

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-67437; File Nos. SR-NYSE-2011-56; SR-NYSEAmex-2011-86)

July 13, 2012

Self-Regulatory Organizations; New York Stock Exchange LLC; NYSE Amex LLC; Order Disapproving Proposed Rule Changes to Codify Certain Traditional Trading Floor Functions That May Be Performed by Designated Market Makers and to Permit Designated Market Makers and Floor Brokers Access to Disaggregated Order Information

On October 31, 2011, the New York Stock Exchange LLC (“NYSE”) and NYSE Amex LLC (“NYSE Amex”) (collectively, the “SROs”) each filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² proposed rule changes (“SRO Proposals”) to amend certain of their respective rules relating to Designated Market Makers (“DMMs”)³ and Floor brokers. The SRO Proposals were published for comment in the Federal Register on November 17, 2011.⁴ The Commission received no comment letters on the proposals. On December 22, 2011, the Commission extended the time period in which to either approve the SRO Proposals,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See NYSE Rule 98(b)(2). “DMM unit” means any member organization, aggregation unit within a member organization, or division or department within an integrated proprietary aggregation unit of a member organization that (i) has been approved by NYSE Regulation pursuant to section (c) of NYSE Rule 98, (ii) is eligible for allocations under NYSE Rule 103B as a DMM unit in a security listed on the Exchange, and (iii) has met all registration and qualification requirements for DMM units assigned to such unit. The term “DMM” means any individual qualified to act as a DMM on the floor of the Exchange under NYSE Rule 103. See also NYSE Amex Equities Rule 2(i). Rule 2(i) defines the term “DMM” to mean an individual member, officer, partner, employee or associated person of a DMM unit who is approved by the Exchange to act in the capacity of a DMM. NYSE Amex Equities Rule 2(j) defines the term “DMM unit” as a member organization or unit within a member organization that has been approved to act as a DMM unit under NYSE Amex Equities Rule 98.

⁴ See Securities Exchange Act Release Nos. 65735 (November 10, 2011), 76 FR 71405 (SR-NYSEAmex-2011-86) (“NYSE Amex Notice”) and 65736 (November 10, 2011), 76 FR 71399 (SR-NYSE-2011-56) (“NYSE Notice”).

disapprove the SRO Proposals, or to institute proceedings to determine whether to disapprove the SRO Proposals, to February 15, 2012.⁵

On February 15, 2012, the Commission instituted proceedings to determine whether to disapprove the proposed rule changes.⁶ The Commission thereafter received five comment letters on the proposals.⁷ NYSE Euronext, on behalf of the SROs, submitted a response letter on March 28, 2012.⁸ On May 14, 2012, the Commission issued a notice of designation of longer period for Commission action on proceedings to determine whether to disapprove the proposed rule changes.⁹ This order disapproves the proposed rule changes.

I. Description of the Proposals

The SRO Proposals seek to amend the SROs' rules in several ways. First, the SROs propose to codify certain trading floor functions that may be performed by DMMs. Second, the SROs propose to allow DMMs to access Exchange systems that would provide DMMs with additional order information about the securities in which they are registered. Third, the SROs propose to make certain conforming amendments to their rules to reflect the additional order

⁵ See Securities Exchange Act Release No. 66036, 76 FR 82011 (December 29, 2011).

⁶ See Securities Exchange Act Release No. 66397, 77 FR 10586 (February 22, 2012) (“Order Instituting Proceedings”).

⁷ See Letters to Elizabeth M. Murphy, Secretary, Commission, from Kenneth Polcari, dated March 12, 2012 (“Polcari Letter”); Patrick Armstrong and Daniel Tandy, Co-Presidents, Alliance of Floor Brokers (“AFB”), dated March 13, 2012 (“AFB Letter”); Jonathan Corpina, President, and Jennifer Lee, Vice President, Organization of Independent Floor Brokers (“OIFB”), dated March 13, 2012 (“OIFB Letter”); James J. Angel, Ph.D., CFA, dated March 15, 2012 (“Angel Letter”); and John Petschauer, CEO, EZX, Inc., dated March 14, 2012 (“EZX Letter”).

