

*Required fields are shown with yellow backgrounds and asterisks.*

Page 1 of \* 24

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549  
Form 19b-4

File No.\* SR - 2012 - \* 58

Amendment No. (req. for Amendments \*)

Proposed Rule Change by NYSE MKT LLC.

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial * <input checked="" type="checkbox"/>	Amendment * <input type="checkbox"/>	Withdrawal <input type="checkbox"/>	Section 19(b)(2) * <input checked="" type="checkbox"/>	Section 19(b)(3)(A) * <input type="checkbox"/>	Section 19(b)(3)(B) * <input type="checkbox"/>			
			Rule					
Pilot <input type="checkbox"/>	Extension of Time Period for Commission Action * <input type="checkbox"/>	Date Expires * <input type="text"/>	19b-4(f)(1) <input type="checkbox"/>	19b-4(f)(2) <input type="checkbox"/>	19b-4(f)(3) <input type="checkbox"/>	19b-4(f)(4) <input type="checkbox"/>	19b-4(f)(5) <input type="checkbox"/>	19b-4(f)(6) <input type="checkbox"/>

Exhibit 2 Sent As Paper Document



Exhibit 3 Sent As Paper Document

**Description**

Provide a brief description of the proposed rule change (limit 250 characters, required when Initial is checked \*).

Proposal to delete NYSE MKT Rules 95c and d Equities and related Supplementary Material

**Contact Information**

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name \* Clare Last Name \* Saperstein

Title \* Vice President NYSE Regulation Inc

E-mail \* csaperstein@nyx.com

Telephone \* (212) 656-2355 Fax (212) 656-2223

**Signature**

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 10/26/2012

By Janet McGinness

(Name \*)

Corporate Secretary

(Title \*)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Janet McGinness, jmcginness@nyx.com

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

**Form 19b-4 Information (required)**

Add Remove View

The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

**Exhibit 1 - Notice of Proposed Rule Change (required)**

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

**Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications**

Add Remove View

Exhibit Sent As Paper Document

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

**Exhibit 3 - Form, Report, or Questionnaire**

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Exhibit Sent As Paper Document

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

**Exhibit 4 - Marked Copies**

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

**Exhibit 5 - Proposed Rule Text**

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

**Partial Amendment**

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of the Proposed Rule Change

- (a) The NYSE MKT LLC (“NYSE MKT” or the “Exchange”) proposes to delete NYSE MKT Rules 95(c) and (d) – Equities and related Supplementary Material. The text of the proposed rule change is attached hereto as Exhibit 5 and is available on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), at the Exchange’s principal office, and at the Public Reference Room of the Securities and Exchange Commission (“Commission”).
- (b) The Exchange does not believe that the proposed rule change will have any direct effect, or any significant indirect effect, on any other Exchange rule in effect at the time of this filing.
- (c) Not applicable.

2. Procedures of the Self-Regulatory Organization

Senior management has approved the proposed rule change pursuant to authority delegated to it by the Board of the Exchange. No further action is required under the Exchange’s governing documents. Therefore, the Exchange’s internal procedures with respect to the proposed rule change are complete.

The person on the Exchange staff prepared to respond to questions and comments on the proposed rule change is:

Clare Saperstein  
Vice President  
NYSE Regulation, Inc.  
(212) 656-2355

3. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

(a) Purpose

The Exchange proposes to delete NYSE MKT Rules 95(c) - Equities and (d) – Equities and related Supplementary Material concerning restrictions on the ability of a Floor broker to engage in intra-day trading.<sup>1</sup>

Background

NYSE MKT Rule 95(c) - Equities provides that:

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<sup>1</sup> The Exchange notes that parallel changes are proposed to be made to the rules of New York Stock Exchange LLC. See SR-NYSE-2012-57.

If a Floor broker acquires a position for an account during a particular trading session while representing at the same time, on behalf of that account, market or limit orders at the minimum variation on both sides of the market, the broker may liquidate or cover the position established during that trading session only pursuant to a new order (a liquidating order) which must be time-recorded upstairs and upon receipt on the trading Floor.

