

Notice is hereby given that pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520), the Securities and Exchange Commission (the “Commission”) has submitted to the Office of Management and Budget a request for extension of the previously approved collection of information discussed below.

Several sections of the Investment Company Act of 1940 (“Act” or “Investment Company Act”)¹ give the Securities and Exchange Commission (“Commission”) the authority to issue orders granting exemptions from the Act’s provisions. The section that grants broadest authority is section 6(c), which provides the Commission with authority to conditionally or unconditionally exempt persons, securities or transactions from any provision of the Investment Company Act, or the rules or regulations thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.² Congress enacted section 6(c) to give the Commission the flexibility to address unforeseen or changed circumstances in the investment company industry. Rule 0–2 under the Investment Company Act,³ entitled “General Requirements of Papers and Applications,” prescribes general instructions for filing an application seeking exemptive relief with the Commission.

Rule 0–2(c)(1) requires that every application for an order for which a form is not specifically prescribed and which is executed by a corporation, partnership or other company and filed with the Commission contain a statement of the applicable provisions of the articles of incorporation, bylaws or similar documents, relating to the right of the person signing and filing such application to take such action on behalf of the applicant, and a statement that all such requirements have been complied with and that the person signing and filing the application is fully authorized to do so. If such authorization is dependent on resolutions of stockholders, directors, or other bodies, such resolutions must be attached as an exhibit to or quoted in the application. Any amendment to the application must contain a similar statement as to the applicability of the original statement of authorization. When any application or amendment is signed by an agent or attorney, rule 0–2(c)(1) requires that the

power of attorney evidencing his authority to sign shall state the basis for the agent’s authority and shall be filed with the Commission. Every application subject to rule 0–2 must be verified by the person executing the application by executing an instrument in substantially the form specified in the rule. Each application subject to rule 0–2 must state the reasons why the applicant is deemed to be entitled to the action requested, the name and address of each applicant, and the name and address of any person to whom any questions regarding the application should be directed. Electronic filing of all applications for orders under the Investment Company Act is mandatory. Each application subject to rule 0–2 is a one-time request and the rule itself does not impose any ongoing obligations or burdens on the part of an applicant.

Based on historical filing data and estimates of the annual number of filings, the staff estimates that the Commission will receive roughly 112 applications for an exemptive order per year, and that each such applications will take an average of 20.25 hours of in-house attorney time as well as total external costs of \$92,000.

These estimates of average costs are made solely for the purposes of the Paperwork Reduction Act. The estimate is not derived from a comprehensive or even a representative survey or study of the costs of Commission rules.

This collection of information is necessary to obtain a benefit and will not be kept confidential. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

The public may view background documentation for this information collection at the following website: www.reginfo.gov. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function. Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice by December 13, 2023 to (i) MBX.OMB.OIRA.SEC_desk_officer@omb.eop.gov and (ii) David Bottom, Director/Chief Information Officer, Securities and Exchange Commission, c/o John Pezzullo, 100 F Street NE, Washington, DC 20549, or by sending an email to: PRA_Mailbox@sec.gov.

Dated: November 7, 2023.

Christina Z. Milnor,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–98869; File No. SR–NYSE–2023–36]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Enhancements to Its Designated Market Maker Program

November 6, 2023.

Pursuant to section 19(b)(1)¹ of the Securities Exchange Act of 1934 (“Act”)² and Rule 19b–4 thereunder,³ notice is hereby given that on October 23, 2023, 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, II, and III 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 enhancements to its Designated Market Maker (“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 Exchange Traded Products (“ETPs”). The proposed rule change is available on the Exchange’s website at www.nyse.com, at the principal office of the Exchange, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b–4.

¹ 15 U.S.C. 80a–1 *et seq.*

² 15 U.S.C. 80a–6(c).

³ 17 CFR 270.0–2.

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 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 enhancements 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.

As described more fully below, the proposal represents the most comprehensive enhancement of the DMM program since its introduction in 2008. The lynchpin of the proposed changes would be the removal of the availability of the remaining non-public information available to individual DMMs and DMM units⁴ on the Trading Floor⁵ intraday. Since 2008, the increasingly automated logic for executions has severely circumscribed the amount of non-public information available to DMMs, and the Exchange has significantly enhanced the

⁴ The term “Designated Market Maker” or “DMM” means an individual member, officer, partner, employee or associated person of a DMM unit who is approved by the Exchange to act in the capacity of a DMM. See Rule 1.1(e). The term “DMM unit” means a member organization or unit within a member organization that has met the requirements of Rules 98 and 104. See Rule 98(b)(1) (defining DMM unit).

⁵ The term “Trading Floor” is defined in Rule 6A to mean the restricted-access physical areas designated by the Exchange for the trading of securities, commonly known as the “Main Room” and the “Buttonwood Room.”

transparency of its marketplace over that same period.⁶ Nonetheless, given their unique role to facilitate openings, reopenings, and the close of trading, DMMs at the point of sale continue to have display-only access to aggregate buying and buying/selling interest that is eligible to participate in the Opening Auction and the Closing Auction at each price point, respectively.⁷ Moreover, pursuant to Rule 104(e)(iii), Floor brokers may request that a DMM provide them with the information that is available to the DMM at the post, including such aggregate buying and selling interest for the Closing Auction.

The Exchange proposes to eliminate DMMs’ access to aggregate order information during Core Trading Hours with one limited exception during trading halts,⁸ as well as the related ability for DMMs to share this

⁶ For instance, the Exchange disseminates Closing Auction Imbalance Information beginning ten minutes before the scheduled end of Core Trading Hours, which provides updated imbalance information and indicative closing prices. In 2019, in connection with the transition to the Pillar trading platform, the Exchange amended its rules to provide that Floor Broker Interest (*i.e.*, interest verbalized in the trading crowd by a Floor broker) would be included in Closing Auction Imbalance Information. Beginning in 2020, the Exchange temporarily suspended the availability of Floor Broker Interest to be eligible to participate in the Closing Auction, as defined in Rule 7.35. In 2021, the Exchange permanently excluded Floor Broker Interest from the Closing Auction and required all Floor brokers to enter orders for the Closing Auction electronically during Core Trading Hours. See Securities Exchange Act Release No. 92480 (July 23, 2021), 86 FR 40886 (July 29, 2021) (SR–NYSE–2020–95). Because of the absence of Floor Broker Interest in the Closing Auction, any remaining information advantage that DMMs might have had with respect to orders from Floor brokers—even after such interest was included in the Closing Auction Imbalance Information—was eliminated. Recently, the Exchange made further changes to the Closing Auction, including adding price parameters within which the DMM must select a Closing Auction Price, in order to make the Closing Auction more transparent and deterministic. See Securities Exchange Act Release No. 95691 (September 7, 2022), 87 FR 56099 (September 13, 2022) (SR–NYSE–2022–32).

⁷ See Rules 104(a)(2) & (3). For instance, in order to facilitate the close, the Exchange makes available to DMMs at the point of sale aggregate order information about all orders eligible to participate in the Closing Auction, including the full quantity of Reserve Orders and MOC and LOC Order quantities, at each price point. In addition, the Exchange makes such aggregate order information available to DMM unit algorithms in connection with the electronic message sent to a DMM unit algorithm to close an assigned security electronically, which is sent shortly after the end of Core Trading Hours. The information available at each price point is not available in the Auction Imbalance Information. However, such information is used to calculate the Continuous Book Clearing Price, which is disseminated via Auction Imbalance Information.

⁸ See Rule 1.1(d) (definition of “Core Trading Hours”). DMMs would be provided access to aggregate order information on an as needed basis to facilitate a reopening. See the discussion of proposed Rule 104(a)(2), *infra*.

information with other market participants on the Trading Floor. DMM access to aggregate order information will henceforth be only as needed and before the open, in connection with the reopening of a security following a trading halt, and following the end of Core Trading Hours to facilitate the Closing Auction. In addition, the Exchange proposes amendments to Rule 76 to entirely eliminate DMM involvement in Floor broker cross transactions on the Trading Floor. Currently, Floor brokers must announce these transactions at the DMM unit post/panel where the security trades, and the assigned DMM acknowledges the Floor broker announcement in Exchange systems. As proposed, the Exchange would announce and acknowledge Floor broker cross transactions, thereby eliminating Floor broker interactions with individual DMMs at the post/panel in connection with these transactions.

The Exchange believes these changes would in turn justify elimination of certain historical restrictions governing DMM unit operations and communications from the Trading Floor, including use of cellular and wireless phones, as well as the prohibition on “Aggressing Transactions” in the final ten minutes of the trading day, thereby reducing the burdens associated with operating a DMM unit on the Exchange. Indeed, the proposal is designed to permit DMM units to operate more like other market makers while retaining the DMM unit’s unique duties and responsibilities to the marketplace, none of which would change as part of the proposal. In an effort to attract more DMM units to the Trading Floor, the Exchange also proposes an introductory program for non-DMM Market Makers and Supplemental Liquidity Providers (“SLPs”) that would provide a 12-month ramp-up period for new entrants to become fully operational Trading Floor-based DMM units.

The numerous obligations currently imposed on DMM units and DMMs by Exchange rules, and Rule 104 in particular, would in no way be diminished or otherwise altered by the proposal. Similarly, the proposal does not increase or otherwise alter the benefits of being an Exchange DMM unit. The proposal is designed rather to modernize the restrictions on DMMs and DMM units that flow from the potential availability of non-public order information on the Trading Floor; the Exchange believes that once the remaining sources of potential non-public order information are removed, these historical restrictions on DMM

units and DMMs are no longer necessary. The proposal accordingly does not alter or disrupt the balance between the benefits and obligations of being an Exchange DMM unit and is instead intended to make the DMM business more competitive. Indeed, the Exchange believes that the cumulative effect of the proposal would be to lower entry barriers to the DMM unit business on the Exchange and stimulate greater competition among existing DMM units and potential new entrants, to the benefit of the investing public, issuers and the marketplace.

Background

In 2008, in connection with the Exchange's transformation of its market structure begun in 2006,⁹ the Exchange phased out the specialist system and replaced specialists with DMMs, who are employees of DMM units.¹⁰

DMMs were conceived as a new type of market maker for a primarily electronic trading environment that had the ability, and the affirmative obligation, to contribute liquidity in a security by trading competitively for the DMM unit's dealer account. DMMs were designed to function in a manner substantially different from the manner in which specialists had previously functioned on the Exchange. In particular, DMMs no longer received copies of orders entered in Exchange systems prior to the orders' publication to all market participants. Similarly, the Exchange eliminated the negative obligation¹¹ to yield trading for a DMM

unit's proprietary account in order to allow public orders to be executed against each other. In addition, DMMs ceased to serve as the responsible broker-dealer for orders on NYSE's book.¹²

Although DMM units were not acting as responsible broker-dealers for orders on the NYSE's book, individual DMMs retained affirmative obligations with respect to the quality of the markets in their assigned securities as set forth in Rule 104, described more fully below. In addition, DMM units were required to maintain adequate minimum capital based on their registered securities, and to use their capital to engage in a course of dealings for their own accounts to assist in the maintenance, so far as practicable, of a fair and orderly market. Transactions on the Exchange by a DMM for the DMM unit's account are expected to be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in a particular stock. Further, DMMs are required to maintain a bid or offer at the National Best Bid or National Best Offer ("inside") for securities in which the DMM unit is registered for a certain percentage of the trading day based on the average daily volume of the security. DMMs are also required to facilitate transactions in their assigned securities during openings and reopenings as well as at the close of trading as required by Exchange rules,¹³ including the obligation to supply liquidity as needed. Currently, DMM and DMM unit algorithms have access to aggregate order information in order to comply with these requirements.¹⁴

These DMM obligations are accompanied by a variety of restrictions related to communications from the Trading Floor contained in Rule 36 and DMM trading and information flow contained in Rule 98. These rules, as well as the requirements of Rule 104, the main rule setting forth the obligations of Exchange DMM units and DMMs, and the related requirements embodied in the allocation process set forth in Rule 103B, are described below.

dealings be restricted, so far as practicable, to those reasonably necessary to permit the specialist to maintain a fair and orderly market. See 17 CFR 240.11b-1(a)(2)(iii).

¹² See, e.g., Release No. 58845, 73 FR at 64381.

¹³ Rule 7.35A sets forth additional specific responsibilities of DMMs with respect to Core Open Auctions and Trading Halt Auctions. Rule 7.35B sets forth additional responsibilities of DMMs with respect to Closing Auctions. The Exchange is not proposing changes to those rules.