⁸ See Letter to Elizabeth M. Murphy, Secretary, Commission, from Janet McGinness, Executive Vice President and Corporate Secretary, NYSE Euronext, dated March 28, 2012 (“SRO Response Letter”).

⁹ See Securities Exchange Act Release No. 66981, 77 FR 29730 (May 18, 2012).

information that would be available to DMMs through Exchange systems, and to specify what information about Floor broker agency interest file (“e-Quotes”) is available to the DMM. Finally, the SROs propose to modify the terms under which DMMs would be permitted to provide market information to Floor brokers and others.

A. Trading Floor Functions

The SROs propose to codify certain trading floor functions formerly performed by specialists that are now performed by DMMs, and were described in each SRO’s respective Floor Official Manual.¹⁰

The proposed rules would specify four categories of trading floor functions that DMMs could perform: (1) maintaining order among Floor brokers manually trading at the DMM’s assigned panel;¹¹ (2) bringing Floor brokers together to facilitate trading;¹² (3) assisting Floor brokers with respect to their orders by providing information regarding the status of a Floor broker’s orders, helping to resolve errors or questioned trades, adjusting errors, and cancelling or

¹⁰ See, e.g., NYSE 2004 Floor Official Manual, Market Surveillance June 2004 Edition, Chapter Two, Section I.

¹¹ See id. at Section I.A. at 7 (“specialist helps ensure that such markets are fair, orderly, operationally efficient and competitive with all other markets in those securities”).

¹² See id. at Section I.B.3. at 10-11 (“[i]n opening and reopening trading in a listed security, a specialist should . . . [s]erve as the market coordinator for the securities in which the specialist is registered by exercising leadership and managing trading crowd activity and promptly identifying unusual market conditions that may affect orderly trading in those securities, seeking the advice and assistance of Floor Officials when appropriate” and “[a]ct as a catalyst in the markets for the securities in which the specialist is registered, making all reasonable efforts to bring buyers and sellers together to facilitate the public pricing of orders, without acting as principal unless reasonably necessary”).

inputting Floor broker agency interest on behalf of a Floor broker;¹³ and (4) researching the status of orders or questioned trades.¹⁴

B. DMM Access to Additional Order Information

Each SRO proposes to make Exchange systems available to a DMM at the post that display the following types of information about securities in which the DMM is registered: (A) aggregated information about buying and selling interest;¹⁵ (B) disaggregated information about the price and size of any individual order or e-Quotes and the entering and clearing firm information for such orders, except that Exchange systems would not make available to DMMs information about any order or e-Quote, or portion thereof, that a market participant has elected not to display to a DMM; and (C) post-trade information.¹⁶ The proposals would make available to DMMs disaggregated information about the following interest in securities in which the DMM is registered: (a) the price and size of all displayable interest submitted by off-Floor participants

¹³ See *id.* at Section I.B.4. at 11 (“In view of the specialist’s central position in the Exchange’s continuous two-way agency auction market, a specialist should proceed as follows . . . [e]qually and impartially provide accurate and timely market information to all inquiring members in a professional and courteous manner.”).

¹⁴ See *id.* at Section I.B.5. at 12 (A specialist should “[p]romptly provide information when necessary to research the status of an order or a questioned trade and cooperate with other members in resolving and adjusting errors.”).

¹⁵ Exchange systems currently make available to DMMs aggregate information about the following interest in securities in which the DMM is registered: (a) all displayable interest submitted by off-floor participants; (b) all Minimum Display Reserve orders, including the reserve portion; (c) all displayable floor broker agency interest files (“e-Quotes”); (d) all Minimum Display Reserve e-Quotes, including the reserve portion; and (e) the reserve quantity of Non-Display Reserve e-Quotes, unless the floor broker elects to exclude that reserve quantity from availability to the DMM.

