

Edgar Filing: SYMS CORP - Form SC 13D/A

SYMS CORP  
Form SC 13D/A  
February 04, 2004

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549

SCHEDULE 13D  
(Rule 13d-101)

INFORMATION TO BE INCLUDED IN THE STATEMENTS FILED PURSUANT TO RULE  
13d-1(a) AND AMENDMENTS THERETO FILED PURSUANT TO RULE 13d-2(a)  
(Amendment No. 5)\*

Syms Corp  
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(Name of Issuer)

Common Stock, par value \$0.05 per share  
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(Title of Class of Securities)

871551107  
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(CUSIP Number)

Marcy Syms  
c/o Syms Corp  
Syms Way  
Seacaucus, New Jersey 07094  
(201) 902-9600  
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(Name, Address and Telephone Number of Person  
Authorized to Receive Notices and Communications)

January 30, 2004  
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(Date of event which requires filing of this statement)

If the filing person has previously filed a statement on Schedule 13G to report the acquisition that is the subject of this Schedule 13D, and is filing this schedule because of Rule 13d-1(e), 13d-1(f) or 13d-1(g), check the following box  
[ ]

\* The remainder of this cover page shall be filled out for a reporting person's initial filing on this form with respect to the subject class of securities, and for any subsequent amendment containing information which would alter disclosures provided in a prior cover page.

The information required on the remainder of this cover page shall not be deemed to be "filed" for the purpose of Section 18 of the Securities Exchange Act of 1934 (the "Exchange Act") or otherwise subject to the liabilities of that section of the Exchange Act but shall be subject to all other provisions of the Exchange Act (however, see the Notes).

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1 NAMES OF REPORTING PERSONS  
I.R.S. IDENTIFICATION NOS. OF ABOVE PERSONS (Entities Only)

Marcy Syms

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2 CHECK THE APPROPRIATE BOX IF A MEMBER OF A GROUP (a)  [X]  
(b)  [ ]

3 SEC USE ONLY

4 SOURCE OF FUNDS

Not applicable

5 CHECK BOX IF DISCLOSURE OF LEGAL PROCEEDINGS IS REQUIRED  
PURSUANT TO ITEM 2(d) or 2(e) [ ]

6 CITIZENSHIP OR PLACE OF ORGANIZATION

United States

NUMBER OF 7 SOLE VOTING POWER

SHARES 2,280,463

BENEFICIALLY 8 SHARED VOTING POWER

OWNED BY None

EACH 9 SOLE DISPOSITIVE POWER

REPORTING 2,280,463

PERSON 10 SHARED DISPOSITIVE POWER

WITH None

11 AGGREGATE AMOUNT BENEFICIALLY OWNED BY EACH REPORTING PERSON

8,326,846

12 CHECK BOX IF THE AGGREGATE AMOUNT IN ROW (11) EXCLUDES CERTAIN SHARES  
[ ]

13 PERCENT OF CLASS REPRESENTED BY AMOUNT IN ROW (11)

53.2%

14 TYPE OF REPORTING PERSON

IN

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Item 1 Security and Issuer.  
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This statement constitutes Amendment No. 5 ("Amendment No. 5") to the Statement on Schedule 13D (the "Schedule 13D") filed with the Securities and Exchange Commission by Marcy Syms (the "Reporting Person") in connection with her ownership of the Common Stock, \$0.05 par value per share (the "Common Stock"), of Syms Corp, a New Jersey corporation (the "Company"), with its principal executive offices at Syms Way, Secaucus, New Jersey 07094.

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In accordance with Exchange Act Rule 13d-2, this Amendment No. 5 amends and supplements only information that has materially changed since the January 20, 2004 filing by the Reporting Person of Amendment No. 4 to the Schedule 13D. Unless otherwise indicated herein, terms used but not otherwise defined in this Amendment No. 5 shall have the same respective meanings herein as are ascribed to such terms in the Schedule 13D.

Item 3. Source and Amount of Funds or Other Consideration.  
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Item 3 of the Schedule 13D is hereby amended and supplemented by adding the following:

On January 30, 2004, by virtue of the Reporting Person forming a "group" with Sy Syms ("Mr. Syms"), by the execution of a Voting Agreement (as hereinafter defined), the Reporting Person was deemed to have acquired beneficial ownership of the 6,046,383 shares beneficially owned on such date by Mr. Syms. The Reporting Person did not expend any funds in connection with the formation of the group or execution of the Voting Agreement.

