the DMM's post to enter a proprietary order in an Investment Company Unit¹³ or a Trust Issued Receipt¹⁴ in another market center in either a component security of an Investment Company Unit or Trust Issued Receipt, or in an options or futures contract related to such securities.

And related to the proposed changes to Rule 36, the Exchange also proposes to amend Rule 104(g) to permit employees of a DMM unit to communicate with a listed issuer contact from the Trading Floor via telephone or written electronic communications, consistent with Rule 36.30 and Rule 98.

The Exchange also proposes to amend Rule 98 to, among other things, delete the definition of "Floor-based non-public order,"¹⁵ and delete the requirement to protect against the misuse of Floor-based non-public order information and the requirement to only permit access to Floor-based non-public order information to Floor-based DMM employees and individuals responsible for the direct supervision of the DMM's Floor-based operations. Instead, DMMs would be prohibited from misusing material, non-public information.

In addition, the Exchange proposes to redefine an Aggressing Transaction in Rule 104 as

¹³ See Rule 5.2(j)(3) for the definition of "Investment Company Unit."

¹⁴ See Rule 8.200 for the definition of "Trust Issued Receipt."

¹⁵ Rule 98(b)(4) defines "Floor-based non-public order" to mean any order, whether expressed electronically or verbally, or any information regarding a reasonably imminent non-public transaction or series of transactions entered or intended for entry or execution on the Exchange and which is not publicly available on a real-time basis via an Exchange-provided datafeed, such as NYSE OpenBook® or otherwise not publicly available. Non-public orders include order information at the opening, re-openings, the close, and order information in Exchange systems that is not available via NYSE OpenBook®.

a purchase (sale) that reaches across the market to trade as the contra-side of the Exchange published bid (offer) priced above (below) the last consolidated trade. Currently, Rule 104 defines an Aggressing Transaction as a DMM unit transaction that is a purchase (sale) that reaches across the market to trade as the contra-side to the Exchange published offer (bid), and is priced above (below) the last differently-priced trade on the Exchange and above (below) the last differently-priced published offer (bid) on the Exchange.

The Exchange also proposes to make DMM re-entry, following an Aggressing Transaction, on the opposite side of the market at or before the applicable Price Participation Point (“PPP”)¹⁶ for that security to be more deterministic. Namely, rather than the current requirement that DMMs re-enter “commensurate with the size of the Aggressing Transaction,” the Exchange proposes to require re-entry to be in the same size as the Aggressing Transaction. Further, the Exchange proposes to eliminate DMMs’ restriction against Prohibited Transactions – the prohibition on DMMs engaging in Aggressing Transactions during the last ten minutes prior to the scheduled close of trading.

Finally, the Exchange proposes a DMM Unit Introductory Program in ETPs (the “Program”), which would be set forth in proposed Rule 104B(a). The Program would be open to all member organizations in good standing registered as a non-DMM Market Maker or a Supplemental Liquidity Providers on the Exchange. The Program is limited to exchange traded products and is designed to provide eligible member organizations with a 12-month ramp up period to becoming fully operational, Trading Floor-based DMM units. As proposed, during the 12-month Program period, DMM units and their DMMs would be subject to the duties and

¹⁶ Rule 104(d)(3)(A) (PPP Guidelines) states that “[t]he Exchange will periodically issue PPP Guidelines that identify the price at or before which a DMM unit is expected to re-enter the market following an Aggressing Transaction. PPPs are only minimum guidelines and compliance with them does not guarantee that a DMM unit is meeting its obligations.”

responsibilities set forth in Rules 104 and 98. Further, DMMs operating in the Program would be permitted to conduct business for the DMM unit such as entering orders and quotations for the account of the DMM unit during the Program. In addition, the proposed rule would provide that during the 12-month Program period, DMM units would not be required to comply with the requirements of Rule 35.20¹⁷ regarding personnel available to DMM units on the Trading Floor.¹⁸

III. Proceedings to Determine Whether to Disapprove SR-NYSE-2023-36 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act¹⁹ to determine whether the proposal should be disapproved. Institution of such proceedings is appropriate at this time in view of the legal and policy issues raised by the proposal, as discussed below. Institution of disapproval 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 on the proposal.

Pursuant to Section 19(b)(2)(B) of the Act, the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the

¹⁷ Rule 35.20 requires each DMM unit to have (1) at least one employee approved by the Exchange for admittance to the Floor for every Post space assigned to the unit, and (2) an adequate number of additional approved employees to provide proper service during the trading day.

¹⁸ The Exchange also proposes other changes, including: (1) deleting Rules 104(e) (Trading Floor Functions of DMMs) and (f) (Temporary DMMs); (2) deleting Rule 103B(III)(C) (DMM One Year Obligation); (3) deleting Rule 7.35(d)(2) (Publication of Manual Closing Imbalance); (4) deleting Rule 104A, Supplementary Material .50 (Equity Trading Reports); and (5) other technical changes described in the Notice.

¹⁹ 15 U.S.C. 78s(b)(2)(B).

Act,²⁰ which 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. In addition, Section 6(b)(5) of the Act prohibits the rules of an exchange from being designed to permit unfair discrimination between customers, issuers, brokers, or dealers. Further, Section 6(b)(8) of the Act requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate under the Act.²¹

The Exchange proposes a comprehensive change to its rules pertaining to the obligations of DMMs based on its contemporaneous proposal to eliminate DMMs' access to intraday aggregate order information except under certain circumstances and DMMs' interaction with Floor brokers during cross transactions. Chief among the changes, the Exchange proposes to eliminate the Prohibited Transactions rule; eliminate rules designed to mitigate concerns related to DMM communication from the Trading Floor with certain off-Floor locations; and eliminate rules designed to mitigate the misuse of Floor-based non-public order information.

