

information that you wish to make available publicly. All submissions should refer to File Number SR-IEX-2021-11, and should be submitted on or before October 13, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁴³

J. Matthew DeLesDernier,

Assistant Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93037; File No. SR-NYSE-2021-44]

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Proposed Rule Change To Amend Rules 7.31, 7.35, 7.35B, 7.35C, 98, and 104 Relating to the Closing Auction

September 16, 2021.

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 September 3, 2021, New York Stock Exchange LLC (“NYSE” 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 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 amend Rules 7.31 (Orders and Modifiers), 7.35 (General), 7.35B (DMM-Facilitated Closing Auctions), 7.35C (Exchange-Facilitated Auctions), 98 (Operation of a DMM Unit), and 104 (Dealings and Responsibilities of DMMs) relating to the Closing Auction. 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.

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 to amend Rules 7.31 (Orders and Modifiers), 7.35 (General), 7.35B (DMM-Facilitated Closing Auctions), 7.35C (Exchange-Facilitated Auctions), 98 (Operation of a DMM Unit), and 104 (Dealings and Responsibilities of DMMs) relating to the Closing Auction.⁴

Overview of Current Closing Auction Process

The following rules currently describe the Closing Auction process on the Exchange: Rule 7.31 (identifying the order types eligible to participate in an Auction); Rule 7.35 (general rules and definitions applicable to Auctions); Rule 7.35B (describing the process for DMM-facilitated Closing Auctions); Rule 7.35C (describing the process for Exchange-facilitated Auctions); and Rule 104 (establishing DMM obligations with respect to Closing Auctions and trading leading into the Closing Auction).

The following interest is eligible to participate in a Closing Auction:

- Unexecuted buy and sell orders resting on the Exchange Book at the end of Core Trading Hours (including DMM Orders);⁵

⁴ Capitalized terms used in connection with Auctions on the Exchange are defined in Rule 7.35(a).

⁵ For purposes of Auctions, the term “DMM Interest” is defined in Rule 7.35(a)(9) to mean all buy and sell interest entered by a DMM unit in its assigned securities and includes the following: (i) “DMM Auction Liquidity,” which is non-displayed buy and sell interest that is designated for an Auction only (see Rule 7.35(a)(9)(A)); (ii) “DMM Orders,” which are orders, as defined under Rule 7.31, entered by a DMM unit (see Rule 7.35(a)(9)(B)); and (iii) “DMM After-Auction Orders,” which are orders entered by a DMM unit before either the Core Open Auction or Trading Halt Auction that do not participate in an Auction and are intended instead to maintain price continuity with reasonable depth following an Auction (see Rule 7.35(a)(9)(C)).

- Auction-Only Orders;⁶ and
- DMM Auction Liquidity entered by the DMM in connection with facilitating the Closing Auction.⁷

Beginning 10 minutes before the scheduled end of Core Trading Hours, the Exchange begins disseminating through its proprietary data feed Closing Auction Imbalance Information that is calculated based on the interest eligible to participate in the Closing Auction.⁸ The Closing Auction Imbalance Information includes the Continuous Book Clearing Price, which is the price at which all better-priced orders eligible to trade in the Closing Auction on the Side of the Imbalance can be traded.⁹ The Closing Auction Imbalance Information also includes an Imbalance Reference Price, which is the Exchange Last Sale Price bound by the Exchange BBO.¹⁰ Beginning five minutes before the end of Core Trading Hours, Closing D Orders are included in the Closing Auction Imbalance Information at their undisplayed discretionary price.¹¹ The Closing Auction Imbalance Information is updated at least every second, unless there is no change to the information, and is disseminated until the Closing

⁶ Auction-Only Orders available for the Closing Auction are defined in Rule 7.31(c)(2)(A)–(D) as the Limit-on-Close Order (“LOC Order”), Market-on-Close Order (“MOC Order”), Closing D Order, and Closing Imbalance Offset Order (“Closing IO Order”).

⁷ The Commission recently approved proposed changes to Rule 7.35B that provide that Floor Broker Interest is no longer eligible to participate in the Closing Auction. See Securities Exchange Act Release No. 92480 (July 23, 2021), 86 FR 40886 (July 29, 2021) (SR-NYSE-2020-95) (“Floor Broker Interest Approval Order”). The term “Floor Broker Interest” is defined in Rule 7.35(a)(10) to mean orders represented orally by a Floor broker at the point of sale.

In light of the Floor Broker Interest Approval Order, the Exchange is proposing conforming changes to Rule 7.35B(j)(2) and subparagraph (A)(iii) to that Rule. Specifically, Rule 7.35B(j)(2) provides that, to avoid closing price dislocation that may result from an order entered into Exchange systems or represented to a DMM orally at or near the end of Core Trading Hours, the Exchange may temporarily suspend the requirement to enter all order instructions by the end of Core Trading Hours. Because the Exchange has eliminated Floor Broker Interest at the close, the Exchange proposes to delete the phrase “or represented to a DMM orally” in Rule 7.35B(j)(2). For similar reasons, the Exchange proposes to delete the phrase “and Floor Broker Interest” in Rule 7.35B(j)(2)(A)(iii).

⁸ See Rule 7.35B(e)(1)(A). DMM Orders, as defined in Rule 7.35(d)(9)(B), that have been entered by the DMM in advance of a Closing Auction are included in the Closing Auction Imbalance Information.

⁹ See Rule 7.35(a)(4)(C). In the case of a buy Imbalance, the Continuous Book Clearing Price would be the highest potential Closing Auction Price and in the case of a sell Imbalance, the Continuous Book Clearing Price would be the lowest potential Closing Auction Price.

¹⁰ See Rule 7.35B(e)(3).

¹¹ See Rule 7.35(b)(1)(C)(ii).

⁴³ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 15 U.S.C. 78a.

³ 17 CFR 240.19b-4.

Auction begins.¹² In addition, if at the Closing Auction Imbalance Freeze Time¹³ the Closing Imbalance¹⁴ is 500 round lots or more, the Exchange will disseminate a Regulatory Closing Imbalance to both the securities information processor and proprietary data feeds.¹⁵

The Exchange begins accepting Auction-Only Orders for the Closing Auction at 6:30 a.m. Eastern Time and they can be entered and cancelled without restriction until 10 minutes before the scheduled end of Core Trading Hours. If a Regulatory Closing Imbalance has not been published, during the Closing Auction Imbalance Freeze the Exchange will reject all MOC and LOC Orders. If a Regulatory Closing Imbalance has been published, during the Closing Auction Imbalance Freeze the Exchange will accept MOC and LOC Orders opposite the Side of the Regulatory Closing Imbalance and will reject MOC and LOC Orders on the Side of the Imbalance.¹⁶ In addition, from the beginning of the Closing Auction Imbalance Freeze until two minutes before the scheduled end of Core Trading Hours, MOC, LOC, and Closing IO Orders may be cancelled or reduced in size only to correct a Legitimate Error, and requests to cancel such orders in the last two minutes of trading will be rejected.¹⁷ Closing D Orders can be entered or cancelled without restriction until 10 seconds before the scheduled close of trading, at which point, a request to either enter or cancel, cancel and replace, or modify a Closing D Order will be rejected.¹⁸

Pursuant to Rule 104(a)(3), Designated Market Makers ("DMM") have the responsibility to facilitate the close of trading for each of the securities in which the DMM is registered as required by Exchange rules, which may include supplying liquidity as needed. Rule 104(a)(3) further provides that DMMs and DMM unit algorithms have access to aggregate order information in order to comply with their requirement to facilitate the close of trading for each of the securities in which the DMM is registered. Accordingly, aggregate order information about all orders eligible to

participate in the Closing Auction, including the full quantity of Reserve Orders¹⁹ and MOC and LOC Order quantities, are available to DMMs at each price point. This information is available at the point of sale to DMMs. In addition, it is made 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.

Rule 7.35B specifies the process for DMM-facilitated Closing Auctions. Pursuant to Rule 7.35B(a), it is the responsibility of each DMM to ensure that registered securities close as soon after the end of Core Trading Hours as possible, while at the same time not unduly hasty, particularly when at a price disparity from the Exchange Last Sale Price.²⁰ As provided for in Rule 7.35B(a)(2), a DMM may enter or cancel DMM Interest after the end of Core Trading Hours in order to supply liquidity as needed to meet the DMM's obligation to facilitate the Closing Auction in a fair and orderly manner, and entry of DMM Interest after the end of Core Trading Hours is not subject to Limit Order Price Protection. Pursuant to Rule 7.35B(c), the DMM may effectuate a closing manually or electronically. Rule 7.35B(g) provides that the DMM is responsible for determining the Auction Price for a Closing Auction and that if there is an Imbalance of any size, the DMM must select an Auction Price at which all better-priced orders on the Side of the Imbalance can be satisfied.

Rule 7.35C specifies the process for Exchange-facilitated Auctions if a DMM cannot facilitate an Auction in one or more securities in which the DMM is registered. DMM Interest does not participate in an Exchange-facilitated Closing Auction trade.²¹

Proposed Amendments to Rules 7.31, 7.35, 7.35B, and 7.35C

The Exchange proposes to amend Rules 7.31, 7.35, and 7.35B to revise the

DMM-facilitated Closing Auction process. The proposed changes would modify how the Closing Auction Price would be determined and how DMMs would be able to participate in the Closing Auction, but would not change their Rule 104 obligation to facilitate the Closing Auction, including to supply liquidity as needed. The Exchange believes that the proposed changes would make the Closing Auction more transparent and deterministic, while still retaining the DMMs' unique obligation to facilitate the Closing Auction.

The Exchange also proposes to make conforming changes to Rule 7.35C to revise the orders eligible to participate in Exchange-facilitated Closing Auctions.