As a related matter, NYSE MKT Rule 95(d) - Equities requires that a Floor broker must execute the liquidating order entered pursuant to NYSE MKT Rule 95(c) - Equities before the Floor broker can execute any other order for the same account on the same side of the market as that liquidating order. The Supplementary Material sets forth examples illustrating the operation of NYSE MKT Rules 95(c) - Equities and (d) - Equities along with examples indicating the type of buy and sell orders that a member may and may not represent for the same customer at the same time pursuant to NYSE MKT Rule 95 - Equities.

The New York Stock Exchange LLC (“NYSE”) adopted NYSE Rules 95(c) and (d) and related Supplementary Material .20 and .30 in 1994.<sup>2</sup> NYSE MKT Rule 95 - Equities, an almost identical version of NYSE Rule 95, was adopted at the time of acquisition of The Amex Membership Corporation by NYSE Euronext.<sup>3</sup> Implicit in its mirroring, the rationale for the adoption of NYSE MKT Rules 95(c) - Equities and (d) - Equities was the same as the rationale for the adoption of NYSE Rules 95(c) and (d) in 1994. As noted in the NYSE filing, the NYSE adopted the rule to address “intra-day trading” by Floor brokers, the practice whereby a market participant places orders on both sides of the market and attempts to garner the spread by buying at the bid and selling at the offer. In particular, NYSE Rule 95(c) was meant to address situations where a Floor broker may have been perceived as having an advantage over other market participants, such as individual investors, because the Floor broker could trade on both sides of the market without leaving the Crowd.<sup>4</sup> Requiring the Floor broker to obtain a new liquidating order was designed, therefore, to reduce the immediacy with which a Floor broker could react to changing market conditions on behalf of an intra-day trading account by requiring him or her to leave the Crowd in order to

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<sup>2</sup> Securities Exchange Act Release No. 34363 (July 13, 1994), 59 FR 36808 (July 19, 1994) (“NYSE Rule 95(c) Adopting Release”).

<sup>3</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008); Securities Exchange Act Release No. 58265 (July 30, 2008), 73 FR 46075 (August 7, 2008) (SR-Amex-2008-63).

<sup>4</sup> NYSE Rule 95(c)’s requirement that a liquidating order be “new” effectively required that a Floor broker leave the Crowd before entering a liquidating order (selling what had been bought, for example) because there was no way for the Floor broker to receive the new order (or otherwise communicate with a customer) from the Crowd.

receive a new liquidating order. The restriction was meant to “enhance investors’ confidence in the fairness and orderliness of the Exchange market.”<sup>5</sup> The Commission specifically noted that the intra-day trading strategy employed by professionals “provide[d] the perception that public customer orders [were] being disadvantaged by the time and place advantage of intra-day traders.”<sup>6</sup> Notably, some public customers who used Floor brokers strongly criticized the restrictions of NYSE Rules 95(c) and (d) as favoring specialists because specialists were not subject to the restrictions.<sup>7</sup> As discussed below, the Exchange believes that the current prevalence of virtually instantaneous and fully automated executions both on and off the floor have diminished substantially any such advantage and rendered the new liquidating order requirements obsolete.

### Proposed Rule Change

The Exchange proposes to delete NYSE MKT Rules 95(c) - Equities and (d) - Equities and related Supplementary Material as outdated in today’s market structure and an unnecessary restriction on the ability of Floor brokers to represent orders on behalf of their customers.

The Exchange believes that the rationale and approach underlying current NYSE MKT Rules 95(c) - Equities and (d) - Equities no longer exists in today’s trading environment. At the time NYSE Rules 95(c) and (d) were adopted, orders entered in the specialist’s book experienced greater latency than did orders handled by Floor brokers. In particular, neither immediate limit order display nor auto execution existed at that time and, as a result, “book” orders could not be executed until the specialist manually executed them. Floor brokers in 1994, in other words, could stand at the point of sale and trade more quickly because of that position. Currently, incoming electronic orders are executed automatically in microseconds, and “book” orders receive immediate limit order display. Moreover, the passage of Floor broker orders through Floor systems today adds an additional layer of latency relative to the prior context. While the rationale for NYSE Rules 95(c) and (d), and therefore also NYSE MKT Rules 95(c) - Equities and (d) – Equities, was that Floor broker customers could “crowd-out small customer limit orders and delay or prevent their execution,”<sup>8</sup> in the current market structure, it is more likely that electronic order flow would “crowd-out” Floor broker customer orders.

