

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69428; File No. SR-NYSEMKT-2013-25)

April 23, 2013

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing of Proposed Rule Change to amend NYSE MKT Rule 104 - Equities to Codify Certain Traditional Trading Floor Functions that may be Performed by Designated Market Makers to Make Exchange Systems Available to DMMs that would Provide DMMs with Certain Market Information, to Amend the Exchange's Rules Governing the Ability of DMMs to Provide Market Information to Floor Brokers, and to Make Conforming Amendments to Other Rules

Pursuant to Section 19(b)(1)<sup>1</sup> of the Securities Exchange Act of 1934 (the "Act")<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on April 9, 2013, NYSE MKT LLC (the "Exchange" or "NYSE MKT") filed with the Securities and Exchange Commission (the "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. On April 18, 2013, the Exchange filed Partial Amendment No. 1 to the proposal.<sup>4</sup> 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 NYSE MKT Rule 104 - Equities to codify certain traditional Trading Floor<sup>5</sup> functions that may be performed by Designated Market Makers

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

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

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

<sup>4</sup> In Partial Amendment No., 1, the Exchange filed the Exhibit 3 which was not included in the April 9, 2013 filing.

<sup>5</sup> NYSE MKT Rule 6A - Equities defines the term "Trading Floor" to mean, in relevant part, "the restricted-access physical areas designated by the Exchange for the trading of securities."

(“DMMs”),<sup>6</sup> to make Exchange systems available to DMMs that would provide DMMs with certain market information, to amend the Exchange’s rules governing the ability of DMMs to provide market information to Floor brokers, and to make conforming amendments to other rules. The text of the proposed rule change is available on the Exchange’s website at [www.nyse.com](http://www.nyse.com), at the principal office of the Exchange, and at the Commission’s Public Reference Room.

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

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of, and basis for, the proposed rule change and 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 NYSE MKT Rule 104 - Equities to codify certain traditional Trading Floor functions that may be performed by DMMs; these functions were previously described in the Exchange’s Floor Official Manual. In addition, the Exchange proposes to amend its rules to make Exchange systems available to DMMs that would provide DMMs with certain market information about securities in which the DMM is registered. The

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<sup>6</sup> NYSE MKT Rule 2(i) - Equities 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 MKT Rule 2(j) - Equities 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 MKT Rule 98 - Equities.

Exchange also proposes to amend its rules governing the ability of DMMs to make available certain order and market information to Floor brokers provided that the market participant entering the order had not opted out of such availability. Finally, the Exchange proposes to make clarifying and conforming amendments to other rules.<sup>7</sup> As described below, the Exchange believes that enabling DMMs to perform certain additional Trading Floor functions previously performed by specialists would improve the quality of certain interactions experienced by investors (specifically, by increasing the likelihood of transaction cost-reducing block transactions).

Specifically, on October 31, 2011, the New York Stock Exchange LLC (“NYSE”) and NYSE MKT each filed with the Commission, pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>8</sup> and Rule 19b-4 thereunder,<sup>9</sup> proposed rule changes to amend Rule 104. The proposals were published for comment in the Federal Register on November 17, 2011.<sup>10</sup> The Commission received no comment letters on the Proposals. On December 22, 2011, the Commission extended the time period to February 15, 2012, in which either to approve the Proposals, disapprove the Proposals, or to institute proceedings to determine whether to disapprove the Proposals.<sup>11</sup> The Commission received no comment letters on the Proposals during the extension. On February 15, 2012, the Commission issued an order instituting

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<sup>7</sup> The Exchange’s affiliate, New York Stock Exchange LLC, has submitted substantially the same proposed rule change to the Commission. See SR-NYSE-2013-21.

<sup>8</sup> 15 U.S.C. § 78s(b)(1).

<sup>9</sup> 17 CFR § 240.19b-4.

<sup>10</sup> 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”).

<sup>11</sup> See Securities Exchange Act Release No. 66036, 76 FR 82011 (December 29, 2011).

proceedings to determine whether to disapprove the Proposals.<sup>12</sup> The Commission received six comment letters supporting the Proposals after the Commission instituted proceedings to determine whether to disapprove the Proposals. After the Commission issued a notice of designation of longer period for Commission action on May 14, 2012,<sup>13</sup> the Commission disapproved the proposed rule changes on July 13, 2012.<sup>14</sup>

As discussed more fully below, the Commission's disapproval was based principally on concerns related to the fairness and competitive impact of providing certain order information to Floor participants. The Exchange is submitting the present filing to provide more detailed support demonstrating the consistency of the proposed rule change in general, and the provision of such order information in particular, with Section 6(b)(5) of the Act and to otherwise address the concerns raised by the Commission in its disapproval order. The Exchange believes that the Commission's application of the Act's fairness and competition-related standards must take specific account of the transformational competitive dynamics that have reshaped the role of the Floor over the last decade, particularly with the potential of the proposal to improve size interactions and reduce transaction costs for the public. Accordingly, this filing: (1) explains the mechanics and operation of the proposal; (2) provides an overview of the reshaped competitive context within which the Floor operates; and (3) offers three detailed scenarios illustrating the potential benefits to the public of making the proposed order information available to Floor participants and a demonstration of how the proposed availability would improve error resolution. The improved order interactions illustrated in the scenarios and the demonstration of

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<sup>12</sup> See Securities Exchange Act Release No. 66397, 77 FR 10586 (February 22, 2012).

<sup>13</sup> See Securities Exchange Act Release No. 66981, 77 FR 29730 (May 18, 2012).

<sup>14</sup> See Securities Exchange Act Release No. 67437, 77 FR 42525 (July 13, 2012) ("Disapproval Order").

improved error resolution explain in detail why the proposed consensual availability of the order information in question should apply not only to orders entered on the Floor, but also to orders entered by off-Floor participants.

#### DMM Trading Floor Functions

On October 24, 2008, the Commission approved, as a pilot program, certain core rules that govern the current operation of the Exchange.<sup>15</sup> These rules embody the Exchange’s “New Market Model.” The New Market Model pilot rules include NYSE Rule 104, which sets forth certain affirmative obligations of DMMs, the category of market participant that replaced specialists. DMMs have obligations with respect to the quality of the markets in securities to which they are assigned that are similar to certain obligations formerly held by specialists. NYSE MKT adopted amendments to implement the New Market Model, including amendments to NYSE MKT Rule 104 – Equities, on November 26, 2008.<sup>16</sup>

In addition to their trading-related functions and obligations, DMMs, under the New Market Model, provide support on the Trading Floor to assist in the efficient operation of the Exchange market and maintain fair and orderly markets. These Trading Floor functions were performed by specialists before the New Market Model was adopted, and described in the Exchange’s Floor Official Manual.<sup>17</sup> Under the New Market Model, there is a continued need

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<sup>15</sup> Securities Exchange Act Release No. 58845, 73 FR 64379 (October 29, 2008) (“New Market Model Release”).

<sup>16</sup> See Securities Exchange Act Release No. 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10).