¹⁴ DMM unit algorithms, however, are not provided aggregated buying and selling interest for the Closing Auction until after the end of Core Trading Hours.

Rule 36

Rule 36 governs the establishment of telephone or electronic communications connections between the Floor and other specified locations, which requires Exchange approval. The requirements applicable to DMM units and DMMs are set forth in Supplementary Material .30 (DMM Unit Post Wires) and Supplementary Material .31 (DMM Electronically Transmitted Written Communications) to Rule 36.

Rule 36.30 governs the establishment of telephone or electronic communications between the DMM units on the Trading Floor with certain specified off-Floor locations.

First, Rule 36.30 provides that, with Exchange approval, a DMM unit may maintain a telephone line at its stock trading post location to the off-Floor offices of the DMM unit, the DMM unit's clearing firm, or to persons providing non-trading related services. The rule further provides that such telephone connection cannot be used for the purpose of transmitting to the Floor orders for the purchase or sale of securities. Rule 36.30 permits a DMM unit to maintain a telephone line at its trading post location to communicate with DMM unit personnel working in locations other than the off-Floor offices of the DMM unit, provided that the telephone numbers of such persons are provided to the Exchange in advance.

Second, Rule 36.30 provides that a DMM unit may also maintain wired or wireless devices that have been registered with the Exchange, such as computer terminals or laptops, to communicate only with the system employing the algorithms and with individual algorithms and that will enable the DMM unit to activate or deactivate the system employing the algorithms or an individual algorithm or change such system's pre-set parameters.

In addition, Rule 36.30 provides that a DMM unit registered in an Investment Company Unit (as defined in Rule 5.2(j)(3)), or a Trust Issued Receipt (the "receipt") as that term is defined in Rule 8.200, may use a telephone connection or order entry terminal at the DMM unit's post to enter a proprietary order in the Investment Company Unit or receipt in another market center, in a Component Security of such an Investment Company Unit or receipt, or in an options or futures contract related to such Investment Company Unit or receipt, and may use the post telephone to obtain market information with respect to such Investment Company Units, receipts, options, futures, or Component

⁹ See, e.g., Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR-NYSE-2004-05) (Order Approving Proposed Rule Change and Amendment Nos. 1, 2, 3, and 5 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment Nos. 6, 7, and 8 to the Proposed Rule Change to Establish the Hybrid Market). Under the Hybrid Market, Exchange systems assumed the function of matching and executing electronically-entered orders.

¹⁰ See, e.g., Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379, 64380-81 (October 29, 2008) (SR-NYSE-2008-46) (Notice of Filing of Amendment Nos. 2 and 3 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment Nos. 1, 2, and 3, To Create a New NYSE Market Model, With Certain Components To Operate as a One-Year Pilot, That Would Alter NYSE's Priority and Parity Rules, Phase Out Specialists by Creating a Designated Market Maker, and Provide Market Participants With Additional Abilities To Post Hidden Liquidity) ("Release No. 58845"). Member organizations wanting to operate a DMM unit must file a written application and be approved prior to operating a DMM unit. See Rule 103(b)(i). As noted below, submission and approval of a DMM unit's written policies and procedures addressing the requirements of Rule 98 is also a prerequisite to operating a DMM unit on the Exchange. DMMs are required to be a member of the Exchange and pass a prescribed examination. See *id.* at (c)(i).

¹¹ The negative obligation as set forth in Rule 11b-1 under the Act required that a specialist's

Securities. If the order in the Component Security of the Investment Company Unit or receipt is to be executed on the Exchange, the order must be entered and executed in compliance with Exchange Rule 112.20 and SEC Rule 11a2–2(T), and must be entered only for the purpose of hedging a position in the Investment Company Unit or receipt.

Rule 36.30 requires DMM units to create and maintain records of all messages generated by the unit's wired or wireless devices to communicate with the system employing the unit's algorithms in compliance with Rule 440 (Books and Records) and SEC Rules 17a–3 and 17a–4 and to maintain such records in the format prescribed by the Exchange.

Rule 36.31 permits DMM units to install and maintain certain written electronic communications applications. Specifically, Rule 36.31(a) permits a DMM unit, subject to Exchange approval and the conditions set forth in Rule 36.31, to install and maintain a wired or wireless device capable of sending and receiving written communications electronically through an Exchange-approved connection (a "Permitted Communications Device").¹⁵ Under Rule 36.31(b), DMM units can connect Floor-based personnel via a Permitted Communications Device to persons with whom they are otherwise permitted to communicate pursuant to Rules 36.30 and 98, *i.e.*, certain personnel in the off-Floor offices of the DMM unit, the DMM unit's clearing operations, and persons who are permitted to provide non-trading related services to the DMM unit under Rule 98. Once connected, on-Floor and off-Floor personnel are permitted to use the Permitted Communications Device for two-way written electronic communications as permitted by Rules 36.30 and 98. To facilitate the DMM unit's obligation to maintain regular communications with listed issuers, Rule 36.31(b) also permits Floor-based DMM personnel to utilize Permitted Communications Devices for written electronic communications with the listed issuer representative designated under Rule 104(g)(1).¹⁶

Rule 36.31(c) requires that a DMM's member organization maintain records of all written communications sent from or to the DMM via the Permitted Communications Device in accordance with Rule 440 and SEC Rule 17a-4(b)(4)

¹⁵ Examples of Permitted Communications Devices include email and instant messaging via a desktop or laptop computer.

¹⁶ Current Rule 36.31 incorrectly refers to Rule 104(j)(1). As discussed below, the Exchange proposes to delete Rule 36.31 in its entirety.

and in such format as may be prescribed by the Exchange.

Finally, Rule 36.31(d) provides that a DMM's member organization must establish policies and procedures reasonably designed to ensure that use of the Permitted Communications Device is consistent with all SEC rules and Exchange rules, policies, and procedures.¹⁷

Rule 76

Rule 76 governs the execution of "cross" or "crossing" orders by Floor brokers. Rule 76 applies only to manual transactions executed on the Trading Floor and provides that when a member has an order to buy and an order to sell the same security that can be crossed at the same price, the member is required to clearly announce to the trading Crowd the proposed cross by offering the security at a price that is higher than his or her bid by a minimum variation permitted in the security before crossing the orders.

To assist Floor brokers in monitoring the price of protected quotations and ensuring compliance with Rule 611 of Reg NMS, Rule 76.10 permits Floor brokers to enter a cross transaction into their hand-held devices ("HHD") at a limit price consistent with customer instructions and as determined by the Floor broker. The Floor broker cannot, however, use this functionality with respect to a cross involving a principal order to buy and a principal order to sell submitted by the same broker-dealer.

Following entry of the orders into the HHD, a quote minder function within Exchange systems monitors protected quotations to determine when the limit prices assigned to the buy and sell orders are such that the orders may be executed consistent with Rule 611. When the protected quotation permits a Rule 611-compliant print (*i.e.*, the desired crossing price is at or between the protected bid and offer), quote minder delivers an alert message indicating that the orders may be crossed; captures within Exchange systems a time-stamped quote that includes the time the alert is sent to the Floor broker and the protected bid and offer at that time; starts a 20-second timer; and enables a "print" key function in the HHD allowing the Floor broker to cross the orders and print the trade through Exchange systems to the

¹⁷ Rule 36.60 (Telephone Listings) provides that a member or member organization may not permit a non-member to list the telephone number of a line terminating in a switchboard of the member or member organization in any type of telephone directory under the name of the non-member. As discussed below, the Exchange proposes to delete this rule in its entirety as obsolete.

Consolidated Tape within that 20-second time period.¹⁸

Floor brokers utilize the 20-second period to comply with Rule 76's requirement that a Floor broker "clear" the trading Crowd before executing a cross transaction, which is accomplished by the broker verbally announcing the cross trade at the post-panel of the DMM unit for the subject security. If there is other Floor broker and/or DMM interest in response to the verbal announcement of the cross trade, the Floor broker must trade with such interest on behalf of the applicable customer order(s). If the original terms of a cross transaction cannot be met for any reason, for example, if the crowd trades with a portion of either the bid or offer and the Floor broker cannot otherwise complete the proposed cross transaction in the size or price as entered, the originally-entered proposed cross transaction is cancelled. If the proposed cross trade is not broken up, the Floor broker may proceed to execute the trade by selecting the "print" key in the HHD prior to the expiration of the 20-second timer, which also transmits a message to Exchange systems to print the transaction to the Consolidated Tape. The completed transaction is then printed to the Consolidated Tape at that price. The DMM confirms the Floor broker announcement as required by Rule 76 in Exchange systems.

Rule 98

Rule 98 governs the operation of DMM units and incorporates various organizational structures for operating a DMM unit and restrictions on DMM trading.

Rule 98 contains narrowly tailored restrictions to address the fact that DMMs, while on the Trading Floor, may have access to certain Floor-based non-public information and requires DMM units to maintain procedures and controls to prevent the misuse of material, non-public information that are effective and appropriate for that member organization. Current Rule 98 generally reflects a principles-based approach to prohibit the misuse of material nonpublic information by a member organization that operates a DMM unit.¹⁹

¹⁸ If Exchange systems do not receive the "print" message from the Floor broker within the allotted time period, the ability to execute the orders and print to the Consolidated Tape will expire and the cross instructions will be canceled.

¹⁹ See Securities Exchange Act Release Nos. 72534 (July 3, 2014), 79 FR 39019 (July 9, 2014) (SR-NYSE-2014-12) (Order Approving Proposed Rule Change Amending Rule 98 To Adopt a Principles-based Approach To Prohibit the Misuse of Material Nonpublic Information and Make Conforming Changes to Other Exchange Rules).

Specifically, under Rule 98(c)(2), a member organization seeking approval to operate a “DMM unit,” which means a trading unit within a member organization approved pursuant to Rule 103 (Registration and Capital Requirements of DMMs and DMM Units) to act as a DMM unit,²⁰ pursuant to Rule 98 must maintain and enforce written policies and procedures reasonably designed, taking into consideration the nature of such member organization’s business, (1) to prevent the misuse of material, non-public information by such member organization or persons associated with such member organization, and (2) to ensure compliance with applicable federal laws and regulations and with Exchange rules.²¹ Further, Rule 98(c)(3)(A) provides that a member organization shall protect against the misuse of “Floor-based non-public order information”²² and that only the Trading Floor-based employees of the DMM unit and individuals responsible for the direct supervision of the DMM unit’s Floor-based operations may have access (as permitted pursuant to Rule 104) to Floor-based non-public order information.

Rule 98(c)(3)(B) specifies the restrictions applicable to employees of the DMM unit while on the Trading Floor. Rule 98(c)(3)(C) also provides that a Floor-based employee of a DMM unit who moves to a location off the Trading Floor, or any person who provides risk management oversight or supervision of the Floor-based operations of the DMM unit and becomes aware of Floor-based non-public order information, shall not (1) make such information available to

customers, (2) make such information available to individuals or systems responsible for making trading decisions in DMM securities in away markets or related products, or (3) use any such information in connection with making trading decisions in DMM securities in away markets or related products. The rule covers an individual that leaves the Floor, as well as a manager providing oversight or supervision of the Floor-based operations of the DMM unit. Submission and approval of a DMM unit’s written policies and procedures addressing the requirements of Rule 98 is a prerequisite to operating a DMM unit on the Trading Floor.

Rule 98(e) sets forth the procedures a DMM unit must follow in the event the DMM unit receives from the member organization or approved person non-public information about a security allocated to the DMM unit.

Rule 98(f) describes certain reporting obligations for, among others, DMM units, including the requirement that a DMM unit promptly report to the Exchange any failure to maintain the confidentiality of Floor-based non-public order information, as required by Rule 98(c).²³

Finally, Rule 98(g) provides that any failure by the DMM unit to maintain confidentiality of Floor-based non-public order information or any breach of any internal controls established to protect such information, may result in the imposition of appropriate regulatory sanctions, including a withdrawal of the registration of one or more securities of the DMM unit or the withdrawal of the approval to operate a DMM unit.

Submission and approval of a DMM unit’s written policies and procedures addressing the requirements of Rule 98 is a prerequisite to operating a DMM unit on the Trading Floor.