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<sup>5</sup> NYSE Rule 95(c) Adopting Release at 36809.

<sup>6</sup> *Id.* at 36810.

<sup>7</sup> *See, e.g.*, Letter from Daniel P. Barry, to Ms. Luka-Hopson, Branch Chief, Division of Market Regulation, Securities and Exchange Commission, dated November 11, 1993 (arguing that the proposed amendment to Rule 95 unfairly singled out “the small public investor” in its application of intra-day trading restrictions to Floor brokers alone).

<sup>8</sup> Rule 95(c) Adopting Release at 38611.

Additionally, since the adoption of NYSE Rules 95(c) and (d), the equities markets in general, and the Exchange in particular, have undergone market structure changes that obviate the need for this rule-based restriction on how a Floor broker represents orders on behalf of customers. For example, the Commission adopted Regulation NMS in 2005<sup>9</sup> and in 2006, the NYSE adopted its “Hybrid Market” structure in part to meet the requirements of Regulation NMS that were implemented in July 2007.<sup>10</sup> Since that time, the NYSE, and because NYSE MKT has the same trading platform, has undergone a dramatic shift “from a floor-based auction market with limited automated order interaction to a more automated market with limited floor-based auction market availability.”<sup>11</sup>

Specifically, the changing role of the Floor broker can be seen in both the overall reduction in the Exchange’s market share in its listed securities, as well as the decline in the Floor broker’s share of Exchange volume and increased reliance on automatic execution. Prior to the adoption of the Hybrid Market, the NYSE had about an 80% market share in its listed securities and approximately 25% of that volume was from Floor broker transactions. Within a year of the approval of the Hybrid Market, automatic execution accounted for 82% of NYSE volume and Floor broker executions declined to 11% of overall Exchange volume.<sup>12</sup> Currently, the NYSE MKT has approximately a 14% market share in its listed securities, and of that volume, Floor broker transactions represent approximately 5% of Exchange total volume. Less than 1% of those Floor broker transactions are represented in a manual, auction format. Furthermore, the average speed of execution has increased substantially to micro-second timing, which has significantly reduced the opportunities for Floor brokers to engage in manual transactions.

In addition, trading strategies have evolved since the enactment of NYSE Rule 95(c). Today one third of all equity trading takes place off-exchange and over 1,200 securities have more than 50% of their volume traded off-exchange, an increase of 143% in less than two years. Among other changes, off-Floor participants regularly engage in buy and sell side trading strategies, i.e., “intra-day trading.” In today’s micro-second market, there is no longer a competitive advantage to being on the trading Floor when engaging in the type of intra-day trading addressed by NYSE MKT Rules 95(c) - Equities and (d) - Equities.

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<sup>9</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 Fed. Reg. 37496 (June 29, 2005) (“NMS Adopting Release”).

<sup>10</sup> See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 Fed. Reg. 16353 (March 31, 2006).

<sup>11</sup> *Id.*

<sup>12</sup> See *Technology squeezes out real, live traders*, USA TODAY (July 12, 2007), available at [http://www.usatoday.com/money/markets/2007-07-11-nyse-traders\\_N.htm](http://www.usatoday.com/money/markets/2007-07-11-nyse-traders_N.htm).

Rather, due to the increase in the speed of trading, the increased fragmentation of the equity markets, and the dissemination of market information available to off-Floor participants, many off-Floor participants are able to synthesize market information across multiple markets faster than a Floor broker can do so from their physical presence on the Exchange trading Floor. Accordingly, to the extent there may still be a time and place advantage for Floor brokers by virtue of their presence on the Trading Floor, the Exchange believes that the type of information available to Floor brokers is no longer the type of information that would provide Floor brokers with an advantage in connection with intra-day trading.

