

March 7, 2024

Via Electronic Mail: rule-comments@sec.gov

Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090

Re: **File No. SR-NYSE-2023-36 (the “Proposal”)**

Dear Ms. Countryman:

The New York Stock Exchange LLC (the “NYSE” or “Exchange”) appreciates this opportunity to respond to the February 9, 2024, Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposal (the “Order”).¹ The Commission received one comment in support of the Proposal.²

For the reasons set forth in the Proposal and in this response, the Exchange believes that the Proposal is consistent with Sections 6(b)(4), 6(b)(5) and 6(b)(8) of the Securities Exchange Act of 1934, as amended (the “Act”), and that the Commission should therefore approve the Proposal. The Exchange would like to address and clarify the following issues raised in the Order.

Aggressing and Prohibited Transactions

Aggressing Transactions are defined as DMM unit transactions that reach across the market to trade as the contra-side to the Exchange published offer (bid) priced above (below) the last

¹ See Securities Exchange Act Release No. 99511 (Feb. 9, 2024), 89 FR 11893 (Feb. 15, 2024) (Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change Regarding Enhancements to Its DMM Program) (SR-NYSE-2023-36) (“Release No. 99511”). The Proposal was filed with the Commission on October 23, 2023 and published in the Federal Register on November 13, 2023. See Securities Exchange Act Release No. 98869 (Nov. 6, 2023), 88 FR 77625 (Nov. 13, 2023) (SR-NYSE-2023-35) (Notice of Filing of Proposed Enhancements to Its Designated Market Maker Program). On December 13, 2023, the Commission extended to February 11, 2024, the time period in which to approve the proposal, disapprove the Proposal, or institute proceedings to determine whether to approve or disapprove the proposal. See Securities Exchange Act Release No. 99161 (Dec. 13, 2023), 88 FR 87829 (Dec. 19, 2023) (SR-NYSE-2023-36) (Notice of Designation of a Longer Period for Commission Action on Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change Regarding Enhancements to Its DMM Program).

² See Letter from Thomas M. Merritt, Deputy General Counsel, Virtu Financial, Inc., dated January 29, 2024, available at <https://www.sec.gov/comments/sr-nyse-2023-36/srnyse202336-416679-988502.pdf>.

differently-priced trade on the Exchange and Exchange published offer (bid). Prohibited Transactions are Aggressing Transactions executed during the final ten minutes of the trading day that result in a new high (low) price for a security on the Exchange for the day at the time of the DMM's transaction, with certain exceptions.³

As detailed in the Proposal, DMMs are not specialists with the combination of market share, time and place advantage, and informational asymmetry that gave them the potential to move prices going into the close to advantage the specialist's proprietary position in a security. Rather, DMMs are market makers for a primarily electronic trading environment designed to function in a substantially different manner than specialists had previously functioned. Unlike specialists, DMMs are not agents for the NYSE's book and DMM trading activity on the Exchange is limited to proprietary trading.⁴ Significantly, unlike specialists, DMMs are now systemically constrained in pricing the Closing Auction.⁵ As the Proposal demonstrates, eliminating access to the remaining non-public order information available to individual DMMs on the Trading Floor during the final ten minutes of trading would place DMMs on the same informational footing as market makers on all other exchanges. Market makers other than DMMs are permitted to reach across the market at any time of the trading day, including the final ten minutes of trading, virtually without restriction and certainly without being subject to a specific, rules-based re-entry requirement that the Exchange proposes to strengthen by requiring re-entry on the same side and in the same amount as the Aggressing Transaction.

Indeed, the Exchange believes that the critical consideration with respect to Aggressing Transactions is the DMM's unique, rule-based re-entry requirement and overall obligations to the marketplace following such transactions. As described in the Proposal, under Rule 104 all DMM transactions, including Aggressing Transactions, 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. In other words, DMM transactions must bear a reasonable relationship to overall market conditions; DMMs cannot destabilize, inappropriately influence or manipulate a security for any reason at any time, including in the final minutes before the close. These obligations are reflected in the DMM obligation to re-enter on the other side of the market after engaging in an

³ The exceptions include matching another market's better bid or offer price, bringing the price of that security into parity with an underlying or related security or asset, or liquidating or decreasing the DMM unit's position. See Rule 104(d)(1)(B).