Rule 103B²⁴

Rule 103B(III) sets out the procedures under which DMM units are assigned to securities listed on the Exchange: an issuer may either select a DMM unit after interviewing all DMM units eligible to participate in the allocation process (Rule 103B(III)(A)), or delegate

the authority for selecting its DMM unit to the Exchange (Rule 103B(III)(B)).²⁵

If the issuer proceeds under the first option, the listing company must select all DMM units to be interviewed from the pool of DMM units eligible to participate in the allocation process.²⁶ A DMM unit’s eligibility to participate in the allocation process is based on objective criteria and determined at the time the interview is scheduled.

Within five business days after the issuer selects the DMM units to be interviewed, the issuer meets with representatives of each of the DMM units. At least one representative of the listing company must be a senior official of the rank of Corporate Secretary or above of that company. Additionally, no more than three representatives of each DMM unit may participate in the meeting, each of whom must be an employee of the DMM unit, and one of whom must be the individual DMM who is proposed to trade the company’s security, unless that DMM is unavailable to appear, in which case a telephone interview is permitted.²⁷

Once a DMM unit is selected, the individual DMM assigned to the security through the Rule 103B process must remain the assigned DMM for at least one year from the date that the issuer begins trading on the Exchange. The DMM unit may designate a different individual DMM within the year by notifying the Exchange of the change and setting forth the reasons for the change with the consent and approval of the issuer.²⁸

Rule 103B(VI)(H) sets forth the allocation sunset policy, which provides that allocation decisions remain effective for initial public offerings that list on the Exchange within eighteen months of such decision and that, in situations where the proposed individual DMM is no longer with the selected DMM unit, the company may choose to stay with the selected DMM unit or be referred to allocation and may interview a replacement individual DMM prior to making that decision.

Rule 104

Rule 104 sets forth the obligations of DMMs and DMM units. Under Rule 104(a), DMMs registered in one or more securities traded on the Exchange are required to engage in a course of dealings for their own account to assist

²⁰ See Rule 98(b)(1) (defining DMM unit).

²¹ Rule 98(c)(2) provides examples of conduct that would constitute the misuse of material, non-public information, including, but not limited to: (1) trading in any securities issued by a corporation, or in any related product, while in possession of material-non-public information concerning the issuer; or (2) trading in a security or related product, while in possession of material non-public information concerning imminent transactions in the security or related product; or (3) disclosing to another person or entity any material, non-public information involving a corporation whose shares are publicly traded or an imminent transaction in an underlying security or related product for the purpose of facilitating the possible misuse of such material, non-public information. See Rule 98(c)(2)(A)–(C).

²² Rule 98(b)(4) defines “Floor-based non-public order” as 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[®].

²³ See Rule 98(f)(3).

²⁴ Rule 103, which governs registration and capital requirements of DMMs and DMM units, provides that as a condition of a member organization’s registration as a DMM unit in one or more securities, the Exchange may at any time require such DMM unit to act as an odd-lot dealer in such securities as provided under the rules of the Exchange. See Rule 103(d). As discussed below, the Exchange proposes to delete Rule 103(d) as obsolete.

²⁵ Rule 103B(VI)(A)(1) also sets out an abbreviated DMM allocation process for listing companies that are a spin-off of or a company related to a listed company or one that lists a Related Security as defined in Rule 103B(VI)(A)(2).

²⁶ See Rule 103B(III)(A)(1).

²⁷ See Rule 103B(III)(A)(2)(b).

²⁸ See Rule 103B(III)(C).

in the maintenance of a fair and orderly market insofar as reasonably practicable.

Rule 104(a)(1) enumerates the specific responsibilities and duties of a DMM, including: (1) maintenance of a continuous two-sided quote, which mandates that each DMM maintain a bid or an offer at the National Best Bid (“NBB”) and National Best Offer (“NBO”) (together, the “NBBO”) for a certain percentage of the trading day,²⁹ and (2) the facilitation of, among other things, openings, re-openings, and the close of trading for the DMM’s assigned securities, all of which may include supplying liquidity as needed.³⁰ The Exchange provides access to aggregate order information in order for DMMs and DMM units to comply with the requirement to facilitate openings, reopenings, and the close of trading.³¹

Rule 104(c) imposes an affirmative obligation on DMMs to maintain, insofar as reasonably practicable, a fair and orderly market on the Exchange in assigned securities, including maintaining price continuity with reasonable depth and trading for the DMM’s own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated.

Rule 104(d) governs transactions by DMMs and provides that transactions on the Exchange by a DMM for the DMM’s account must be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular security.

Rule 104(d)(1)(A) defines a DMM unit transaction that is a purchase (sale) that

²⁹ See Rule 104(a)(1). Specifically, for securities that are not ETPs and that have a consolidated average daily volume of less than one million shares per calendar month, a DMM unit must maintain a bid or an offer at the NBBO for at least 15% of the trading day. For securities that are not ETPs with a consolidated average daily volume equal to or greater than one million shares, a DMM unit must maintain a bid or an offer at the NBBO for at least 10% or more of the trading day. Finally, for ETPs, a DMM unit must maintain a bid or an offer at the NBBO for at least 25% of the trading day. Reserve or other hidden orders entered by the DMM would not be included in the inside quote calculations. See *id.* at (a)(1)(A).

³⁰ See *id.* at (a)(2)–(3). Rule 104(e) further provides that DMM units must provide contra-side liquidity as needed for the execution of odd-lot quantities eligible to be executed as part of the opening, reopening, and closing transactions but that remain unpaired after the DMM has paired all other eligible round lot sized interest.

³¹ See *id.* DMMs utilize access to aggregate order information in order to be able to publish a non-mandatory manual closing imbalance beginning one hour before the scheduled end of Core Trading Hours up to the Closing Auction Imbalance Freeze Time under Rule 7.35B(d)(2). Since the Exchange is eliminating access to such aggregate order information intraday, it would be unavailable to DMMs at the close, and the Exchange accordingly proposes to delete Rule 7.35B(d)(2) and the clause “and if published, Manual Closing Imbalance” in Rule 7.35B(e)(1)(B).

reaches across the market³² 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 as an “Aggressing Transaction.” Rule 104(d)(1)(B) prohibits Aggressing Transactions during the last ten minutes prior to the scheduled close of trading that would result in a new high (low) price for a security on the Exchange for the day at the time of the DMM’s transaction, unless such transaction would match another market’s better bid or offer price, bring the price of that security into parity with an underlying or related security or asset, or would liquidate or decrease the position of the DMM unit³³ (“Prohibited Transactions”).

Rule 104(d)(2) provides that the DMM unit’s obligation to maintain a fair and orderly market may require re-entry on the opposite side of the market after effecting one or more transactions and that such re-entry should be commensurate with the size of the transaction(s) and the immediate and anticipated needs of the market, with two provisos:

- First, following an Aggressing Transaction, other than an Aggressing Transaction involving an ETP, the DMM unit must re-enter the opposite side of the market at or before the applicable Price Participation Point (“PPP”) for that security commensurate with the size of the Aggressing Transaction.

- Second, following an Aggressing Transaction, other than an Aggressing Transaction involving an ETP, that (1) is 10,000 shares or more or has a market value of \$200,000 or more and (2) exceeds 50% of the published offer (bid) size, the DMM unit must immediately re-enter the opposite side of the market at or before the applicable PPP for that security commensurate with the size of the Aggressing Transaction.

Rule 104(e) describes the Trading Floor functions of DMMs. Specifically, Rule 104(e)(i) codifies the following DMM Trading Floor functions:

- maintaining order among Floor brokers manually trading at the DMM’s assigned panel;

³² A DMM reaches across the market when the DMM buys from the NYSE offer or sells to the NYSE bid.

³³ The phrase “the position of the DMM unit” in Rule 104(d)(1)(B) means the DMM unit’s inventory of securities exclusive of pending, unexecuted orders and has the same meaning as “net position information in DMM securities” in Rule 98(c)(5). See Rule 104(d)(1)(B)(i). Current Rule 104(d)(1)(B)(i) incorrectly refers to subsection (g)(1)(B), which the Exchange proposes to correct.

- bringing Floor brokers together to facilitate trading, which may include the DMM as a buyer or seller;

- assisting a Floor broker with respect to an order by providing information regarding the status of a Floor broker’s orders, helping to resolve errors or questioned trades, adjusting errors, and cancelling or inputting Floor broker agency interest on behalf of a Floor broker; and

- researching the status of orders or questioned trades on his or her own initiative or at the request of the Exchange or a Floor broker when a Floor broker’s handheld device is not operational, when there is activity indicating that a potentially erroneous order was entered or a potentially erroneous trade was executed, or when there otherwise is an indication that improper activity may be occurring.³⁴

Rule 104(e)(ii) provides that the Exchange may make systems available to a DMM at the DMM unit post that display aggregate buying and selling interest and post-trade information about securities in which the DMM is registered. Rule 104(e)(ii) prohibits a DMM from using any information provided by Exchange systems pursuant to subparagraph (ii) in a manner that would violate Exchange rules or federal securities laws or regulations.

Rule 104(e)(iii) permits DMMs to provide market information available to the DMM at the post as described in subparagraph (e)(ii) to respond to Floor broker inquiries in the normal course of business, or visitors to the Trading Floor for the purpose of demonstrating methods of trading, provided that a Floor broker may not submit an inquiry pursuant to Rule 104(e)(iii) by electronic means and the DMM may not use electronic means to transmit market information to a Floor broker in response to a Floor broker’s inquiry pursuant to subparagraph (e)(iii).

Rule 104(f) governs temporary DMMs and provides that, in the event of an emergency, such as the absence of the DMM, or when the volume of business in a particular stock or stocks is so great that it cannot be handled by the assigned DMMs without assistance, a Trading Official may authorize a member of the Exchange who is not registered as a DMM in such stock or stocks, to act as a temporary DMM for that day only.

Finally, Rule 104(g) sets forth the obligation of DMMs to communicate with their listed issuers. Pursuant to Rule 104(g)(1), on at least a quarterly basis, each DMM unit must communicate with one or more senior

³⁴ See Rule 104(e)(i)(A)–(D).

officials of each issuer of listed securities in whose securities DMMs associated with the DMM unit are registered, with the exception of ADRs. Rule 104(g)(2) provides that the periodic communication requirement can be met by either in-person meetings, telephone calls, or written communications. Rule 104(g)(2)(B) prohibits an employee of a DMM unit from communicating with a listed issuer contact from the Trading Floor via telephone, but states that such an employee may, while on the Trading Floor, use written electronic communications to communicate with a listed issuer contact from the Trading Floor, subject to Rule 36.31.³⁵

Proposed Rule Changes

The Exchange proposes to amend Rule 104 to eliminate DMM access to aggregate order information intraday with one limited exception for reopenings and limit the DMMs' ability to utilize and disseminate this information when it is provided by the Exchange. Henceforth, DMM access to aggregate order information to facilitate the Closing Auction would be only as needed and outside Core Trading Hours. In addition, the Exchange proposes amendments to Rule 76 that would permit the Exchange to announce manual cross transactions, thereby removing any involvement by individual DMMs in these transactions.

Based on these changes to Rules 104 and 76, the Exchange believes it would be appropriate to remove the restrictions on a DMM unit's communications from the Trading Floor in Rule 36 and the specific Rule 98 restrictions arising from the presence of Floor-based non-public order information. The Exchange notes that DMM units and DMMs would remain subject to the Rule 98 prohibitions against disadvantaging customers or other market participants by improperly capitalizing on material, non-public information from any source. DMM unit operations together with upstairs customer-facing and other operations would continue to need to protect customer information consistent with existing obligations that also apply to equity market makers registered on other exchanges.

³⁵ Rule 104A contains various DMM trade and data reporting requirements carried over from the specialist era, all of which the Exchange proposes to delete as duplicative of Exchange and SEC books and recordkeeping requirements. Rule 106A provides that when a member temporarily takes the book of a DMM or an order from another member, he or she shall, while he or she is in possession of that book or order and for the remainder of the day, stand in the same relationship to the book or order as the DMM or other member. The Exchange proposes to delete Rule 106A as obsolete.

In addition, the Exchange proposes to redefine an Aggressing Transaction in Rule 104 as 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. As discussed below, given that the majority of volume in Exchange listed securities is effectuated away from the Exchange, utilizing the last consolidated trade as the benchmark for DMM transactions that reach across the market would provide a more meaningful measure of the market for the underlying security and the aggressiveness of the DMM transaction. The Exchange would make DMM re-entry on the opposite side of the market at or before the applicable PPP for that security more deterministic by requiring re-entry to be at the same size as the Aggressing Transaction. The Exchange also proposes to eliminate the prohibition on DMMs engaging in Aggressing Transactions during the last ten minutes prior to the scheduled close of trading.