Proposed Changes to Closing Auction Price. The Exchange proposes to amend Rule 7.35B(g) to add explicit price parameters to the Closing Auction Price. As noted above, the DMM is responsible for determining a Closing Auction Price that is able to satisfy all better-priced orders on the Side of the Imbalance. This requirement would not change. The Exchange proposes to add that the Closing Auction Price determined by the DMM must also be at a price that is at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price. Specifically, the Exchange proposes to amend Rule 7.35B(g) as follows (proposed changes italicized):

(g) *Determining an Auction Price.* The DMM is responsible for determining the Auction Price for a Closing Auction under this Rule. If there is an Imbalance of any size[,]

(1) The DMM must select an Auction Price at which all better-priced orders on the Side of the Imbalance can be satisfied; and

(2) *if the Side of the Imbalance is to buy (sell), the Auction Price must be at or above (below) the last-published Imbalance Reference Price and not above (below) the last-published non-zero Continuous Book Clearing Price.*

The Exchange believes that adding this proposed Closing Auction Price parameter is consistent with how the Closing Auction Price has been determined for the vast majority of Closing Auctions. For example, in the period January 1, 2021 to July 23, 2021, 96.5% of all Closing Auctions were priced at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price. Similarly, during this same period, 94.9% of closing auction volume priced within these parameters. The Exchange further believes that this proposed change would eliminate any potential

¹² See Rule 7.35(c)(1) and (2).

¹³ See Rule 7.35(a)(8) (defining the "Closing Auction Imbalance Freeze Time" to be 10 minutes before the scheduled end of Core Trading Hours).

¹⁴ As defined in Rule 7.35(a)(4)(A)(ii), a "Closing Imbalance" means the Imbalance of MOC and LOC Orders to buy and MOC and LOC Orders to sell. That Rule further defines a "Regulatory Closing Imbalance" as a Closing Imbalance disseminated at or after the Closing Auction Imbalance Freeze Time.

¹⁵ See Rule 7.35B(d)(1).

¹⁶ See Rule 7.35B(f)(1)(A) and (B).

¹⁷ See Rule 7.35B(f)(2)(A) and (B).

¹⁸ See Rule 7.35B(f)(3).

¹⁹ Reserve Orders, including the non-displayed reserve interest of such orders, are eligible to participate in the Closing Auction. See, e.g., Rule 7.35B(h)(2)(B) (describing the allocation ranking of at-priced orders ranked Priority 3—Non-Displayed Orders, which refers to the reserve interest of Reserve Orders).

²⁰ The term "Exchange Last Sale Price" is defined in Rule 7.35 to mean the most recent trade on the Exchange of a round lot or more in a security during Core Trading Hours on that trading day, and if none, the Official Closing Price from the prior trading day for that security.

²¹ See Rule 7.35C(a)(1) ("If the Exchange facilitates an Auction, DMM Interest will not be eligible to participate if such Auction results in a trade, and will be eligible to participate if such Auction results in a quote.")

for a Closing Auction Price to be lower (higher) than the last-published Imbalance Reference Price in the case of a Buy (Sell) Imbalance. This proposed change would also promote transparency and determinism with respect to the Closing Auction because the Closing Auction Price would be required to be within a pre-determined range of prices that have been disseminated via the Closing Auction Imbalance Information and that cannot be changed after the end of Core Trading Hours.²²

Proposed Changes to How DMMs Would Participate in the Closing Auction. The Exchange proposes to change how DMMs would be able to enter buy and sell interest to participate in the Closing Auction by limiting the circumstances of when a DMM could enter or cancel interest after the end of Core Trading Hours.

Currently, Rule 7.35B(a)(2) provides that a DMM may enter or cancel DMM Interest after the end of Core Trading Hours in order to supply liquidity as needed to meet the DMM's obligation to facilitate the Closing Auction in a fair and orderly manner. Consistent with this current Rule, the Exchange does not block a DMM from entering or cancelling DMM Interest after the end of Core Trading Hours. Instead, the DMM's determination of whether to enter or cancel DMM Interest after the end of Core Trading Hours is subject to the DMM's obligation to maintain a fair and orderly market, as specified in Rule 104.

The Exchange proposes to amend Rule 7.35B(a)(2) to provide that after the end of Core Trading Hours, a DMM may enter only DMM Auction Liquidity and only if such interest would offset any Unpaired Quantity at the Closing Auction Price. With this change, DMMs would be systematically restricted with respect to the side, price, and quantity of the DMM Auction Liquidity that they may enter after the end of Core Trading Hours. Because DMM Auction Liquidity would have priority over at-priced Yielding Orders (described in more detail below), the Exchange further proposes that offsetting at-priced Yielding Orders would not be included in the calculation of the Unpaired Quantity that a DMM may offset with DMM Auction Liquidity. With these proposed changes, a DMM could enter DMM Auction Liquidity after the end of Core Trading Hours only to close a

security at a price that is at or closer to the Imbalance Reference Price than the published Continuous Book Clearing Price.²³ The Exchange proposes to systematically enforce this new requirement and block any DMM buy and sell interest that does not meet these new requirements.

The Exchange proposes to cancel DMM Orders (*i.e.*, DMM buy and sell orders resting on the Exchange Book) at the end of Core Trading Hours because it also proposes that DMM Orders would not be eligible to participate in the Closing Auction.²⁴ Therefore DMM Orders would not be included in the Auction Imbalance Information for the Closing Auction. The Exchange also proposes to eliminate the ability of a DMM to cancel any DMM Interest after the end of Core Trading Hours. To effect these changes, the Exchange proposes to amend Rule 7.35B(a)(2) as follows (proposed additions italicized, proposed deletions bracketed):²⁵

(2) *DMM Interest:* A DMM may enter [or cancel] DMM Auction Liquidity[Interest] after the end of Core Trading Hours [in order]only to [supply liquidity as needed to meet the DMM's obligation to facilitate the Closing Auction in a fair and orderly manner]offset any Unpaired Quantity at the Closing Auction Price. Offsetting at-priced Yielding Orders will not be included in the calculation of the Unpaired Quantity that a DMM may offset with DMM Auction Liquidity. The entry of DMM Auction Liquidity[Interest] after the end of Core Trading Hours will not be subject to Limit Order Price Protection. *DMM Orders will not be eligible to participate in the Closing Auction, will not be included in the Auction Imbalance Information for the Closing Auction,*

²³ For example, if there is an Imbalance to buy, the Imbalance Reference Price is \$10.00, and the Continuous Book Clearing Price is \$10.10, the DMM could enter DMM Auction Liquidity to sell only at prices ranging from \$10.10 to \$10.00 and only if there is Unpaired Quantity at such prices. If the DMM determines to close that security at \$10.03 and there is Unpaired Quantity to buy of 1,000 shares at that price (excluding at-priced offsetting Yielding Orders to sell), the DMM could enter DMM Auction Liquidity to sell up to only 1,000 shares.

²⁴ The Exchange also proposes to amend Rule 7.35B(j)(2)(A)(iii) to provide that DMM Orders would be rejected if entered after the end of Core Trading Hours (*i.e.*, during the "Solicitation Period") to offset an extreme order imbalance at or near the close.

²⁵ As a related change, because DMM Orders would no longer be either participating in the Closing Auction or included in the Closing Auction Imbalance information, the Exchange proposes to amend Rule 7.35(b)(1)(D) to specify that the references to DMM Interest and the Imbalance Reference Price in that Rule would be applicable only if DMM Interest would be included in the Core Open or Trading Halt Auction Imbalance Information.

and will be cancelled at the end of Core Trading Hours.

With this proposed change to Rule 7.35B(a)(2), DMMs would have fewer tools available to manage the risk of the DMM leading into the Closing Auction, particularly since their DMM Orders would automatically be cancelled before the Closing Auction and they would be systematically restricted with respect to the side, price, and quantity of DMM Auction Liquidity that they may enter after the end of Core Trading Hours. Yet, as required by their obligations in Rule 104, in connection with the Closing Auction, DMMs would still be required to contribute their own capital to supply liquidity as needed to assist in the maintenance of a fair and orderly market. In addition, DMMs would continue to have an obligation with respect to determining a Closing Auction Price that satisfies all better-priced orders on the Side of the Imbalance.

In recognition of both the continued obligations of DMMs with respect to the Closing Auction and their ongoing need to manage the risk of the DMM leading into the Closing Auction, the Exchange proposes to provide DMMs with different tools to participate in the Closing Auction. Specifically, the Exchange proposes to make the existing Closing D Order type available to DMMs. Currently, only Floor brokers may enter Closing D Orders. To enable DMMs to enter Closing D Orders, the Exchange proposes to amend Rule 7.31(c)(2)(C)(i) to provide that a Closing D Order may be entered only by a Floor broker or DMM. The Exchange proposes that Closing D Orders would function for DMMs in a similar manner as they currently function for Floor brokers, with the following differences:

First, the Exchange would not offer the Yielding Modifier to DMMs, and therefore a Closing D Order entered by the DMM could not include a Yielding Modifier.²⁶ Accordingly, the Exchange proposes to amend Rule 7.31(c)(2)(C)(iii) to add the clause "entered by a Floor broker" to make clear that adding a Yielding Modifier to a Closing D Order would be available only to Floor brokers.

Second, unlike Closing D Orders in NYSE-listed securities entered by a Floor broker, Closing D Orders entered by a DMM in NYSE-listed securities would not be able to participate in a

²² The only circumstance when the Continuous Book Clearing Price could change after the end of Core Trading Hours would be if Rule 7.35B(j)(2)(A), described below, were invoked and the requirement to enter all order instructions by the end of Core Trading Hours were temporarily suspended for a security.