⁴ See Securities Exchange Act Release No. 58845(October 24, 2008), 73 FR 64379, 64381 (October 29, 2008) (SR-NYSE-2008-46). At the time the rule on Prohibited Transactions was adopted in 2006 in connection with the Commission's approval of the "hybrid market" proposal, specialists were still the responsible broker-dealer for orders on the Exchange's book even though the Exchange had assumed the function of matching and executing electronically-entered orders. See Securities Exchange Act Release No. 53539 (March 22, 2006), 71 FR 16353 (March 31, 2006) (SR-NYSE-2004-05).

⁵ Pursuant to Rule 7.35B(g)(2), the Auction Price that the DMM is responsible for determining must be at or between the last-published Imbalance Reference Price and the last-published non-zero Continuous Book Clearing Price.

Aggressing Transaction, which dampens volatility and ensures that DMM transactions bear a reasonable relationship to overall market conditions. The Proposal would retain and strengthen the re-entry obligation as well as simplify it by requiring re-entry on the opposite side at or before the applicable Price Participation Point or PPP provided by the Exchange in the same size as the Aggressing Transaction. *No other market maker that reaches across the market at any point in the trading day has any remotely similar market stabilizing obligation.*

Moreover, the Exchange believes that a DMM transaction that reaches across the market to trade on the contra-side to the Exchange published bid (offer) that is also priced above (below) the last *consolidated trade*, as proposed, would provide a better measure of the “aggressiveness” of the transaction (i.e., whether the DMM transaction could potentially disrupt the price of the security) in a marketplace where the majority of trading in NYSE-listed securities takes place on venues away from the Exchange. The Exchange believes the proposed criteria are an improvement on the current NYSE-centric benchmarks developed in a different era for a vastly different type of market participant.

Non-Public Information

The Order states that the DMMs have a “unique” position on the NYSE Trading Floor⁶ and would continue to have access to non-public aggregate order information before the open or until a security opens for trading; while trading is halted and until a security is reopened for trading; and after the end of Core Trading Hours as well as the ability to “observe negotiations and other interactions on the Trading Floor.”⁷

In response, the Exchange would emphasize that, although DMMs currently have access to non-public aggregate order information throughout the trading day, under the Proposal, DMM access to this information would be on an as needed basis and *only* under the following limited circumstances when trading, whether in a halted stock or in general, would not be active:

- before the open or until a security opens for trading, or
- while trading is halted and only until a security is reopened for trading, or
- only after the end of Core Trading Hours.

As noted in the Proposal, as a practical matter, all information available only to the DMM prior to the opening would also be included in the opening imbalance feed and, on an order-by-order

⁶ See NYSE Rule 6A.

⁷ See Release No. 99511, 89 FR at 11896.

basis, in the NYSE Integrated Feed.⁸ DMM unit algorithms are not currently provided access to aggregate order information until the beginning of Core Trading Hours for the open and until after the end of Core Trading Hours for the close, and only in connection with messaging for the DMM to electronically facilitate the close of trading, and the Exchange proposes this would continue.

The Order does not, however, mention the significant restrictions on the use and dissemination of non-public aggregate order information under the Proposal. Specifically, the Exchange proposes that:

- DMMs and DMM units may only use aggregate order information to satisfy the responsibilities and duties set forth in Rule 104(a)(1)-(3);
- aggregate order information may only be disseminated to
 - employees of DMM units, and
 - the individuals responsible for direct supervision of DMM units; and
- while a DMM may provide non-public aggregate order information in response to a Floor broker inquiry, that information can only be provided in response to a Floor broker inquiry before the open or until a security opens for trading, or while trading is halted and only until a security is reopened for trading. Further, a Floor broker may not submit such an inquiry by electronic means and the DMM may not use electronic means to transmit market information to a Floor broker in response to a Floor broker's inquiry.

In addition, DMM units would retain the obligation under Rule 98 to maintain the confidentiality of non-public order information made available to a DMM for the purpose of facilitating an intraday reopening and to appropriately supervise a DMM's access to and use of such information.