The Exchange has long maintained that, in today's marketplace, primarily electronic DMM market-making activity is not materially different from market-making on other exchanges. The Exchange believes that the proposed changes provide a framework for DMM units to operate more like other market makers while retaining the DMM's unique responsibilities to the marketplace and continuing to guard against the misuse of material, non-public information. As part of this effort to reduce barriers to entry for member organizations interested in operating a DMM unit on the Trading Floor, the Exchange proposes an introductory program that would permit eligible member organizations to make markets in ETPs remotely as DMM units for an initial 12-month ramp up period before transitioning to become fully operational Floor-based DMM units. The Exchange believes this initiative would attract new DMM units to the Exchange and enhance competition among existing and prospective DMM units.

Rule 104

Rule 104 forms the cornerstone of DMM and DMM unit responsibilities and obligations when trading assigned listed securities. The Exchange proposes to shift the focus of the rule in places from the performance of individual DMMs assessed by reference to qualitative criteria to the DMM unit's performance to be assessed by a combination of qualitative measures and fee-based incentives. This shift would also be reflected in the elimination in

Rule 103B of the requirement that issuers interview the individual DMM proposed to trade their security as part of the allocation process and the requirement that the same individual DMM trade the new listing for one year from the date the issuer begins trading on the Exchange. The Exchange would also make technical and clarifying changes to Rule 104.

The Exchange believes that the proposed change would modernize Rule 104 by removing the rule's emphasis on the individual Floor-based market maker. The Exchange believes that this is a vestige of the specialist system, where the conduct and skill of the individual trader assigned to a listed security were paramount considerations in a manual trading environment. In a marketplace dominated by electronic trading, Rule 104 should instead focus on the obligations and responsibilities of the DMM unit, which as the license holder is the responsible broker-dealer.³⁶ The proposed change is not intended to dilute any of the standards applicable to individual DMMs and other persons associated with the DMM unit, as these persons would continue to have the same duties and obligations as a member organization under the Exchange's rules.³⁷

To effectuate these changes in Rule 104, the Exchange proposes to add "DMM unit" and/or replace "DMM" with "DMM unit" in several places in the rule, as follows:

- The title of the rule would be changed to "Dealings and Responsibilities of DMMs and DMM Units."
- The first sentence of Rule 104(a) would obligate DMM units 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, and the last sentence of Rule 104(a) would refer to the responsibilities and duties of a DMM unit.
- The first sentence of Rule 104(a)(1)(B) would set forth the applicable pricing obligations during the trading day that a DMM unit must adhere to, and the Exchange also proposes conforming changes in Rule 104(a)(1)(B)(i) governing bid and offer quotations and in the last sentence of the rule.

³⁶ See Rule 2(b)(i) (defining a member organization as a registered broker or dealer); Rule 300(a) (providing that trading licenses are issued to member organizations).

³⁷ See, e.g., Rule 0(b) ("The Exchange's Rules shall apply to all member organizations and persons associated with a member organization. Persons associated with a member organization shall have the same duties and obligations as a member organization under these Rules").

- Rule 104(a)(2) would set forth the obligation to facilitate transactions in DMM unit assigned securities during openings and reopenings as required by Exchange rules.

- Rule 104(a)(3) would set forth the DMM unit's obligation to facilitate transactions in their assigned securities during the close of trading.

- The heading to Rule 104(d) would be changed to "Transactions by DMM Units" with one conforming change in Rule 104(d)(1) and one in Rule 104(d)(1)(B).

The Exchange proposes the following additional changes to Rule 104.

Rule 104(a)

The Exchange proposes to transpose the current qualitative criteria for assessing maintenance of a fair and orderly market from current Rules 104(c)(2) and (c)(3) to Rule 104(a) with the following clarifying changes:

- The Exchange proposes to replace "implies" with "means" and "disparity" with "imbalance" in the first sentence of the text transposed from Rule 104(c)(2). As proposed, the sentence would read "The maintenance of a fair and orderly market means the maintenance of price continuity with reasonable depth, to the extent possible consistent with the ability of participants to use permitted DMM order types, and the minimizing of the effects of temporary imbalances between supply and demand."

- In the second sentence of the text transposed from Rule 104(c)(2), the Exchange would replace "it is commonly desirable that" with "should." As proposed, the sentence would read "In connection with the maintenance of a fair and orderly market, DMM units should engage to a reasonable degree under existing circumstances in dealings for the DMM unit's own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated."

- In the second full paragraph of proposed Rule 104(a), the Exchange would add "minimum" before "Depth Guidelines" in the first sentence of text transposed from Rule 104(c)(3). Further, the Exchange would add the following clause to the end of the third sentence of the second full paragraph: "provided, however, compliance with the suggested minimum Depth Guidelines does not by itself establish maintenance of a fair and orderly market."

As proposed, Rule 104(a) would reflect the responsibility of the DMM unit for the overall quality of markets in its registered securities, which would

include the activities of its employee DMMs.

The Exchange would add a subheading to Rule 104(a)(1)(A) titled "Two-Sided Obligation" to mirror the subheading in Rule 104(a)(1)(B).

In Rule 104(a)(1)(B)(i) governing bid and offer quotations, the Exchange would replace a reference to paragraph (1)(A) of the rule with the defined term Two-Sided Obligation.

As noted, Rule 104(a)(2) sets forth the obligation to facilitate transactions in assigned securities during openings and reopenings, including the obligation to supply liquidity as needed, and Rule 104(a)(3) sets forth the obligation to facilitate the close of trading. Both rules provide that DMM and DMM unit algorithms will have access to aggregate order information in order to comply with the respective requirements.

The Exchange proposes to eliminate intraday DMM and DMM unit access to aggregate order information with one limited exception for reopenings.³⁸ As proposed, in order to facilitate openings and reopenings pursuant to Rule 104(a)(2), DMMs and DMM units would only have access to non-public aggregate order information as needed and only (1) before the open or until a security opens for trading, or (2) while trading is halted and only until a security is reopened for trading. In order to facilitate the close of trading, as proposed, DMMs and DMM units would only have access to non-public aggregate order information as needed and only after the end of Core Trading Hours.³⁹

A new proposed Rule 104(a)(4) would transpose current Rule 104(e)(ii) and replace "aggregated buying and selling interest" with "aggregate order information." The Exchange would also add specifically with respect to aggregate order information that, except as provided in proposed Rule 104(a)(5) described below, such information may only be used by DMMs and DMM units to satisfy the responsibilities and duties set forth in Rule 104(a)(1)–(3), and may only be disseminated to employees of

³⁸ As a practical matter, all information available only to the DMM prior to the opening would also be included in the opening imbalance feed.

³⁹ As previously noted, the information available at each price point is unavailable in the Auction Imbalance Information, although this information is used to calculate the Continuous Book Clearing Price, which is disseminated via Auction Imbalance Information. DMM unit algorithms are not currently provided access to such non-public information until the beginning of Core Trading Hours for the open and until after the end of Core Trading Hours for the close, and only in connection with messaging for the DMM to electronically facilitate the close of trading, and the Exchange proposes this would continue. As a practical matter, the information currently available to DMMs would be restricted as proposed. See also note 6, *supra*.

DMM units, and the individuals responsible for direct supervision of DMM units.

In addition, the Exchange proposes a new Rule 104(a)(5) based on current Rule 104(e)(iii) that would permit the DMM to provide the information described in proposed Rule 104(a)(4) in response to an inquiry from a Floor broker, provided that aggregate order 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 further proposes to retain the current requirements that Floor broker inquiries be made by electronic means and that the DMM use electronic means to transmit market information to a Floor broker in response to a Floor broker's inquiry pursuant to this subparagraph (5).

Rule 104(c)

Rule 104(c) sets forth the functions of DMMs. In addition to transposing the text of Rule 104(c)(2) and (c)(3) to Rule 104(a) without change (other than the non-substantive clarifying changes described above), the Exchange proposes to add "and DMM units" following DMM in current Rule 104(c)(4) (proposed to be renumbered as (c)(2)) to clarify that both DMMs and DMM units are designated as market makers on the Exchange for all purposes under the Securities Exchange Act of 1934 and the rules and regulations thereunder.

In addition, the Exchange would delete Rule 104(c)(5) in its entirety as obsolete. Rule 104(c)(5) was added in anticipation of the listing of ETPs on the Trading Floor in order to provide the Exchange with adequate time to calculate the appropriate Depth Guidelines for ETPs based on actual trading data. The first ETP listed in November 2022 and appropriate Depth Guidelines were implemented that same year, rendering Rule 104(c)(5) obsolete.

Rule 104(d)

Rule 104(d)(1)(A) defines an Aggressing Transaction as a DMM unit transaction that (1) is a purchase (sale) that reaches across the market to trade as the contra-side to the Exchange published offer (bid), and (2) 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. Pursuant to Rule 104(d)(B), a DMM transaction in the last ten minutes of trading is prohibited if it is an Aggressing Transaction, *i.e.*, reaches across the market, and, as a result,

creates a new Exchange high or low, unless the transaction would match another market's better bid or offer price, bring the price of that security into parity with an underlying or related security or asset, or would liquidate or decrease the position of the DMM unit.

First, the Exchange proposes to modify the second leg of the definition of Aggressing Transaction. As proposed, an Aggressing Transaction would be (1) a purchase (sale) that reaches across the market to trade as the contra-side to the Exchange published offer (bid) that (2) is priced above (below) the last consolidated sale. The Exchange believes that the last consolidated trade is a more meaningful benchmark of the market for the underlying security since most intraday trading in Exchange listed securities occurs away from the NYSE. Assessing whether a trade that reaches across the market by reference to whether that transaction aggressively moves the price above (below) the last consolidated trade rather than above (below) the last trade on the Exchange and above (below) the last differently-priced published bid or offer on the Exchange could thus result in identifying a greater number of potentially disruptive DMM unit transactions. Moreover, these transactions would remain subject to the DMM unit re-entry obligations on the opposite side of the market set forth in Rule 104(d)(2) and which this proposal does not seek to change.

Second, the Exchange proposes to delete Rule 104(d)(B) to eliminate Prohibited Transactions.

Prohibited Transactions originated as a rule intended to prevent Exchange specialists from setting a price in the final ten minutes of trading to advantage the specialist's proprietary position in a security.⁴⁰

As noted, over the years, the increasingly automated logic for executions has severely circumscribed the amount of non-public information that is only available to DMMs, and the Exchange has significantly enhanced the transparency of its marketplace.⁴¹ Any

information advantage that DMMs may have had with respect to orders from Floor brokers—even after such interest was included in the Closing Auction Imbalance Information—was eliminated in 2020 once Floor brokers could no longer represent verbal interest intended for the Closing Auction and were required to enter orders for the Closing Auction electronically during Core Trading Hours.⁴² Moreover, DMM unit algorithms only have access to the same data feeds that are available to the public and, with the proposed elimination of the additional non-public information available to Floor-based DMMs, DMMs would have no informational advantage, however slight, in the Closing Auction. Like all other market participants, DMMs would only be able to see the imbalance but not the orders that are moving the imbalance in a given direction, and would have absolutely no information regarding the identity of the participants in the Closing Auction. Significantly, DMMs are now also constrained in pricing the Closing Auction. Pursuant to Rule 7.35B(g)(2), the Auction Price that the DMM is responsible for determining *must* be at or between the last-published Imbalance Reference Price and the last-published non-zero Continuous Book Clearing Price.

Elimination of the availability of aggregate order information to DMMs marks the culmination of the Exchange's efforts to remove any suggestion of informational asymmetry going into the Closing Auction. As a result of the proposal, there would be no question that DMMs would be on the same informational footing as all other market participants at this crucial point in the trading day and would, like them, be trading without access to non-public information that individual DMMs could use to potentially disadvantage other market participants or condition the market. DMMs engaging in Aggressing Transactions in the final 10 minutes of the trading day would moreover be at the risk of the market and would remain subject to the requirement to re-enter on the opposite side of the market at or before the applicable PPP for the security, including immediate re-entry at or before the applicable PPP if the DMM transaction is of block size or greater.