As a result of the above-discussed changes, NYSE MKT Rules 95(c) - Equities and (d) - Equities are no longer operating to place Floor brokers on equal footing as other market participants, but instead are placing them at a disadvantage to other participants in the largely automatic market that has developed in the almost twenty years since the restrictions were put in place. Therefore, the Exchange believes it is appropriate to delete NYSE MKT Rules 95(c) - Equities and (d) - Equities and related Supplementary Material. By deleting a trading restriction that was adopted in response to a specific market structure that has fundamentally changed since 2005, the Exchange believes that the proposed rule changes will serve to place Floor brokers on a more equal footing with other market participants utilizing automatic executions.

Furthermore, the Exchange notes that the manner that the current rule requires a Floor broker to comply with the rule is based on an auction market model where a rule-based speed bump that required a Floor broker to obtain a new time-stamped order from a customer was feasible.<sup>13</sup> In today's market structure, where Floor brokers compete with off-Floor participants that are entering orders on a micro-second basis on both the buy and sell side of the market, such a speed bump is not only a disadvantage to Floor brokers, but also does not serve its original purpose. In particular, the 1994 approval order for NYSE Rules 95(c) and (d) notes that part of the rationale of implementing the speed bump for Floor brokers was to protect the public. However, even though the trading restrictions first enacted by the 1994 rule changes will no longer be in effect, the public will still be protected. Floor brokers, through their normal course of business, act as agents for customers and, pursuant to Exchange and Commission rules, are required to act in the best interests of their customers.

In addition to the above-referenced changes, the Exchange proposes to delete Supplementary Material .20 and .30 to NYSE MKT Rule 95 - Equities. The

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<sup>13</sup>

The Exchange notes that Exchange systems are not currently configured to accept the "BC" and "SLQ" order markings specified in Rule 95(c), as these are markings that were required to be included on manual order tickets that were completed by hand by a Floor broker rather than instructions submitted with electronic orders that customers transmit electronically to Floor brokers.

Exchange proposes to keep Supplementary Material .10 to NYSE MKT Rule 95 - Equities.

(b) Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,<sup>14</sup> in general, and Section 6(b)(5) of the Act,<sup>15</sup> in particular, in that it is designed to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed rule change would further the ability of Floor brokers to carry out their Trading Floor functions and, as a result, is designed to remove impediments to and perfect the mechanism of a free and open market through the efficient operation of the Exchange, specifically by placing Floor brokers on equal footing with other market participants utilizing automatic executions.

The fundamental changes that have occurred in the roughly twenty years since the adoption of NYSE Rules 95(c) and (d) have left the underlying rationale behind their adoption obsolete, and subsequently, the rationale behind NYSE MKT Rules 95(c) - Equities and (d) - Equities is also obsolete. The significant increase in market speed and the reduced role of Floor brokers have largely eliminated the concerns that NYSE MKT Rules 95(c) - Equities and (d) - Equities were intended to address. By deleting a trading restriction that was originally adopted in response to a specific market structure that has fundamentally changed since 2005, the Exchange believes that the proposed rule changes will serve to place Floor brokers on a more equal footing with other market participants utilizing automatic executions.

4. 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.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

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<sup>14</sup> 15 U.S.C. 78f(b).

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

6. Extension of Time Period for Commission Action

The Exchange does not consent at this time to an extension of any time period for Commission action.

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

The proposed rule change is not based on the rules of another self-regulatory organization.

9. Exhibits

Exhibit 1 – Form of Notice of Proposed Rule Change for Publication in the Federal Register

Exhibit 5 –Text of Proposed Changes

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

[Date]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change Deleting NYSE MKT Rules 95(c) and (d) – Equities and Related Supplementary Material

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on October 26, 2012, NYSE MKT LLC (the “Exchange” or “NYSE MKT”) 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 delete NYSE MKT Rules 95(c) and (d) – Equities and related Supplementary Material. The text of the proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

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 to delete NYSE MKT Rules 95(c) - Equities and (d) – Equities and related Supplementary Material concerning restrictions on the ability of a Floor broker to engage in intra-day trading.<sup>4</sup>

Background

NYSE MKT Rule 95(c) - Equities provides that:

If a Floor broker acquires a position for an account during a particular trading session while representing at the same time, on behalf of that account, market or limit orders at the minimum variation on both sides of the market, the broker may liquidate or cover the position established during that trading session only pursuant to a new order (a liquidating order) which must be time-recorded upstairs and upon receipt on the trading Floor.