The Exchange believes that these restrictions, taken together, effectively neutralize the ability for DMMs to utilize this non-public information to the detriment of other market participants during the trading day. Aggregate order information would no longer be available without restriction while the market is open to the DMM assigned to the security. Moreover, the information would only be available for limited periods while a security is halted or the market closed. Given the speed of today's marketplace, the Exchange does not believe that individual DMMs would be able to derive any benefit from accessing this information while trading is not active.

⁸ It should also be noted that while DMMs have access to aggregate order information, any market participant with access to the NYSE Integrated Feed has access to the same information in a disaggregated form.

In addition, “negotiations and interactions” on the Trading Floor occur primarily before a security opens for trading, such as during initial public offerings. Trading on the NYSE today is almost exclusively electronic. Order information must be entered into Exchange systems and is no longer verbally announced at a DMM trading post. Indeed, over time, the Exchange has eliminated most need for manual interactions on the Trading Floor, including most recently verbal orders at the close,⁹ and the Exchange now proposes to eliminate DMM participation in cross transactions. As a result, as proposed, the only remaining points of “interaction” between DMMs and other market participants on the Trading Floor would be at times when the DMMs are facilitating the opening or during trading halts. Although DMMs would have access to non-public aggregate order information for limited periods to fulfill their obligations under Rule 104 during those times, access to and use of that information would be limited and subject to significant restrictions. Trading, moreover, whether in a halted stock or in general, would not be active during the proposed periods when the DMM would be given access to non-public Floor-based order information, unlike today.

Obsolescence of Rules 36.30 and 104A

Finally, the Exchange would like to address the questions relating to the proposed deletion of Rule 36.30 and Rule 104A.

Rule 36.30 governs the use of telephones at a DMM unit’s post. Rule 36.30 was amended in 2001 to permit specialists to use communication devices at the post to enter proprietary orders in options and futures on an ETF, on the ETF itself on another market center, or in component securities of the ETF, and to permit the ETF specialist to obtain market information with respect to ETFs options, futures, and component securities.¹⁰ The specialist entering proprietary orders in a component security of an ETF with an upstairs clearing firm for execution on the Trading Floor was required to enter and execute the orders in accordance with Rule 112.20¹¹ and Rule

⁹ See Securities Exchange Act Release No. 92480 (July 23, 2021), 86 FR 40885 (July 29, 2021) (SR-NYSE-2020-95) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 2, To Make Permanent Commentaries to Rule 7.35A and Commentaries to Rule 7.35B and To Make Related Changes to Rules 7.32, 7.35C, 46B, and 47).

¹⁰ See Securities Exchange Act Release No. 44616 (July 30, 2001), 66 FR 40761, 40762 (Aug. 3, 2001) (SR-NYSE-2001-08) (Order Approving Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval to Amendment No. 3 to the Proposed Rule Change by the New York Stock Exchange, Inc. Amending Its Rules To Provide for the Trading of Exchange-Traded Funds on an Unlisted Trading Privileges Basis) (“Release No. 44616”).

¹¹ Rule 112 governs orders initiated “off the Floor.” In 2001, Rule 112.20 provided, in relevant part, that a member using a communication facility located on the Floor of the Exchange to enter an order for their own account will be deemed to be initiating an off-Floor order if such order is routed through a clearing firm's order room, where a time-stamped record of the order is maintained, before such order re-transmitted to the Floor for execution. However, an off-Floor

11a2–2(T) under the Act,¹² and could only enter such orders for the purpose of hedging a position in the ETF.¹³ These amendments were designed to facilitate the introduction of ETFs trading on the Exchange on a UTP basis.¹⁴

This provision of Rule 36.30 is obsolete because the types of DMM trading activities from the trading post contemplated in Rule 36.30 are no longer permitted. Rule 98(c)(3)(B)(ii) prohibits employees of a DMM unit from trading any security that is a related product of their DMM securities, which includes options and single-stock futures,¹⁵ while on the Trading Floor. Moreover, pursuant to Rule 98(c)(3)(B)(i), DMMs can trade DMM securities only on or through the systems and facilities of the Exchange at the DMM unit’s assigned stock trading post location and as permitted by Exchange rules. In fact, the specific carve out in Rule 98(c)(3)(B)(i) for Rule 36.30 was deleted in 2017.¹⁶ Moreover, because Floor-based trading in options or single-stock futures is not permitted, Rule 105 and the related guidelines specifying how such Floor-based hedging could occur were deleted in 2014.¹⁷ As discussed below, this is the reason that the requirement in Rule 104A.50 for DMM units to keep records of all options and single stock futures purchases and sales to hedge its registered securities positions as permitted by Rule 105 is also obsolete.