<sup>17</sup> See 2004 Floor Official Manual, Market Surveillance June 2004 Edition, Chapter Two, 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”), 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

for DMMs to perform these Trading Floor functions. The Exchange proposes to add new subparagraph (j)(i) to Rule 104 - Equities to codify these historic functions.<sup>18</sup>

In particular, DMMs perform four categories of Trading Floor functions: (1) maintaining order among Floor brokers manually trading at the DMM's assigned panel, including managing trading crowd activity and facilitating Floor broker executions at the post; (2) facilitating Floor broker interactions, including either participating as a buyer or seller, and appropriately communicating to Floor brokers the availability of other Floor broker contra-side interest; (3) assisting Floor brokers with respect to their orders, including resolving errors and, for example, inputting Floor interest into Exchange systems in the event of handheld technology outages; and (4) researching the status of orders or questioned trades. The current performance of these four functions can be illustrated as follows:

First, a DMM may maintain order among Floor brokers manually trading at the DMM's assigned panel. For example, where there is significant agency interest in a security, the DMM may help Floor Officials maintain order by managing trading crowd activity and facilitating the execution of one or more Floor broker's

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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"), 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."), and 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."). Relevant excerpts of the *2004 Floor Official Manual* are attached as Exhibit 3 of this filing.

<sup>18</sup> The Exchange proposes to redesignate the rule text currently set forth in section (j) as section (k) of Rule 104 - Equities.

orders trading at the post.

Second, a DMM may bring Floor brokers together to facilitate trading, which may include the DMM acting as a buyer or seller. This function is consistent with the floor-based nature of the Exchange's hybrid market. For example, if a DMM is aware that a Floor broker representing buying interest inquired about selling interest in one of his or her assigned securities and later a Floor broker representing selling interest makes an inquiry about buying interest, the assigned DMM may inform the Floor broker representing the buying interest of the other Floor broker's selling interest. In addition, the DMM itself may provide contra-side interest to a Floor broker representing interest at the post.

Third, DMMs may assist 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 inputting Floor broker agency interest on behalf of a Floor broker. For example, if a Floor broker's handheld device is not operational, the DMM may assist the Floor broker by entering or canceling broker interest on the Floor broker's behalf.<sup>19</sup>

Fourth, DMMs may research the status of orders or questioned trades. DMMs may do so on their own initiative or at the request of the Exchange or a Floor broker when a Floor broker's hand-held device is not operational, when there is activity indicating that a potentially erroneous order was entered or a potentially erroneous trade was executed, or when there otherwise is an indication that improper activity may be occurring.

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<sup>19</sup> The Exchange maintains a full audit trail of all Floor broker orders, including information reflecting entry, modification, cancellation, and execution of such orders.

### DMM Access to Exchange Systems

The Exchange proposes to amend Rule 104 - Equities to add new subparagraph (j)(ii), which would state that the Exchange may make 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;<sup>20</sup> (b) disaggregated information about the price and size of any individual order or Floor broker agency interest file, also known as “e-Quotes,” 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. For the latter two categories, the DMM would have access to entering and clearing firm information and, as applicable, the badge number of the Floor broker representing the order. 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. Importantly, aggregated information at each price level about buying and selling interest that is not marked dark is already visible to DMMs. Similarly, aggregated information for interest not marked dark is visible to any market participant beyond the Floor via OpenBook.<sup>21</sup>

Under the proposed rule change, Exchange systems would make available to DMMs disaggregated information about the following interest in securities in which the DMM is

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<sup>20</sup> Exchange systems 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.

<sup>21</sup> Floor brokers currently have the ability to make an order visible to the DMM but not in OpenBook. They would maintain that ability under the proposed rule.



registered: (a) the price and size of all displayable interest submitted by off-Floor participants; and (b) all e-Quotes, including reserve e-Quotes, that the Floor broker has not elected to exclude from availability to the DMM.<sup>22</sup> Importantly, both Floor brokers and off-Floor participants would have the continued ability to enter partially or completely “dark” orders that are not visible to the DMM, which would prevent any communication about such interest between the DMM and Floor brokers. The Exchange believes that it is appropriate to provide DMMs with this disaggregated order information because the information will assist DMMs in carrying out their Trading Floor functions. In addition to the potential for improved interaction of larger-sized orders illustrated by the three scenarios and related information below, providing DMMs with access to the disaggregated order information will contribute to the DMMs’ ability to carry out their responsibility for managing the auction market process at the Exchange, which includes the function of bringing buyers and sellers together to facilitate trading. The proposed rule change would specifically prohibit DMMs from using any trading information available to them in Exchange systems, including disaggregated order information, in a manner that would violate the Exchange rules or federal securities laws or regulations.

The Exchange believes that the proposed rule change would contribute substantially to the fair and orderly operation of the Exchange Trading Floor. As illustrated in detail below, the proposed consensual availability of the order information in question offers the potential for improved error resolution. DMM assistance at the post through the performance of the Trading Floor functions continues to be an invaluable resource to minimize any disruption to the market, particularly if the Exchange or a customer is experiencing a systems issue; the Exchange systems

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<sup>22</sup> The Exchange previously permitted DMMs to have access to Exchange systems that contained the disaggregated order information described above. The Exchange stopped making such information available to DMMs on January 19, 2011. See Information Memo 11-03.

that provide disaggregated order information play a pivotal role in that assistance. Allowing DMMs to have access to those Exchange systems to perform the Trading Floor functions is more efficient than diverting Exchange resources to attend to individual Floor broker issues, particularly when the DMMs are ready and able to perform the same functions.

#### Ability of DMMs to Provide Market Information on the Trading Floor

The Exchange proposes to modify the terms under which DMMs would be permitted to provide market information to Floor brokers and visitors on the Trading Floor. Specifically, Rule 104(j)(iii) - Equities would permit a DMM to provide the market information to which he or she has access under proposed Rule 104(j)(ii) - Equities to: (1) a Floor broker in response to an inquiry in the normal course of business; or (2) a visitor to the Trading Floor for the purpose of demonstrating methods of trading. This aspect of the proposal builds on and modifies current NYSE MKT Rule 115 - Equities, and the Exchange therefore proposes to delete NYSE MKT Rule 115 - Equities, which covers the same subject.<sup>23</sup>

Currently, NYSE MKT Rule 115 - Equities provides 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 on the Trading Floor. This aspect of current Rule 115 - Equities would be replicated in proposed Rule 104(j)(iii)(B) - Equities. Second, a DMM may disclose market information to other market centers in order to facilitate the operation of the Intermarket Trading System (“ITS”). This text is obsolete as the ITS Plan has been eliminated and therefore would not be included in amended Rule 104 - Equities.<sup>24</sup> Third, a

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<sup>23</sup> Rule 115 - Equities will be redesignated as “Reserved.” The Exchange further proposes to make conforming amendments to Rules 13 – Equities and 104(a)(6) – Equities.