As a related matter, NYSE MKT Rule 95(d) - Equities requires that a Floor broker must execute the liquidating order entered pursuant to NYSE MKT Rule 95(c) - Equities before the Floor broker can execute any other order for the same account on the

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<sup>4</sup> The Exchange notes that parallel changes are proposed to be made to the rules of New York Stock Exchange LLC. See SR-NYSE-2012-57.

same side of the market as that liquidating order. The Supplementary Material sets forth examples illustrating the operation of NYSE MKT Rules 95(c) - Equities and (d) - Equities along with examples indicating the type of buy and sell orders that a member may and may not represent for the same customer at the same time pursuant to NYSE MKT Rule 95 - Equities.

The New York Stock Exchange LLC (“NYSE”) adopted NYSE Rules 95(c) and (d) and related Supplementary Material .20 and .30 in 1994.<sup>5</sup> NYSE MKT Rule 95 - Equities, an almost identical version of NYSE Rule 95, was adopted at the time of acquisition of The Amex Membership Corporation by NYSE Euronext.<sup>6</sup> Implicit in its mirroring, the rationale for the adoption of NYSE MKT Rules 95(c) - Equities and (d) - Equities was the same as the rationale for the adoption of NYSE Rules 95(c) and (d) in 1994. As noted in the NYSE filing, the NYSE adopted the rule to address “intra-day trading” by Floor brokers, the practice whereby a market participant places orders on both sides of the market and attempts to garner the spread by buying at the bid and selling at the offer. In particular, NYSE Rule 95(c) was meant to address situations where a Floor broker may have been perceived as having an advantage over other market participants, such as individual investors, because the Floor broker could trade on both sides of the market without leaving the Crowd.<sup>7</sup> Requiring the Floor broker to obtain a

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<sup>5</sup> Securities Exchange Act Release No. 34363 (July 13, 1994), 59 FR 36808 (July 19, 1994) (“NYSE Rule 95(c) Adopting Release”).

<sup>6</sup> See Securities Exchange Act Release No. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008); Securities Exchange Act Release No. 58265 (July 30, 2008), 73 FR 46075 (August 7, 2008) (SR-Amex-2008-63).

<sup>7</sup> NYSE Rule 95(c)’s requirement that a liquidating order be “new” effectively required that a Floor broker leave the Crowd before entering a liquidating order (selling what had been bought, for example) because there was no way for the Floor broker to receive the new order (or otherwise communicate with a

new liquidating order was designed, therefore, to reduce the immediacy with which a Floor broker could react to changing market conditions on behalf of an intra-day trading account by requiring him or her to leave the Crowd in order to receive a new liquidating order. The restriction was meant to “enhance investors’ confidence in the fairness and orderliness of the Exchange market.”<sup>8</sup> The Commission specifically noted that the intra-day trading strategy employed by professionals “provide[d] the perception that public customer orders [were] being disadvantaged by the time and place advantage of intra-day traders.”<sup>9</sup> Notably, some public customers who used Floor brokers strongly criticized the restrictions of NYSE Rules 95(c) and (d) as favoring specialists because specialists were not subject to the restrictions.<sup>10</sup> As discussed below, the Exchange believes that the current prevalence of virtually instantaneous and fully automated executions both on and off the floor have diminished substantially any such advantage and rendered the new liquidating order requirements obsolete.

#### Proposed Rule Change

The Exchange proposes to delete NYSE MKT Rules 95(c) - Equities and (d) - Equities and related Supplementary Material as outdated in today’s market structure and an unnecessary restriction on the ability of Floor brokers to represent orders on behalf of their customers.

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customer) from the Crowd.

<sup>8</sup> NYSE Rule 95(c) Adopting Release at 36809.

<sup>9</sup> *Id.* at 36810.

<sup>10</sup> *See, e.g.*, Letter from Daniel P. Barry, to Ms. Luka-Hopson, Branch Chief, Division of Market Regulation, Securities and Exchange Commission, dated November 11, 1993 (arguing that the proposed amendment to Rule 95 unfairly singled out “the small public investor” in its application of intra-day trading restrictions to Floor brokers alone).

