

December 6, 2013

VIA E-MAIL AND FEDERAL EXPRESS

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: Securities Exchange Act Release No. 34-70047 (SR-NYSE-2013-21; SR-NYSEMKT-2013-25); Order Instituting Proceedings to Determine Whether to Approve or Disapprove Proposed Rule Changes Amending NYSE Rule 104 and NYSE MKT Rule 104-Equities, as Modified by Amendment Nos. 1, to Codify Certain Traditional Trading Floor Functions that may be Performed by Designated Market Makers (“DMMs”), to make Exchange Systems Available to DMMs that would Provide DMMs with Certain Market Information, to Amend the Exchanges’ Rules Governing the Ability of DMMs to Provide Market Information to Floor brokers, and to Make Conforming Amendments to Other Rules (“Second Order Instituting Proceedings” or “Second Order”)

Dear Ms. Murphy:

The New York Stock Exchange LLC (“NYSE”) and NYSE MKT, LLC (“NYSE MKT,” collectively with NYSE, the “Exchanges”), submit this letter in response to the grounds for disapproval provided by the Securities and Exchange Commission (the “SEC” or the “Commission”) in the above-referenced Second Order Instituting Proceedings.¹ The proceeding will determine whether the Commission disapproves the

¹ On October 31, 2011, the Exchanges each filed with the Commission proposed rule changes to amend Rule 104. See Securities Exchange Act Release Nos. 65735 (Nov. 10, 2011), 76 FR 71405 (SR-NYSEAmex-2011-86) and 65736 (November 10, 2011), 76 FR 71399 (SR-NYSE-2011-56). The Commission received no comment letters on the proposals. On December 22, 2011, the Commission extended the time period to February 15, 2012 to approve, disapprove, or institute proceedings to determine whether to disapprove the proposals. The Commission again received no comment letters on the proposals during the extension. On February 15, 2012, the Commission issued an order instituting proceedings. See Securities Exchange Act Release No. 66397, 77 FR 10586 (February 22, 2012) (“First Order Instituting Proceedings”). At that time, the Commission received six comment letters supporting the proposals. The Commission disapproved the proposed rule changes on July 13, 2012. See Securities Exchange Act Release No. 67437, 77 FR 42525 (July 13, 2012) (“Disapproval Order”). After the Disapproval Order, the Exchanges submitted revised proposals to address the concerns raised by the Commission in the Disapproval Order. See Securities Exchange Act Release Nos. 69427 (April 23, 2013), 78 FR 25118 (SR-NYSE-2013-21) and 69428 (April 23, 2013), 78 FR 25102 (SR-NYSEMKT-2013-25). The Commission issued the Second Order Instituting Proceedings on July 26, 2013. See Securities Exchange Act Release No. 70047 (July 26, 2013), 78 FR 46661 (Aug. 1, 2013). The Commission received three comment letters supporting the proposals. See Letter from James Angel, Visiting Associate Professor, University of Pennsylvania, to Securities Exchange Commission, dated May 14, 2013 (“Angel Letter”); Letter from Daniel Beunza, London School of Economics and Political Science, to Elizabeth M. Murphy, Secretary, Securities and

above-referenced proposed rule changes (the “Proposals”), which propose to codify certain traditional trading floor functions that may be performed by DMMs, to make Exchange systems available to DMMs that would provide DMMs with certain market information, including disaggregated order information,² and to amend the Exchanges’ Rules governing the ability of DMMs to provide market information to Floor brokers.

This letter is intended to both supplement the Exchanges’ response letter to the Second Order, dated September 5, 2013 (“First Response Letter”),³ and address the following remaining concerns articulated by the Commission in the Second Order:

The Exchanges . . . do not address why the dangers that would arise if disaggregated information were made available generally to off-floor participants are not present when this same information is made available to off-floor market participants that are Floor broker customers. Nor have the Exchanges described any mechanism by which they would be able to assure that disaggregated information is not misused by Floor broker customers. Accordingly, the Commission is concerned that the Exchanges have not demonstrated why this aspect of the Proposals is designed to protect investors and the public interest, and is not designed to permit unfair discrimination, or impose any unnecessary or inappropriate burden on competition.

The Exchanges wish to stress by way of summary the following points, which are developed more fully below:

- *First*, making the disaggregated order information available to Floor brokers’ customers would expand the possible points of contact with member organizations representing block trading interest since the customers may have networks of relationships that differ from and may extend beyond those of Floor brokers, thereby increasing opportunities for order interaction and reduced transaction costs for the investing public.