¹⁶ For the latter two categories, the DMM also would have access to entering and clearing firm information for each order and, as applicable, the badge number of the floor broker representing the order. According to the SROs, the systems would not contain any information about the ultimate customer (*i.e.*, the name of the member or member organization’s customer) in a transaction.

(off-Floor participants may submit non-displayable interest that is hidden from the DMM);¹⁷ and (b) all e-Quotes, including reserve e-Quotes, that the Floor broker has not elected to exclude from availability to the DMM.¹⁸

C. Conforming Amendments and Floor Broker e-Quote Information

The SROs also propose to make conforming amendments to their rules to reflect the additional order information that would be available to DMMs through Exchange systems, and to specify what information about e-Quotes is available to the DMM. Specifically, the SROs propose to revise NYSE Rule 70 and NYSE Amex Rule 70 governing e-Quotes to reflect that disaggregated order information would be available to the DMM except as elected otherwise. The SROs would allow a Floor broker to enter e-Quotes with reserve interest (“Reserve e-Quote”) with or without a displayable portion.

A Reserve e-Quote with a displayable portion would participate in manual and automatic executions. Order information at each price point, including the reserve portion, would be included in the aggregate interest available to the DMM. Order information at each price point would be available to the DMM on a disaggregated basis as well. If the Floor broker chooses to exclude the Reserve e-Quote with a displayable portion from the DMM, then the DMM would have access to the entire portion on an aggregated basis but would not have access to any of that interest on a disaggregated basis.

¹⁷ See NYSE and NYSE Amex Rule 13, defining non-displayed order types.

¹⁸ The SROs previously permitted DMMs to have access to Exchange systems that contained the disaggregated order information described above. The SROs stopped making such information available to DMMs on January 19, 2011. See NYSE and NYSE Amex Information Memo 11-03.

A Reserve e-Quote with an undisplayable portion would also participate in manual and automatic executions. Like the Reserve e-Quote with a displayable portion, order information at each price point would be included in the aggregate interest available to the DMM. Again, like the Reserve e-Quote with a displayable portion, order information at each price point would be available to the DMM on a disaggregated basis as well. If the Floor broker chooses to exclude the Reserve e-Quote with an undisplayable portion from the DMM, however, then the DMM would not have access to such interest on either an aggregated basis or a disaggregated basis. Such interest would not participate in manual executions.

In addition, the SROs propose to delete rules which currently prohibit DMMs from using the Display Book system to access information about e-Quotes excluded from the aggregated agency interest and Minimum Display Reserve Order information, other than for the purpose of effecting transactions that are reasonably imminent where such Floor broker agency and Minimum Display Reserve Order interest information is necessary to effect such transaction.¹⁹

D. Ability of DMMs to Provide Market Information on the Trading Floor

The SROs also propose to modify the manner under which DMMs would be permitted to provide market information to Floor brokers and visitors on the trading floor. Specifically, the proposed rules would permit a DMM to provide the market information to which he or she has access to a: (1) Floor broker in response to an inquiry in the normal course of business; or (2) visitor to the trading floor for the purpose of demonstrating methods of trading. As such, Floor brokers would be able to access disaggregated order information that market participants have not otherwise elected to be hidden from the DMM. A Floor broker would not be able to submit

¹⁹ See proposed deletions to NYSE Rule 104(a)(6) and NYSE Amex Rule 104(a)(b).

such an inquiry for market information by electronic means, and the DMM's response containing market information could not be delivered through electronic means.