²⁶ The Yielding Modifier is not necessary for DMMs because their transactions on the Exchange are as a dealer acting in the capacity as a market maker, and therefore they are not subject to the trading prohibitions specified in Section 11(a) of the Act. 15 U.S.C. 78k(a)(1) and 15 U.S.C. 78k(a)(1)(i).

Core Open Auction or Trading Halt Auction.²⁷ As currently set forth in Rule 7.31(c)(2)(C)(ii), on arrival, a Closing D Order is processed as a Limit Order and may trade or route prior to the Closing Auction, which means that such orders are eligible to trade both in continuous trading and in Auctions prior to the Closing Auction. Because the purpose of providing Closing D Orders to DMMs is to provide them with a tool to participate in Closing Auctions, the Exchange does not believe that Closing D Orders entered by DMMs in NYSE-listed securities would need to participate in a Core Open Auction or Trading Halt Auction on the Exchange. To effect this proposed difference, the Exchange proposes to add the following text to Rule 7.31(c)(2)(C)(ii):

provided that a Closing D Order entered by a DMM in an NYSE-listed security will not be eligible to trade in a Core Open Auction or Trading Halt Auction. The Exchange will reject a Closing D Order that is sent by a DMM in an NYSE-listed security either before the Core Open Auction or during a trading halt or pause, provided that the Exchange will accept such orders beginning ten minutes before the scheduled end of Core Trading Hours even if the security remains halted or paused or never opened. The Exchange will cancel a Closing D Order entered by a DMM in an NYSE-listed security if the security is halted or paused earlier than 10 minutes before the scheduled end of Core Trading Hours.

The reason why the Exchange would accept, or not cancel, a Closing D Order entered by a DMM in the last ten minutes of trading is because, as provided for in Rule 7.35(d), the Exchange will not open or reopen a security that has not yet opened or is halted or paused and will not transition to continuous trading if such opening or reopening would be in the last ten minutes of trading before the end of Core Trading Hours. Instead, the Exchange will remain unopened, halted, or paused and will close the security as provided for in the Rule 7.35 Series. Because in these circumstances, the Exchange would proceed to a Closing Auction, the Exchange proposes to accept (or not cancel) Closing D Orders entered by DMMs in NYSE-listed securities during this ten-minute period, even if the security is in a halt state during that period.

²⁷ The Exchange does not propose this difference for Closing D Orders entered by DMMs in UTP Securities as such orders would be routed for participation in an opening or reopening auction on the primary listing market and DMMs would not have a unique role in those auctions. By contrast, because DMMs have a parity allocation in Core Open Auctions and Trading Halt Auctions, the Exchange believes it would simplify Exchange rules to provide that such orders would not participate in Exchange Core Open and Trading Halt Auctions.

Except for these differences, Closing D Orders entered by DMMs would function the same as they do for Floor brokers, including that:

- Entry of such orders can begin at 6:30 a.m. (Rule 7.34(a)(1)).
- Such orders can be entered in any securities trading on the Exchange, including a UTP Security,²⁸ and the DMM can provide instruction of whether a Closing D Order in a UTP Security would be routed to the primary listing market as either a MOC or LOC Order (Rule 7.31(c)(2)(iv)).
- Such orders would be included in the Closing Auction Imbalance Information at their undisplayed discretionary price beginning five minutes before the end of Core Trading Hours (Rule 7.35(b)(1)(C)(ii)).
- Beginning 10 seconds before the scheduled close of trading, a request to enter a Closing D Order in any security or to cancel, cancel and replace, or modify such order in an Auction-Eligible Security would be rejected (Rule 7.35B(f)(3)).

The Exchange further proposes to exclude Closing D Orders entered by a DMM from the definition of “DMM Orders” in Rule 7.35(a)(9)(B). With this change, the proposed reference to DMM Orders in the amendment to Rule 7.35B(a)(2) would not include Closing D Orders, and therefore, Closing D Orders entered by a DMM would not be cancelled at the end of Core Trading Hours. The Exchange also proposes a clarifying change to Rule 7.35(a)(9)(C) to provide that DMM After-Auction Orders means “DMM Orders,” and not just “orders.” With this change, the definition of DMM After-Auction Orders would similarly not include Closing D Orders entered by a DMM. The Exchange also proposes to delete the phrase “as defined under Rule 7.31” in Rule 7.35(a)(9)(C) as unnecessary because the defined term “DMM Orders” already references Rule 7.31.

The Exchange believes that providing DMMs with the ability to enter Closing D Orders in their assigned securities would provide them with a replacement mechanism both to supply liquidity as needed for the Closing Auction, as required by Rule 104(a)(3), and to manage the risk of the DMM leading into the Closing Auction, in a manner that is more transparent and deterministic than the current process. Specifically, the Exchange proposes that Closing D Orders entered by a DMM would be included in the Closing

²⁸ The term “UTP Security” is defined in Rule 1.1 to mean a security that is listed on a national securities exchange other than the Exchange and that trades on the Exchange pursuant to unlisted trading privileges.

Auction Imbalance Information at their undisplayed discretionary price beginning five minutes before the end of Core Trading Hours, which is when Closing D Orders entered by Floor brokers are included in the Closing Auction Imbalance Information.²⁹ With this change, Closing D Orders entered by DMMs would be reflected in the Closing Auction Imbalance Information, which is not the case for DMM Interest currently entered or cancelled after the end of Core Trading Hours. Market participants would be able to respond to any changes in the Closing Auction Imbalance Information that may result from Closing D Orders entered by DMMs by entering interest into the continuous order book or retaining the services of a Floor broker to enter Closing D Orders on their behalf.³⁰

Moreover, because Closing D Orders entered by DMMs would function similarly to Closing D Orders entered by Floor brokers, and would not be permitted to be entered or cancelled in the last ten seconds of trading, the manner by which the Continuous Book Clearing Price would be determined would be the same as today and would not change in the last ten seconds due to the entry of a Closing D Order. In addition, because DMMs could not enter or cancel any new interest after the end of Core Trading Hours (other than offsetting interest), the potential range of Closing Auction Prices would no longer be able to be changed by a DMM after the end of Core Trading Hours.

The Exchange further believes that providing DMMs with the ability to enter Closing D Orders in all securities that trade on the Exchange, including UTP Securities, would generally support the maintenance of a fair and orderly market in securities traded on the Exchange by providing for a mechanism for DMMs to enter such orders directly. Currently, a DMM may choose to use a Floor broker to enter Closing D Orders in securities that have not been assigned to that DMM. The Exchange believes that allowing DMMs to enter Closing D Orders directly would reduce operational complexity and cost for DMMs, thereby creating an incentive for additional firms to register as a DMM. This proposed change would also make it easier for regulatory staff to monitor DMM trading activity on the Exchange.

The Exchange also believes that providing DMMs with the ability to

²⁹ See Rule 7.35(b)(1)(C)(ii).

³⁰ As today, the Closing Auction Imbalance Information would not identify the source of orders included in the Continuous Book Clearing Price, including whether an order is entered by a DMM, Floor broker, or other member organization.

enter Closing D Orders in all securities that trade on the Exchange would serve as an incentive for additional broker-dealers to register as a DMM on the Exchange. Currently, there are numerous costs associated with becoming a DMM. For example, before being approved to operate as a DMM, among other things, a firm must develop and implement DMM-specific technology designed to interface with Exchange systems consistent with the obligations under Rule 104 (*e.g.*, to maintain depth and continuity in assigned securities and to facilitate Auctions both manually and electronically); hire, train, and maintain staff on the Trading Floor; and develop and implement policies and procedures and surveillances designed to comply with DMM-specific rules (*e.g.*, Rules 36, 98, and 104).³¹ The Exchange understands that in the past, to justify incurring such upfront costs, firms would not register as a DMM firm unless they had certainty that once they started operations as a DMM, they would have had a roster of listed securities allocated to the firm. In the past, this has been achieved by a new entrant acquiring an existing DMM firm, with the new firm being allocated the listed securities previously allocated to the acquired firm. In the absence of such opportunities, which would arise only if an existing firm seeks to exit the DMM business, the Exchange believes that providing potential new DMM entrants with additional opportunities to provide liquidity across all securities that trade on the Exchange may serve as an incentive for new entrants to undertake the costs to register as a DMM unit without a significant roster of allocated securities. The Exchange believes that additional DMMs would promote diversity of DMMs on the Exchange, providing greater choice to issuers when selecting the DMM that would be assigned to their securities.

DMM Interest Allocation in the Closing Auction. Because of the changes to what type of DMM interest would be eligible to participate in a Closing Auction, the Exchange proposes to change how much such DMM Interest would be allocated in a Closing Auction, as described in Rule 7.35B(h), as follows:

³¹ Pursuant to Rule 98(c)(1), to operate a DMM unit, a member organization must obtain approval from the Exchange. To obtain approval, among other things, the DMM unit must maintain and enforce written policies and procedures consistent with Rule 98 requirements relating both to protecting material non-public information generally, and more specifically to protecting against the misuse of Floor-based non-public order information.

First, the Exchange proposes to amend Rule 7.35B(h)(1) to provide that better-priced Closing D Orders—whether entered by a Floor broker or a DMM—would be guaranteed to participate in the Closing Auction (subject to DMM allocation self-trade prevention, described below). The Exchange believes that because DMMs would be entering Closing D Orders before the end of Core Trading Hours and such interest would be included in the Closing Auction Imbalance Information, if they are better-priced orders, they should be included in the Closing Auction in the same manner that all other better-priced orders entered by other member organizations are allocated in the Closing Auction. The Exchange does not consider this a benefit for DMMs because all better-priced interest is guaranteed to participate in the Closing Auction.³² Therefore, DMMs would not receive a different allocation opportunity from other participants for such better-priced Closing D Orders.