Item 4. Purpose of Transaction.  
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Item 4 of the Schedule 13D is hereby amended and supplemented by adding the following:

On January 30, 2004, the Reporting Person, individually and as trustee of The Laura Merns Living Trust, dated February 14, 2003, and Mr. Syms, individually and as trustee of The Sy Syms Revocable Living Trust, dated March 17, 1989, entered into a Voting Agreement, dated as of January 30, 2004, a copy of which is included as Exhibit 1 to this Amendment No. 5 and is incorporated by reference herein (the "Voting Agreement").

Pursuant to the Voting Agreement, each of the Reporting Person and Mr. Syms agreed that at any meeting of the shareholders of the Company, however called, and in any action by consent of the shareholders of the Company, each of the Reporting Person and Mr. Syms shall vote or cause to be voted or execute a written consent in favor of certain Covered Matters (as hereinafter defined) which are approved by a majority of the members of the Company's board of directors who are present and voting at a meeting for which a quorum is present or which are approved by the unanimous written consent of the directors acting without a meeting, and in the case of the elections of directors, for those individuals who are the nominees of the board of directors or, if the Company has a nominating committee, who are the nominees of the nominating committee. Covered Matters include: (i) the election of directors; (ii) the ratification and approval of independent accountants; (iii) the approval of any amendment to the Company's certificate of incorporation; and (iv) the approval of any stock option plan, bonus plan or other equity-based incentive plan for employees, consultants and/or directors of the Company, or of any amendment to any of the foregoing.

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The information set forth in response to this Item 4 is qualified in its entirety by reference to the Voting Agreement.

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Except as set forth in this Statement, the Reporting Person does not have any plan or proposals that relate to or would result in any of the transactions described in subparagraphs (a) through (j) of Item 4 of Schedule 13D.

### Item 5. Interest in Securities of the Issuer.

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Item 5 of the Schedule 13D is hereby amended and supplemented by adding the following:

5(a) Prior to the formation of a group with Mr. Syms on January 30, 2004, the Reporting Person beneficially owned, within the meaning of Exchange Act Rule 13d-3, 2,280,463 shares, representing approximately 14.6% of the outstanding shares of the Company. Of such 2,280,463 shares of Common Stock, (i) the Reporting Person is the direct beneficial owner of 1,592,675 shares of Common Stock (which amount includes her options to purchase 537,500 shares of Common Stock) over which she has the sole voting and dispositive power, and (ii) 687,788 shares are held by the Laura Merns Living Trust, dated February 14, 2003, between Laura Merns, as settlor, and the Reporting Person, as trustee, of which the Reporting Person is an indirect beneficial owner, and as the sole trustee thereunder, has the sole voting and dispositive power over such Common Stock held by the Trust.

Upon the formation of the group with Mr. Syms on January 30, 2004, the Reporting Person was deemed to have acquired all shares beneficially owned by Mr. Syms on that date and, as a result, the Reporting Person was deemed to have beneficial ownership, within the meaning of Exchange Act Rule 13d-3, on that date of 8,326,846 shares, representing approximately 53.2% of the outstanding shares of the Company. The additional shares deemed acquired by the Reporting Person consisted of 6,046,383 shares which Mr. Syms beneficially owned.

As of the date of this Statement, the Reporting Person beneficially owned, within the meaning of Exchange Act Rule 13d-3, 8,326,846 shares, representing approximately 53.2% of the outstanding shares of the Company. These shares consisted of the 8,326,846 shares described above.

5(b) The Reporting Person has sole power to vote and to dispose of the 2,280,463 shares she beneficially owned prior to the formation of a group with Mr. Syms on January 30, 2004. The Reporting Person does not have any power, whether sole or shared, to vote or to dispose of any of the 6,046,383 shares beneficially owned by Mr. Syms prior to the formation of the group.

5(c) No transactions in the shares have been effected since those reported on in the filing on January 20, 2004 of Amendment No. 4 to the Schedule 13D by the Reporting Person.

5(d) Not applicable.

5(e) Not applicable.