order for an account in which a member has an interest is to be treated as an on-Floor order if it is executed by the number who initiated it. See Release No. 44616, 66 FR at 40763, n. 19. In 2002, Supplementary Material .20 became subsections (b), (c), (d) and (e) of the current version of Rule 112. See Securities Exchange Act Release No. 46579 (Oct. 1, 2002), 67 FR at 63004, 63005 (Oct. 9, 2002) (SR-NYSE-2002-31) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to Codification of New York Stock Exchange Policies Previously Approved by the Commission and the Reordering of Other Rules).

¹² See 17 CFR § 240.11a2–2(T).

¹³ See Release No. 44616, 66 FR at 40763.

¹⁴ See id., 66 FR at 40762-63. All NYSE-listed ETFs on the Trading Floor moved to the Exchange’s affiliate NYSE Arca, Inc., in 2007. Exchange Traded Products would not trade on the Exchange again until 2022, under different circumstances and subject to different listing rules.

¹⁵ See Rule 98(b)(7) (defining related products).

¹⁶ See Securities Exchange Act Release No. 80334 (Mar. 29, 2017), 82 FR 16458, 16458-59 (Apr. 4, 2017) (SR-NYSE-2017-03) (Order Approving Proposed Rule Change Amending Rule 98).

¹⁷ See Securities Exchange Act Release No. 72534 (July 3, 2014), 79 FR 39019 (July 9, 2014) (SR-NYSE-2014-12) (Order Approving Proposed Rule Change Amending Rule 98 To Adopt a Principles-based Approach To Prohibit the Misuse of Material Nonpublic Information and Make Conforming Changes to Other Exchange Rules) (“Release No. 72534”). Specifically, the Exchange deleted Rules 105(b)-(d) and the Guidelines for DMM’s Registered Security Option and Single Stock Futures Transactions Pursuant to Rule 105. The prohibition on pool dealing in Rule 105(a) was retained and clarified. See id., 79 FR at 39022, n.31.

Rule 104A is a stub rule consisting of a single Supplementary Material .50 setting forth retention and reporting requirements for DMM units relating to equity trading, options and single stock futures trading data, and foreign securities.

The first heading of Rule 104A.50 is titled “Equity Trading Reports” and requires DMM units (including relief DMMs) to maintain records of purchases and sales initiated on the Floor in stocks in which the DMM is registered for an account in which the DMM has an interest. DMM units must also maintain records of purchases and sales in the Exchange’s off-hours trading sessions. Such records must show the sequence in which each transaction actually took place, the time thereof, and whether such transaction was at the same price or in what respect it was at a different price in relation to the immediately preceding transaction in the same stock. The price designations for transactions made in another market center are to be determined from the immediately preceding transaction price on the Exchange. DMM units and relief DMMs are required to report such transactions in such automated format and with such frequency as may be prescribed by the Exchange.¹⁸ The rule also provides that paragraph 104.12 sets forth circumstances under which DMMs who maintain investment accounts in registered securities are required to submit an equity trading data report.

The Exchange believes that the electronic systematization of orders on the NYSE has rendered the requirement that DMM units and relief DMMs maintain separate records of purchases and sales initiated on the Floor in assigned stocks for an account in which the DMM has an interest, and to report that information electronically to the Exchange, obsolete. Exchange systems automatically capture all DMM unit trading on the NYSE and there is no longer any need for a separate requirement to manually submit DMM purchases and sale information in assigned securities to the Exchange. The Exchange also believes that the requirement is largely duplicative of existing books and records requirements, including Rule 17a-3(a).¹⁹ Moreover, the specific requirement in this portion of Rule 104A.50 requiring DMM units to maintain records of purchases and sales in the Exchange’s off-hours trading sessions is obsolete. The Exchange decommissioned the last off-hours trading session in January 2024.²⁰ Finally, the portion of the rule providing that paragraph 104.12 sets forth circumstances under which DMMs who maintain investment accounts in registered securities are required to submit an equity trading data report is equally obsolete given that Rule 104.12 was deleted.²¹

¹⁸ Historically, this data was submitted to the NYSE on a paper Form 81 and was known as Form 81 information.