Second, the Exchange proposes to amend Rule 7.35B(h)(2)(A) to provide that at-priced Closing D Orders entered by a DMM in securities that are assigned to that DMM would be included in the DMM Participant³³ for purposes of a parity allocation. Rule 7.35B(h)(2) currently provides that at-priced orders and DMM Interest of any price are not guaranteed to participate in the Closing Auction. The Exchange proposes that at-priced Closing D Orders would also not be guaranteed to participate in the Closing Auction. In addition, current Rule 7.35B(h)(2)(A) further provides that orders ranked Priority 2—Display Orders, which include DMM Interest, are ranked on parity by Participant pursuant to Rule 7.37(b)(2)–(7). Accordingly, currently, at-priced DMM Interest is allocated on parity by DMM Participant in the Closing Auction. The Exchange therefore believes that ranking at-priced Closing D Orders entered by a DMM in its assigned securities on parity by DMM Participant would not be novel. The distinction from current rules, however, would be that Closing D Orders would be required to be entered before the end of Core Trading Hours. By contrast, under the current rules, DMMs could receive a parity allocation of at-priced DMM Interest entered after the end of Core Trading Hours.

In addition, proposed Rule 7.35B(h)(2)(A) would provide that at-

priced Closing D Orders entered by a DMM in securities not assigned to that DMM would be included in the Book Participant. This allocation methodology would be new because, currently, a member organization acting in its capacity as a DMM is not permitted to enter orders in securities that are not assigned to it. Because a member organization entering orders in NYSE-listed securities not assigned to it in its capacity as a DMM would not be functioning as a DMM, the Exchange proposes that such at-priced Closing D Orders be included in the Book Participant³⁴ for purposes of parity allocations in the Closing Auction.

Third, the Exchange proposes to amend Rule 7.35B(h)(2) to add new subparagraph (E) providing that DMM Auction Liquidity, *i.e.*, the offsetting interest that a DMM would be permitted to enter after the end of Core Trading Hours in connection with facilitating the Closing Auction and that would always be at-priced interest, would be allocated after both LOC Orders and Closing IO Orders.³⁵ This would be new, because currently, all at-priced DMM Interest, including that entered after the end of Core Trading Hours, would be allocated before at-priced LOC Orders and Closing IO Orders. As described above, the Exchange proposes that only at-priced interest entered by a DMM *before* the end of Core Trading Hours, *i.e.*, Closing D Orders, would be allocated before LOC Orders and Closing IO Orders. However, that would not be a unique benefit because currently, all displayed and non-displayed orders, including Closing D Orders entered by Floor brokers, are allocated before LOC Orders and Closing IO Orders. Accordingly, DMMs would not receive a unique benefit with this allocation sequence.

As proposed, DMM Auction Liquidity, which can be entered only after the end of Core Trading Hours, would be allocated *after* the following at-priced orders have any opportunity to participate in the Closing Auction: orders ranked Priority 2—Displayed Orders and Closing D Orders; orders ranked Priority 3—Non-Display Orders; LOC Orders; and Closing IO Orders. As further proposed, among at-priced orders, DMM Auction Liquidity would

³⁴ Under Rule 7.36(a)(5), the term “Book Participant” means orders collectively represented in the Exchange Book that have not been entered by a Floor broker or DMM. Pursuant to Rule 7.37(b)(5), an allocation to the Book Participant will be allocated to orders that comprise the Book Participant by working time.

³⁵ The Exchange proposes a non-substantive amendment to re-number current Rules 7.35B(h)(2)(E) and (F) as proposed Rules 7.35B(h)(2)(F) and (G).

³² See Rule 7.35B(h)(1).

³³ Under Rule 7.36(a)(5), the term “DMM Participant” means the DMM assigned to the security. Accordingly, a DMM is eligible for a DMM Participant parity allocation only in securities assigned to that DMM.

receive an allocation opportunity before orders ranked Priority 4—Yielding Orders and Closing D Orders with a Yielding Modifier. The Exchange believes that this allocation would be consistent with a fair and orderly market because orders with a Yielding Modifier are, by their terms, conditional, intended to yield to other available interest, and not guaranteed an execution in the Closing Auction.

As noted above in connection with the discussion relating to proposed amendments to Rule 7.35B(a)(2), because DMM Auction Liquidity would be allocated ahead of Yielding Orders, the Exchange would not include offsetting at-priced Yielding Orders in the calculation of the Unpaired Quantity that would be provided to DMMs to let them know the full quantity of DMM Auction Liquidity that they would be eligible to trade at a price point. In addition, because the Exchange proposes to change how DMM Auction Liquidity would be ranked and allocated in a Closing Auction, the Exchange proposes to amend the second sentence of Rule 7.35(a)(9)(A) ³⁶ to specify that the ranking and allocation of DMM Auction Liquidity, as described in that Rule, would be applicable only for a Core Open Auction or Trading Halt Auction.

Finally, the Exchange proposes to amend Rule 7.35B(h)(3)(A) relating to DMM Participant allocation. The current rule addresses how DMM Orders would be allocated within the DMM Participant.³⁷ Because DMM Orders would no longer participate in the Closing Auction, the Exchange proposes to delete the current rule text. The Exchange proposes that Rule 7.35B(h)(3)(A) would instead address how the Exchange would apply self-trade prevention within the DMM Participant Allocation.

As noted above, a DMM would not be able to enter or cancel Closing D Orders in the last ten seconds of Core Trading Hours. In addition, DMMs would be permitted to enter DMM Auction Liquidity after the end of Core Trading Hours, and only to offset Unpaired Quantity at the Closing Auction Price.

Accordingly, it could be possible that a DMM has a Closing D Order to buy (sell) that is eligible to participate in the Closing Auction when there is a buy (sell) Unpaired Quantity, and therefore the DMM may be entering offsetting DMM Auction Liquidity to sell (buy). If the prices of two such contra-side orders either lock or cross, the Exchange proposes to apply STP Decrement and Cancel (“STPD”), as described in Rule 7.31(i)(2)(C)(i), to such locking/crossing interest.³⁸ The Exchange believes that by applying STPD, the Exchange would systematically ensure that DMM Auction Liquidity would not trade in a Closing Auction where there are also contra-side Closing D Orders entered by the DMM.³⁹ It would also ensure that only the equivalent size of the two orders would be cancelled. Therefore, such cancellation would have minimal impact on how the Closing Auction Price would be determined. The Exchange further proposes that if there is more than one Closing D order to sell (buy) to be cancelled, such orders would be cancelled in price/time sequence, from lowest (highest) price first, and then at each price, from oldest to newest.

Exchange-Facilitated Auctions. Rule 7.35C(a)(1) currently provides that if the Exchange facilitates an Auction, DMM Interest will not be eligible to participate if such Auction results in a trade and will be eligible to participate if such Auction results in a quote. The Exchange proposes that because, as described above, Closing D Orders entered by DMMs would be processed similarly to Floor broker Closing D Orders, including that they would be included in Closing Auction Imbalance Information, Closing D Orders entered

by a DMM be processed similarly to Closing D Orders entered by Floor brokers in an Exchange-facilitated Auction. Accordingly, the Exchange proposes to amend Rule 7.35C(a)(1) to provide that Closing D Orders entered by a DMM would be eligible to participate in an Exchange-facilitated Closing Auction.

Proposed Amendments to Rules 104 and 98

Prohibited Transactions. In connection with the above-described changes to the process for DMM-facilitated Closing Auctions, the Exchange proposes to amend Rule 104 to eliminate the current restriction on DMMs engaging in “Prohibited Transactions” during the last ten minutes of trading prior to the scheduled close of trading. The Exchange believes that the proposed changes to the Closing Auction process obviate the need for this current restriction and the Exchange proposes to delete the text currently set forth in Rule 104(g)(1)(B) and subparagraph (i) thereto in its entirety.

Rule 104(g)(1)(A) currently defines an “Aggressing Transaction” as a DMM unit transaction that: “(i) is a purchase (sale) that reaches across the market to trade as the contra-side to the Exchange published offer (bid); and (ii) 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.” Rule 104(g)(1)(B) further provides that:

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 are prohibited, 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 unit.⁴⁰

These are referred to as “Prohibited Transactions.” When the Exchange previously sought to remove Prohibited Transactions, the Commission disapproved the proposed rule change and noted that it analyzed the proposal “in the context of the unique role played by DMMs on the Exchanges.”⁴¹

⁴⁰ Rule 104(g)(1)(B) defines the “position of the DMM unit” for purposes of Rule 104(g)(1)(B) as “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).”

⁴¹ See Securities Exchange Act Release No. 81150 (July 1, 2017), 82 FR 33534, 33536 (July 20, 2017) (SR-NYSE-2016-71) (“Disapproval Order”). The Exchange has since amended Rule 104 to revise how Prohibited Transactions function on the

³⁶ The second sentence of Rule 7.35(a)(9)(A) currently provides that “[f]or purposes of ranking and allocation in an Auction, DMM Auction Liquidity is ranked Priority 2—Display Orders.”

³⁷ Current Rule 7.35B(h)(3)(A) provides: “At-priced DMM Orders will be placed on the allocation wheel for the Closing Auction based on the time of entry and any other orders or interest from such DMM will join that position on the allocation wheel. If the only DMM Interest available to participate in a Closing Auction is DMM Auction Liquidity or better priced DMM Orders or both, such DMM Interest will be placed last on the allocation wheel.”

