

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-66758; File No. SR-NYSE-2012-05)

April 6, 2012

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

I. Introduction

On February 7, 2012, New York Stock Exchange LLC (“Exchange” or “NYSE”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Rule 476A to update its “List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A.” The proposed rule change was published for comment in the Federal Register on February 24, 2012.³ The Commission received no comment letters on the proposed rule change. This order approves the proposed rule change.

II. Description

By way of background, NYSE Rule 476 governs disciplinary proceedings involving charges against members, member organizations, principal executives, approved persons, employees, or others for violations of the federal securities laws, Exchange rules and agreements with the Exchange, and other offenses listed in the rule.

NYSE Rule 476A, “Imposition of Fines for Minor Violation(s) of Rules,” provides that, in lieu of commencing a disciplinary proceeding under Rule 476, the Exchange may (subject to specified requirements) “impose a fine, not to exceed \$5,000, on any member, member

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 66421 (February 17, 2012), 77 FR 11181 (“Notice”).

organization, allied member, approved person, or registered or non-registered employee of a member or member organization, for any violation of a rule of the Exchange, which violation the Exchange shall have determined is minor in nature.”⁴ The provisions of Rule 476A are known as the Exchange’s Minor Rule Violation Plan.

According to the Exchange, the “summary fines” under Rule 476A provide a meaningful sanction for rule violations when the violation calls for stronger discipline than an admonition or cautionary letter, but the facts and circumstances of the violation do not warrant initiation of a formal disciplinary proceeding under Rule 476. A “List of Exchange Rule Violations and Fines Applicable Thereto Pursuant to Rule 476A” (“Rule 476A List”) is appended as Supplementary Material to the rule.

In the instant proposal, the NYSE proposes to amend the Rule 476A List to: (i) make technical, non-substantive changes to conform the list to previously-approved changes in Exchange rules,⁵ (ii) update the rules relating to conduct by Designated Market Makers (“DMMs”), and (iii) add rules relating to conduct by DMMs, as follows:

Proposed Non-Substantive Changes to Rule 476A List

The Exchange proposes to update the Rule 476A List to conform it to approved changes to Exchange rules by updating the titles of certain rules, updating references to rules that have been renumbered or harmonized with a Financial Industry Regulatory Authority (“FINRA”) rule,

⁴ NYSE Rule 476A(a).

⁵ In addition to these technical changes to the Rule 476A List, which are described below, the proposed rule change would amend Rule 476A(a) by replacing the term “allied member” with the term “principal executive,” to be consistent with a prior rule change eliminating the category of “allied member” on the Exchange. See Securities Exchange Act Release No. 58549 (September 15, 2008), 73 FR 54444 (September 19, 2008) (SR-NYSE-2008-80). See also NYSE Rule 476, which uses the term “principal executive.”

deleting references to rules that have been deleted, updating the descriptions of rules that have been amended, and fixing a typographical error.⁶

Proposed Updates to Rule 476A List for DMM Conduct Rules

The current Rule 476A List includes certain specific rules that govern DMM conduct (e.g., NYSE Rules 104(a)(1)(A) and 104.10), as well as a category designated as “Exchange policies regarding procedures to be followed in delayed opening situations,” which refers to policies relating to DMM conduct included in NYSE Rule 123D. The Exchange proposes generally to update the Rule 476A List with current rules governing DMM conduct. In particular, under the proposed rule change, the list would be amended to include, more expansively, “Rule 104 requirements for the dealings and responsibilities of DMMs” and “Rule 123D requirements for DMMs relating to openings, re-openings, delayed openings, trading halts, and tape indications.” Thus, additional elements of Rules 104 and 123D would be included in the Minor Rule Violation Plan, as further detailed below.

Rule 104

NYSE Rule 104 requires DMMs registered in one or more securities traded on the Exchange to engage in a course of dealings for their own account to assist in the maintenance of a fair and orderly market, insofar as reasonably practicable, by contributing liquidity when lack of price continuity and depth, or disparity between supply and demand exists or is reasonably to be anticipated.⁷

The Rule 476A List currently includes the following elements of Rule 104:

⁶ For a more detailed description of these proposed non-substantive changes, see Notice, supra note 3.

⁷ NYSE Rule 104 currently operates on a pilot basis, set to end on July 31, 2012. The Exchange stated its belief that the Rule 476A List should reference those rules that are currently operational, even if operating on a pilot basis.

- Rule 104(a)(1)(A), which requires DMMs to maintain a bid or an offer at the National Best Bid and National Best Offer (“inside”) at least 15% of the trading day for securities in which the DMM unit is registered that have a consolidated average daily volume of less than one million shares, and at least 10% for securities in which the DMM unit is registered that have a consolidated average daily volume equal to or greater than one million shares; and
- Rule 104.10, which is described in the Rule 476A List as relating to “Functions of DMM.” This description does not relate to the rule currently denominated as Rule 104.10, which was adopted when the Exchange adopted the New Market Model,⁸ but to a former rule relating to certain subject matters that, according to the Exchange, continue to be covered in the current Rule 104.

The proposed rule change would, instead, include a single reference in the Rule 476A List identifying “Rule 104 requirements for the dealings and responsibilities of DMMs” as subject to the Minor Rule Violation Plan. The proposed rule change would have the effect of adding to the Rule 476A List Rules 104(b), (c), (d), and (e),⁹ as well as Rule 104(a)(1)(B), the

⁸ See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46).