Because the proposed rule expands on and incorporates the current SRO rules regarding disclosure of order information by DMMs, the SROs are proposing to delete these rules.²⁰ The current rules provide that a DMM may disclose market information for three purposes. First, a DMM may disclose market information for the purpose of demonstrating the methods of trading to visitors to the trading floor. This aspect of the current rule is replicated in the proposed rules. Second, a DMM may disclose market information to other market centers in order to facilitate the operation of the Intermarket Trading System ("ITS"). According to the SROs, this text is obsolete as the ITS Plan has been eliminated and therefore the SROs are proposing to delete it. Third, a DMM may, while acting in a market making capacity, provide information about buying or selling interest in the market, including (a) aggregated buying or selling interest contained in Floor broker agency interest files other than interest the broker has chosen to exclude from the aggregated buying and selling interest, (b) aggregated interest of Minimum Display Reserve Orders and (c) the interest included in DMM interest files, excluding Capital Commitment Schedule ("CCS") interest as described in Rule 1000(c), in response to an inquiry from a member conducting a market probe in the normal course of business. The proposed rules would permit DMMs to provide Floor brokers not only with the same aggregated order information that

²⁰ The SROs are also proposing conforming amendments to correct cross-references to the former rule.

DMMs currently are permitted to provide under current rules, but also with the disaggregated and post-trade order information described above.²¹

The proposed rules would permit a DMM to provide market information to a Floor broker in response to a specific request by the Floor broker to the DMM at the post, rather than specifying that the information must be provided “in response to an inquiry from a member conducting a market probe in the normal course of business,” as currently provided in the SRO rules. Under the proposed rule change, Floor brokers would not have access to Exchange systems that provide disaggregated order information, and Floor brokers would only be able to access such market information through a direct manual interaction with a DMM at the post.

II. Disapproval Proceedings, Summary of Comment Letters and the SROs’ Response

In the Order Instituting Proceedings, the Commission expressed concern about the consistency of the proposals with Section 6(b)(5) of the Act, including whether they would permit unfair discrimination, promote just and equitable principles of trade, and protect investors and the public interest.²² Among other things, the Commission noted that, while the proposals may improve the ability of DMMs and Floor brokers to trade on the Exchanges, the proposals also would provide them access to potentially valuable information about Exchange orders that is not available to other members or market participants, including the identity of the entering and clearing firm.²³ The Commission stated that, while exchanges may legitimately confer special benefits on market participants willing to accept substantial responsibilities to contribute to

²¹ Because DMMs on the trading floor do not have access to CCS interest information, the proposed rule does not specify that DMMs would not be disseminating such information.

²² 15 U.S.C. 78f(b)(5).

²³ See Order Instituting Proceedings, supra note 6, at 10589.

market quality, such benefits must not be disproportionate to the services provided.²⁴ The Commission noted that the Exchanges were not proposing to require any additional obligations from DMMs and Floor brokers in exchange for the additional order information, and had not clearly explained how the proposals would materially improve the quality of the SROs' markets.²⁵ As a result, the Commission was concerned that the proposals unfairly discriminated in favor of DMMs and Floor brokers, might not have been designed to protect the broad group of investors that trade on the SROs, and otherwise might be inequitable.²⁶

The Commission received five comment letters in support of the proposed rule changes,²⁷ along with a response from the SROs.²⁸ In general, the commenters believed that the floors of the Exchanges continued to provide a valuable service to the markets, particularly with respect to the facilitation of block trades, and they broadly indicated that the proposed provision of disaggregated order information to Floor members would further this important function.²⁹ One commenter also stated that the access to this information would enable DMMs to assist Floor brokers in the event of a technical failure.³⁰ Some noted that this type of information had historically been made available to Floor members.³¹

²⁴ See Order Instituting Proceedings, supra note 6, at 10588.

²⁵ Id. at 10589.

²⁶ See id.

²⁷ See supra note 7.

²⁸ See supra note 8.

²⁹ AFB Letter, supra note 7, at 3; Angel Letter, supra note 7, at 2; EZX Letter, supra note 7; OIFB Letter, supra note 7, at 1; and Polcari Letter, supra note 7, at 2.

³⁰ See OIFB Letter, supra note 7, at 1.