³⁸ Under Rule 7.31(i)(2)(C)(i), STPD works as follows: “if both orders are equivalent in size, both orders will be cancelled back to the originating member organization. If the orders are not equivalent in size, the equivalent size will be cancelled back to the originating Client ID and the larger order will be decremented by the size of the smaller order with the balance remaining on the Exchange Book.”

³⁹ As described above, the STPD functionality would be implemented for DMMs as a tool to help enable them to meet their obligations to facilitate the Closing Auction in a fair and orderly manner while systematically preventing the DMM from engaging in certain trading activity such as “wash sales.” The Exchange notes that it does not propose to implement self-trade prevention for all market participants in the Closing Auction, rather only for the limited case of DMM Auction Liquidity entered after the end of Core Trading Hours. Because the Closing Auction is a single transaction involving many different participants at a single clearing price, it would be difficult to implement this functionality from a technological and operational perspective across multiple parties and all other types of auction interest because it would require the Exchange to continually provisionally cancel and recalculate the prospective auction.

In assessing the DMM's benefits and obligations with respect to the close, in the Disapproval Order, the Commission reiterated that it assesses "whether the rewards granted to DMMs . . . are commensurate with their obligations" and whether Exchange rules reflect "an appropriate balance of DMM obligations against the benefits provided to DMMs." With respect to that proposed rule change, the Commission found that "[i]n return for their obligations and responsibilities, DMMs have significant priority and informational advantages in trading on the Exchanges, both during continuous trading and during the closing auction." Among other things, the Commission noted that "during the Auction itself, DMMs are aware of interest represented by Floor brokers, which is not publicly disseminated." The Commission further noted that "when offsetting an imbalance during the closing auction, DMM interest trades at parity with limit orders on the Exchange order book, and DMM interest takes priority over limit-on-close orders with a price equal to the closing price and over closing-offset orders."

Since 2017, the Exchange has implemented changes relating to trading functions on the Exchange leading into the Closing Auction that have altered the balance of DMM obligations against the benefits provided to DMMs. First, 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.⁴² Accordingly, from August 2019, when Pillar was implemented, until March 2020, when the Trading Floor was temporarily closed as a precaution to prevent the spread of COVID-19, the information available to DMMs regarding Floor Broker Interest became available to subscribers of the Closing Auction Imbalance Feed.

Second, beginning in 2020, the Exchange temporarily suspended the availability of Floor Broker Interest to be eligible to participate in the Closing Auction.⁴³ The Exchange recently

amended its rules to permanently exclude Floor Broker Interest from the Closing Auction.⁴⁴ 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—has since been eliminated. Accordingly, one of the information advantages of DMMs that the Commission cited to in the Disapproval Order no longer exists.

The Exchange believes that this proposed rule change further alters the balance of DMM obligations compared to the benefits provided to DMMs with respect to the Closing Auction. The Exchange believes that in the aggregate, these changes (including the elimination of Floor Broker Interest) result in a shift that decreases the benefits available to DMMs without a commensurate decrease in obligations. Specifically, with this proposed rule change:

- DMMs must still meet their Rule 104 obligation to facilitate the Closing Auction and supply liquidity as needed. They must also select an Auction Price that satisfies all better-priced orders on the Side of the Imbalance. However, they would now be systematically restricted as to the price range at which the Closing Auction Price could be determined. As proposed, if the Side of the Imbalance is to buy (sell), the Auction Price must be at or above (below) the last-published Imbalance Reference Price and not above (below) the last-published non-zero Continuous Book Clearing Price. Accordingly, with this proposed change, DMMs will be subject to a further limitation on how they may select the Closing Auction Price. By contrast, under current rules, there is no express requirement for a DMM to close a stock within the Continuous Book Clearing Price, although DMMs are obligated to, among other things, supply liquidity as needed to facilitate the Closing Auction in a fair and orderly manner. This proposed change promotes transparency and determinism of the Closing Auction Price and systematically constrains how a DMM selects a Closing Auction Price. The Exchange therefore believes that this proposed change decreases the unique benefits granted to the DMMs without decreasing the obligations on the DMMs with respect to the Closing Auction.

- The only interest that a DMM may enter after the end of Core Trading

Hours to participate in the Closing Auction would be DMM Auction Liquidity, and such interest could be entered only to offset Unpaired Quantity at the Auction Price. Such interest is thus restricted by side, price, and quantity. By contrast, under current rules, DMMs have no systematic restrictions on entering or cancelling DMM Interest after the end of Core Trading Hours. This change ensures that DMM Auction Liquidity could be used only to dampen significant price movements at the close. The Exchange believes this proposed change significantly decreases unique benefits to the DMMs because they would still be required to supply liquidity as needed to support a fair and orderly Closing Auction, but would have limited tools to enter any such interest after the end of Core Trading Hours. The Exchange proposes to make the Closing D Order available to DMMs in part to offset this reduction of unique benefits with respect to entering or cancelling DMM Interest after the end of Core Trading Hours. However, unlike how DMMs currently may enter and cancel DMM Interest, DMMs would not receive any unique treatment with respect to the availability of this order type. To the contrary, Closing D Orders for DMMs would function similarly to Closing D Orders available to Floor brokers, including that they may not be entered or cancelled in the last ten seconds of trading and the interest would be included in the Closing Auction Imbalance Information. Accordingly, the Exchange is not providing a bespoke tool for DMMs to supply liquidity for the Closing Auction. In addition, the Exchange proposes to make Closing D Orders available for a wholly independent reason to provide an incentive for more broker-dealers to seek to register as a DMM, which would increase DMM diversity on the Exchange to increase issuer choice.

- DMM Auction Liquidity entered in connection with facilitating the Closing Auction would, by its terms, be at-priced interest and would be allocated *after* at-priced displayed orders, non-displayed orders, LOC Orders, and Closing IO Orders. Accordingly, unlike at-priced DMM Interest under current Rules, it would not have priority over LOC Orders and Closing IO Orders. While such DMM Auction Liquidity would have priority over orders with a Yielding Modifier, the Exchange notes that such orders are, by their terms, conditional in nature and designed to yield to other orders. Accordingly, DMMs would have a reduced benefit in connection with Closing Auction

Exchange. See Securities Exchange Act Release No. 85637 (April 12, 2019), 84 FR 16079 (SR-NYSE-2018-34) (Order approving amendments to Rule 104, including modifying the definition of prohibited transactions) ("Prohibited Transactions Approval Order").

⁴² See Rule 7.35B(a)(1)(B).

⁴³ See Securities Exchange Act Release No. 89086 (June 17, 2020), (SR-NYSE-202-52) (Commentary .03 to Rule 7.35B was in effect on a temporary basis from June 17, 2020 until July 23, 2021, when the Commission issued the Floor Broker Interest Approval Order).

⁴⁴ See Floor Broker Interest Approval Order, *supra* note 7.

allocations for their at-priced DMM Auction Liquidity. The Exchange notes that the proposed allocation of Closing D Orders entered by the DMM would not provide them with a unique benefit because they would function similarly to Closing D Orders entered by Floor brokers. Accordingly, if a Closing D Order is better-priced, it would be guaranteed to participate in the Closing Auction (subject to DMM-specific self-trade prevention), just as any other better-priced interest would be guaranteed an allocation. In addition, that information would be transparent because such Closing D Orders would be included in Closing Auction Imbalance Information. DMMs would therefore not be receiving a unique benefit in this allocation. The Exchange further believes it is appropriate that at-priced DMM-entered Closing D Orders in their assigned securities would be allocated on parity as part of the DMM Participant because DMMs would continue to have a significant obligation with respect to the Closing Auction, and the benefit associated with a parity allocation for such orders is designed to offset that obligation, in part. The Exchange would not propose the same benefit for Closing D Orders entered by a DMM in securities that are not assigned to the DMM; in such case, such orders would be included in the Book Participant, and therefore would not receive any allocation priority over other market participants.

DMMs would continue to have benefits in connection with their unique role. For example, at the point of sale, DMMs have access to aggregated buying and selling interest that is eligible to participate in the Closing Auction.⁴⁵ However, pursuant to current Rule 104(h)(ii), a DMM may not use any information provided by Exchange systems in a manner that would violate Exchange rules or federal securities laws or regulations. In addition, pursuant to current Rule 104(h)(iii), Floor brokers may request that a DMM provide them with the information that is available to the DMM at the post, including such aggregated buying and selling interest for the Closing Auction. The Exchange continues to believe that it benefits the trading community as a whole to continue to make such information available to DMMs because Floor brokers who request such market looks can use that information to provide their customers with information necessary

for them to make trading decisions leading into the close.

Providing Closing D Orders to DMMs would also provide them with a benefit. However, that benefit would not be unique to DMMs, as this order type is also available to Floor brokers. Because all Floor brokers operate on an agency-only basis, any market participant can avail themselves of Floor broker services and use Closing D Orders. The Exchange also believes that providing Closing D Orders to DMMs is designed to offset the current significant barriers to entry for new DMM firms on the Exchange, which is an obligation independent of the obligations related to the Closing Auction.

In the aggregate, the Exchange believes that the above-described changes have altered the balance of benefits and obligations for DMMs and the resulting scope of obligations would no longer be commensurate with DMM benefits. For example, with respect to the benefits specifically identified by the Commission in the Disapproval Order, DMMs no longer have an informational advantage relating to Floor broker verbal interest at the close and their at-priced DMM Auction Liquidity would no longer have priority over LOC or Closing IO Orders.

