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VIA EMAIL AND FEDERAL EXPRESS

August 10, 2010

Ms. Elizabeth M. Murphy
Secretary
U. S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549

Re: File No. SR-NYSE-2010-20 – Proposed Rule Change to Amend Rule 123C to Permit the Dissemination of Certain Order Imbalance Information to Floor Brokers

Dear Ms. Murphy:

New York Stock Exchange ("NYSE" or "Exchange") hereby responds to the anonymous comment letter received by the Securities and Exchange Commission ("SEC" or "Commission") with respect to the above-referenced rule filing.

In this rule filing, NYSE proposes to amend Rule 123C to allow Exchange systems to provide certain order imbalance information with respect to Market At-The-Close ("MOC") and Marketable Limit At-The-Close ("LOC") interest to Floor brokers from 2:00 p.m. to 3:45 p.m. on each trading day.[1] Specifically, during that timeframe, Floor brokers would receive an electronic communication from Exchange systems that provides the amount of, and any imbalance between, MOC interest and marketable LOC interest to buy and sell certain securities.
Such information would be provided systemically to any Floor broker who has an order in a stock in which an order imbalance exists, or it could be requested by a Floor broker on an individual stock symbol basis. It should be noted that Floor brokers have always been permitted to receive this information at the point of sale. The electronic dissemination of such data is more efficient, thereby helping to more effectively allocate resources for both Floor brokers and Designated Market Makers ("DMMs") and reduce investor costs. The MOC/LOC interest is executable only on the Close and is subject to cancellation at any time

[1] On any day that the scheduled close of trading on the Exchange is earlier than 4:00 p.m., the information would be disseminated beginning two hours prior to the scheduled close of trading.

before 3:45 p.m., at which time the Exchange begins to disseminate a public data feed with Order Imbalance Information.[2]

The only comment received by the SEC with respect to this filing is the anonymous letter dated July 14, 2010 from a commenter who opposes the proposed rule change. First, the commenter asserts that the proposed rule change would create "a two-tiered system in which select market participants (in this case, floor brokers and Designated Market Makers) receive critical supply/demand imbalance information prior to the public" and that the Exchange has not met the high standard required to justify the proposed rule change. The commenter further asserts that the order imbalance information would be material to the public and that the Exchange has "a mandate to ensure that all participants are on an equal footing, with the opportunity to receive the same data at the same time." Second, the commenter argues that, rather than providing the order imbalance information to Floor brokers to assist them in deploying resources, Floor brokers and DMMs should be required to hire additional personnel. Finally, the commenter asks the SEC to consider how the proposed rule change differs from flash orders, and asserts that in both cases, "select exchange partners are granted access to material public [sic] information about orders entered into exchange systems, albeit in this case the information may be provided minutes before public dissemination, instead of a fraction of a second."

With respect to the first point, the Exchange disagrees with the characterization of the information. The information does not represent overall supply or demand for a security as the commenter claims. In truth, the information is a small subset of buying and selling interest that is subject to change or cancellation before it is executable on the Close. Generally, MOC and LOC orders account for less than 1% of total NYSE orders on any given trading day, both in terms of actual number of orders and the number of shares represented by those orders. With respect to the total number of shares executed on NYSE on any given trading day, MOC and LOC orders generally account for less than 10%. In light of these facts, the anonymous commenter's conclusory arguments do not provide a basis for demonstrating the materiality of information that constitutes an extremely small fraction of the Exchange's activity and an even smaller fraction of overall market activity.

In addition, NYSE notes that beginning at 3:45 p.m., 15 minutes prior to the Close, all market participants, including Floor brokers, may receive the Exchange's proprietary Order Information Imbalance data feed, which includes real-time order imbalances that accumulate prior to the Close. As such, the information that would be made available to Floor brokers under the proposed rule change could not be deemed material or even critical to investors'

[2] *See* NYSE Rule 123C(3) and (9).

decisions to enter orders for execution on the Close in light of the fact that more accurate, complete, and timely information is made publicly available each day beginning at 3:45 p.m. Other than the single anonymous comment letter, no customer, market participant, or other exchange has expressed the view that the dissemination of non-actionable order imbalance information prior to 3:45 p.m. is material or critical to investors' decisions.

NYSE also notes that Section 6(b)(5) of the Securities Exchange Act of 1934 ("Exchange Act") sets forth specific requirements that an exchange's rules must meet, none of which supports the commenter's claim that exchanges have "a mandate to ensure that all participants are on an equal footing, with the opportunity to receive the same data at the same time." Specifically, Section 6(b)(5) states that an exchange's rules must be "designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest," and may not be "designed to permit unfair discrimination between customers, issuers, brokers, or dealers." The Exchange believes that the proposed rule change satisfies these requirements for the reasons set forth in the Commission's notice.

The commenter further argues that rather than providing the order imbalance information to Floor brokers to assist them in deploying resources, Floor brokers and DMMs should be required to hire additional personnel. However, the commenter cites no basis under the Exchange Act, the rules thereunder, or the Exchange's rules for imposing such a requirement, and the Exchange does not believe such a basis exists.

Finally, the commenter asks the SEC to consider how the proposed rule change differs from flash orders, and asserts that in both cases, "select exchange partners are granted access to material public [sic] information about orders entered into exchange systems, albeit in this case the information may be provided minutes before public dissemination, instead of a fraction of a second." As described above, the Exchange disagrees that the proposed rule change would provide Floor brokers with material, non-public information. Furthermore, NYSE disagrees that the proposed rule change presents any concerns that are comparable to those raised by the Commission in its proposal to eliminate the exception for flash orders in Rule 602 of Regulation NMS ("Flash Order Proposing Release").[3] In the Flash Order Proposing Release, the Commission stated that "[t]he flashing of order information could lead to a two-tiered market in which the public does not have access, through the consolidated

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[3] *See* Securities Exchange Act Release No. 60684 (September 18, 2009), 74 FR 48632 (September 23, 2009); *see also* Securities Exchange Act Release No. 62445 (July 2, 2010) 75 FR 39626 (July 9, 2010).

quotation data streams, to information about the best available prices for U.S.-listed securities that is available to some market participants through proprietary data feeds." The key element of flash orders is the ability of select market participants to respond to actionable order information at the best available prices before any other market participant. Unlike flash orders, the order imbalance information available to Floor brokers before 3:45 is not actionable. To the contrary, the order imbalance information disseminated to Floor brokers is subject to change up to 3:45 p.m. because until that time, MOC and LOC interest may be cancelled, and after 3:45, such imbalance information is disseminated marketwide. As such, the dissemination of order imbalance information to Floor brokers could not in anyway be construed as the "best available prices" to any market participant because by definition and design there can be no execution prior to the Close and a more accurate, timely, and complete dissemination of information begins marketwide at 3:45 p.m. Therefore, the Exchange believes that the commenter's comparison of flash orders to the NYSE's proposed rule change is inapposite.

For these reasons, the NYSE believes that its proposed rule change is consistent with the requirements of the Exchange Act and the rules and regulations thereunder applicable to NYSE. The anonymous nature of this single public comment on the proposal does not allow the Exchange to discern the commenter's perspective or intent in objecting to the proposed rule change (*e.g.*, any potential competitive motivation to the comments). In any event, the commenter has not demonstrated that the Commission should not find that the proposed rule change is consistent with the Exchange Act. Accordingly, NYSE does not believe that any amendments to the proposal are warranted, and the proposed rule change should be approved in its current form.

Very truly yours,

Janet M Kissane