³¹ See AFB Letter, supra note 7, at 2; Angel Letter, supra note 7, at 2; and OIFB Letter, supra note 7, at 1.

Commenters did not believe the proposals were unfairly discriminatory because, in their view, DMMs would be obligated to provide disaggregated order information to Floor brokers in a non-discriminatory fashion, and Floor brokers would be obligated to do the same for their customers.³² Commenters also expressed the view that the disaggregated order information would be of limited utility because it could only be accessed manually,³³ and they noted that Floor brokers were restricted from trading proprietarily and thus could not directly benefit from this information.³⁴

Commenters also emphasized that market participants that do not wish to allow their disaggregated order information to be provided to DMMs and Floor brokers can use undisplayed orders or place orders on a competing exchange.³⁵ One commenter urged the Commission to allow exchange experimentation and believed that, if the proposals resulted in information leakage or degraded market quality, then order flow would rapidly shift to other trading venues.³⁶

In their response, the SROs, among other things, emphasized that “[t]he purpose of the Proposals is to help DMMs facilitate large orders on the Trading Floor if an investor wishes to utilize the resources of a Floor broker,”³⁷ and argued that the proposals would “potentially make

³² See AFB Letter, supra note 7, at 3; Angel Letter, supra note 7, at 3; OIFB Letter, supra note 7, at 1-2; and Polcari Letter, supra note 7, at 2.

³³ See OIFB Letter, supra note 7, at 2.

³⁴ See AFB Letter, supra note 7, at 4; OIFB Letter, supra note 7, at 2; Polcari Letter; supra note 7, at 3.

³⁵ See AFB Letter, supra note 7, at 2; Angel Letter, supra note 7, at 3; and OIFB Letter, supra note 7, at 1.

³⁶ See Angel Letter, supra note 7, at 3-4.

³⁷ SRO Response Letter, supra note 7, at 15-16.

the Floor more hospitable to large orders, reduce transaction costs and produce savings for long-term investors.”³⁸ In proposing to provide disaggregated order information to Floor members, the SROs “seek to provide improved conditions for buyers and sellers to interact at potentially more favorable prices, or in larger-sized executions, on the Floors of the Exchanges.”³⁹ The SROs believe that “making this information available to Floor brokers [would make] it easier for . . . size trades to be arranged, and for leakage and market impact to be avoided.”⁴⁰

At the same time, the SROs take the position that “any informational advantage conveyed is extremely slight.”⁴¹ They note that DMMs and Floor brokers already have access to aggregated order information, and that the proposals would allow them “to see the disaggregated form of such aggregated interest, which means simply that the components of the aggregated interest and the entering and clearing firms that are associated with those components (but not the ultimate customers) will be visible.”⁴² The SROs also point out that the disaggregated information “is only available to a DMM while on the trading Floor at the trading post,” and take the position that the “DMM must query the specific information about a particular security, a process which limits the number of securities for which information can be obtained at any given time,” so that “[a]ny actual informational advantage resulting from viewing disaggregated information would be eliminated by the staleness of the information.”⁴³ In the view of the SROs,

³⁸ Id. at 3.

³⁹ Id. at 4-5.

⁴⁰ Id. at 11.

⁴¹ Id. at 11.

⁴² Id. at 10-11.

⁴³ Id. at 12.

because the proposals do “not convey any truly exclusive or significant benefit to DMMs and Floor brokers, new, additional obligations are not necessary.”⁴⁴