The Exchange believes that as a result of these significant alterations to DMM obligations and benefits, any current need for Prohibited Transactions as a DMM obligation has been obviated. As described by the Commission, Prohibited Transactions provide for a bright-line rule designed to prevent a DMM from aggressively taking liquidity and moving prices on the Exchange immediately before the Closing Auction, and therefore destabilizing the market.⁴⁶ Prohibited Transactions make sense when a DMM has discretion over the Closing Auction Price and when a DMM can enter and cancel interest after the end of Core Trading Hours. However, with the proposed changes described in this filing, DMM discretion is explicitly limited; the Closing Auction Price must be within a defined and transparent parameter that cannot be changed after the end of Core Trading Hours and DMMs would be limited in what offsetting interest they can enter after the end of Core Trading Hours. So while the DMM would still have an obligation to facilitate the Closing Auction and supply liquidity as needed, DMMs would no longer have the same discretion in how they fulfill this obligation. As a result, any trading activity that a DMM would engage in the last ten minutes of trading would be

no different than how other market participants trade leading into the close.

Because the Exchange proposes to eliminate Prohibited Transactions, the Exchange proposes to make a conforming amendment to Rule 98 to delete subparagraphs (c)(5) and (c)(5)(A) and renumber subparagraphs (c)(6) and (c)(7) as (c)(5) and (c)(6). The Exchange added Rule 98(c)(5) for the sole purpose of requiring DMMs to provide net position information in connection with monitoring their compliance with Prohibited Transactions.⁴⁷ Accordingly, if Prohibited Transactions are eliminated, that reporting requirement becomes obsolete.

Proposed Non-Substantive Amendments to Rule 104. In addition to eliminating prohibited transactions, the Exchange proposes to amend Rule 104 to eliminate obsolete rule text and update rule references, and make other conforming changes, as follows:

- The Exchange proposes to amend Rule 104(a)(2) to update the cross reference from Rule 123D to Rule 7.35A and to use the Pillar terms of “Core Open Auctions and Trading Halt Auctions” instead of referring to “openings.” The Exchange also proposes to delete the reference to Rule 13 and Reserve Order interest procedures at the opening as obsolete. Finally, the Exchange proposes to delete the reference to Supplementary Material .05 to Rule 104 with respect to odd-lot order information to the DMM unit algorithm, as this is also obsolete now that the Exchange trades on Pillar.

- The Exchange proposes to amend Rule 104(a)(3) to update the cross reference from Rule 123C to Rule 7.35B and to use the Pillar term of “Closing Auctions” instead of “closes.” The Exchange also proposes to delete the reference to Rule 13 and Reserve Order interest procedures at the close as obsolete.

- The Exchange proposes to amend Rule 104(b) by deleting subparagraphs (2) and (6) and replacing the text for Rule 104(b)(2) with the following: “Unless otherwise specified in Rule 7.31, DMM unit algorithms may use the orders and modifiers set forth in Rule 7.31.” Rule 104(b)(2) currently provides that “Exchange systems shall enforce the proper sequencing of incoming orders and algorithmically-generated messages and will prevent incoming DMM interest from trading with resting DMM interest. If the incoming DMM

⁴⁵ As noted above, DMM unit algorithms are not provided aggregated buying and selling interest for the Closing Auction until after the end of Core Trading Hours.

⁴⁶ See Disapproval Order at 33536, *supra*, note 40.

⁴⁷ See Securities Exchange Act Release No. 86131 (June 18, 2019), 84 FR 29565 (June 23, 2019) (SR-NYSE-2019-25) (Notice of filing and immediate effectiveness of proposed rule change). See also Prohibited Transactions Approval Order, *supra* note 40.

interest would trade with resting DMM interest only, the incoming DMM interest will be cancelled. If the incoming DMM interest would trade with interest other than DMM interest, the resting DMM interest will be cancelled.” Since the Exchange transitioned to Pillar, the Exchange no longer enforces self-trade prevention on behalf of DMMs. Instead, DMMs may use one of the Self-Trade Prevention Modifiers (“STP”) described in Rule 7.31(i)(2).

Rule 104(b)(6) currently provides that “DMM Units may not enter the following orders and modifiers: Market Orders, MOO Orders, CO Orders, MOC Orders, LOC Orders, or Buy Minus Zero Plus Instructions.” In the Pillar rules, Rule 7.31 sets forth which orders and modifiers are not available to DMMs, and therefore Rule 104(b)(6) is obsolete. The Exchange believes that the proposed new text for Rule 104(b)(2) would provide transparency that Rule 7.31 would describe which orders and modifiers would be available to DMMs, including STP modifiers.

- The Exchange proposes to amend Rule 104(b)(3) to delete references to “Floor broker agency interest files or reserve interest” as such references are now obsolete. The Exchange no longer uses “Floor broker agency interest files” and no longer provides Floor brokers with reserve interest functionality that differs from the Reserve Orders available to all member organizations, as described in Rule 7.31.

- The Exchange proposes to amend Rule 104(b) by deleting subparagraph (4), which provides that “[t]he DMM unit’s algorithm may place within Exchange systems trading interest to be known as a “Capital Commitment Schedule”. (See Rule 1000 concerning the operation of the Capital Commitment Schedule).” With the transition to Pillar, the Exchange has replaced the “Capital Commitment Schedule” with Capital Commitment Orders, as described in Rule 7.31(d)(5), and has deleted Rule 1000. Accordingly, this current rule is obsolete. The Exchange proposes a non-substantive amendment to renumber Rule 104(b)(5) as Rule 104(b)(4).

- The Exchange proposes to delete the text accompanying current Rules 104(c), (d), and (e) as obsolete now that the Exchange trades on Pillar.

Rule 104(c) currently provides: “A DMM unit may maintain reserve interest consistent with Exchange rules governing Reserve Orders. Such reserve interest is eligible for execution in manual transactions.” Rule 7.31 now describes how Reserve Orders function.

Rule 104(d) currently provides: “A DMM unit may provide algorithmically-generated price improvement to all or part of an incoming order that can be executed at or within the Exchange BBO through the use of Capital Commitment Schedule interest (see Rule 1000). Any orders eligible for execution in Exchange systems at the price of the DMM unit’s interest will trade on parity with such interest, as will any displayed interest representing a d-Quote enabling such interest to trade at the same price as the DMM unit’s interest.” As noted above, with Pillar, the Exchange has deleted Rule 1000 and no longer offers the Capital Commitment Schedule to DMMs.

Rule 104(e) currently provides: “DMM units shall provide contra side liquidity as needed for the execution of odd-lot quantities that are eligible to be executed as part of the opening, re-opening and closing transactions but remain unpaired after the DMM has paired all other eligible round lot sized interest.” This requirement is obsolete.

With these proposed deletions, the Exchange proposes non-substantive amendments to renumber Rules 104(f), (g), (h), (i), and (j) as Rules 104(c), (d), (e), (f), and (g) and update cross-references in proposed Rule 104(e)(iii) from subparagraph (h)(ii) and (iii) to (e)(ii) and (iii).

- The Exchange proposes to amend current Rule 104(h)(ii) (proposed Rule 104(e)(ii)) to delete reference to information that is no longer available to a DMM at the post. Specifically, the Exchange no longer provides DMMs at the post with the following information: “the price and size of any individual order or Floor broker agency interest file and the entering and clearing firm information for such order, except that the display shall exclude any order or portion thereof that a market participant has elected not to display to a DMM”. Accordingly, the Exchange proposes to amend Rule 104(e)(ii) to delete that rule text.

* * * * *

The Exchange proposes that the non-substantive amendments to Rule 104 (not including the proposed elimination of prohibited transactions) would be operative immediately upon approval of this proposed rule change. Because of the technology changes associated with the proposed changes to the Closing Auction process and availability of Closing D Orders for DMMs, the Exchange proposes that, subject to approval of the proposed rule change, the Exchange will announce the implementation date of the remaining proposed rule changes, including the

elimination of prohibited transactions, by Trader Update. Subject to approval of this proposed rule change, the Exchange anticipates that such changes will be implemented in the first half of 2022.

2. Statutory Basis

The Exchange believes that the proposal is consistent with Section 6(b) of the Act,⁴⁸ in general, and furthers the objectives of Sections 6(b)(5) of the Act,⁴⁹ 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.

Proposed Changes to Closing Auction Price. The Exchange believes that the proposed amendment to Rule 7.35B(g) regarding how the Closing Auction Price would be determined would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote a more transparent and deterministic Closing Auction process. Specifically, the proposed change would require that the DMM determine a Closing Auction Price that is at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price. Accordingly, the Closing Auction Price must be within a pre-determined range of prices that would have been disseminated via the Closing Auction Imbalance Information and that cannot be changed after the end of Core Trading Hours. The Exchange further believes that this proposed parameter is consistent with how Closing Auction Prices have been determined for the vast majority of Closing Auctions. For example, in the period January 1, 2021 to July 23, 2021, 96.5% of all Closing Auctions were priced at or between the last-published Imbalance Reference Price and Continuous Book Clearing Price. Similarly, during this same period, 94.9% of closing auction volume priced within these parameters.

Proposed Changes to How DMMs Would Participate in the Closing Auction. The Exchange believes that the proposed amendments to Rules

⁴⁸ 15 U.S.C. 78f(b).

⁴⁹ 15 U.S.C. 78f(b)(5).

7.35B(a)(2), 7.31(c)(2)(C), and 7.35(a)(9) regarding how DMMs would participate in the Closing Auction would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes would promote transparency and determinism regarding the Closing Auction process by eliminating DMMs' ability to cancel interest after the end of Core Trading Hours and limiting their ability to enter interest after the end of Core Trading Hours. As a result of the proposed changes, DMMs would no longer have discretion after the end of Core Trading Hours to enter or cancel DMM Interest, which could potentially impact the Closing Auction Price. Instead, as proposed, DMMs would be able to meet their obligation under Rule 104(a)(3) to supply liquidity as needed by either entering Closing D Orders before the end of Core Trading Hours or entering DMM Auction Liquidity after the end of Core Trading Hours, but only to offset Unpaired Quantity at the Closing Auction Price (which must be within a predetermined range, as described above). Accordingly, with these proposed changes, a DMM could enter DMM Auction Liquidity after the end of Core Trading Hours only to close a security at a price that is at or closer to the Imbalance Reference Price than the published Continuous Book Clearing Price.