⁴² See Securities Exchange Act Release No. 92480 (July 23, 2021), 86 FR 40885 (July 29, 2021) (SR-NYSE-2020-95) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2, To Make Permanent Commentaries to Rule 7.35A and Commentaries to Rule 7.35B and To Make Related Changes to Rules 7.32, 7.35C, 46B, and 47).

The re-entry requirement is designed to dampen the volatility that can ensue from a DMM quoting aggressively in their assigned securities throughout the trading day. The proposal would retain the re-entry requirement following an Aggressing Transaction and make it stronger and more deterministic by requiring the DMM unit to re-enter on the opposite side in the same size as the Aggressing Transaction.⁴³ The Exchange believes the re-entry requirement represents a significant differentiator between DMMs and other market makers who do not have similar stabilizing re-entry requirements.

There may be a variety of reasons related to the DMM unit's obligations to the marketplace for a DMM unit to quote aggressively in assigned securities at the close. For instance, a DMM may want to add to an existing proprietary position in anticipation of having to add liquidity on the other side during the Closing Auction—in other words, in anticipation of facilitating the close. If Prohibited Transactions are retained, a DMM would continue to be prohibited from engaging in this type of desirable activity in the final 10 minutes of the trading day if adding to the DMM unit's position results in a new high or low price on the Exchange. Indeed, such a restriction could in fact negatively impact the amount of liquidity available to investors on the Exchange in securities in which the DMM unit has a position. The Exchange accordingly believes that, in light of the proposal, restricting DMM unit trading going into the Closing Auction no longer serves any meaningful regulatory or other purpose and that there would thus no longer be any reason to treat DMM units differently from other similarly situated market makers at the end of the trading day.

The Exchange currently employs a suite of surveillances for trading by DMM units and other market participants intraday and in and around the close of trading and actively examines trading patterns for potential violations, including appropriate re-entry on the opposite side of the Aggressing Transaction. The Exchange

⁴³ For instance, a DMM unit engaging in a 500 share Aggressing Transaction would be required to re-enter on the opposite side at or before the PPP in the same quantity. To effectuate this change, "commensurate with" the size of the Aggressing Transaction in Rule 104(d)(2)(A) would be changed to "in the same size" as the Aggressing Transaction. Given this proposed bright line re-entry requirement, the Exchange would delete the heading to Rule 104(d)(3), the last sentence of current Rule 104(d)(3)(A), and all of Rule 104(d)(3)(B). The first sentence of current Rule 104(d)(3)(A) describing the issuance of PPP Guidelines by the Exchange would become new Rule 104(d)(2)(C).

⁴⁰ In 2018, the Exchange replaced four types of DMM transactions based on the DMM's position (Neutral, Non-conditional, Conditional and Prohibited) with a single, enhanced DMM unit transaction called an "Aggressing Transaction" that retained specific re-entry requirements and was prohibited during the last ten minutes of trading if the transaction resulted in a new Exchange high or low price of the day, with exceptions for matching another market's better bid or offer, bringing the price of that security into parity with an underlying or related security or asset, or liquidating or decreasing the DMM unit's position. See Securities Exchange Act Release No. 54860 (December 1, 2006), 71 FR 71221, 71229 (December 8, 2006) (SR-NYSE-2006-76).

⁴¹ See note 6, *supra*.

believes that its rules are reasonably designed to prevent DMMs from inappropriately influencing or manipulating the close. These rules would not change as a result of the proposal and would continue to require an evaluation of DMM unit trading activity, and in particular transactions for the DMM unit's own account, from the standpoint of the affirmative and other obligations to the marketplace, including the responsibility to ensure that openings and reopenings are fair and orderly, reflecting a professional assessment of market conditions at the time, and appropriate consideration of the balance of supply and demand as reflected by orders represented in the market.⁴⁴

For all the foregoing reasons, the Exchange believes that deletion of Rule 104(d)(B) would eliminate restrictions on DMM units that are no longer necessary given the evolution of trading on the Exchange, thereby promoting additional liquidity for investors around the close of trading.

Rules 104(e) and (f)

The Exchange proposes to delete Rules 104(e) (Trading Floor Functions of DMMs) and (f) (Temporary DMMs).

Rule 104(e) as noted sets forth certain permitted DMM Trading Floor functions, including maintaining order among Floor brokers manually trading at the DMM's assigned panel (Rule 104(e)(i)(A)); bringing Floor brokers together to facilitate trading, which may include the DMM as a buyer or seller (Rule 104(e)(i)(B)); assisting Floor brokers by providing information regarding the status of a Floor broker's orders, helping to resolve errors or questioned trades, adjusting errors, and cancelling or inputting Floor broker agency interest on behalf of a Floor broker (Rule 104(e)(i)(C)); and researching the status of orders or questioned trades on the DMM's own initiative or at the request of the Exchange or a Floor broker under various circumstances. Each of these historical functions is less important in today's marketplace and, to the extent necessary, can be performed by Exchange staff rather than by DMMs. In addition, as set forth in Rule 104(e)(ii), the Exchange makes available to DMMs aggregated buying and selling interest and post-trade information in the securities in which the DMM is registered in order to facilitate these Trading Floor functions. As discussed

above, the Exchange proposes a new Rule 104(a)(4) to retain the substance of current Rule 104(e)(ii) and a new Rule 104(a)(5) to permit DMMs to provide aggregate order information only in connection with a Floor broker 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, in connection with the facilitation of the opening or reopening of a security. The current restrictions on electronic submission of an inquiry and electronic transmission of market information in response to the inquiry would also be retained.

The Exchange would delete Rule 104(f) governing temporary DMMs as obsolete. The rule has rarely been invoked. Moreover, the Exchange's rules provide for relief DMMs, which would be available during the trading day to ensure no interruption of the continuity of DMM service to the market.

Rule 104(g)

As noted, Rule 104(g) sets forth the obligation of DMMs to communicate with their listed issuers. In view of the proposed changes to Rule 36 discussed below, permitting communications with any individual, including employees from listed issuers, from the Trading Floor, consistent with Rule 98, the Exchange proposes conforming changes to Rule 104(g)(2)(B), which currently prohibits communications with a listed issuer contact from the Trading Floor via telephone and limiting communication from the Trading Floor to written electronic communications. As proposed, Rule 104(g)(2)(B) would 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. Current Rule 104(g)(2)(A) requires that employees of a DMM unit comply with the requirements of Rule 98 with respect to the information that may be shared with the listed issuer contact during the required communications, which would include communications from the Trading Floor. Rule 36.30 as proposed also requires DMM units to establish policies and procedures reasonably designed to ensure that use of telephones and alternative communication devices, as well as permitted communications devices, are consistent with all SEC rules and Exchange rules. Taken together, these restrictions would require DMM units to reasonably ensure that communications with listed issuer contacts from the Trading Floor are restricted to information that is permitted by the

federal securities laws and Exchange rules.

Rule 104(g) would become new Rule 104(e) and the numbering would be removed from proposed Rule 104(e)(2).

Rule 76

The Exchange proposes to modernize the way Floor brokers execute cross transactions on the Trading Floor. Rather than perpetuating the current practice of a Floor broker verbally announcing the cross trade at the post/panel of the DMM unit for the subject security and having the DMM acknowledge the Floor broker announcement, the Exchange proposes to undertake these functions, thereby eliminating any interaction between a Floor broker and a DMM during cross transactions. The proposed change is consistent with and complements the elimination of the remaining intraday DMM Trading Floor functions set forth in Rule 104, described above.

As proposed, Floor brokers entering a cross transaction into Exchange systems would activate a 20-second timer as occurs today, with the difference that once the 20-second period starts, the Exchange would announce the proposed cross transaction in place of the current verbal announcement at the DMM unit post/panel. The Exchange believes that the proposal would thereby remove any potential for individual DMMs to interact with Floor brokers in connection with these transactions.

In today's marketplace, cross transactions are negotiated upstairs by customers seeking a primary market print or customers who do not wish to have their orders handled by broker-dealers that also trade as principal. As a practical matter, cross transactions are no longer arranged at the point of sale by Floor brokers interacting with other brokers and the DMM in a physical trading crowd. In the current environment, verbally announcing a proposed cross transaction at a post/panel means announcing it to the DMM and any other Floor brokers that happen to be nearby. As proposed, the Exchange would announce the cross transaction to all Floor-based participants. If there is interest in response to the Exchange announcement of the cross trade, the Floor Broker would still be required to trade with such interest on behalf of the applicable customer order(s), as is the case today. Similarly, if the original terms of the proposed cross transaction cannot be met because other Floor-based members trade with a portion of either the proposed bid or offer and the Floor Broker cannot complete the proposed cross transaction in the size or price entered into Exchange systems, the

⁴⁴ As noted, the Exchange supplies DMMs with suggested Depth Guidelines for each security in which a DMM is registered, and DMMs are expected to quote and trade with reference to the Depth Guidelines. See Rule 7.35A.

originally-entered proposed cross transaction would be cancelled, as is also the case today.

To effectuate the proposed rule changes, the Exchange would delete “trading” before “Crowd” in the second sentence of Rule 76.⁴⁵ The proposed change would have the effect of removing the restriction on announcing a proposed cross transaction at the post/panel where the security to be crossed is traded. The same change would be made in the next to last sentence in Rule 76.10. It should be noted that an Exchange announcement of a proposed cross transaction to the Crowd would be consistent with Rule 70.30.⁴⁶

The Exchange proposes further conforming changes to delete “from their wireless hand-held devices (‘HHD’)” from the first sentence of subsection (a) of Supplementary Material .10 and the three other references to “HHD” therein. One reference to HHD would be replaced by “Floor broker.” The other reference is part of the phrase “using the ‘print’ key function in the HHD” that would be deleted. The Exchange also proposes to simplify the rule by replacing references to “quote minder” with “Exchange systems.”

Finally, the Exchange proposes to delete the preamble to Rule 76 providing that “Supplementary Material .10 to this Rule is not applicable to trading UTP Securities on the Pillar trading platform.” Currently, Floor brokers can effect proposed cross transactions in both Exchange listed and UTP securities pursuant to Rule 76, although the Cross Function described in current Rule 76.10 is unavailable for cross transactions in UTP Securities because UTP Securities are not assigned to a trading post/panel with a DMM. Given the proposed elimination of verbal announcements at the point of sale for Exchange-listed securities, the Cross Function could also be utilized for UTP securities. As proposed, Floor brokers executing cross transactions under Rule 76.10 would follow the same procedures for Exchange-listed and UTP securities, with the Exchange announcing cross transactions in both cases.

The remaining aspects of the Crossing Function described in Rule 76.10 would remain unchanged.

⁴⁵ The Exchange also proposes clarifying changes to replace “member” and “he or she” with “Floor broker” or “the Floor broker’s” in the first sentence of the rule.

⁴⁶ Rule 70.30 defines “Crowd” as the “rooms on the Exchange Floor that contain active posts/panels where Floor brokers are able to conduct business constitute the Crowd. A Floor broker will be considered to be in the Crowd if he or she is physically present in one of these rooms.”

Rule 36

The Exchange proposes to combine current Rule 36.30 governing installation and use of telephones at DMM unit posts on the Trading Floor and current Rule 36.31 governing use of wired or wireless devices such as computer terminals or laptops into a single, revised proposed Rule 36.30 titled “DMM Unit Telephones and Permitted Communications Devices.”⁴⁷

The proposed changes would modernize DMM communications from the Trading Floor by permitting DMM units to use any telephone registered with the Exchange, including cellular or wireless telephones, and by permitting wired or wireless devices, currently limited to communications only with the system employing the algorithms and with individual algorithms, to also communicate with persons off the Trading Floor. Together with the proposed changes to Rule 104(g) governing communications with listed issuers discussed above, the proposed changes would enable DMMs to communicate from the Trading Floor with any person off the Trading Floor, including individuals at listed issuers, consistent with reasonable record-keeping and supervision requirements and the Rule 98 requirements to maintain confidentiality of non-public information about securities allocated to the DMM unit. Current restrictions on communications with listed issuers during specific time periods would no longer be necessary and would not be carried forward.⁴⁸

The proposed changes are based in part on Rule 36.21 governing use of cellular and wireless phones by Exchange Floor brokers, which were in turn based on the rules governing use of cellular phones on the options trading floors of the Exchange’s affiliates NYSE Arca, Inc. (“NYSE Arca”), and NYSE American LLC (“NYSE American”), and include similar proposed safeguards on the use of such devices tailored for DMMs.⁴⁹

⁴⁷ In the heading, the Exchange would also add a missing space between .30 and DMM and to delete “Post Wires—”.