<sup>24</sup> See Securities Exchange Act Release No. 55397 (March 5, 2007), 72 FR 11066 (March 12, 2007) (Intermarket Trading System; Notice of Filing and Immediate Effectiveness of the Twenty Fourth Amendment to the ITS Plan Relating to the Elimination of the ITS

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(d) - Equities, in response to an inquiry from a member conducting a market probe<sup>25</sup> in the normal course of business.

Proposed Rule 104(j)(iii) - Equities would permit DMMs also to provide disaggregated and post-trade order information to Floor brokers.<sup>26</sup> Broadening the scope of information that DMMs can provide Floor brokers will assist DMMs with carrying out their historical function of bringing Floor brokers together to facilitate block and other large transactions, as demonstrated by the scenarios illustrated herein. The Exchange notes that the proposed visibility is not without precedent—NYSE Rule 115 previously allowed NYSE specialists to provide disaggregated order information to Floor brokers prior to adoption of the Hybrid Market.<sup>27</sup> And, as noted above, both Floor brokers and off-Floor participants currently have and will continue to have the ability

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Plan).

<sup>25</sup> Generally, a market probe refers to when a Floor broker is seeking to ascertain the depth of the market in a security to determine at what price point a security may trade. However, it is a term of art whose meaning is not codified.

<sup>26</sup> 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.

<sup>27</sup> See NYSE Regulation Information Memo 05-5 (stating that, under NYSE Rule 115, specialists may disclose the identity of the members or member organizations representing any orders entrusted to the specialist). The NYSE amended NYSE Rule 115 in connection with the Hybrid Market because at that time, there was no way for Floor brokers to enter fully dark electronic interest. Now that NYSE and Exchange systems can accept fully dark electronic interest from both Floor brokers and off-Floor participants, the Hybrid Market change to NYSE Rule 115 has been obviated and the rule can return to its former status.

to enter partially or completely “dark” orders that are not visible to the DMM. DMMs, in other words, would be unable to see or disseminate information about such “dark” orders or the dark portion of the orders in response to an inquiry from a Floor broker. When providing information, the individual DMM is responsible for fairly and impartially providing accurate and timely information to all inquiring Floor brokers about buying and selling interest in his or her assigned security.

Proposed Rule 104(j)(iii) - Equities also 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 Rule 115 - Equities. The Exchange believes that the term “market probe” no longer accurately reflects the manner in which DMMs and Floor brokers interact on the Trading Floor. Rather, the Exchange believes that the Floor broker’s normal course of business, as an agent for customers, includes both seeking market probes into the depth of the market as well as seeking out willing contra-side buyers and sellers in a particular security. In addition, the rule would specify that a Floor broker may not submit an inquiry to the DMM by electronic means and that the DMM may not use electronic means to transmit market information to a Floor broker in response to an inquiry. Under the proposed rule change, Floor brokers would not have access to Exchange systems that provide disaggregated order information, and they would only be able to access such market information through a direct interaction with a DMM at the post.

The Exchange believes that providing Floor brokers with access to the disaggregated order information would serve a valuable function by increasing the ability of Floor brokers to source liquidity and provide price discovery for block transactions, as demonstrated in the three

detailed scenarios below. In particular, the ability of Floor brokers to receive the disaggregated order information should, in turn, enhance their ability to facilitate transactions for their customers by identifying market participants with trading interest that could trade with the Floor brokers' customers. Floor brokers have historically served this role on behalf of their customers, which include institutional clients and block-trading desks, and they continue to perform this agency function today.

#### Effect of Market Structural Changes on the Exchange and the Floor

Before illustrating in detail how the proposed changes will facilitate block trades and expedite error resolution, the Exchange believes it is essential to take into account the structural and competitive changes the Exchange and the Floor have experienced in recent years. Indeed, the Act's fairness and competition-related standards cannot appropriately guide the Commission's review absent a concrete recognition of the reshaped competition of the Exchange and the Floor and the array of execution choices available to market participants today. Toward that end, it must be recognized that NYSE and the Exchange have undergone fundamental, structural changes since 2006 and has been reshaped by the competitive dynamics that have accompanied these changes. The reforms and the intensely competitive environment within which they have taken place have their roots in the Commission's effort to modernize and strengthen the national market system for equity securities through Regulation NMS.<sup>28</sup> In particular, in March 2006, the Commission approved the beginning of NYSE's historic shift "from a floor-based auction market with limited automated order interaction to a more automated market with limited floor-based auction market availability."<sup>29</sup> With the approval of the "Hybrid

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<sup>28</sup> See Securities Exchange Act Release No. 51808, 70 FR 37496 (June 29, 2005) ("NMS Adopting Release").

<sup>29</sup> See Securities Exchange Act Release No. 53539, 71 FR 16353 (March 31, 2006).

Market,” the NYSE began the substantial expansion of automatic execution and the ability of its Floor members to participate in its automated market electronically.<sup>30</sup> At the time of approval, automatic executions on the NYSE represented approximately 11% of its market share volume, and the bulk of executions occurred manually in its floor-based auction.<sup>31</sup> The average speed of execution was over ten seconds.<sup>32</sup> In 2005, the average trade size in NYSE-listed securities was 724 shares.<sup>33</sup> NYSE’s share of consolidated volume in NYSE-listed names for the year preceding the approval of the Hybrid Market was 79.1%.<sup>34</sup>

Roughly two years later, the NYSE proposed further and substantial structural reforms with its New Market Model.<sup>35</sup> Foremost in significance were: (1) the phasing out of the specialist system and the concurrent creation of the DMM; (2) the alteration of the NYSE’s longstanding priority and parity rules to allow DMMs to trade on equal footing with other market participants where the specialist previously had been obligated to yield to public customer orders in the book; and (3) the elimination of the advance electronic “look” at incoming orders that had been a historical feature of the specialist system.<sup>36</sup> By 2009, the average speed of execution was less than a second, and the average trade size in NYSE-listed securities had fallen to 268 shares.<sup>37</sup> In 2009, the year following the adoption of the New Market Model, NYSE’s share of

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Id.

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Id.

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See Securities Exchange Act Release No. 61358, 75 FR 3594, 3595 (January 21, 2010) (“Equity Market Structure Release”).

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Id.

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Id. at 3595.

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See New Market Model Release.

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Id. at 64380, 64387-88.

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Id.

consolidated volume in NYSE-listed names was 25.1%.<sup>38</sup> At the risk of stating the obvious, these transformative changes have had the effect of reducing substantially the scope and utility of market information accessible to DMMs and Floor brokers—a perspective from a point of sale with roughly 80% market share differs starkly from one with less than 25%. Such changes demonstrate the flexibility that the market has with respect to utilizing different venues and various market models that best suit their needs.

Today, the Exchange continues to operate a limited Floor-based auction model. Not surprisingly, the Floor itself reflects directly the transformation recounted above. The current Floor broker community is distinguished in significant part by its embrace of technology, as reflected by the introduction of Floor broker algorithms in 2009. Though competitive dynamics have reduced the Floor’s numbers, significant demand remains among the most informed market participants for the technology-enabled services of today’s Floor brokers.