Exchange Commission, dated May 20, 2013 (“LSE Letter 1”); Letter from Daniel Beunza, London School of Economics and Political Science, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated August 22, 2013 (“LSE Letter 2”).

² Order information could be arranged in aggregated or disaggregated form. Aggregated order information would, for example, consolidate order quantity at a particular price level. Disaggregated order information, on the other hand, would show the quantity of each component order making up the aggregated order information. In addition, disaggregated order information would include the identity of the entering and clearing firms for the component orders.

³ See Letter from Janet McGinness, EVP and Corporate Secretary, to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, dated September 5, 2013.

- *Second*, the Exchanges intend to issue a Member Education Bulletin directed to Floor brokers underscoring the purpose of proposed Rule 104(j), stressing the obligations related to the sharing of disaggregated order information to customers, and reflecting the rationale for permitting such sharing (including the requirement that the Floor broker reasonably believe that the customer is receiving such information in consideration of a transaction or potential transaction, and the Proposals' goal of enhancing points of contact between potential counterparties to size transactions).
- *Third*, the Exchanges believe that FINRA's cross-market surveillance for front-running on those markets for which FINRA conducts surveillances, including over-the-counter trading reported to a FINRA trade reporting facility, could potentially identify the misuse of disaggregated order information by off-Floor participants. This surveillance would be complemented by FINRA's incorporation of the transmission of disaggregated order information by Floor brokers into FINRA's existing examination review process, as detailed more fully below.
- *Fourth*, the Exchanges intend to issue an Information Memo containing adequate notice of the changes implemented by proposed Rule 104(j) and a description of a complaint mechanism that would be available to report any potential misuse of disaggregated order information that could have been provided to a Floor broker's customer.

As noted in the Proposals and in the First Response Letter, the Exchanges believe that the availability of disaggregated order information upon request by Floor brokers would serve an important public interest, that is, to assist in sourcing liquidity in an otherwise fragmented market, thereby increasing order interaction and reducing the transaction costs of the investing public. This order information would facilitate block trading by providing Floor brokers the opportunity to reach out to other market participants to ascertain whether there was additional buying or selling interest available. This is the classic role of a Floor-based market and consistent with the approved Rules of the Exchanges prior to 2005. The Exchanges believe that such manual disclosure of information would facilitate block trades because while a market participant may not be willing to disclose the full scope of interest in an order book, if approached directly, such market participant could be willing to disclose more details of his or her buying or selling interest in order to negotiate a larger block-sized transaction.

The benefit of the Proposals only works, however, if the Floor broker has a relationship with the party representing the disaggregated order. Because not all interest entered into Exchange systems is represented by other Floor brokers or firms associated with Floor brokers, a Floor broker may not have a relationship with the member organization that entered interest into Exchange systems. However, a Floor broker's customer may have a relationship with the potential counterparty to a transaction. For example, assume the Floor broker has a mutual fund customer that has expressed interest in buying ABC in significant size. Further assume that a member organization is representing an order on the book from a pension fund customer to sell 5,000 shares near the inside, and that the pension fund has

indicated to the member organization that it has additional selling interest but has decided not to enter an order expressing that additional interest. The proposed availability of disaggregated order information would enable the Floor broker to identify the member organization representing the pension fund selling interest (but not, of course, the pension fund), and to share that information with his or her customer. It is possible that the Floor broker in this scenario would not have a strong relationship with the member organization, but the mutual fund customer would.⁴ The ability of the Floor broker to share the identity of the member organization with the mutual fund customer would allow that point of contact to be identified and for the mutual fund customer to initiate contact and negotiate directly with the member organization. The direct contact between the mutual fund customer and the member organization could produce an interaction in the amount of the expressed 5,000 shares of ABC, and indeed could enable the member organization to facilitate an even larger transaction that would reduce market impact and transaction costs for both the mutual fund customer of the Floor broker and the pension fund customer of the member organization. The Exchanges therefore believe that allowing Floor brokers to provide such disaggregated order information on a stock-by-stock basis to customers would further the goal of bringing buyers and sellers together in a conservative manner that is designed to preserve the public interest.