⁴⁸ See Rule 36.31 (restricting DMM units from using a Permitted Communications Device to communicate with a listed issuer representative between 9:15 a.m. Eastern Time until the security opens and beginning 15 minutes before the scheduled closing time for a security until the security is closed).

⁴⁹ The Exchange’s affiliates, NYSE Arca and NYSE American, operate physical options trading floors in San Francisco and New York, respectively. NYSE American Rule 902NY (Admission and Conduct on the Options Trading Floor), governing phone use on the NYSE Amex Options Trading Floor, was adopted in 2009 and modeled on NYSE Arca Rule 6.2(h) (Admission to and Conduct on the Options Trading Floor). Both exchanges allow

To effect these changes, the Exchange would delete the current text of Rule 36.30 (DMM Unit Post Wires) and Rule 36.31 (DMM Electronically Transmitted Written Communications) in their entirety. The proposed combined Rule 36.30 would contain separate sections (a) and (b) governing “Telephones” and “Other Permitted Communications Devices,” respectively.

Proposed Rule 36.30(a) governing “Telephones” would have four subsections.

Proposed subsection (a)(1) would govern registration and provide that DMM units must register, prior to use, any new telephone, including cellular or wireless phones, to be used on the Trading Floor by submitting a request in writing to the Exchange in an acceptable format. In addition, proposed Rule 36.30(a) would provide that no DMM unit may employ any alternative communication device (other than telephones as described herein) on the Trading Floor without prior Exchange approval.

Proposed subsection (a)(2) would govern functionality and provide that when using a registered telephone or alternative communication device on the Trading Floor, a DMM may engage in direct voice communication to an off-Floor location with any individual with whom telephone communications are permitted under Rule 98. Similarly, consistent with the restriction in current Rule 36.30, proposed Rule 36.30(b) would provide that registered telephones or alternative communication devices used by DMMs on the Trading Floor would not be used for the purpose of transmitting orders for the purchase or sale of securities to a DMM or the DMM unit.

Proposed subsection (a)(3) would set forth the DMM unit’s recordkeeping requirement for telephones registered for use on the Trading Floor. As proposed, DMM units would be required to maintain records of the use of telephones and all other approved alternative communication devices, including logs of calls placed, in compliance with Rule 440 and SEC Rules 17a-3 and 17a-4. The Exchange would reserve the right to periodically inspect such records pursuant to Rule 8210, which governs provision of information and testimony as well as inspection and copying of books. The Exchange proposes to use the same record retention language for telephones currently applicable to Permitted Communications Devices.

Floor-based permit holders and their employees to use personal phones on the options trading floors subject to certain restrictions.

Finally, proposed subsection (a)(4) would require that DMM units to establish policies and procedures reasonably designed to ensure that use of telephones and alternative communication devices is consistent with all SEC rules and Exchange rules.

Proposed Rule 36.30(b) governing “Permitted Communications Devices” would also have four subsections. Rule 36.30(b) would adopt a similar structure to proposed Rule 36.30(a) and incorporate aspects of current Rules 36.30 and .31 as described below.

Proposed subsection (b)(1) would govern registration and provide that DMM units would have to register, prior to use, any other wired or wireless devices such as computer terminals or laptops used to communicate with (1) persons off the Trading Floor, or (2) the system employing the DMM unit’s algorithms or with individual algorithms that enable the DMM unit to activate or deactivate the system employing the algorithms or an individual algorithm or change such system’s pre-set parameters, which the proposed rule would together define as a “Permitted Communications Device.”

Proposed subsection (b)(2) would govern functionality and provide that a Permitted Communications Device may be used only for communications between individuals or systems located at the DMM unit on the Trading Floor and individuals or systems with whom communications are permitted under Rule 98.

Proposed subsection (b)(3) would set forth record-keeping requirements and provide that DMM units must maintain records of the use of Permitted Communications Devices, including all communications sent to or from Permitted Communication Devices, in compliance with Rule 440 and SEC Rules 17a–3 and 17a–4. The proposed rule would further provide that such records would need to be maintained in a format prescribed by the Exchange. Both of these requirements can be found in the current rules. Proposed Rule 36.30(b)(3) would add the proviso that the Exchange reserves the right to periodically inspect such records pursuant to Rule 8210, consistent with proposed Rule 36.30(a)(3).

Proposed subsection (b)(4) would provide that DMM units must establish policies and procedures reasonably designed to ensure that the use of Permitted Communications Devices are consistent with all SEC rules and Exchange rules.

Proposed Rule 36.30(c) would be titled “General” and would incorporate the limitations in current Rule 36.21 and the rules of the Exchange’s options

affiliates⁵⁰ that the Exchange may deny, limit, or revoke registration of any device used on the Trading Floor whenever it determines, in accordance with the procedures set forth in Rule 9558,⁵¹ that use of such device is inconsistent with the public interest, the protection of investors, or just and equitable principles of trade, or such device has been or is being used to facilitate any violation of the Act, as amended.

In addition, the Exchange proposes to delete current Rule 36.30 prohibiting a non-member to list the telephone number of a line terminating in a switchboard of the member or member organization in any type of telephone directory under the name of the non-member as obsolete. Similarly, the Exchange would not retain text in current Rule 36.30 permitting DMMs to use a telephone connection or order entry terminal at the DMM unit’s post to enter a proprietary order in an Investment Company Unit (as defined in Rule 5.2(j)(3)) or a Trust Issued Receipt (as defined in Rule 8.200) 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, as obsolete.

Rule 98

Rule 98 was adopted in 1986, at a time when specialist firms, which had been independent member-owned entities, increasingly became affiliates of larger member organizations. Given the specialists’ position in the marketplace, Rule 98 required an organizational separation between a specialist and its affiliates in order to eliminate or control conflicts of interest between the business activities of affiliates of the specialist and the specialist’s responsibilities to the market and to customer orders that the specialist represented as agent.⁵² As noted above, in 2008, the Exchange adopted a more flexible, principles-based approach to Rule 98 that, among other things, allowed DMM operations to be integrated into better-capitalized member organizations; permitted a DMM unit to share non-trading-related services with its parent member organization or approved persons; and provided flexibility to member organizations and their approved

persons in conducting risk management of DMM operations.

The Exchange now proposes revisions to Rule 98 to provide a framework for DMM unit operations on the Trading Floor once DMMs would only be provided access to aggregate order information in order to facilitate openings and reopenings as needed and only (1) before the open or until a security opens for trading, or (2) while trading is halted and only until a security is reopened for trading, and to facilitate the closing of trading on an as-needed basis and only outside Core Trading Hours.⁵³ Importantly, the proposed changes to Rule 98 would in no way diminish the DMM unit’s obligation to maintain confidentiality and enforce written policies and procedures to prevent the misuse of material, non-public information by DMM units and their employees, as well as to ensure compliance with applicable federal laws and regulations and Exchange rules, or the obligation of individual DMMs to refrain from trading in DMM securities on the basis of material, non-public information.

To effectuate these changes, the Exchange would make the following changes to Rule 98:

- The definition of “Floor-based non-public order” in Rule 98(b)(4) would be deleted. The Exchange believes that the concept of Floor-based non-public order information would become obsolete with the proposed changes to Rules 76 and 104. The current definitions in (b)(5) through (b)(7) would be renumbered.

- Current Rule 98(c)(2) would be broken into two parts. New Rule 98(c)(2) would consist of the first sentence of the current rule describing the requirements for member organizations seeking approval to operate a DMM unit pursuant to Rule 98. New Rule 98(c)(3) would consist of the remainder of current Rule 98(c)(2) with the following text added as the first sentence: “Member organizations operating a DMM unit and DMMs shall not misuse material, non-public information.” The Exchange believes the proposed change would strengthen the Exchange’s ability to address potential misuses of non-public information from any source under the revised rule set.

- Current Rule 98(c)(3)(A) providing that a DMM unit shall protect against the misuse of Floor-based non-public order information and that only Floor-based employees of the DMM unit and individuals responsible for the direct supervision of the DMM unit’s Floor-

⁵⁰ See Rule 36.21; see generally NYSE American Rule 902NY(i) and NYSE Arca Rule 6.2(h).

⁵¹ Rule 9558 relates to summary proceedings for actions authorized by section 6(d)(3) of the Act.

⁵² See Securities Exchange Act Release No. 23768 (Nov. 3, 1986), 51 FR 41183 (Nov. 13, 1986) (SR–NYSE–85–25).

⁵³ See discussion of proposed revisions to Rule 104, *supra*.

based operations may have access to Floor-based non-public order information would be deleted. Current Rule 98(c)(3)(B) would become new Rule 98(c)(4)(A).

- Current Rule 98(c)(3)(B)(iii) prohibiting, except as provided for in Rule 36.30, communications by employees of a DMM unit with individuals or systems responsible for making trading decisions for related products or for away-market trading in their assigned DMM securities, would be amended to only permit those communications consistent with Rule 98. As noted, this change would be consistent with the proposed changes to Rule 36.30.

- Current Rule 98(c)(3)(B)(iv) prohibiting employees of a DMM unit from having access to customer information or the DMM unit's position in related products would be revised to limit the prohibition to customer order information only.⁵⁴ The reference to the DMM unit's position in related products would be removed consistent with the proposed changes to current Rule 98(c)(3)(B)(iii) described above.

- The Exchange would delete current 98(c)(3)(C) specifically addressing Floor-based employees of a DMM unit that move to a location off the Trading Floor or any person providing risk management oversight or supervision of the Floor-based operations of the DMM unit that becomes aware of Floor-based non-public order information as no longer necessary given the elimination of the general availability of such information to DMM units.

- The Exchange would similarly delete current 98(c)(3)(D) providing that a DMM unit may make available to a Floor broker associated or affiliated with an approved person or member organization any information that the DMM would be permitted to provide under Exchange rules to an unaffiliated Floor broker.

- The Exchange would delete current Rule 98(c)(5) requiring member organizations to provide the Exchange with net position information in DMM securities by the DMM unit and any independent trading unit of which it is part based on the elimination of Prohibited Transactions. The Exchange utilizes this data to assess Prohibited Transactions, which would be deleted as discussed above. Rules 98(c)(6) and (7) would be renumbered accordingly.

- The Exchange would amend Rule 98(e)(1) describing steps to be taken in

the event a DMM unit receives non-public information about a security that is allocated to the DMM unit to delete the phrase "from the member organization or approved person." The proposed change does not privilege Floor-based non-public information and reflects that non-public information can be received from any source. In addition, the Exchange would make clear that the non-public information referenced therein excludes aggregate order information provided by the Exchange as set forth in Rule 104(a)(2) and (3).

- Subsection (3) of Rule 98(f) governing reporting obligations would be amended to delete the reference to "Floor-based" non-public order information. As amended, Rule 98(f)(3) would require a DMM unit to promptly report to the Exchange any failure to maintain the confidentiality of non-public information.

- Rule 98(f)(4) would become new Rule 98(f)(3) and the phrase "Floor-based non-public order information" in that subsection would be replaced with "non-public information."

- Finally, the Exchange proposes to similarly replace "Floor-based non-public order information" with "non-public information" in Rule 98(g).

Rule 103B

Rule 103B(III) mandates that when an issuer selects a DMM unit by interview, the individual DMM who is proposed to trade the company's security must participate in the interview. Further, once a DMM unit is selected, Rule 103B mandates that the individual DMM assigned to the security must remain the assigned DMM for at least one year from the date that the issuer begins trading on the Exchange.⁵⁵

The Exchange proposes to remove the requirement that listed issuers must interview the individual DMM who is proposed to trade the company's security and the related requirement that the individual DMM assigned a proposed security must remain the assigned DMM for one year from the date that the issuer begins trading on the Exchange, also known as the "DMM one-year obligation." Conforming changes would be made to Rule 103B(VI)(H) to delete the contingency where the proposed individual DMM is no longer with the selected DMM unit.

In addition to providing the DMM unit with greater flexibility in determining who should participate in

the interview process, the proposed changes to Rule 103B would deemphasize the importance of the individual DMM in the issuer allocation process. The Exchange believes that listed issuers will not be disadvantaged by the proposal and in fact would benefit from the ability to develop broader relationships with a DMM unit by not limiting trading in its listed security to a single individual for any length of time.