The Exchange seeks to compete by offering market participants a product that is entirely distinct from the trading venues of its competitors in one essential respect—the integration of human judgment into the price discovery process at a single, physical point of sale for each security.<sup>39</sup> This product stands more or less alone among a diverse array of completely automated execution venues available to investors today. It is important to note that the nature and extent of the integration of human judgment, delivered through DMMs and Floor brokers, is driven by the demands of informed consumers—there is no shortage of competing execution

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<sup>38</sup> Equity Market Structure Release at 3595.

<sup>39</sup> See S. Rept. 94-75 (1975) (“This is not to say that it is the goal of [the 1975 Amendments] to ignore or eliminate distinctions between exchange markets and over-the-counter markets or other inherent differences or variations in components of a national market system. Some present distinctions may tend to disappear in a national market system, but it is not the intention of the bill to force all markets for all securities into a single mold.”)

venues that have no DMMs, Floor brokers or substantial equivalents. Moreover, those market participants who choose to trade on the Exchange have no obligation to utilize the services of a Floor broker, or to use those services in a particular way. Whether and how Floor brokers are used today reflects directly, in other words, the judgment of market participants as to the value the Floor adds.

As demonstrated below, this wholly consensual integration of human judgment at the point of sale, and in particular the visibility of certain limited order information discussed herein to DMMs and Floor brokers, serve legitimate Floor functions (as well as broader market structure goals) in three important respects. They: (1) increase the possibility that buyers and sellers of size positions can meet, thereby enhancing opportunities to reduce transaction costs; (2) expedite the discovery and resolution of errors, thereby reducing disruptive impacts and promoting fair and orderly markets; and (3) leverage the informed choices of users, allowing the interplay of competitive forces to determine the scope and nature of human interaction in the price discovery process.<sup>40</sup> Acute concerns with respect to the potential benefits of the referenced order information in the hands of DMMs and Floor brokers, the Exchange respectfully submits, are misplaced. The information in question would add only a view of the components and the entering and clearing firm (not the customer) for trading interest that is already visible in the aggregate to DMMs today. Given the clear obligations of DMMs and the strictly agency capacity of Floor brokers, the benefit attributable to the proposed visibility would enure to the benefit of the customer or member placing the order, not the DMM or Floor broker. The utility of the information, therefore, lies in its potential to bring buyers and sellers of size together, not to advantage intermediaries

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<sup>40</sup> See H.R. Rept. 94-229 (1975).



### Benefits of Proposed Rule to Trading Floor and Investors

The Commission's Disapproval Order focused on the availability to DMMs and communication by DMMs to Floor brokers of disaggregated order information (specifically, the price and size of individual orders and the identity of the entering and clearing firms for such orders). Before turning to the particulars of the Disapproval Order, the Exchange would respectfully underscore its contention that the acute concern with respect to the availability of disaggregated order information to DMMs and Floor brokers is misplaced. The incremental information to be made available is demonstrably useful to DMMs, as illustrated in the scenarios and situations below, in bringing together buyers and sellers of block positions and in expediting the resolution of errors and would thereby promote both order interaction and orderly markets. However, the information simply does not add to a DMMs trading view in any meaningful way. It does no more than make visible to the DMM and available to Floor brokers the component orders of trading interest that is already visible to the DMM in the aggregate (and to off-Floor market participants via OpenBook) and the entering and clearing firm and Floor broker, if any. Importantly, the benefit attributable to the availability of such information would accrue as a practical matter to the customer or member organization behind a trade and not to the DMM or Floor broker involved in the trade.

In finding that the proposed rule changes were not consistent with the requirements of the Act, the Commission stated that: (1) the Exchange and commenters had not explained how the particular information proposed to be provided would further legitimate Floor functions; (2) the Exchange was "not proposing to require any additional obligations from DMMs and Floor brokers in exchange for the additional information"; (3) the Commission was concerned that the benefit to Floor members of receiving disaggregated order information may be more than slight,

“particularly with respect to less liquid securities where order information is less likely to become rapidly stale”; and (4) the provision of disaggregated order information to Floor Members and, by extension exclusively to Floor broker customers “could have a detrimental effect on competition between on-Floor and off-Floor members of the Exchanges.” This revised proposed rule change addresses these concerns.

#### Scenarios Illustrating How the Particular Information Proposed to be Provided Would Further Legitimate Floor Functions

The Commission stated in the Disapproval Order that neither the Exchange nor the commenters have explained how making available “disaggregated information about public orders on the Exchange books as well as Floor broker e-Quotes” to DMMs and Floor brokers would further legitimate Floor functions. The scenarios below illustrate how the particular information proposed to be provided—the price and size of individual orders, the identity of the entering and clearing firm, and Floor broker badge number for such orders—would serve the goals of facilitating block trades and expediting error resolution. Importantly, each of the scenarios makes clear that the benefits to the public flow from not only the proposed consensual availability of the information in question for orders entered on the Floor, but also those entered by off-Floor participants.

#### Scenario 1: DMM Facilitates Block Trade Between Floor Broker and Upstairs Seller by Sharing Price, Size, and Entering Firm

Assume a pension fund customer gives Floor broker a 20,000 share order to buy ABC, a mid-cap stock, at up to \$10.08 at 11:00 AM when the PBBO for the stock is \$10.03 by \$10.06 with 500 shares on displayed on each side. There is no crowd at the ABC post at the time the order is received, but Floor broker can see from the tape that the stock is trading electronically on the Exchange. On the book a penny away from the inside offer at \$10.07, there is a sell order for

10,000 that has been entered by Member Organization. There is no Floor broker representing the sell order, and there are no Floor broker e-Quotes on the book. Floor broker tells DMM for ABC that he or she represents a buyer of size beyond the displayed market. Currently, the DMM is permitted to inform the Floor broker of the aggregate selling interest at different price points on the book, but may not access or provide the identity of the Member Organization—an off-floor participant—that entered such selling interest. Under the proposed rule, the DMM could inform Floor broker that the off-Floor Member Organization is an entering firm for an order to sell 10,000 shares at \$10.07. Floor broker could then contact the upstairs desk of Member Organization or Member Organization’s on-floor representative, if any, who could then contact his or her upstairs desk, to explore a possible transaction.

Assume that the 10,000 share sell order that Member Organization sent to the Exchange is a child of a 30,000 order entered electronically by a mutual fund customer into Member Organization’s customer-facing execution management system with non-displayed price discretion to \$10.05. (The parent order size and price discretion obviously would not be visible to the DMM or Floor broker.) Knowing Member Organization’s identity and the size and price of the trading interest Member Organization has entered into Exchange systems, the Floor broker may now contact Member Organization or Member Organization’s on-floor representative and the Floor broker can indicate the size of the buying interest he or she is representing. In this respect, the Floor broker now can enter into negotiations directly, similar to how off-Floor participants, particularly broker dealers that internalize flow from their customers, can reach out directly to other broker dealers to negotiate block-sized trades. By making contact, Member Organization and Floor broker may agree to do a larger transaction at a more aggressive price. Assume Floor Broker and Member Organization agree to 20,000 shares at \$10.05.