¹⁹ See 17 CFR 240 § 240.17a-3(a).

²⁰ See Securities Exchange Act Release No. 99533 (Feb. 14, 2024), 89 FR 13132 (Feb. 21, 2024) (SR-NYSE-2024-06) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Delete Current Rule 7.39).

²¹ Rule 104.12 permitted a specialist to assign part of their dealer account position to an investment account, provided that such assignment did not create a short position in the specialist’s dealer account. Rule 104.12 prohibited assignment to the investment account of any position or part thereof that was purchased on non-stabilizing ticks, i.e., a “plus” tick (at a price higher than the

The second heading of Rule 104A.50 is titled “Options and single stock futures trading data reports” and provides that every DMM unit (including relief DMMs) must keep a record of all options and single stock futures purchases and sales to hedge its registered securities positions as permitted by Rule 105 and must report such transactions in such automated format and with such frequency as may be prescribed by the Exchange. As noted above, Rule 105 sets forth the hedging guidelines that permitted a DMM to trade from the Trading Floor listed options or single-stock futures that overlie DMM securities. This rule was deleted in 2014 with the elimination of any Floor-based trading in listed options or single-stock futures.²² This section of Rule 104A.50 is thus equally obsolete.

The final heading of the rule is titled “Foreign securities reports” and provides that every DMM unit (including relief DMMs) must keep a record of all purchases and sales of foreign securities as defined in Rule 36.30 for an account in which he or she has an interest. DMM units and relief DMMs are also required to report such transactions in such automated format and with such frequency as may be prescribed by the Exchange. This provision was added to Rule 104A.50 in 2002 in connection with an amendment to Rule 36.30 that permitted specialists in foreign securities (a definition of “foreign security” was also added to Rule 36.30) to enter orders in their foreign specialty or related stocks directly from the trading post using a communication link.²³ Rule 36.30 no longer permits DMMs to enter orders in assigned foreign or related securities directly from the trading post and no longer defines a foreign security. Although Rule 104A.50 does not limit the reporting requirement to foreign or related securities executed on the Trading Floor, the Exchange believes that continuing to require DMM units to record and report the details of all proprietary transactions executed away from the Exchange in foreign securities serves no regulatory or other purpose in today’s marketplace.

* * *

In conclusion, the Exchange would like to reiterate that in today’s market environment, primarily electronic DMM market-making activity does not result in DMMs or DMM units encountering unique information during the trading day. The Exchange believes that the proposed changes would update Exchange rules to reflect this reality by providing a framework for DMM units to operate more like other market makers while retaining the DMM’s distinctive responsibilities to the marketplace and continuing to guard against the misuse of material, non-public information. The Exchange believes that the Proposal would reduce barriers to entry for member

last trade) or “zero plus tick” (higher than the last different trade). In order to assign a position to an investment account, a specialist's purchases in that security had to be at least 75% stabilizing for that day and the calendar week encompassing the purchase of that security.

²² See note 17, *supra* & Release No. 72534, 79 FR at 39022.

²³ See Securities Exchange Act Release No. 46560 (Sept. 26, 2002), 67 FR 62088, 62089 (Oct. 3, 2002) (SR-NYSE-00-31) (Order Approving Proposed Rule Change and Amendment No. 1 Thereto and Notice of Filing and Order Granting Accelerated Approval of Amendment Nos. 2 and 3 Thereto by the New York Stock Exchange, Inc. To Amend Exchange Rules 36.30 and 104A.50).

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organizations interested in operating a DMM unit on the Trading Floor and attract new DMM units to the Exchange, thereby significantly enhancing competition among existing and prospective DMM units. The Proposal is consistent with the Act and should be approved.

Respectfully submitted,

A handwritten signature in blue ink that reads "David De Gregorio". The signature is written in a cursive style with a prominent initial "D".

David De Gregorio
Associate General Counsel

cc: Honorable Gary Gensler, Chair
Honorable Hester M. Peirce, Commissioner
Honorable Caroline A. Crenshaw, Commissioner
Honorable Mark T. Uyeda, Commissioner
Honorable Jaime Lizárraga, Commissioner
Haoxiang Zhu, Director, Division of Trading and Markets