The Exchange believes that the rationale and approach underlying current NYSE MKT Rules 95(c) - Equities and (d) - Equities no longer exists in today's trading environment. At the time NYSE Rules 95(c) and (d) were adopted, orders entered in the specialist's book experienced greater latency than did orders handled by Floor brokers. In particular, neither immediate limit order display nor auto execution existed at that time and, as a result, "book" orders could not be executed until the specialist manually executed them. Floor brokers in 1994, in other words, could stand at the point of sale and trade more quickly because of that position. Currently, incoming electronic orders are executed automatically in microseconds, and "book" orders receive immediate limit order display. Moreover, the passage of Floor broker orders through Floor systems today adds an additional layer of latency relative to the prior context. While the rationale for NYSE Rules 95(c) and (d), and therefore also NYSE MKT Rules 95(c) - Equities and (d) - Equities, was that Floor broker customers could "crowd-out small customer limit orders and delay or prevent their execution,"<sup>11</sup> in the current market structure, it is more likely that electronic order flow would "crowd-out" Floor broker customer orders.

Additionally, since the adoption of NYSE Rules 95(c) and (d), the equities markets in general, and the Exchange in particular, have undergone market structure changes that obviate the need for this rule-based restriction on how a Floor broker represents orders on behalf of customers. For example, the Commission adopted Regulation NMS in 2005<sup>12</sup> and in 2006, the NYSE adopted its "Hybrid Market" structure in part to meet the requirements of Regulation NMS that were implemented in July

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<sup>11</sup> Rule 95(c) Adopting Release at 38611.

<sup>12</sup> See Securities Exchange Act Release No. 51808 (June 9, 2005), 70 Fed. Reg. 37496 (June 29, 2005) ("NMS Adopting Release").

2007.<sup>13</sup> Since that time, the NYSE, and because NYSE MKT has the same trading platform, has undergone a dramatic shift “from a floor-based auction market with limited automated order interaction to a more automated market with limited floor-based auction market availability.”<sup>14</sup>

Specifically, the changing role of the Floor broker can be seen in both the overall reduction in the Exchange’s market share in its listed securities, as well as the decline in the Floor broker’s share of Exchange volume and increased reliance on automatic execution. Prior to the adoption of the Hybrid Market, the NYSE had about an 80% market share in its listed securities and approximately 25% of that volume was from Floor broker transactions. Within a year of the approval of the Hybrid Market, automatic execution accounted for 82% of NYSE volume and Floor broker executions declined to 11% of overall Exchange volume.<sup>15</sup> Currently, the NYSE MKT has approximately a 14% market share in its listed securities, and of that volume, Floor broker transactions represent approximately 5% of Exchange total volume. Less than 1% of those Floor broker transactions are represented in a manual, auction format. Furthermore, the average speed of execution has increased substantially to micro-second timing, which has significantly reduced the opportunities for Floor brokers to engage in manual transactions.

In addition, trading strategies have evolved since the enactment of NYSE Rule

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<sup>13</sup> See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 Fed. Reg. 16353 (March 31, 2006).

<sup>14</sup> *Id.*

<sup>15</sup> See *Technology squeezes out real, live traders*, USA TODAY (July 12, 2007), available at [http://www.usatoday.com/money/markets/2007-07-11-nyse-traders\\_N.htm](http://www.usatoday.com/money/markets/2007-07-11-nyse-traders_N.htm).

95(c). Today one third of all equity trading takes place off-exchange and over 1,200 securities have more than 50% of their volume traded off-exchange, an increase of 143% in less than two years. Among other changes, off-Floor participants regularly engage in buy and sell side trading strategies, i.e., “intra-day trading.” In today’s micro-second market, there is no longer a competitive advantage to being on the trading Floor when engaging in the type of intra-day trading addressed by NYSE MKT Rules 95(c) - Equities and (d) - Equities. Rather, due to the increase in the speed of trading, the increased fragmentation of the equity markets, and the dissemination of market information available to off-Floor participants, many off-Floor participants are able to synthesize market information across multiple markets faster than a Floor broker can do so from their physical presence on the Exchange trading Floor. Accordingly, to the extent there may still be a time and place advantage for Floor brokers by virtue of their presence on the Trading Floor, the Exchange believes that the type of information available to Floor brokers is no longer the type of information that would provide Floor brokers with an advantage in connection with intra-day trading.