Both sides of the trade would have secured a size transaction within the parameters of their stated limit. More importantly, both would have avoided the potential market impact that a series of smaller size transactions might have produced. The transaction in all likelihood would not have occurred without the Floor broker's knowledge of the price and size of the order and the identity of the Member Organization entering it. The Floor broker, in other words, would have had no incentive to reveal that he or she represented a buyer without the meaningful possibility of an interaction that was indicated by the size and price of the trading interest and the identity of the Member Organization representing it.

The Disapproval Order notes that the Commission can envision an argument whereby enabling DMMs to see Floor broker e-Quotes or the identity of Floor brokers would facilitate the bringing together of buyers and sellers of large orders, apparently suggesting that limiting DMM visibility to this Floor broker interest would serve this end of order interaction effectively. The above scenario illustrates why limiting access only to other Floor broker interest would ignore a large segment of the trading population, and limit the ability of buyers and sellers to negotiate directly, regardless of their location. Specifically, allowing DMMs to access the disaggregated information of off-Floor participants permits DMMs to facilitate block transactions between Floor brokers and those same off-Floor participants. In the above scenario, the member organization that has not elected to utilize a Floor broker is still able to benefit from the proposed rule changes by permitting his order information to be relayed to Floor brokers on a disaggregated basis. And importantly, the member organization *has permitted* the order information to be relayed on a disaggregate basis: if the member organization determines that the cost of exposing an order on a disaggregated basis outweighs any potential benefit, then the member organization can enter the order dark. Thus, the member organization can determine—

on an individual basis—the benefits and costs of the permitting its own information disclosed on a disaggregated basis. Visibility of price, size, and entering firm opens up a wider range of wholly consensual channels of communication that more fully and effectively enhance the potential for order interaction. Put another way, Member Organization remains at all time in full control of the information he or she is duty-bound to protect as agent for the mutual fund seller—when entering the order on the Exchange and making it visible to the DMM and Floor brokers (*i.e.*, Member Organization could have decided to enter the order dark), and when he engages with Floor broker following Floor broker’s initiation of contact (*i.e.*, Member Organization could have declined to engage with the Floor broker when he or she initiated contact). Moreover, with Floor broker share of Exchange volume currently at approximately 9%, the contra-side interest represented by a Floor broker in any given situation will likely be only a small subset of total available interest.

Scenario 2: DMM Facilitates Block Trade by Sharing Post-Trade Information with Floor Broker.

An interaction similar to Scenario 1 could be facilitated by a DMM sharing post-trade information with a Floor broker pursuant to the proposed rule. Assume Floor broker has the same 20,000 share order to buy ABC from his or her pension fund customer. Assume in this scenario that Member Organization has no current interest entered in Exchange systems, but was a seller on the Exchange earlier in the day. Assume the upstairs desk of Member Organization has the same parent order of 30,000 shares of ABC as in Scenario 1. Floor broker approaches the DMM and asks if there is enough sell-side interest to accommodate. DMM tells Floor broker that there is no interest to accommodate, but that Member Organization was a seller earlier in the day. As in Scenario 1, assume there is no Floor broker representing the seller. Floor Broker approaches the upstairs desk of Member Organization or Member Organization’s on-floor

representative, if any, who could then contact his or her upstairs desk, and achieves the same result as in Scenario 1. As with Scenario 1, the benefit of the interaction illustrated here stems from the consensual availability of information related to orders entered by an off-Floor participant.

Scenario 3: DMM Facilitates Block Issuer Repurchase Transaction by Sharing Price, Size, and Entering Firm

Assume an Exchange-listed issuer engages a Floor broker to handle a Rule 10b-18 repurchase with a goal of repurchasing 500,000 shares at a maximum price of \$10.15. Assume the highest current independent published bid is \$10.03, the last independent transaction price reported was \$10.08, and the offer is quoted at \$10.07. The issuer wishes to make a block purchase of up to 100,000 at \$10.07 or better.<sup>41</sup> The Floor broker approaches the DMM and asks about selling interest at the \$10.07 price level. Under the proposed rule, the DMM could inform Floor broker that Member Organization is a seller of 10,000 shares at \$10.07. Assume as in the prior scenarios that there is no Floor broker representing the selling interest and that the Floor broker initiates contact with the upstairs desk of Member Organization or Member Organization's on-floor representative, if any, who could then contact his or her upstairs desk, and finds additional selling interest upstairs as in Scenario 1. Assume the Floor broker and Member Organization agree upon a transaction of 100,000 shares at \$10.07.

In this scenario, the issuer receives a large fill at better than the last independent

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<sup>41</sup> Rule 10b-18 provides an issuer with a safe harbor from liability under Section 9(a)(2) of the Act and Rule 10b-5 under the Act based on the manner, timing, price, and volume of their repurchased when in accordance with Rule 10b-18's conditions. Rule 10b-18(b)(4) provides the condition that the total volume of the purchases cannot exceed 25 percent of the average daily total volume for that security; however, once per week the issuer may make one block purchase without regards to the volume limit if no other Rule 10b-18 purchase takes place on the same day and the block purchase is not included when calculating a security's four week average daily total volume.

transaction price, and both sides have minimized the impact of their transaction. As the Commission has previously stated in considering block purchases by issuers, “the market impact of a block purchase is likely to be less than that of a series of purchases of smaller amount that in the aggregate are equal in size to the block but are accomplished over a period of time.”<sup>42</sup> As with Scenarios 1 and 2, the benefit to the repurchasing issuer and the seller illustrated here stems from the consensual availability of information related to orders entered by an off-Floor participant.

Situations Where DMM Access to Entering Firm’s Identity Would Prevent Errors or Expedite Resolution Thereof

In addition to promoting the interaction of buyers and sellers in size transactions, DMM access to the identity of firms entering individual orders would improve a DMM’s ability to identify erroneous trades and to intervene where entering firms, whether a Floor broker or off-Floor participant, are experiencing technology problems. The proposed visibility would expedite the identification and possible prevention of such errors. Moreover, the Exchange’s recent experience in identifying the source of millions of unintended trades in more than 150 symbols attributable to a member’s software malfunction<sup>43</sup> confirms the potential contribution of the proposed visibility to the diagnosis and resolution of problems and the maintenance of orderly markets. Specifically, in that situation, the DMMs were the first to identify the anomalous trades and report the trades to Exchange officials. The Exchange believes that had DMMs also been able to see the commonality of the entering firm in the spike of incoming orders, the source of the disruption may have been identified more quickly, potentially avoiding millions of dollars in firm losses. Finally, entering firm information can serve to mitigate the effect of less severe but

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<sup>42</sup> Exchange Act Release No. 17222 (October 17, 1980) (“10b-18 Proposing Release”). Rule 10b-18 was originally proposed as Rule 13e-2.