In addition, the SROs believe that existing restrictions on trading by DMMs and Floor brokers address concerns associated with any potential informational advantage.⁴⁵ According to the SROs, the disaggregated order information would not be available to a DMM’s trading algorithm, and Exchange rules effectively erect an information barrier between DMM personnel on the Floor and the DMM’s off-Floor trading operations.⁴⁶ With respect to Floor brokers, the SROs state that, because “they are prohibited from trading on a principal basis, any potential benefit accrues to the investor, not the Floor broker.”⁴⁷ The SROs also note that, prior to the adoption of their “Hybrid Market,” specialists were permitted to provide disaggregated order information to Floor brokers.⁴⁸ Finally, the SROs take the position that “access to the disaggregated order information is entirely consensual,”⁴⁹ because a market participant that does not want its interest shown can “(1) choose to have the order not display on a disaggregated basis or (2) place the order with a NYSE competitor.”⁵⁰

III. Discussion

Under Section 19(b)(2)(C) of the Act, the Commission shall approve a proposed rule change of a self-regulatory organization if the Commission finds that such proposed rule change

⁴⁴ Id. at 13.

⁴⁵ Id. at 3.

⁴⁶ Id. at 11-12.

⁴⁷ Id. at 12.

⁴⁸ Id. at 5 and 16.

⁴⁹ Id. at 11.

⁵⁰ Id. at 16.

is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to such organization.⁵¹ The Commission shall disapprove a proposed rule change if it does not make such a finding.⁵² The Commission’s Rules of Practice, under Rule 700(b)(3), state that the “burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”⁵³

After careful consideration, the Commission does not find that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. In particular, the Commission does not find that the proposals are consistent with Section 6(b)(5) of the Act,⁵⁴ which, among other things, requires that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to protect investors and the public interest, and not to permit unfair discrimination between customers, issuers, brokers, or dealers.

⁵¹ See 15 U.S.C. 78s(b)(2)(C)(i).

⁵² See 15 U.S.C. 78s(b)(2)(C)(ii); see also 17 CFR 201.700 (b)(3) and note 56 infra, and accompanying text.

⁵³ See 17 CFR 201.700. The description of a proposed rule change, its purpose and operation, its effect, and a legal analysis of its consistency with applicable requirements must all be sufficiently detailed and specific to support an affirmative Commission finding. See id. Any failure of a self-regulatory organization to provide the information elicited by Form 19b-4 may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the rules and regulations issued thereunder that are applicable to the self-regulatory organization. Id.

⁵⁴ 15 U.S.C. 78f(b)(5).

Specifically, the SROs propose to provide their Floor members – DMMs and Floor brokers – special access to information about individual orders on the Exchanges. The proposals would permit DMMs to access information about the price and size of individual orders on the Exchange books, as well as Floor broker e-Quotes, along with the identity of the broker-dealer that entered the order and the clearing firm. DMMs also would be provided post-trade information with respect to Exchange orders that, similarly, includes the identity of the broker-dealer that entered the order and the clearing firm.

In the Order Instituting Proceedings, the Commission expressed concern that, while the proposals may improve the ability of DMMs and Floor brokers to trade on the SROs, the proposals also would provide DMMs and Floor brokers access to potentially valuable information about Exchange orders generated both on and off the Floor that is not made available to other Exchange members or market participants, unless it is acquired through a Floor broker. The Commission also noted that the SROs were not proposing to require any additional obligations from DMMs and Floor brokers in exchange for the additional order information, and had not clearly explained how the proposals would materially improve the quality of the SROs' markets. In response, commenters and the SROs made general arguments that the proposals would facilitate the ability of DMMs and Floor brokers to perform important trading floor functions, such as bringing together market participants seeking to trade large orders or assisting Floor members in the event they experience a technical failure. Neither the SROs nor the commenters explained, however, how the particular information proposed to be provided – disaggregated information about public orders on the Exchange books as well as Floor broker e-Quotes – would further those legitimate Floor functions. Although not articulated by the SROs

or commenters, the Commission could envision an argument that allowing DMMs to see information about individual Floor broker e-Quotes, including the identity of the responsible Floor broker, and convey that information to other Floor brokers, could facilitate the bringing together of buyers and sellers of large orders on the Floor more efficiently than through verbal communications. However, neither the SROs nor the commenters have offered any specific explanation, nor has the Commission been able to otherwise discern, how the provision of disaggregated pre-trade and post-trade information about public orders on the Exchange books, including the identity of the entering and clearing firms, would promote a legitimate Floor function. Nor have the SROs or the commenters provided any specific justification for allowing Floor brokers to pass on to their customers the identity of the responsible Floor broker for e-Quotes, or any disaggregated order information (pre-trade or post trade) with respect to orders on the Exchange books that originate off the Exchange floors.