Specifically, the information available to Floor brokers would be the size of disaggregated orders in the Exchanges' order books (both Floor brokers and off-Floor participants already have access to order information in the aggregate) and the identity of the Exchange member organization that entered the order. Neither DMMs nor Floor brokers would have access to information about the ultimate customer behind such order. Accordingly, if a Floor broker relayed information to a customer, it would be limited to information about the entering firm, which would be a registered broker or dealer. The Exchanges therefore believe that the Proposals are designed to protect investors and the public interest because it achieves the benefit of bringing buyers and sellers together, whether located on the Floor or not, by providing limited information, i.e., the identity of an Exchange member organization, to Floor broker customers.

The Exchanges do not believe that the Proposals are designed to permit unfair discrimination. As noted in the Proposals, if a member organization did not want their orders to be made available to Floor brokers, it would have the choice to enter dark interest that would not be made available to the DMM in any form.⁵ The use of non-displayed interest is available to all Exchange member organizations. Accordingly, any member organization entering interest at the Exchanges that was concerned about any potential for misuse of that information would have the choice to enter fully dark interest.

⁴ Many mutual funds have highly developed internal trading desks with their own extensive network of relationships with sell-side desks. It is entirely possible that a trader on a mutual fund trading desk would have an established relationship with a sell-side trader at the member organization that was more developed and reliable than a particular Floor broker's relationship with a particular member organization, and that the direct point of contact between the mutual fund trader and the trader at the member organization would produce a size interaction.

⁵ See Rules 13 and 70.

On the flip side, the Exchanges offer the only Floor-based equities market, and with that, the unique role of agency-based Floor brokers to assist in sourcing liquidity. In today's highly fragmented equities market and concomitant difficulty in sourcing liquidity, approval of the Proposals would enable the Exchanges to offer a venue where its member organizations could knowingly enter interest that would not be widely publicly disseminated, but could be made available to a Floor broker upon request. Member organizations would be on notice that such information could be shared with Floor broker customers. Member organizations frustrated with the inability to source liquidity and seeking the benefit of this trading model could route their interest to the Exchanges. Member organizations that do not want their order information made known to Floor brokers could either enter fully dark interest at the Exchanges, or route such interest to one or more of a multitude of other trading venues.

To the extent that the Exchanges are competing with these other trading venues, the Exchanges do not believe that the Proposals impose any unnecessary or inappropriate burden on competition. To the contrary, the Exchanges believe that the Proposals are pro-competitive because the Exchanges would be able to provide a unique offering to all of its member organizations seeking to source liquidity in a fragmented market.

With respect to the potential misuse of information by a Floor broker's customer, as noted in the First Response Letter, the Exchanges believe that the manual manner by which information would be relayed from Floor brokers to their customers would prevent the potential abuse of that information that could be present if automated, opportunistic traders were able to mine such information electronically. The Exchanges note further that Floor brokers are already subject to requirements to assure that any buying and selling information that they relay from the Trading Floor to customers is intended for the consideration of securities transactions. Specifically, Rule 36.70(b)(i) provides, in relevant part, that Floor brokers are permitted to provide to their customers, via wireless hand-held devices,⁶ information about buying and selling interest in the market (e.g., market looks).⁷ Pursuant to that rule, a "customer" is defined as a person who the Floor broker reasonably believes is receiving the order-related messages in consideration of a securities transaction or potential securities transaction with a Floor broker. Accordingly, Exchange Rules already contemplate that Floor brokers will provide their customers with market looks, and Floor brokers are already on notice that they have an obligation to ensure that they

⁶ The wireless hand-held devices used by Floor brokers track the information sent to customers. As such, this information would be available to FINRA if needed during an investigation into the potential misuse of disaggregated order information. FINRA would incorporate the transmission of disaggregated order information by Floor brokers to customers into its existing Market Look examination review. In addition, FINRA's examination program for Floor brokers includes a review for potential front-running that incorporates an analysis of policies and procedures as well as observation of trading activity in proprietary, customer, and personal accounts.

⁷ Floor brokers are also permitted to provide information via an Exchange authorized and provided portable phone. See Rule 36.21(a)(ii). And under Rule 36.21(a)(iv), a Floor broker using the Exchange provided phone must comply with the record retention requirements set forth in Rule 440 and SEC Rules 17a-3 and 17a-4. As such, the Exchanges would have access to call records if required for a FINRA investigation into the potential misuse of disaggregated order information.

relay such information only to customers that are considering a securities transaction. The Exchanges note that Floor brokers would continue to be subject to this rule requirement with respect to any disaggregated order information that would be provided to customers.