DMM Unit Introductory Program in ETPs

The Exchange proposes a new Rule 104B⁵⁶ governing its DMM Unit Introductory Program in ETPs (the "Program").⁵⁷

As 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 an SLP on the Exchange. The Program is limited to ETPs and is designed to provide eligible member organizations with a 12-month ramp up period to becoming fully operational. Trading Floor-based DMM units, which the Exchange believes would encourage competition among existing DMM units and potential new entrants to the benefit of investors.

Proposed Rule 104B(b) would set forth the Program qualifications. As proposed, eligible member organizations must meet the registration and capital requirements set forth in Rule 103 and have:

- adequate technology to support all electronic DMM obligations through the systems and facilities of the Exchange during the initial 12-month period;
- MPIDs that identify to the Exchange trading activity in assigned DMM securities;
- adequate trading infrastructure to support DMM unit trading activity, which includes support and administrative staff to maintain operational efficiencies in the Program; and
- a disciplinary history that is consistent with just and equitable business practices.

In addition, proposed Rule 104B(b) would provide that individuals to be

⁵⁶ As noted, the Exchange proposes to delete Rule 104A as obsolete. See note 35, *supra*. Current Rule 104B prohibiting DMMs (to be changed to DMM units) from charging commissions for trades in registered securities would become new Rule 104A.

⁵⁷ See Securities Exchange Act Release No. 92480 (July 23, 2021), 86 FR 40885 (July 29, 2021) (SR-NYSE-2020-95) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2, To Make Permanent Commentaries to Rule 7.35A and Commentaries to Rule 7.35B and To Make Related Changes to Rules 7.32, 7.35C, 46B, and 47).

⁵⁴ The prohibition relates to customer order information, so the Exchange would add "order" to the rule text. See Securities Exchange Act Release No. 71837 (Apr. 1, 2014), 79 FR 19146 (Apr. 7, 2014) (SR-NYSE-2014-12).

⁵⁵ See Rule 103B(III)(C). The DMM unit may designate a different individual DMM within the year by notifying the Exchange of the change and setting forth the reasons for the change with the consent and approval of the issuer.

registered as DMMs are required to be members of the Exchange and pass the qualifying examination for DMMs. Applications for this examination should be submitted to the Exchange.

Proposed Rule 104B(c) would govern the application process for the Program. As proposed, eligible member organizations would be required to submit a Rule 103 application to the Exchange with all supporting documentation in order to participate in the Program. Based on the application, the Exchange would determine whether an applicant was qualified for the Program based on proposed Rule 104B(b) and would notify the applicant of its eligibility decision in writing. In the event an application is disapproved, the proposed rule would provide that an applicant may re-apply for the Program at least three calendar months following notification by the Exchange of disapproval. Finally, proposed Rule 104B(c) would provide that once approved for the Program, the DMM unit along with their DMMs would be subject to the obligations as set forth in proposed Rule 104B(e) of this Rule during the 12-month duration of the Program discussed below.

Proposed Rule 104B(d) would govern voluntary withdrawal from the Program. As proposed, at any time during the 12-month duration of the Program, a DMM unit would be able to withdraw by giving notice to the Exchange in writing. Such withdrawal would become effective when the ETPs assigned to the withdrawing DMM unit are reassigned by the Exchange, which as proposed would be done as soon as practicable but no later than 30 days from the date the Exchange receives a withdrawal notice. As further proposed, in the event the reassignment takes longer than the 30-day period, the withdrawing DMM unit would have no obligations under the proposed rule and would not be held responsible for any matters concerning previously assigned ETPs upon termination of the 30-day period. Rule 104B(d) mirrors the voluntary withdrawal provisions for SLPs in current Rule 107B(e).

Proposed Rule 104B(e) would govern the obligations of DMM units and their DMMs. As proposed, during the 12-month Program period, DMM units and their DMMs would be subject to the duties and 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. Finally, DMMs would be permitted to conduct business

only on behalf of the DMM unit with which the DMM is associated.

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 35.20⁵⁸ regarding personnel available to DMM units on the Trading Floor; would be ineligible to compete for new listings pursuant to Rule 103B; and would be eligible for DMM unit pricing incentives set forth in the Exchange's Price List unless specifically provided therein.

Finally, proposed Rule 104B(f) would set forth the additional requirement that all DMM units in the Program must transition to fully operational DMM units on the Trading Floor and meet all Exchange requirements for DMM units within the 12-month period. As proposed, DMM units failing to fully transition as provided herein would forfeit all ETP symbols and would be ineligible to re-apply for the Program or become DMM units for a 12-month period. Finally, the proposed rule would provide that member organizations disputing Exchange determinations under this Rule would be required to follow the appeal procedures set forth in Rule 107B(k).⁵⁹

* * * * *

The Exchange believes that the proposal would enhance and modernize DMM unit operations from the Trading Floor and remove barriers to entry into the DMM unit business without diluting DMM unit obligations and responsibilities. The result would enhance and encourage competition among current and prospective DMM units, to the benefit of investors and issuers.

For all of the foregoing reasons, the Exchange believes that the proposed rule change is consistent with the Act.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b) of the Act,⁶⁰ in general, and furthers the objectives of section 6(b)(5) of the Act,⁶¹ in particular, because 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

regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to, and perfect the mechanisms of, a free and open market and a national market system and, in general, to protect investors and the public interest and because it is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

Rule 104

The Exchange believes that the proposed changes to Rule 104 that would eliminate DMM access to aggregate order information intraday with one exception for reopenings and the traditional DMM Trading Floor-based functions involving information sharing with other Floor-based market participants would remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting DMM units to function more like other proprietary market makers. The proposed changes would continue to provide DMMs with tools to comply with their obligations to supply liquidity as needed to facilitate openings, reopening and the close of trading, while eliminating the potential that DMMs on the Trading Floor could utilize non-public information to disadvantage other market participants and public customers, particularly during the Closing Auction. Further, restricting DMM access to aggregate order information to an as needed basis and while trading is halted and only until the security is reopened would not be inconsistent with the public interest and the protection of investors because DMM units would still have the obligation under Rule 98 to maintain the confidentiality of non-public order information made available to a DMM for the purpose of facilitating an intraday reopening and to appropriately supervise a DMM's access to and use of such information. The proposed changes to Rule 104 restricting use and dissemination of aggregate order information are also designed to prevent fraudulent and manipulative acts and practices and would promote the public interest and the protection of investors.

The Exchange believes that redefining Aggressing Transactions in Rule 104 as transactions that reach across the market priced above (below) the last consolidated trade would remove impediments to and perfect the mechanism of a free and open market and a national market system by focusing on transactions that reach across the market above or below a price that bears a reasonable relationship to

⁵⁸ 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.

⁵⁹ Rule 107B(k) specifies the process for SLPs to appeal non-regulatory Exchange penalties.

⁶⁰ 15 U.S.C. 78f(b).

⁶¹ 15 U.S.C. 78f(b)(5).

the overall market for the security, given that most of the volume in Exchange listed securities occurs away from the Exchange. The Exchange believes that the proposal would not be inconsistent with the public interest and the protection of investors. As noted, the proposal would not eliminate the requirement that all DMM transactions be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock. Further, DMM Aggressing Transactions would continue to uniquely require re-entry on the opposite side of the market at or before the applicable PPP for the security as warranted, including immediate re-entry if the DMM transaction aggressively taking liquidity is of block size or greater. The Exchange believes that requiring re-entry to be in the same size as the Aggressing Transaction would strengthen the re-entry requirement by making it more deterministic, thereby supporting maintenance of a fair and orderly market and removing impediments to and perfect the mechanism of a free and open market and a national market system.

In addition, the Exchange believes that eliminating Rule 104(d)(1)(B) prohibiting Aggressing Transactions in the final ten minutes of trading would remove impediments to and perfect the mechanism of a free and open market and a national market system by permitting DMM units to enter trades going into the close without restriction, which the Exchange believes would benefit the marketplace by adding liquidity to the Closing Auction. Further, eliminating Prohibited Transactions would not be inconsistent with the public interest and the protection of investors because DMMs, as proprietary traders without the ability to direct or influence trading or control the quote, would have no informational advantage going into the close and must select a closing price between the last-published Imbalance Reference Price and the last-published non-zero Continuous Book Clearing Price. The Exchange believes that eliminating Prohibited Transactions would not be inconsistent with the public interest and the protection of investors because DMM trading decisions going into the close would continue to be evaluated from the perspective of their obligations to the marketplace, including the obligation to arrange a fair and orderly close and selection of a price in the required range, as set forth in Exchange rules. Moreover, during the last ten minutes of trading, DMM units would

still have an obligation to re-enter the market if their trading both reaches across the market and increases or establishes a position, which would dampen volatility and ensure that DMM transactions bear a reasonable relationship to overall market conditions. Indeed, as noted above, the Exchange would strengthen re-entry for Aggressing Transactions by requiring re-entry on the opposite side at or before the applicable PPP provided by the Exchange in the same size as the Aggressing Transaction.

The numerous obligations currently imposed on DMM units by Rule 104 would in no way be altered or diminished by the proposal. The Exchange does not believe that the balance of benefits and obligations under Rule 104 would be impacted by the proposed rule change. DMM units would be subject to strengthened re-entry requirements when engaging in Aggressing Transactions at or before the applicable PPP for that security by having to re-enter on the opposite side in the same size as the transaction, and the requirement that all DMM unit transactions be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock would not be altered by the proposal. These safeguards would continue to reasonably ensure that DMM unit transactions bear a reasonable relationship to overall market conditions. For the same reasons, the proposal would not alter or disrupt the balance between the benefits and obligations of being an Exchange DMM unit.

The Exchange believes that the replacing DMM unit for DMM in Rule 104 would remove impediments to and perfect the mechanism of a free and open market and a national market system by emphasizing the responsibility of the DMM unit for trading in assigned Exchange listed securities, thereby adding additional clarity and transparency to the Exchange's rules. The proposal would not be inconsistent with the public interest and the protection of investors because the proposal does not absolve individual DMMs from the obligation to comply with Exchange rules or diminish the potential penalties for individual DMMs that fail to do so.⁶²

Rule 36

The Exchange believes that permitting DMMs to use properly registered and approved telephones and any other alternative communication device as

well as any wired or wireless devices such as computer terminals or laptops (defined in the proposed rule as "Permitted Communications Devices") to communicate with persons off the Trading Floor, subject to the confidentiality requirements of Rule 98, are designed to prevent fraudulent and manipulative acts and practices and would be consistent with the public interest and the protection of investors because the Exchange would eliminate intraday DMM access to the remaining non-public information available to them on the Trading Floor, as reflected in the proposed changes to Rule 104. Further, in those situations where a DMM would be provided access to aggregate order information while trading is halted and only until the security is reopened, DMM units would still have the obligation under Rule 98 to maintain the confidentiality of the non-public order information made available to a DMM for the purpose of facilitating an intraday reopening and appropriately supervise a DMM's use of the telephone in that circumstance.

In addition, the Exchange would retain certain safeguards surrounding the use of such devices that are proposed for inclusion in amended Rule 36. The proposed safeguards would include the requirement that DMM units register all devices to be used on the Trading Floor with the Exchange and the specific recordkeeping requirement proposed for both telephones and Permitted Communications Devices that would require DMM units to maintain records of the use of telephones and all other approved alternative communication devices, including logs of calls placed, as well as the use of Permitted Communications Devices, including all messages generated by the unit's wired or wireless devices to communicate with the system employing the unit's algorithms, in compliance with Rule 440 and SEC Rules 17a-3 and 17a-4. Further, DMM units would be required to establish policies and procedures reasonably designed to ensure that use of telephones is consistent with all SEC rules and Exchange rules. The Exchange accordingly believes that these proposed safeguards establish an appropriate regulatory framework for supervising and monitoring mandated DMM communications with listed issuers consistent with the objectives of section 6(b)(5) of the Act.⁶³ The Exchange also believes that the proposed amendments to Rule 36 support the mechanism of free and open markets by continuing to provide a means for increased and more

⁶² See note 37, *supra*.

⁶³ 15 U.S.C. 78f(b)(5).

efficient communication by DMMs to and from the Trading Floor, including in furtherance of their rule-based obligation to regularly contact their assigned listed issuers.