Although the SROs and commenters have taken the position that the disaggregated order information proposed to be provided would afford only a slight benefit to Floor members, given that it must be accessed manually, they have not clearly explained why this is the case, particularly with respect to less liquid securities where order information is less likely to become rapidly stale. In addition, neither the SROs nor the commenters have articulated a rationale for providing disaggregated order information – particularly that relating to public orders on the Exchange books – exclusively to DMMs and Floor brokers and, by extension, exclusively to Floor broker customers, and not to all Exchange members and customers. While the SROs and commenters believe that the proposals are not unfairly discriminatory because DMMs must provide the information to Floor brokers in a non-discriminatory fashion, and Floor brokers must

do the same with respect to their customers, they do not explain why it is not unfairly discriminatory to offer this information only through Floor brokers and not through other Exchange members.

The SROs and commenters point out that customers can prevent their disaggregated order information from being accessed by DMMs and Floor brokers by submitting a non-displayable order or, with respect to Floor broker e-Quotes, instructing that the information be withheld from the DMM. They also note that Floor brokers are not permitted to trade on a proprietary basis, and that DMMs are subject to restrictions that limit their ability to benefit directly from their receipt of disaggregated order information by trading proprietarily. Although these are factors that may mitigate potential harm that may result from the proposals, they do not in themselves offer an affirmative justification as to why the specific proposals under consideration would not permit unfair discrimination, or would promote just and equitable principles of trade and protect investors and the public interest, or would otherwise be consistent with the Act. Similarly, while the SROs and commenters note that specialists historically were permitted to provide disaggregated order information to Floor brokers prior to the Exchanges' conversion to a more automated "Hybrid Market," they do not articulate how this former practice is relevant to whether the proposed provision of disaggregated order information to Floor members in the context of the current market models of the SROs is consistent with the Act.

When the Commission is engaged in rulemaking or the review of a rule filed by a self-regulatory organization, and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital

formation.⁵⁵ Based on the evidence presented, the Commission notes that making the information that is proposed to be provided under this filing exclusively available to DMMs and Floor brokers could have a detrimental effect on competition between on-Floor and off-Floor members of the Exchanges. Moreover, while providing DMMs and Floor brokers with order information related to Floor broker interest may promote efficiency, the SROs have not demonstrated that other aspects of these proposals – specifically, providing DMMs and Floor brokers with order information about public orders on the Exchange books – would have a similar effect.

As noted above, Rule 700(b)(3) of the Commission’s Rules of Practice states that “[t]he burden to demonstrate that a proposed rule change is consistent with the Exchange Act and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change” and that a “mere assertion that the proposed rule change is consistent with those requirements . . . is not sufficient.”⁵⁶ For the reasons set forth above, the Commission does not believe that the SROs have met their burden to demonstrate that the proposed rule changes are consistent with the requirements of the Act and the rules and regulations thereunder.

⁵⁵ See 15 U.S.C. 78c(f).

⁵⁶ 17 CFR 201.700(b)(3).

IV. Conclusion

For the foregoing reasons, the Commission does not find that the proposed rule changes are consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5) of the Act.

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵⁷ that the proposed rule changes (SR-NYSE-2011-56 and SR-NYSEAmex-2011-86) be, and hereby are, disapproved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁸

Kevin M. O'Neill
Deputy Secretary

⁵⁷ 15 U.S.C. 78s(b)(2).

⁵⁸ 17 CFR 200.30-3(a)(12).