### Item 6. Contracts, Arrangements, Understandings or Relationships With Respect to Securities of the Issuer.

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Item 6 of the Schedule 13D is hereby amended and supplemented by adding the following:

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Except for the Voting Agreement described above, to the best of the knowledge of the Reporting Person, there are no contracts, agreements, understandings or relationships (legal or otherwise), including, but not limited to, transfer or voting of any of the securities, finder's

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fees, joint ventures, loan or option arrangements, puts or calls, guarantees of profits, division of profits or loss, or the giving or withholding of proxies, and any other person, with respect to any securities of the Company, including any securities pledged or otherwise subject to a contingency the occurrence of which would give another person voting power or investment power over such securities.

The matters set forth in Items 3 and 4 above are incorporated in this Item 6 by reference as if fully set forth herein.

Item 7. Material to be Filed as Exhibits.

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Item 7 of the Schedule 13D is hereby amended and supplemented to include the following:

- 1. Voting Agreement, dated as of January 30, 2004, between Marcy Syms, individually and as trustee of The Laura Merns Living Trust, dated February 14, 2003, and Sy Syms, individually and as trustee of The Sy Syms Revocable Living Trust, dated March 17, 1989.

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Signatures

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After reasonable inquiry and to the best of my knowledge and belief, I certify that the information set forth in this statement is true, complete and correct.

/s/ Marcy Syms

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Marcy Syms

Dated: February 4, 2004

Exhibit 1

VOTING AGREEMENT

VOTING AGREEMENT, dated as of January 30, 2004, between Marcy Syms, individually and as trustee of The Laura Merns Living Trust, dated February 14, 2003, and Sy Syms, individually and as trustee of The Sy Syms Revocable Living Trust, dated March 17, 1989, as amended (each, a "Shareholder" and together, the "Shareholders").

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### Recitals

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A. As of the date hereof, each Shareholder owns, beneficially and/or of record, shares of common stock, \$0.05 par value per share (the "Common Stock"), of Syms Corp, a New Jersey corporation (the "Company"), which represent, in the aggregate, more than 50% of the voting power of the Company.

B. Each Shareholder desires to enter into this Agreement with respect to the voting of the shares of Common Stock now held, beneficially and/or of record, by such Shareholder, and the voting of any additional shares of Common Stock which may in the future be held, beneficially and/or of record, by such Shareholder (collectively, the "Shares"), on the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants and agreements contained herein, and intending to be legally bound hereby, the parties hereto agree as follows:

1. Agreement to Vote. (a) In recognition of the Shareholders' common goals and objectives as shareholders of the Company and to ensure the orderly management and operation of the Company, each Shareholder hereby agrees that at any meeting of the shareholders of the Company, however called, and in any action by consent of the shareholders of the Company, each Shareholder shall vote or cause to be voted or execute a written consent in favor of all Covered Matters (as hereinafter defined) which are approved by a majority of the members of the Company's board of directors who are present and voting at a meeting for which a quorum is present or which are approved by the unanimous written consent of the directors acting without a meeting, and, in the case of the election of directors, for those individuals who are the nominees of the board of directors or, if the Company has a nominating committee, who are the nominees of the nominating committee.

(b) For purposes hereof, "Covered Matters" shall mean any of the following:

(i) the election of directors;

(ii) the ratification and approval of independent accountants;

(iii) the approval of any amendment to the Company's certificate of incorporation; and

(iv) the approval of any stock option plan, bonus plan or other equity-based incentive plan for employees, consultants and/or directors of the Company, or of any amendment to any of the foregoing.

(c) Nothing contained herein shall be deemed to vest in either Shareholder any direct or indirect ownership with respect to the Shares owned by the other party hereto, and notwithstanding anything in this Agreement to the contrary, each Shareholder shall retain any and all of his or her rights, powers and authorities as a shareholder of the Company.

(d) Except as specifically set forth in this Agreement, nothing herein shall be deemed to limit or restrict the ability of each Shareholder to sell, hold, dispose and/or encumber all or any portion of his or her Shares.

(e) Any stock certificates representing the Shares owned by a Shareholder shall bear an appropriate legend relating to this Agreement.