As part of the implementation of the proposed rule changes, the Exchanges intend to issue a Member Education Bulletin targeted to Floor brokers. First, the bulletin would underscore the purpose of the proposed rule changes: to increase the potential points of contact for those seeking to source block trading interest and to increase the opportunities for size interaction. Second, the bulletin would further stress that disaggregated order information could be shared with customers under circumstances when Floor brokers reasonably believed their customers would be receiving such information in consideration of a securities transaction or potential securities transaction.

While the Exchanges believe that the proposed availability of disaggregated order information has the potential to increase large interactions and reduce transaction costs, and that it presents no meaningful potential for misuse, the Exchanges acknowledge that the form of theoretical misuse if it were to occur likely would be akin to front-running. The Exchanges have had extensive discussions with FINRA regarding the Proposals and specifically the concerns regarding potential misuse of disaggregated order information by a Floor broker's customer. The Exchanges note that FINRA conducts a cross-market surveillance that monitors for front-running, and such surveillance could potentially identify the misuse of disaggregated order information by off-Floor participants. If a customer of a Floor broker traded on a venue subject to FINRA's jurisdiction, including over-the-counter trading reported to a FINRA trade reporting facility, this trading activity would be subject to FINRA's front-running surveillances.⁸

To the extent that any concerns about the potential misuse of information by a Floor broker's customer are not mitigated by the fact that Exchange member organizations would be on notice that their orders could be made available to Floor brokers and this was the market structure model unique to the Exchanges, by the availability of non-displayed interest for member organizations that would not want their order information made available to Floor brokers, by the limited scope of information that would be made available to Floor brokers, by the manual nature that such information would be relayed to Floor brokers and their customers, or by the existing rule obligation that Floor brokers only relay such market look information to customers that are considering a securities transaction, the Exchanges note that any member organization that believed that information about its orders had been misused in any way could contact the Exchanges.

⁸ For obvious reasons, FINRA is not comfortable providing more granular information about the form or manner of its surveillance for front-running. The Exchanges will continue to have discussions with FINRA regarding how such surveillances can be used to monitor for the type of misuse of disaggregated order information that is of concern with the Proposals and will reiterate this point with FINRA prior to any implementation of the Proposals. As reflected in footnote 6, FINRA would incorporate the transmission of disaggregated order information by Floor brokers to customers into its existing Market Look examination review and its examination program for Floor brokers includes a review for potential front-running that incorporates an analysis of policies and procedures as well as observation of trading activity in proprietary, customer, and personal accounts.

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Upon approval of the Proposals, the Exchanges propose to issue an Information Memo that would educate member organizations regarding proposed Rule 104(j) and what that means for orders that were entered at the Exchanges. That is, unless interest was entered as non-displayed, such interest could be made available to a Floor broker for purposes of sourcing liquidity. The Information Memo would also remind member organizations of the availability of non-displayed orders. Finally, the Information Memo would provide member organizations with information about how they could contact the Exchanges with any complaints that they would have regarding any misuse of disaggregated order information that would have been provided to a Floor broker's customer. The Exchanges believe that the member organizations entering interest at the Exchanges would be in the best position to assess whether that information was misused. Specifically, the member organization and/or their customer presumably would be monitoring the market for the security in question and would be positioned to see opportunistic use of the information in question. Accordingly, the Exchanges intend to develop and provide notice of a complaint mechanism that would be available to report any potential misuse of disaggregated order information that could have been provided to a Floor broker's customer. The Exchanges would review any such complaints and refer any violations of Rule 36.70(b)(i) to NYSE Regulation, Inc. for review, and if appropriate, disciplinary action. The Exchanges would also review any such complaints to assess whether to further revise or modify the Exchanges' Rules.

For the reasons set forth in the Proposals, the First Response Letter, and herein, the Exchanges therefore respectfully request that the Commission approve the Proposals.

Very truly yours,

A handwritten signature in blue ink that reads "Janet McInnes". The signature is written in a cursive, flowing style.

Cc: *via FedEx to:*
Mary Jo White, Chair
Luis A. Aguilar, Commissioner
Daniel M. Gallagher, Commissioner
Kara M. Stein, Commissioner
Michael S. Piwowar, Commissioner

via e-mail to:
John Ramsay, Acting Director, Division of Trading and Markets
James Burns, Deputy Director, Division of Trading and Markets
David S. Shillman, Associate Director, Division of Trading and Markets