Rule 76

The Exchange believes that the proposed changes to Rule 76 would remove impediments to and perfect the mechanism of a free and open market and a national market system by streamlining and modernizing the process for executing cross transactions on the Trading Floor. As noted, the requirement that a Floor broker announce a cross transaction at the point of sale is to “clear” the trading Crowd before executing a cross transaction. While the requirement made sense when Floor brokers that might be interested in participating in a cross transaction still needed to stand at a post/panel throughout the trading day, the requirement makes less sense in the current electronic trading environment. The Exchange believes that having the Exchange announce proposed cross transactions would make the process more efficient by not limiting the announcement to one physical location on the Trading Floor. An Exchange announcement would also allow additional members of the Trading Floor community to learn about a pending cross transaction and potentially participate, to the benefit of the marketplace and investors. Moreover, eliminating the DMM’s role in acknowledging the Floor broker announcement would remove impediments to and perfect the mechanism of a free and open market and a national market system by further permitting DMM units to function more like other proprietary market makers. As noted above, this change is also consistent with the proposed removal of the traditional DMM Trading Floor-based functions set forth in Rule 104. The Exchange accordingly believes that the proposed changes to Rule 76 would promote just and equitable principles of trade consistent with section 6(b)(5) of the Act.⁶⁴

The Exchange believes the proposal also benefits investor protection and public interest goals by eliminating interaction between the Floor broker and the individual DMM assigned to the subject security in the manual cross transaction process on the Trading Floor. The Exchange believes that the proposal would eliminate any information asymmetry that may exist when a DMM learns about a cross transaction before the trade is executed

and printed. Although the Exchange believes any existing informational advantages are slight and the window for the DMM to act exceedingly small, the Exchange believes the proposal would protect investors and the public interest by adding additional protections against the misuse of non-public information. Similarly, having the Exchange supervise and acknowledge the announcement of the proposed cross transaction promotes investor protection and the public interest. The Exchange believes that the proposal is thus designed to prevent fraudulent and manipulative acts and practices. Finally, having the Exchange announce cross transactions under Rule 76 and eliminating the need to announce at the point of sale would permit extending the Cross Function in Rule 76.10 to UTP securities, which would remove impediments to and perfect the mechanism of a free and open market and a national market system by applying the same streamlined process to all cross transactions on the Trading Floor.

Rule 98

The Exchange believes that the proposed changes to Rule 98 deleting references to Floor-based non-public order information and to specific requirements regarding maintenance of the confidentiality of such information that the Exchange would no longer provide to DMMs would remove impediments to and perfect the mechanism of a free and open market and a national market system by simplifying information barrier restrictions applicable to DMM units operating on the Trading Floor consistent with the principles-based approach to protect against the misuse of material non-public information, including specifically prohibiting trading based on material non-public information from any source, and will protect investors and the public interest by reinforcing protections against the misuse of material non-public information and deleting rules that may no longer meet this goal.

The Exchange believes that the proposed rule change would remove impediments to and perfect the mechanism of a free and open market by permitting a member organization operating a DMM unit to maintain and enforce policies and procedures to, among other things, prohibit the misuse of material non-public information and eliminating restrictions on how a member organization structures its DMM unit operations. The proposed amendments maintain the existing Rule 98 restrictions that are specific to DMM

units and DMMs but also maintain the information barrier requirements between the DMM unit and non-DMM unit areas of a member organization. Member organizations operating DMM units will continue to be subject to federal and Exchange requirements for protecting material non-public order information⁶⁵ and protecting customer orders that are the consistent with the existing rules governing broker dealers that operate as equity market makers on other registered exchanges.⁶⁶ Moreover, member organizations operating a DMM unit and DMMs would be specifically enjoined in proposed Rule 98(c)(3) from misusing material, non-public information, consistent with the protection of investors and the public interest.

The Exchange notes that Rule 98 will still require that member organizations maintain and enforce policies and procedures reasonably designed to ensure compliance with applicable federal securities laws and regulations and with Exchange rules. The Exchange notes that such written policies and procedures will continue to be subject to oversight by the Exchange and therefore the elimination of prescribed restrictions should not reduce the effectiveness of the Exchange rules to protect against the misuse of material non-public information.

The Exchange therefore believes that the proposed rule change will maintain the existing protection of investors and the public interest that is currently set forth in Rule 98, while at the same time removing impediments to and perfecting a free and open market by removing those restrictions related to Floor-based non-public information that the Exchange is eliminating and restricting.

New Rule 104B

The Exchange believes the proposal to establish a new DMM Unit Incentive Program in ETPs open to non-DMM Market Makers and SLPs would remove impediments to and perfect the mechanism of a free and open market and a national market system by encouraging member organizations that are already quoting and trading on the Exchange to become fully operational Floor-based DMMs following the ramp-up period. The Exchange believes that increasing the number of Floor-based DMM units would increase competition among existing and prospective DMM units, which would enhance price discovery, liquidity, competitive quotes, and price improvement on the

⁶⁵ See 15 U.S.C. 78o(g) and Rule 98(c)(2).

⁶⁶ See Rule 5320.

⁶⁴ 15 U.S.C. 78f(b)(5).

Exchange, to the benefit of investors. Moreover, the Exchange believes that providing for a DMM unit on the NYSE in ETPs would remove impediments to and perfect the mechanism of a free and open market and a national market system by allowing existing market makers and liquidity providers to leverage existing market-making strategies on the Exchange and provide all member organizations that choose to participate with enhanced opportunities to qualify for the various proposed credits to be set forth in the Exchange's Price List through increased quoting and liquidity-providing activity.

The Exchange believes the proposal also benefits investor protection and public interest goals by providing for a new category of market participant that would contribute to displayed liquidity, price discovery, and market quality on the Exchange in ETPs. The proposed DMM units are not intended to supplant existing non-DMM Market Makers or SLP market participants or their roles on the Exchange, and would instead represent an additional source of displayed liquidity on the Exchange during the ramp-up period (and beyond such period, to the extent DMM units thereafter transition to become fully integrated Floor-based DMM units) that would enhance the range and diversity of market making activity on the Exchange during that time, thus promoting competition and market quality on the Exchange to the benefit of all market participants.

The Exchange believes that proposed Rule 104B would also remove impediments to and perfect the mechanism of a free and open market and a national market system by setting forth qualification and registration requirements and processes for both member organizations individual employees. Specifically, the proposed rule would require member organizations to meet the registration and capital requirements set forth in Rule 103, file a DMM application, and have adequate technology to support all electronic DMM obligations through the systems and facilities of the Exchange during the initial 12-month period; MPIDs that identify to the Exchange trading activity in assigned DMM securities; adequate trading infrastructure to support DMM unit trading activity, which includes support and administrative staff to maintain operational efficiencies in the Program; and a disciplinary history that is consistent with just and equitable business practices. Individuals that would function as DMMs for the DMM units must also be members of the Exchange and pass the DMM qualifying

examination. The Exchange believes that proposed Rule 104B would thus protect investors and the public interest by ensuring that prospective DMMs and DMM units are subject to uniform, objective requirements for eligibility. Moreover, the proposed rule change would also promote investor protection and the public interest by requiring that eligible member organizations and DMMs be subject to the same registration requirements as regular DMM units and DMMs, including the requirement that eligible member organizations file a DMM application and individual DMMs take the DMM examination.

The proposed rule change would also promote just and equitable principles of trade by subjecting prospective DMMs and DMM units to the same duties and responsibilities set forth in Rules 104 and 98 as fully-operational, Trading Floor-based DMM units and DMMs. Establishing the same regulatory requirements for DMM units and DMMs would ensure the consistency and quality of the Exchange's marketplace and is also designed to prevent fraudulent and manipulative acts and practices and promote just and equitable principles of trade by requiring Exchange registration and approval. Finally, the Exchange believes that proposed Rule 104B would enhance investor protection and the public interest by enumerating the specific process a DMM unit must follow to withdraw during the 12-month duration of the program and the reassignment of assigned securities during that time. The proposed process would ensure orderly transitioning of ETPs that were assigned to a DMM unit that withdraws and uninterrupted trading of the security on the Exchange.

The Exchange believes that the proposal promotes just and equitable principles of trade by providing an exemption to member organizations that meet the qualifications for the program from the requirements of Rule 35.20 regarding the presence of personnel available to DMM units on the Trading Floor. As proposed, the program is designed to provide time for member organizations to become fully operational Trading Floor-based DMM units. The exemption is for a 12-month period, following which proposed Rule 104(g) requires DMM units to transition to fully operational DMM units on the Trading Floor and meet all Exchange requirements for DMM units, including having adequate personnel on the Trading Floor. For similar reasons, the Exchange believes that it would not be inconsistent with just and equitable principles of trade to provide that DMM

units would be ineligible to compete for new listings pursuant to Rule 103B. As proposed, the program is limited to ETPs and DMM units would only be expected to support electronic DMM obligations during the ramp-up period.

Finally, the Exchange believes that the proposal promotes just and equitable principles of trade by providing that member organizations aggrieved by an Exchange determination under the proposed rule can utilize the approved procedures set forth in Rule 107B(k) for SLPs to appeal non-regulatory actions and penalties by the Exchange. The Exchange believes adopting the same appeals procedures as those approved for SLPs would reduce duplication and ensure consistent treatment for member organizations aggrieved by non-regulatory Exchange actions. For these reasons, the Exchange also believes that the proposed rule change is consistent with section 15A(b)(8)⁶⁷ of the Act, which requires, among other things, that Exchange rules provide a fair procedure for prohibition or limitation with respect to access to services offered by the Exchange.

Non-Substantive Amendments

The Exchange believes that the proposed changes to eliminate obsolete rule text, in Rules 36.30, 104(c)(5), 104(d)(B), 104(e), 104(f), 104A, and 106A would increase the clarity and transparency of the Exchange's rules and remove impediments to and perfect the mechanism of a free and open market by ensuring that persons subject to the Exchange's jurisdiction, regulators, and the investing public could more easily navigate and understand the Exchange rules. The Exchange further believes that the proposed amendments would not be inconsistent with the public interest and the protection of investors because investors will not be harmed and in fact would benefit from increased transparency and clarity, thereby reducing potential confusion.

For the foregoing reasons, the Exchange believes that the proposal is consistent with the Act.

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. The Exchange believes that the proposal would lower entry barriers to the DMM unit business on the Exchange and

⁶⁷ 15 U.S.C. 78o-3(b)(8).

thereby stimulate greater competition among existing DMM units and potential new entrants, to the benefit the investing public, issuers, and the marketplace. In addition, to the extent that the proposal would lead to additional member organizations becoming fully-operational DMM units, the Exchange believes the proposal would expand and diversify the pool of Exchange DMMs. The Exchange also believes that the proposed changes would continue to foster competition and optimal performance among DMM units, thereby enhancing the quality of the services DMMs provide to issuers and promoting intermarket competition, particularly for issuers in connection with their determination of which exchange to select as a primary listing exchange. The Exchange does not believe that the proposed rule change would impose any burden on intra-market competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposal is designed to address the DMM unit's operations on the Trading Floor, access to non-public information, and unique role in facilitating trading on the Exchange without diminishing the balance of benefits and obligations, or altering or diminishing the numerous obligations currently imposed by Exchange rules, on DMM units.

Finally, the Exchange believes that member organizations eligible for the Program may be able to deploy their existing market-making strategies on the Exchange and qualify for credits offered by the Exchange based on increased quoting and liquidity-providing activity. The Exchange therefore believes that the proposed rule change would promote competition by encouraging additional displayed liquidity, facilitating price discovery, and increasing the range and diversity of market making activity on the Exchange. Further, the Exchange does not believe that the proposed rule would impose any burden on intra-market competition because adding a new, temporary market participant would allow eligible member organizations an opportunity to access the benefits available to fully-operational DMM units when trading ETPs electronically for a brief ramp up period, subject to the same registration and regulatory obligations as those DMM units.

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 up to 90 days (i) as the Commission may designate 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 the 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 (<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 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. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR-NYSE-2023-36 and should be submitted on or before December 4, 2023.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁶⁸

Sherry R. Haywood,
Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-98865; File No. SR-ISE-2023-23]

Self-Regulatory Organizations; Nasdaq ISE, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend the Pricing Schedule at Options 7 To Specify Pricing Related to Unrelated Market or Marketable Interest

November 6, 2023.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on October 23, 2023, Nasdaq ISE, LLC ("ISE" 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 Exchange. 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 its Pricing Schedule at Options 7 to specify pricing related to unrelated market or marketable interest.

The text of the proposed rule change is available on the Exchange's website at <https://listingcenter.nasdaq.com/rulebook/ise/rules>, at the principal office of the Exchange, and at the Commission's Public Reference Room.

⁶⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.