<sup>43</sup> Loss Swamps Trading Firm, WALL STREET JOURNAL, August 2, 2012.

still important technology problems, such as Floor broker handheld outages. DMMs currently are unable to identify individual Floor broker orders and cancel them during handheld outages; the proposed rule would enable them to perform this important function.

#### Burdens Placed on DMMs and Floor Brokers

The Disapproval Order notes that the Exchange was “not proposing to require any additional obligations from DMMs and Floor brokers in exchange for the additional information.”<sup>44</sup> As noted above, the Exchange does not believe the additional information adds meaningfully to the trading view of the DMM, and that any such addition would benefit customers, not DMMs and Floor brokers. Indeed, the function of providing disaggregated order information to Floor brokers upon request would be an administrative burden to DMMs rather than a benefit. Additionally, as noted above, Floor brokers, as agents, would receive no benefit attributable to the information, as such benefit would flow directly and entirely to the customer whose order they are representing and the contra side to it. Moreover, the Exchange believes,

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<sup>44</sup> See Disapproval Order at 10. The Exchange believes that a close reading of the precedent indicates that this level of scrutiny of the incremental obligations associated with a proposal such as this one is not required. The source of the scrutiny stems from New Market Model Order in which the NYSE proposed fundamental structural changes, including phasing out the specialist system and a wholesale alteration of the NYSE’s historic priority and parity rules. See Securities Exchange Act Release No. 58845, 73 FR 64379 (October 29, 2008) (“New Market Model Release”). What was proposed in the New Market Model, in other words, called for a review by the Commission that was necessarily intense, in stark contrast with the modest changes proposed here. Additionally, in support of what would be regarded as “special advantages” and “rewards that are not disproportionate to the services provided,” the Commission previously cited a series of orders approving proposals that generally involve the creation or registration of a new class of market maker or participation of an existing class in a new market. Those proposals, similar to the New Market Model, were structural in nature and in stark contrast to the limited nature of this proposed rule change. Furthermore, the principal market participant impacted by the present proceeding, Floor brokers, is not a market maker at all, but an agent, rendering much of the referenced precedent factually distinct. Accordingly, the Exchange respectfully suggests that the level of scrutiny associated with the precedents cited is not required here.



based on fundamental changes in the competitive context since the approval of the New Market Model and the continuing and significant obligations of DMMs and Floor brokers, that the proposed availability of disaggregated order information would not constitute a disproportionate benefit. In other words, the potential value of the information in question has been substantially diminished since 2006 in that that DMMs only have information about orders at the Exchange, which represent approximately 22% of market-wide volume in Exchange-listed stocks across the market.

Notwithstanding the DMM's evolving role in the overall trading of Exchange-listed securities, the obligations and restrictions placed on DMMs and Floor brokers have remained unchanged. In addition, the manual process by which disaggregated order information is accessed reduces to a minimum any potential benefit. As demonstrated by the scenarios above, perhaps its principal value is the opportunity it offers to open a consensual dialogue with a counterparty—an opportunity aligned with both the interests of other Floor and non-Floor members as well as investors. The disaggregated order information, while inconsequential from a trading perspective, is thus important administratively in clearing the way to size interactions, reducing transaction costs, and enhancing the quality of the Exchange's market.

Specifically, with respect to the continuing and significant burdens on DMMs, pursuant to NYSE MKT Rule 104 - Equities, a function of a DMM is:

[T]he maintenance, in so far as reasonably practicable, of a fair and orderly market on the Exchange in the stocks in which he or she is so acting. The maintenance of a fair and orderly market implies the maintenance of price continuity with reasonable depth, to the extent possible consistent with the ability of participants to use reserve orders, and the minimizing of the effects of

temporary disparity between supply and demand. In connection with the maintenance of a fair and orderly market, it is commonly desirable that a member acting as DMM engage to a reasonable degree under existing circumstances in dealings for the DMM's own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated.<sup>45</sup>

Additionally, any transaction by a DMM for the DMM's account must "be effected in a reasonable and orderly manner in relation to the condition of the general market and the market in the particular stock."<sup>46</sup>

Furthermore, the Exchange notes that any non-public market information that a DMM receives through Exchange systems would be subject to specific restrictions as "non-public order information"<sup>47</sup> under NYSE MKT Rule 98 - Equities. For example, Rule 98(c)(2)(A) - Equities would require DMMs to maintain the confidentiality of any such non-public market information and would prohibit the DMM member organization's departments, divisions, or aggregation units that are not part of the DMM unit, including investment banking, research, and customer-facing departments, from having access to that information. In addition, Rule 98 - Equities sets forth restrictions on access to non-

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<sup>45</sup> See NYSE Rule 104(a)(1) - Equities.

<sup>46</sup> See NYSE Rule 104(g) - Equities.

<sup>47</sup> NYSE Rule 98(b)(7) - Equities defines the term "non-public order" to mean "any order, whether expressed electronically or verbally, or any information regarding a reasonably imminent non-public transaction or series of transactions entered or intended for entry or execution on the Exchange and which is not publicly available on a real-time basis via an Exchange-provided datafeed, such as NYSE OpenBook® or otherwise not publicly available. Non-public orders include order information at the opening, re-openings, the close, when the security is trading in slow mode, and order information in the NYSE Display Book® that is not available via NYSE OpenBook®."

public order information by the off-Floor locations of a DMM unit, including restrictions on the ability of a DMM located on the Trading Floor from communicating directly with off-Floor individuals or systems responsible for making off-Floor trading decisions.<sup>48</sup>

The manner by which the DMM would access disaggregated order information aligns precisely with the information's relative lack of trading utility and its administrative significance in facilitating size interactions. A DMM can access the disaggregated order information only while located at the post on the Trading Floor, and a DMM's ability to access the disaggregated order information is largely manual. The DMM must query the specific information about a particular security, which limits the number of securities about which disaggregated order information can be accessed at any given time. Importantly, Exchange systems would not provide disaggregated order information to the algorithmic trading systems of any DMM unit,<sup>49</sup> and would not support any electronic dissemination of the disaggregated order information to other market participants. As noted above, participants who do not want the DMM to have access to disaggregated order information have the option to enter dark interest that is not visible to the DMM in disaggregated form. The Exchange also notes that the proposed rule change would specifically prohibit DMMs from using any trading information

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<sup>48</sup> See Rules 98(d)(2)(B)(i)–(iii), (f)(1)(A)(i)–(ii), and (f)(3)(C)(ii) - Equities. In addition, Rule 98(c)(2)(A)(ii) - Equities provides that a DMM may make available to a Floor broker associated with an approved person or member organization any information that the DMM would be permitted to provide under Exchange rules to an unaffiliated Floor broker.