As a result of the above-discussed changes, NYSE MKT Rules 95(c) - Equities and (d) - Equities are no longer operating to place Floor brokers on equal footing as other market participants, but instead are placing them at a disadvantage to other participants in the largely automatic market that has developed in the almost twenty years since the restrictions were put in place. Therefore, the Exchange believes it is appropriate to delete NYSE MKT Rules 95(c) - Equities and (d) - Equities and related Supplementary Material. By deleting a trading restriction that was adopted in response to a specific market structure that has fundamentally changed since 2005, the Exchange believes that

the proposed rule changes will serve to place Floor brokers on a more equal footing with other market participants utilizing automatic executions.

Furthermore, the Exchange notes that the manner that the current rule requires a Floor broker to comply with the rule is based on an auction market model where a rule-based speed bump that required a Floor broker to obtain a new time-stamped order from a customer was feasible.<sup>16</sup> In today's market structure, where Floor brokers compete with off-Floor participants that are entering orders on a micro-second basis on both the buy and sell side of the market, such a speed bump is not only a disadvantage to Floor brokers, but also does not serve its original purpose. In particular, the 1994 approval order for NYSE Rules 95(c) and (d) notes that part of the rationale of implementing the speed bump for Floor brokers was to protect the public. However, even though the trading restrictions first enacted by the 1994 rule changes will no longer be in effect, the public will still be protected. Floor brokers, through their normal course of business, act as agents for customers and, pursuant to Exchange and Commission rules, are required to act in the best interests of their customers.

In addition to the above-referenced changes, the Exchange proposes to delete Supplementary Material .20 and .30 to NYSE MKT Rule 95 - Equities. The Exchange proposes to keep Supplementary Material .10 to NYSE MKT Rule 95 - Equities.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the

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<sup>16</sup> The Exchange notes that Exchange systems are not currently configured to accept the "BC" and "SLQ" order markings specified in Rule 95(c), as these are markings that were required to be included on manual order tickets that were completed by hand by a Floor broker rather than instructions submitted with electronic orders that customers transmit electronically to Floor brokers.

requirements of Section 6(b) of the Act,<sup>17</sup> in general, and Section 6(b)(5) of the Act,<sup>18</sup> in particular, in that it is designed to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest. In particular, the proposed rule change would further the ability of Floor brokers to carry out their Trading Floor functions and, as a result, is designed to remove impediments to and perfect the mechanism of a free and open market through the efficient operation of the Exchange, specifically by placing Floor brokers on equal footing with other market participants utilizing automatic executions.

The fundamental changes that have occurred in the roughly twenty years since the adoption of NYSE Rules 95(c) and (d) have left the underlying rationale behind their adoption obsolete, and subsequently, the rationale behind NYSE MKT Rules 95(c) - Equities and (d) - Equities is also obsolete. The significant increase in market speed and the reduced role of Floor brokers have largely eliminated the concerns that NYSE MKT Rules 95(c) - Equities and (d) - Equities were intended to address. By deleting a trading restriction that was originally adopted in response to a specific market structure that has fundamentally changed since 2005, the Exchange believes that the proposed rule changes will serve to place Floor brokers on a more equal footing with other market participants utilizing automatic executions.

**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.

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<sup>17</sup> 15 U.S.C. 78f(b).

<sup>18</sup> 15 U.S.C. 78f(b)(5).

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 (i) as the Commission may designate up to 90 days of such date 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2012-58 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSEMKT-2012-58. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Section, 100 F Street, NE, Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet website at [www.nyse.com](http://www.nyse.com). All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2012-58 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Kevin M. O'Neill  
Deputy Secretary

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<sup>19</sup> 17 CFR 200.30-3(a)(12).