The Exchange believes that making Closing D Orders available to DMMs would remove impediments to and perfect the mechanism of a free and open market and a national market system because they would provide DMMs with a replacement mechanism both to meet their ongoing Rule 104(a)(3) obligations with respect to the Closing Auction to contribute their own capital to supply liquidity as needed to assist in the maintenance of a fair and orderly market and to manage the risk of the DMM. The Exchange further believes that it would promote transparency and determinism to the Closing Auction process for DMMs to enter their interest before the end of Core Trading Hours. Specifically, the Exchange proposes that Closing D Orders entered by a DMM would be included in the Closing Auction Imbalance Information at their undisplayed discretionary price beginning five minutes before the end of Core Trading Hours, which is when Closing D Orders entered by Floor brokers are included in the Closing Auction Imbalance Information. With this change, Closing D Orders entered by DMMs would be reflected in the

Closing Auction Imbalance Information, which is not the case for DMM Interest currently entered or cancelled after the end of Core Trading Hours. Market participants would be able to respond to any changes in the Closing Auction Imbalance Information that may result from Closing D Orders entered by DMMs by entering interest into the continuous order book or retaining the services of a Floor broker to enter Closing D Orders on their behalf.

In addition, Closing D Orders are not novel and the Exchange proposes that they would function for DMMs in a similar manner as they currently function for Floor brokers, with only two substantive differences. First, DMMs could not combine a Yielding Modifier with a Closing D Order. The Yielding Modifier is not necessary for DMMs because their transactions on the Exchange are as a dealer acting in the capacity as a market maker, and therefore they are not subject to the trading prohibitions specified in Section 11(a) of the Act.⁵⁰ Second, Closing D Orders entered by a DMM in NYSE-listed securities would not be able to participate in a Core Open Auction or Trading Halt Auction. Because the purpose of providing Closing D Orders to DMMs is to provide them with a tool to participate in Closing Auctions, the Exchange does not believe that Closing D Orders entered by DMMs in NYSE-listed securities would need to participate in a Core Open Auction or Trading Halt Auction on the Exchange.

The Exchange further believes that providing DMMs with the ability to enter Closing D Orders in securities that trade on the Exchange, including UTP Securities, that are not assigned to them as a DMM, would remove impediments to and perfect the mechanism of a free and open market and a national market system and support the maintenance of a fair and orderly market because it would provide a mechanism for DMMs to enter such orders directly. Currently, a DMM may choose to use a Floor broker to enter Closing D Orders in securities that have not been assigned to that DMM. The Exchange believes that allowing DMMs to enter Closing D Orders directly would reduce operational complexity and cost for DMMs, thereby creating an incentive for additional firms to register as a DMM. This proposed change would also make it easier for regulatory staff to monitor DMM trading activity on the Exchange.

In addition, the Exchange believes that making this order type available to DMMs for all securities that trade on the Exchange would provide an incentive

for additional broker-dealers to register as a DMM on the Exchange.

Specifically, the Exchange believes that providing potential new DMM entrants with additional opportunities to provide liquidity across all securities that trade on the Exchange may serve as an incentive for new entrants to undertake the costs to register as a DMM unit without a significant roster of allocated securities. The Exchange further believes that promoting diversity of DMMs would remove impediments to and perfect the mechanism of a free and open market and a national market system by providing issuers with additional choice in their DMM assignments.

The Exchange believes that the proposed amendments to Rule 7.35(a)(9)(B) and (C) would remove impediments to and perfect the mechanism of a free and open market and a national market system because they would promote clarity and transparency regarding the terms "DMM Order" and "DMM Auction Liquidity" in a manner designed to conform to the substantive changes to how DMMs would participate in the Closing Auction. The Exchange further believes that the proposed amendment to Rule 7.35B(j)(2)(A)(iii) would similarly remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed amendment is consistent with the proposal that DMM Orders would not be eligible to participate in a Closing Auction; if a DMM were permitted to enter DMM Orders during a Solicitation Period under that Rule, such orders would need to be cancelled before the Closing Auction, per proposed changes to Rule 7.35B(a)(2).

DMM Interest Allocation in the Closing Auction. The Exchange believes that the proposed amendments to Rule 7.35B(h) to change how DMM Interest, including Closing D Orders entered by a DMM, would be allocated in a Closing Auction, would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes are designed to process DMM Interest consistent with the role of the DMM in a particular Closing Auction:

- The Exchange believes that amending Rule 7.35B(h)(1) to provide that better-priced Closing D Orders entered by a DMM would be guaranteed to participate in the Closing Auction (subject to DMM-specific self-trade prevention) would promote a fair and orderly Closing Auction process because better-priced DMM Closing D Orders would not receive a different allocation opportunity from other Participants that

⁵⁰ See *supra* note 26.

have entered better-priced interest; all better-priced interest is guaranteed to participate in the Closing Auction. In addition, because DMMs would be entering Closing D Orders before the end of Core Trading Hours and such interest would be included in the Closing Auction Imbalance Information, if they are better-priced orders, the Exchange believes that should be included in the Closing Auction in the same manner that all other better-priced orders entered by other member organizations are allocated in the Closing Auction. Accordingly, DMMs would not be receiving a unique benefit as a result of this proposed allocation.

- The Exchange believes that amending Rule 7.35B(h)(2)(A) to provide that at-priced Closing D Orders in securities that are assigned to the DMM would be included in the DMM Participant allocation would promote a fair and orderly Closing Auction process because it is consistent with the current allocation of at-priced DMM Interest in the Closing Auction, and therefore it is not novel. This benefit is designed to offset the DMM's significant obligation to facilitate the Closing Auction and supply liquidity as needed. The Exchange further notes that the proposed amendment would allow this at-priced DMM Participant allocation only for Closing D Orders, which, by their terms, must be entered before the end of Core Trading Hours and would be included in the Closing Auction Imbalance Information. Accordingly, this proposed allocation would be consistent with how Closing D Orders are currently allocated for Floor brokers in the Closing Auction because they would be allocated as part of the allocation of orders ranked Priority 2—Display Orders, which currently get an allocation opportunity before orders ranked Priority 3—Non-Display Orders and LOC Orders. The Exchange likewise believes that the proposal that at-priced Closing D Orders entered by DMMs in securities not assigned to the DMM be included in the Book Participant would be consistent with existing Rules because in such case, the member organization entering such orders would not be functioning as a DMM, and therefore would not be eligible for a DMM Participant allocation for such orders.

- The Exchange believes that amending Rule 7.35B(h)(2) to add new sub-paragraph (E) describing how DMM Auction Liquidity would be allocated would promote a fair and orderly Closing Auction process. Specifically, because DMM Auction Liquidity could be entered only to offset Unpaired Quantity at the Closing Auction Price,

the Exchange does not believe that such interest should get an allocation benefit. Accordingly, DMM Auction Liquidity would be allocated *after* not only displayed and non-displayed orders, but also *after* LOC Orders and Closing IO Orders. The Exchange further believes providing DMM Auction Liquidity with an allocation opportunity before orders ranked Priority 4—Yielding Orders would be consistent with a fair and orderly market because orders with a Yielding Modifier are, by their terms, intended to yield to other available interest and not guaranteed an execution in the Closing Auction. Because DMM Auction Liquidity would have an allocation opportunity before orders with a Yielding Modifier, the Exchange further believes it would be consistent with a fair and orderly Closing Auction process to not include offsetting Yielding Orders in the calculation of Unpaired Quantity that a DMM would be permitted to offset with DMM Auction Liquidity.

- The Exchange believes that deleting the text currently set forth in Rule 7.35B(h)(3)(A) and replacing it with a description of how self-trade prevention would be applied within the DMM Participant Allocation would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would promote transparency of the circumstances of when and how DMM Interest would be decremented and cancelled to prevent a self-trade between Closing D Order(s) to buy (sell) entered by a DMM and DMM Auction Liquidity to sell (buy). By applying STPD, the Exchange believes that the proposed mechanism would reduce the impact of such cancellation on the Closing Auction Price.

Exchange-Facilitated Auctions. The Exchange believes that the proposed amendment to Rule 7.35C(a)(1) would remove impediments to and perfect the mechanism of a free and open market and a national market system because it would allow for Closing D Orders entered by DMMs, which would be entered before the end of Core Trading Hours, to participate in an Exchange-facilitated Closing Auction. Currently, Closing D Orders entered by Floor brokers are eligible to participate in an Exchange-facilitated Closing Auction, and the Exchange believes that Closing D Orders entered by DMMs should not be processed differently.

Prohibited Transactions. The Exchange believes that the proposed changes to the Closing Auction process, combined with the elimination of Floor Broker Interest in the Closing Auction, would significantly alter the balance of

benefits and obligations for DMMs and the resulting scope of obligations would no longer be commensurate with DMM benefits. The Exchange therefore believes that eliminating Prohibited Transactions would remove impediments to and perfect the mechanism of a free and open market and a national system and would promote just and equitable principles of trade because, as a result of the proposed changes, DMMs' unique benefits vis-à-vis the Closing Auction process would be significantly altered, obviating the need for Prohibited Transactions. Specifically:

- DMMs would still have the obligation to select a Closing Auction Price that satisfies all better-priced orders on the Side of the Imbalance and supply liquidity as needed to facilitate a fair and orderly Closing Auction Process. However, as proposed, the DMM would now be systematically restricted as to the price range at which the Closing Auction Price could be determined and therefore DMMs would be subject to a further limitation on how they may select the Closing Auction Price. Accordingly, the Exchange believes this proposed change would maintain obligations on DMMs with respect to the Closing Auction while decreasing the tools available to meet those obligations.