<sup>49</sup> The order information in these systems would be available for a DMM to view manually at the post and as such is different from the advance order-by-order information that DMM trading algorithms previously received before implementation of the New Market Model pilot (sometimes referred to as “the look”). Under the proposed rule change, as is the case today, DMM trading algorithms would have the same information with respect to orders entered on the Exchange, Floor broker agency interest files or reserve interest as is disseminated to the public by the Exchange. See Rule 104(b)(iii) - Equities.

available to them in Exchange systems, including disaggregated order information, in a manner that would violate the Exchange rules or federal securities laws or regulations.<sup>50</sup>

#### Benefit to Floor of the Proposed Availability of Disaggregated Order Information

The Disapproval Order also raised concerns about the possible benefit to Floor members of the proposed availability of order information, stating that the benefit to Floor members may be more than slight, “particularly with respect to less liquid securities where order information is less likely to become rapidly stale.” Respectfully, the Commission’s concern about the possible benefit to Floor members is misplaced, irrespective of whether the security is highly liquid or less liquid.

It has been noted above, but is worth stressing, that DMMs currently have access to aggregated order information that fully reflects the size of trading interest for a particular security on the Exchange that has not been designated as dark by the entering firm. Similarly, such aggregated information for interest not marked dark is visible to any market participant beyond the Floor via OpenBook. What is proposed, therefore, is *not* making a new segment of trading interest visible to DMMs, but rather making the components of already visible trading interest available, along with the entering firm, clearing firm, and badge number of the Floor broker, if any. Since the proposal would not increase the visibility of trading interest in less liquid securities, the question of whether such information is more or less likely to remain fresh or become stale is not at issue in a meaningful way. The point of the proposed availability of order information is to enable Floor brokers to search more effectively for size counterparties for their customers and to expedite the ability of DMMs to resolve errors, not to improve the trading position of DMMs.

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<sup>50</sup> See Proposed NYSE MKT Rule 104(j)(ii) - Equities.

Moreover, the question of staleness is further beside the point when one remembers that DMM trading today is predominantly automated and algorithmic. Even if the proposed visibility included trading interest that was not currently visible—it does not—DMMs as a practical matter would need to integrate such information into their automated trading models to use it. Exchange systems, however, would specifically prevent such use.

To the extent that the Commission is concerned that a DMM could otherwise use the proposed incremental information for trading purposes, it is useful to consider the premise apparently underlying the concern. The premise is presumably that learning the component sizes of trading interest that is already visible in the aggregate, or that learning the identity of the entering firm, clearing firm, or the Floor broker for a component order, could somehow add sufficiently to the DMMs view of the market to induce the DMM to trade on the same side or opposite side of a component order. The Exchange is aware of no facts, data or analysis that would support such a premise. Additionally, firms already advertise many of these particulars of their trading interest on both a pre- and post-trade basis (IOIs and other forms) through a variety of electronic vendor solutions, such as Bloomberg<sup>51</sup> and Autex.<sup>52</sup> Therefore, the ability and willingness of firms to advertise their interest is hardly a new concept in today's marketplace. The proposal would simply restore within the Exchange environment features and services previously available on the Floor and currently offered beyond the Floor by multiple market data vendors.

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<sup>51</sup> Bloomberg allows brokers to disseminate IOIs to the buy-side via Bloomberg's Execution Management Solutions.

<sup>52</sup> Autex is an electronic platform from Thomson Financial that allows potential buyers and sellers to identify other large traders by showing "trade advertisements" in a stock. The interface presents indicators of interest among traders, permitting buy-side clients to identify optimum trading partners.

Moreover, the balance of benefits and potential costs would favor unambiguously a choice on the part of a member or customer to make disaggregated order information visible to the DMM and available to Floor brokers. As illustrated in detail by Scenarios 1 and 2 above, the potential benefits to a customer of sharing disaggregated order information (again, by choosing not to enter the order dark) would be both significant and concrete. A member's sharing of a customer's order information, for example, would make it possible for contra side interest to initiate contact with the member and for the customer to experience a size transaction that avoids market impact and reduces transaction costs. In contrast, the potential cost of sharing the information would be de minimis because the component order information would add nothing meaningful to the information reflected in the aggregate trading interest already visible to DMM and to the market via OpenBook. More fundamentally, members today can choose from an array of alternatives to the Exchange's integration of human judgment into the price discovery process at a single, physical point of sale. That choice represents the ultimate check on any imbalance in the allocation of benefits to DMMs or Floor brokers.

It is also worth noting that the utility of disaggregated order to the Floor is largely independent from its freshness or staleness as trading information. Information that is stale in trading terms, for example, may nonetheless be enormously helpful to an agent like a Floor broker in the search for a size counterparty. Assume, for instance, that there is no live interest expressed in the Display Book at or near a particular price point. It may nonetheless be useful for a Floor broker to know that a particular firm had entered an order in the security at a particular level a day or two before. Knowing the identity of the entering firm could allow a Floor broker to identify a counterparty in much the same way as Scenario 1 above, producing the same size interaction and reduced transaction costs for both sides of the trade. Notably, this

utility is also distinct from how actively traded a particular security is.

Moreover, Section 11(a) obligations on Floor brokers ensure that investors, not Floor brokers, will reap the benefits of access to the disaggregated order information, providing that Floor brokers will not “effect any transaction on [the] exchange for its own account . . . .”<sup>53</sup> This trading restriction has been in place since 1978, when Floor brokers regularly had access to disaggregated order information on the Floor. NYSE amended NYSE Rule 115 regarding what information could be provided in connection with a market look because, at the time, NYSE did not have the technology to replicate the ability of Floor brokers to maintain certain interest as “dark.” Although NYSE reduced the access to information available to Floor brokers – which was always via the specialist, and now, DMM – the trading restrictions were not lessened. Now that NYSE and the Exchange have enabled market participants to replicate electronically the type of dark interest formerly maintained manually by Floor brokers, the Exchange can restore the access to disaggregated order information without any need to adjust the applicable trading restrictions. These applicable trading restrictions provide assurance that the Floor brokers will not be reaping the benefits of access to disaggregated order information; the benefits will directly flow to investors.

Existing trading restrictions and the additional affirmative obligations required by the New Market Model provide appropriate controls, ensuring that the adoption of Rule 104(j) - Equities meets the requirements of Section 6(b)(5) of the Act. As previously enumerated, DMMs are subject to a number of restrictions governing access to non-public order information that remains unchanged since before the adoption of the New Market Model, and which were put in place when DMMs still had an agency role. Even though they no longer act as agents, DMMs

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<sup>53</sup> 15 U.S.C. § 78k(a) (2012).

are still subject to those trading restrictions. The rules of the Exchange are designed such that any additional access by DMMs and Floor brokers to information not available generally to off-Floor traders carries with it restrictive obligations regarding the permitted use of such information.