⁹ See Notice, supra note 3 at 11182-83 for a full description of the elements of Rule 104 that, under the proposal, would be included in the Minor Rule Violation Plan. The Exchange states that other elements of Rule 104 (i.e., Rule 104(j) and supplementary material .05 and .10) are not related to DMM obligations, but rather reflect operational aspects of the Exchange. See id. at note 11. The Exchange notes that, in a separate filing, it has proposed to delete NYSE Rule 104(a)(6). See Securities Exchange Act Release No. 65736 (November 10, 2011), 76 FR 71399 (November 17, 2011) (SR-NYSE-2011-56). The Commission instituted proceedings to determine whether to disapprove SR-NYSE-2011-56. See Securities Exchange Act Release No. 66397 (February 15, 2012), 77 FR 10586 (February 22, 2012).

rule that governs the DMM's new pricing obligations, which were implemented by all equities markets on December 6, 2010.¹⁰

Rule 123D

The Rule 476A List currently provides that “violations of Exchange policies regarding procedures to be followed in delayed opening situations” are eligible for summary fines under the Minor Rule Violation Plan. According to the Exchange, such Exchange policies are codified in Rule 123D. Accordingly, the Exchange proposes to delete “violations of Exchange policies regarding procedures to be followed in delayed opening situations” and replace it with “Rule 123D requirements for DMMs relating to openings, re-openings, delayed openings, trading halts, and tape indications.” The effect of this change would be to include other requirements of DMMs set forth in Rule 123D – relating to openings, re-openings, trading halts, and tape indications – in the Minor Rule Violation Plan.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.¹¹ In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act¹² because expanding the list of DMM obligations that are subject to the Minor Rule Violation Plan should afford the Exchange increased flexibility in carrying out its

¹⁰ See Securities Exchange Act Release No. 63255 (November 5, 2010), 75 FR 69484 (November 12, 2010) (SR-NYSE-2010-69).

¹¹ In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

supervisory responsibilities, and, in doing so, help to meet the aim of protecting investors and the public interest.

The Commission also believes that the proposed rule change is consistent with Sections 6(b)(1) and 6(b)(6) of the Act,¹³ which require that an exchange enforce compliance with, and have rules that provide appropriate discipline for violations of, the Act, the rules and regulations thereunder, and Exchange rules. As an initial matter, the proposed rule change will further these objectives through its clarification of the list of Exchange rule violations that are subject to NYSE Rule 476A by updating rule titles and rule references, deleting references to rules that have been deleted, updating descriptions of rules that have been amended, and fixing a typographical error.

Further, the Commission recognizes that the proposed rule change will render violations of DMM obligations under Rule 104¹⁴ and Rule 123D that were not previously on the Rule 476A List as now eligible for treatment as minor violations. However, the Commission notes that designating a rule as subject to the Minor Rule Violation Plan does not signify that violation of the rule will always be deemed a minor violation. As noted by the Exchange, Rule 476A preserves the Exchange's discretion to seek formal discipline, as warranted, when transgressions of rules designated as eligible for the Minor Rule Violation Plan are found to be more serious. Thus, the Exchange will remain able to require, on a case-by-case basis, formal disciplinary action for any particular violation. Therefore, the Commission believes that the proposed rule change will not compromise the Exchange's ability to seek more stringent sanctions for the more serious violations of Rules 104 and 123D.

¹³ 15 U.S.C. 78f(b)(1) and 15 U.S.C. 78f(b)(6).

¹⁴ The Commission believes that it is appropriate to include in NYSE Rule 476A references to rules that are currently operating on a pilot basis.

In addition, because NYSE Rule 476A provides procedural rights to a person fined under the rule, entitling the person to contest the fine and receive a full disciplinary proceeding,¹⁵ the Commission believes that NYSE Rule 476A, as amended by this proposed rule change, will provide a fair procedure for the disciplining of Exchange members and persons associated with members, consistent with Sections 6(b)(7) and 6(d)(1) of the Act.¹⁶

Finally, the Commission finds that the proposed rule change is consistent with the public interest, the protection of investors, or is otherwise in furtherance of the purposes of the Act, as required by Rule 19d-1(c)(2) under the Act,¹⁷ which governs minor rule violation plans. The Commission believes that the proposed changes to NYSE Rule 476A will strengthen the Exchange's ability to carry out its oversight and enforcement responsibilities as a self-regulatory organization, in cases where full disciplinary proceedings are unsuitable in view of the nature of a particular violation.

In approving this proposed rule change, the Commission emphasizes that in no way should the amendment of the rule be seen as minimizing the importance of compliance with NYSE rules and all other rules subject to the imposition of fines under NYSE Rule 476A. The Commission believes that the violation of any self-regulatory organization's rules, as well as Commission rules, is a serious matter. However, NYSE Rule 476A provides a reasonable means of addressing rule violations that do not rise to the level of requiring formal disciplinary proceedings, while providing greater flexibility in handling certain violations. The Commission expects that the Exchange will continue to conduct surveillance with due diligence and make a

¹⁵ See NYSE Rule 476A(d).

¹⁶ 15 U.S.C. 78f(b)(7) and 15 U.S.C. 78f(d)(1).

¹⁷ 17 CFR 240.19d-1(c)(2).

determination based on its findings, on a case by-case basis, of whether a violation requires formal disciplinary action under Rule 476.

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹⁸ that the proposed rule change (SR-NYSE-2012-05) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁹

Kevin M. O'Neill
Deputy Secretary

¹⁸ 15 U.S.C. 78s(b)(2).

¹⁹ 17 CFR 200.30-3(a)(12); 17 CFR 200.30-3(a)(44).