Given the scope of changes proposed by the Exchange, the Commission analyzes the proposal in the context of the unique role played by DMMs on the Exchange, namely their role to assist in the maintenance of a fair and orderly market in securities for which they have been assigned responsibility as the DMM (e.g., the maintenance of price continuity with reasonable depth) and to facilitate certain transactions in their assigned securities, most notably the opening,

²⁰ 15 U.S.C. 78f(b)(5).

²¹ 15 U.S.C. 78f(b)(8).

reopening, and closing auctions.²² And because the Exchange's proposal would significantly alter the benefits and obligations of DMMs, the Commission takes into consideration questions as to whether the Exchange rules, as amended, would continue to strike an appropriate balance between such benefits and obligations, consistent with Section 6 of the Act.

One obligation that the Exchange proposes to delete is the negative obligation the Exchange currently imposes on DMMs to restrict aggressive trading in the last ten minutes before the close, i.e., Prohibited Transactions. This raises questions as to whether the elimination of Prohibited Transactions is both consistent with a DMM's obligation to maintain a fair and orderly market and, more generally, designed to prevent fraudulent or manipulative acts and practices. According to the Exchange, the deletion is appropriate because: removing DMMs' intraday access to aggregate order information would place DMMs on the same informational footing as all other market participants; the proposal would retain the re-entry requirement following an Aggressing Transaction; and there may be a variety of reasons related to the DMM unit's obligations to the marketplace for a DMM to quote aggressively in its assigned securities at the close. In light of the Exchange's arguments, the Commission seeks comments on whether commenters agree. Has the Exchange adequately justified how allowing DMMs to aggressively take liquidity and potentially move prices on the Exchange immediately before the closing auction is consistent with the Act and DMM obligations under Exchange rules?

Another issue raised by the Exchange's proposal is whether the changes are adequately designed to mitigate concerns related to access by DMMs to non-public information from the Trading Floor. According to the Exchange, based on its proposal to limit DMMs' access to

²² DMMs also have the affirmative obligation to maintain quotes in their assigned securities at the inside market a specified percentage of time. See Rule 104.

aggregate order information intraday, and to remove DMMs from involvement in manual cross transactions, it is appropriate to delete the restrictions on DMM communications from the Trading Floor, including restrictions involving Floor-based non-public order information. Applying the same rationale, the Exchange also proposes to delete its rule prohibiting DMM communications with a listed issuer contact from the Trading Floor via telephone, and proposes instead to rely on the requirement that DMMs comply with current Rule 98 and the Exchange's proposed general requirement that DMM units establish policies and procedures reasonably designed to ensure that the use of communication devices is consistent with all SEC rules and Exchange rules. DMMs, however, have a unique position on the Trading Floor and would still have access to non-public aggregate order information – namely before the open or until a security opens for trading; while trading is halted and until a security is reopened for trading; and after the end of Core Trading Hours. DMMs would also continue to have the ability to observe negotiations and other interactions on the Trading Floor. Accordingly, Commission seeks comments regarding the sufficiency of the remaining Exchange rules to address concerns regarding the unique access to, and potential misuse of, non-public trading, issuer, and other information, including the Floor-based non-public order information as it is currently defined in the rules. Do the changes to remove DMMs' access to intraday aggregate order information and eliminate DMMs' involvement in cross transactions sufficiently limit DMMs ability to obtain non-public information such that prescriptive restrictions on DMM communication from the Trading Floor, including those listed issuer contact, is no longer necessary? Do they mitigate concerns that restrictions pertaining to Floor-based non-public order information are meant to address?

In addition to the above requests for comments, the Commission also seeks comments regarding the Exchange's proposal relating to the following:

1. The Exchange proposes to use the last consolidated trade rather than the last trade on the Exchange in the definition of Aggressing Transaction. The Exchange states that the last consolidated trade is a more meaningful benchmark for the underlying security. What effect would this change have for the operation of Rule 104?

2. The Exchange proposes to delete Rule 104A in its entirety, including DMM recordkeeping and/or reporting obligations pertaining to securities, options, single stock futures, and foreign securities. According to the Exchange, it is appropriate to delete the rule as it is duplicative of Exchange and SEC books and recordkeeping requirements. Do commenters agree? Why or why not?

3. The Exchange also proposes to delete in Rule 36.30 the provision that stipulates that DMMs can only enter proprietary order in Component Securities of Investment Company Units or Trust Issued Receipts for the purpose of hedging a position in the Investment Company Units or Trust Issued Receipts. According to the Exchange, this provision is obsolete but does not explain why. Do commenters agree with the Exchange's statement that the provision is obsolete?

IV. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their views, data, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposal is consistent with Section 6(b)(5)²³

²³ 15 U.S.C. 78f(b)(5).

of the Act or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval that would be facilitated by an oral presentation of views, data, and arguments, the Commission will consider, pursuant to Rule 19b-4 under the Act,²⁴ any request for an opportunity to make an oral presentation.²⁵

Interested persons are invited to submit written data, views, and arguments regarding whether the proposal should be approved or 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 (<https://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include file number SR-NYSE-2023-36 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-2023-36. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

²⁴ 17 CFR 240.19b-4.

²⁵ Rule 700(c)(2) of the Commission's Rules of Practice provides that "[t]he Commission, in its sole discretion, may determine whether any issues relevant to approval or disapproval would be facilitated by the opportunity for an oral presentation of views." 17 CFR 201.700(c)(2).

comments on the Commission’s internet website (<https://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 a.m. and 3 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-2023-36 and should be submitted by [insert date 21 days from date of 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.²⁶

Sherry R. Haywood,

Assistant Secretary

²⁶ 17 CFR 200.30-3(a)(12).