#### Floor Competition with Off-Floor Members

The Disapproval Order expresses concern about the provision of disaggregated order information to Floor Members and, by extension, exclusively to Floor broker customers and the potential “detrimental effect on competition between on-Floor and off-Floor members of the Exchanges.” Several points bear emphasis here. The Floor broker’s ability to share information in this way aligns with the agency relationship between the Floor broker and his or her customer, and is complementary to other affected market participants. That is, the agent-Floor broker is enabled to make full disclosure to his or her principal-customer. The customer, given his or her own trading interest, has an interest in not disseminating the information learned from the Floor broker. The member organization and the member organization’s customer benefit in that the Floor broker’s customer potentially could initiate direct contact with the member organization. In this way, the Floor broker’s sharing of this type of information with the customer provides a sort of check of the principal on the agent and ensures that the agent adds value. The Exchange’s integration of human judgment into a point of sale occurs, in other words, within a competitive landscape filled with customer choice among both exchange and off-exchange venues. The modest increase in visibility offered by the proposed rules, especially in light of increasing dispersal of liquidity, in no way upsets that competitive balance.

In addition, extending the proposed visibility to other off-Floor participants presents obvious dangers. NYSE MKT Rules 98 - Equities and 104(b) - Equities are not applicable to other proprietary traders, for example. Accordingly, if disaggregated information were provided



electronically to all market participants, there would be no mechanism or informational barrier ensuring that the disaggregated information could only be used for the benefit of investors. Rule 104(j)'s success in protecting investors and the public interest is directly tied to its limited access.

Finally, any off-Floor member is free to utilize the services of a Floor broker, in which case, the benefits of the proposed rule change would flow entirely to the off-Floor member (or the customer entering the order). Additionally, the benefits of the proposed rule change still inure to those participants who choose not to utilize Floor brokers because Floor brokers may source liquidity from those participants. The proposed rule change is not a zero-sum game: the benefits of the proposal are spread across market participants, not limited to a select few at the expense of others.

#### Conforming Amendments

To reflect the information that would be available to DMMs through Exchange systems, the Exchange proposes amendments to Rules 70(e), (f) and (i) - Equities and 70.25(a)(vii) - Equities to specify which information is available to a DMM through Exchange systems. The Exchange also proposes changes to Rule 70 - Equities to specify what information about e-Quotes is available to the DMM. The Exchange notes that the proposed amendments to Rule 70 - Equities do not change the operation of the existing rule, other than to specify which interest may be available to the DMM on a disaggregated basis, as discussed above. Rather, the amendments are proposed as clarifying changes with respect to the manner that Floor broker agency interest currently operates and how such interest may be available to the DMM. For example, current Rule 70(e) - Equities states that a Floor broker has discretion to exclude all of his or her agency interest, subject to the provisions in the rule, from the aggregated agency

interest information available to the DMM consistent with Exchange rules governing Reserve Orders. Because “excluding” interest from the information available to the DMM is similar to how Reserve Orders operate pursuant to Rule 13 - Equities, the Exchange proposes to harmonize the terms and use term “e-Quote” to replace the term “Floor broker agency interest,” use the term “Minimum Display Reserve e-Quote” to replace the concept in current Rule 70(f)(ii) - Equities, and use the term “Non-Display Reserve e-Quotes” to replace the concept in current Rule 70(f)(i) - Equities. The Exchange also proposes to provide more specificity in amended Rule 70 - Equities of how such interest would be made available to the DMM, consistent with the current operation of the Rule.

In addition, the Exchange proposes to delete Rule 104(a)(6) - Equities, which currently provides that DMMs, trading assistants and anyone acting on their behalf are prohibited from using the Display Book® system to access information about Floor broker agency interest 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.

## 2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with the requirements of Section 6(b) of the Act,<sup>54</sup> in general, and Section 6(b)(5) of the Act,<sup>55</sup> in particular, in that it is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism for a free and open market and a national market system and, in general, to protect investors and the public interest.

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<sup>54</sup> 15 U.S.C. 78f(b).

<sup>55</sup> 15 U.S.C. 78f(b)(5).

Specifically, the Exchange believes that the proposed change promotes just and equitable principles of trade because the proposed change is an integration of human judgment into the price discovery process at a single, physical point of sale, whose nature and extent is driven by the demands of informed consumers. With no shortage of competing execution venues and the lack of an obligation on the part of market participants to utilize the services of a Floor broker, whether and how Floor brokers are used reflect the value placed by market participants on what the Floor adds. The wholly consensual integration of human judgment will serve legitimate Floor functions in three respects: (1) it increases the possibility that buyers and sellers of size positions can meet, thereby enhancing their opportunities to reduce transaction costs; (2) it expedites the discovery and resolution of errors, thereby reducing disruptive impacts and promoting fair and orderly markets; and (3) it leverages the informed choices of users, allowing the interplay of competitive forces to determine the scope and nature of human interaction in the price discovery process.

Similarly, the Exchange believes that the proposed change will protect investors and the public interest because existing trading restrictions and additional affirmative obligations required by the New Market Model provide appropriate controls. As previously stated, DMMs are subject to a number of restrictions governing access to non-public order information. Additionally, the rules of the Exchange are designed such that any additional access by DMMs and Floor brokers to information not available generally to off-Floor traders carries with it restrictive obligations regarding the permitted use of such information.

Additionally, the Exchange believes that the proposed change will remove impediments to, and perfect the mechanisms of, a free and open market and a national market system because the proposed change clarifies that DMMs may perform certain defined Trading Floor functions,

which were previously performed by specialists, in furtherance of the efficient, fair, and orderly operation of the Exchange. Increasing the amount of information, including disaggregated order information, that a DMM is permitted to view and provide to Floor brokers would further the ability of DMMs to carry out the defined Trading Floor functions and, as a result is designed to remove impediments to and perfect the mechanism of a free and open market through the efficient operation of the Exchange, in particular by facilitating the bringing of buyers and sellers together.

The Exchange also believes that the proposed change is equitable and not unfairly discriminatory because extending the proposed visibility to other off-Floor participants presents obvious dangers: NYSE MKT Rules 98 - Equities and 104(b) - Equities are not applicable to other proprietary traders, and if disaggregated information were provided electronically to all participants, there would be no mechanism or informational barrier ensuring that the disaggregated information could only be used for the benefit of investors.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange believes that the proposed rule change will facilitate the execution of block trades, and as a result, will reduce the market impact and associated transactions costs for members wishing to take advantage of the rule proposal. The reduction of transaction costs, along with the proposal's other purpose of expediting error resolution, will improve the efficiency of the market and remove barriers to order execution, thus increasing the level of participation and competition in the marketplace.

The Exchange operates in a highly competitive market in which market participants can

easily and readily direct order flow to competing venues. The Exchange's integration of human judgment into a point of sale occurs within that competitive landscape filled with customer choice among both exchange and off-exchange venues. The modest increase in visibility offered by the proposed rules, especially in light of increasing dispersal of liquidity, in no way upsets that competitive balance.

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

No written comments were solicited or received with respect to the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the Federal Register or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove the proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEMKT-2013-25 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-NYSEMKT-2013-25. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for 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 a.m. and 3 p.m. Copies of the filing will also be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information

that you wish to make available publicly. All submissions should refer to File Number SR-NYSEMKT-2013-25 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>56</sup>

Elizabeth M. Murphy  
Secretary

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<sup>56</sup> 17 CFR 200.30-3(a)(12).