- DMMs would no longer have discretion after the end of Core Trading Hours to enter or cancel DMM Interest. Instead, as proposed, after the end of Core Trading Hours, DMMs would be able to enter only DMM Auction Liquidity and could enter such interest only at pre-determined price ranges and only if such interest would offset Unpaired Quantity at those pre-determined price ranges. Accordingly, such interest would be systematically restricted by side, price, and quantity. This change ensures that DMM Auction Liquidity could be used only to dampen significant price movements at the close. The Exchange believes this proposed change significantly decreases unique benefits to the DMMs because they would still be required to supply liquidity as needed to support a fair and orderly Closing Auction, but would have limited tools to enter any such interest after the end of Core Trading Hours.

- The Exchange proposes to make the Closing D Order available to DMMs in part to offset this reduction of unique benefits with respect to entering or cancelling DMM Interest after the end of Core Trading Hours. However, unlike how DMMs currently may enter and cancel DMM Interest, DMMs would not receive any unique treatment with

respect to the availability of this order type. To the contrary, Closing D Orders for DMMs would function similarly to Closing D Orders available to Floor brokers, including that they may not be entered or cancelled in the last ten seconds of trading and the interest would be included in the Closing Auction Imbalance Information. Accordingly, the Exchange is not providing a bespoke tool for DMMs to supply liquidity for the Closing Auction. In addition, the Exchange proposes to make Closing D Orders available for a wholly independent reason to provide an incentive for more broker-dealers to seek to register as a DMM, which would increase DMM diversity on the Exchange to increase issuer choice. In addition, the proposed allocation of Closing D Orders entered by the DMM would not provide them with a unique benefit because they would function similarly to Closing D Orders entered by Floor brokers. Accordingly, if a Closing D Order is better-priced, it would be guaranteed to participate in the Closing Auction (subject to DMM-specific self-trade prevention), just as any other better-priced interest would be guaranteed an allocation. In addition, that information would be transparent because such Closing D Orders would be included in Closing Auction Imbalance Information. DMMs would therefore not be receiving a unique benefit in this allocation

- DMM Auction Liquidity entered in connection with facilitating the Closing Auction would, by its terms, be at-priced interest and would be allocated *after* at-priced displayed orders, non-displayed orders, LOC Orders, and Closing IO Orders. Accordingly, unlike at-priced DMM Interest under current Rules, it would not have priority over LOC Orders and Closing IO Orders. While such DMM Auction Liquidity would have priority over orders with a Yielding Modifier, the Exchange notes that such orders are, by their terms, conditional in nature and designed to yield to other orders. Accordingly, DMMs would have a reduced benefit in connection with Closing Auction allocations for their at-priced DMM Auction Liquidity.

In the aggregate, the Exchange believes that the above-described changes have altered the balance of benefits and obligations for DMMs and the resulting scope of obligations would no longer be commensurate with DMM benefits. For example, with respect to the benefits specifically identified by the Commission in the Disapproval Order, DMMs no longer have an informational advantage relating to Floor broker verbal interest at the close

and their at-priced DMM Auction Liquidity would no longer have priority over LOC or Closing IO Orders.

The Exchange believes that, as a result of these significant alterations to DMM obligations and benefits, any current need for Prohibited Transactions as a DMM obligation would be obviated. As described by the Commission, Prohibited Transactions provide for a bright-line rule designed to prevent a DMM from aggressively taking liquidity and moving prices on the Exchange immediately before the Closing Auction, and therefore destabilizing the market.⁵¹ Prohibited Transactions make sense when a DMM has discretion over the Closing Auction Price and when a DMM can enter and cancel interest after the end of Core Trading Hours. However, with the proposed changes described in this filing, DMM discretion is explicitly limited; the Closing Auction Price must be within a defined and transparent parameter that cannot be changed after the end of Core Trading Hours and DMMs would be limited in what offsetting interest they can enter after the end of Core Trading Hours. So, while the DMM would still have an obligation to facilitate the Closing Auction and supply liquidity as needed, DMMs would no longer have the same discretion in how they fulfill this obligation. As a result, any trading activity that a DMM would engage in the last ten minutes of trading would be no different than how other market participants trade leading into the close.

The Exchange notes that in the absence of Prohibited Transactions, if a DMM engages in an Aggressing Transaction in the last ten minutes of trading, the DMM would be subject to the re-entry obligations specified in current Rule 104(g)(2) (proposed Rule 104(d)(2)). Accordingly, DMMs would continue to be subject to a unique obligation in the last ten minutes of trading that would not be applicable to any other member organizations trading on the Exchange. To the extent a DMM engages in an Aggressing Transaction in the last ten minutes of trading, such re-entry obligation would dampen any potential destabilizing impact of such Aggressing Transaction.

Finally, the Exchange believes that the proposed amendments to Rule 98 to delete sub-paragraphs (c)(5) and (c)(5)(A) and renumber subparagraphs (c)(6) and (c)(7) as (c)(5) and (c)(6) would remove impediments to and perfect the mechanism of a free and open market and a national market system because the Exchange added Rule 98(c)(5) for the sole purpose of

requiring DMMs to provide net position information in connection with monitoring their compliance with Prohibited Transactions.⁵² Accordingly, because the Exchange is proposing to eliminate Prohibited Transactions, the related reporting requirement becomes obsolete.

Proposed Non-Substantive Amendments to Rule 104. The Exchange believes that the proposed non-substantive amendments to Rule 104 would remove impediments to and perfect the mechanism of a free and open market and a national market system because the proposed changes are designed to eliminate obsolete rule text, update rule references to reflect Pillar functionality, and make other conforming changes. Specifically, the Exchange proposes to eliminate references to pre-Pillar Rules and trading functionality, including references to Rules 123D, 123C, Rule 1000, the Capital Commitment Schedule, Floor broker agency interest files, odd-lot orders in the close, and self-trade prevention. The Exchange also proposes to update Rule 104(b) to cross reference Rule 7.31 to determine which orders and modifiers are available to DMMs, rather than separately (and duplicatively) including this description in Rule 104. The Exchange also proposes to update current Rule 104(h)(ii) (proposed Rule 104(e)(ii)) to delete reference to information that is no longer available to DMM at the post. The Exchange believes that these proposed amendments will promote transparency and clarity in Exchange rules regarding how DMMs function on the Exchange, including what information is available to them at the post.

The Exchange further believes that the proposed non-substantive amendments to Rules 7.35B(j)(2) and 7.35B(j)(2)(A)(iii) to eliminate references to Floor broker interest and oral interest entered by Floor brokers at the close would remove impediments to and perfect the mechanism of a free and open market and a national market system because these proposed changes are designed to conform Exchange rules to the changes described in the Floor Broker Interest Approval Order.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,⁵³ the Exchange believes that the proposed rule change would not impose any burden on competition that is not necessary or appropriate in furtherance

⁵² See *supra* note 46.

⁵³ 15 U.S.C. 78f(b)(8).

⁵¹ See Disapproval Order at 33536, *supra*, note 40.

of the purposes of the Act. The proposed change is designed to revise the Closing Auction process on the Exchange to make it more transparent and deterministic, while still retaining the DMM market model. The Exchange believes that the proposed rule change would promote 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 because they are designed to address the DMM's unique role at the Exchange, including the DMM's Rule 104(a)(3) obligation to facilitate the Closing Auction by supplying liquidity as needed for a fair and orderly Closing Auction. The proposed changes are designed to make the process more transparent and deterministic. The proposed changes would also result in reducing the overall DMM benefits because they would eliminate discretion regarding DMM Interest entered or cancelled after the end of Core Trading Hours and require that the DMM select a Closing Auction Price from within a pre-determined and transparency range of prices.

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 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 (<http://www.sec.gov/rules/sro.shtml>); or
- Send an email to rule-comments@sec.gov. Please include File Number SR-NYSE-2021-44 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-2021-44. 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 (<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 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 10:00 a.m. and 3:00 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change. Persons submitting comments are cautioned that we do not redact or edit personal identifying information from comment submissions. You should submit only information that you wish to make available publicly.

All submissions should refer to File Number SR-NYSE-2021-44 and should be submitted on or before October 13, 2021.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁴

J. Matthew DeLesDernier,

Assistant Secretary.

[FR Doc. 2021-20448 Filed 9-21-21; 8:45 am]

BILLING CODE 8011-01-P

⁵⁴ 17 CFR 200.30-3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-93023; File No. SR-EMERALD-2021-28]

Self-Regulatory Organizations; MIAX Emerald, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by To Amend Its Fee Schedule With Respect to Open-Close Report Data

September 16, 2021.

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 September 2, 2021, MIAX Emerald, LLC ("MIAX Emerald" or "Exchange"), filed with the Securities and Exchange Commission ("Commission") a proposed rule change as described in Items I, II, and III 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 is filing a proposal to amend the Exchange's Fee Schedule ("Fee Schedule") to provide historical Open-Close Report data for free by amending the fees for the Open-Close Report to: (i) Respond to ad hoc requests for end-of-day data free of charge; and (ii) provide mid-month subscribers data for the entire month in which they subscribe.

The text of the proposed rule change is available on the Exchange's website at <http://www.miaxoptions.com/rule-filings/emerald>, at MIAX's principal office, 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 Exchange 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 these 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 aspects of such statements.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.