2. Representations and Warranties. Each Shareholder represents and warrants to other party hereto as follows:

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(a) Such Shareholder has the legal capacity and the power to execute, deliver and perform this Agreement and to consummate the transactions contemplated hereby. This Agreement has been duly and validly executed and delivered by such Shareholder and constitutes the valid and binding obligation of such Shareholder, enforceable against such Shareholder in accordance with its terms.

(b) The execution, delivery and performance by such Shareholder of this Agreement and the consummation by such Shareholder of the transactions contemplated hereby will not, with or without the giving of notice or the lapse of time, or both, conflict with or violate (i) any provision of law, rule or regulation to which such Shareholder is subject, (ii) any order, judgment or decree applicable to such Shareholder or (iii) any provision of any agreement, contract or other instrument to which such Shareholder is a party or by which he or she is bound. The execution and delivery of this Agreement by such Shareholder does not, and the performance of this Agreement by such Shareholder shall not, require any consent, approval, authorization or permit of, or filing with or notification to, any court or arbitrator or any governmental body, agency or official, except for such filings as may be required under the Securities Exchange Act of 1934, as amended.

(c) Such Shareholder has not (i) entered into any other voting agreement with respect to his or her Shares which remains in effect as of the date hereof or (ii) granted any proxy or power of attorney with respect to his or her Shares which remain in effect as of the date hereof.

3. No Inconsistent Agreements. Each Shareholder hereby covenants and agrees that, except as contemplated by this Agreement, so long as this Agreement remains in effect, he or she (a) shall not enter into any other voting agreement with respect to his or her Shares and (b) shall not grant a proxy or power of attorney with respect to his or her Shares, in each such case, which is inconsistent with its obligations pursuant to this Agreement.

4. Shareholder Capacity. Nothing in this Agreement shall limit or restrict either Shareholder in acting in his or her capacity as a director of the Company and exercising his or her fiduciary duties and responsibilities relating thereto, it being understood that this Agreement shall apply to each Shareholder solely in his or her capacity as a shareholder of the Company and shall not apply to each Shareholders' actions, judgments or decisions as a director of the Company.

5. Amendments and Waivers. No amendment or waiver of any provision of this Agreement shall be valid unless the same shall be in writing and signed by both Shareholders. No waiver by either party of any default, misrepresentation, or breach of warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation or breach of warranty or covenant hereunder or affect in any way any rights arising by virtue of any prior or subsequent such occurrence.

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6. Term of the Agreement. This Agreement shall expire upon the tenth anniversary of the date hereof; provided that either party hereto may earlier terminate this Agreement upon not less than 18 months prior written notice to the other party hereto; provided, further, that any Shareholder may withdraw from this Agreement upon not less than 30 days prior written notice at any time after the date on which the Shareholders, together with their transferees subject to this Agreement, cease to own more than 50% of the voting power of the Company.

7. Miscellaneous. (a) This Agreement shall be governed by, and construed in accordance with, the laws of the State of New Jersey without regard to the

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conflicts of law principles thereof.

(b) This Agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and supercedes all prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. If any of the provisions of this Agreement are for any reason declared by the final judgment of a court of competent jurisdiction to be unenforceable or ineffective, those provisions shall be deemed severable from the other provisions of this Agreement and the remainder of this Agreement shall remain in full force and effect.

(c) This Agreement shall be binding upon and inure to the benefit of and be enforceable by the parties hereto (individually and as attorney-in-fact, trustee, executor, custodian or otherwise, if applicable) and their respective successors, assigns, heirs, legal representatives and personal representatives. If a Shareholder effectuates any transfer to which the preceding sentence applies, he or she shall, as a condition to such transfer, first obtain an agreement in writing from such transferee to be bound by all of the terms and provisions of this Agreement with the same force and effect as if such transferee were (and such transferee shall be considered) a "Shareholder" for all purposes of this Agreement as of the date hereof. Notwithstanding anything to the contrary contained herein, a transferee acquiring any Shares from a Shareholder in a public offering or via a public sale shall not be bound by the terms and conditions of this Agreement.

(d) This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, this Agreement has been executed and delivered by the parties hereto as of the day and year first above written.

/s/ Marcy Syms

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Marcy Syms, individually and as trustee of  
the Laura Merns Living Trust, dated  
February 14, 2003

/s/ Marcy Syms

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Sy Syms, individually, and as trustee  
under The Sy Syms Revocable Living Trust,  
dated March 17, 1989, as amended