Additions: Underlined  
 Deletions: [Bracketed]

## Rules of NYSE MKT LLC

### Rule 95 - Equities. Discretionary Transactions

(a) No member while on the Floor shall execute or cause to be executed on the Exchange, or on any other market center pursuant to Regulation NMS any transaction for the purchase or sale of any stock with respect to which transaction such member is vested with discretion as to (1) the choice of security to be bought or sold, (2) the total amount of any security to be bought or sold, or (3) whether any such transaction shall be one of purchase or sale. The member must receive all material terms of an order, as referenced in (1), (2), and (3), from the member's customer off the Floor, and may not simply rely on a general understanding of the customer's intentions and thereby create an order or a material term of an order on the Floor. For example, a member who has purchased stock pursuant to a customer's off-Floor order may not simply rely on an understanding of the customer's strategy to sell the stock if it becomes profitable to do so, but must first obtain a new order to sell entered by the customer from off the Floor. See also Rule 90 - Equities and the supplementary material thereto.

(b) The provisions of paragraph (a) of this Rule shall not apply to any transaction permitted by Rule 93 - Equities for any account in which the member executing such transaction is directly or indirectly interested.

[(c) If a Floor broker acquires a position for an account during a particular trading session while representing at the same time, on behalf of that account, market or limit orders at the minimum variation on both sides of the market, the broker may liquidate or cover the position established during that trading session only pursuant to a new order (a liquidating order) which must be time-recorded upstairs and upon receipt on the trading Floor. All liquidating orders as described above must be marked on the Floor as `BC' in the case of an order covering a short position, or `SLQ' in the case of the sell order liquidating a long position.]

(d) For the purposes of this rule, an account shall be deemed any account in which the same person or persons is directly or indirectly interested. A Floor broker representing an order to liquidate or cover a position, which was established during the same trading session at a time when the broker represented orders at the minimum variation on both sides of the market for the same account, must execute that liquidating or covering order before any other order on the same side of the market for that account.]

••• *Supplementary Material:* -----

**.10** The provisions of this rule shall not apply to (i) any order to liquidate a position carried over from a previous trading session; (ii) any order liquidating any part of a position assumed as part of a strategy relating to bona fide arbitrage; and (iii) any order liquidating any part of a block position assumed in reliance on the exemption for block positioners contained in Section 11(a)(1)(A) of the Securities Exchange Act.

**.20 Reserved** [The following examples illustrate the operation of paragraphs (c) and (d) above. All examples assume that orders are for the same account, and are market buy-minus/sell-plus orders, or limit orders at the minimum variation.

B	= buy order	SL	= sell long order
BC	= buy to cover short order *	SS	= sell short order
T	= acquiring trade	SLQ	= sell long to liquidate order *
*			

\*-Designation not used for system orders

## I. No Carry-Over Position

### A. Crowd

B 5000, SS 5000

T: buy 2000

#### Steps

1. obtain SLQ 2000 order to liquidate that day
2. SS 5000 order cannot be executed while contra side position exists

### B. Crowd

B 5000, SS 5000

T: sell short 2000

#### Steps

1. obtain BC 2000 order to liquidate that day
2. B 5000 order cannot be executed while contra side position exists

## II. Carry-Over Position (2000 shares long)

### A. Crowd

B 5000, SL 2000

T: buy 3000

### Steps

1. obtain SLQ 3000 order to liquidate new position that day
2. SL 2000 order should be executed first (representing the carry-over position)

## III. Carry-Over Position (2000 shares short)

### A. Crowd

B 5000, SS 5000

T: sell short 3000

### Steps

1. obtain BC 3000 order to liquidate new position that day
2. 2000 shares of B 5000 order may be executed to cover 2000 share carry-over position
3. BC 3000 order must be executed before balance of B 5000 order may be executed.]

**.30 Reserved** [The following examples indicate the types of buy and sell orders that a member may and may not represent for the same customer at the same time.

### Permitted

- Buy 10,000 at 25                      and    Sell short, or sell long 10,000 at 25 plus minimum trading variation
- Buy 10,000 at-the-market "buy minus"                      and    Sell 10,000 at-the-market "sell plus" (if "long")
- Buy 10,000 at-the-market                      and    Sell 10,000 at-the-market, contingent upon the *entire* buy order being completed first

**Not Permitted**

- Buy 10,000 at-the-market and Sell 10,000 at-the-market
- Buy 10,000 at-the-market and Sell 10,000 at a limit discretion at that limit and higher]