

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-57022; File No. SR-Amex-2007-138)

December 20, 2007

Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing of Proposed Rule Change to Establish a New Class of Off Floor Market Makers in ETFs Called Designated Amex Remote Traders

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on December 19, 2007, the American Stock Exchange LLC (“Amex” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by the Amex. 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 Amex proposes to adopt changes to its rules to create a new class of off-floor market makers in all ETF securities that trade on the Exchange, including the implementation of related changes to the Exchange’s AEMI trading platform. These market makers, to be called “Designated Amex Remote Traders” or “DARTs,” will electronically enter competitive quotations on a regular basis sufficient to satisfy market maker regulatory requirements. Business requirements will include minimum performance standards with respect to each assigned security that a DART trades. The purpose of the new program is to (1) encourage competitive quoting within the Amex and between the Amex and other market centers, (2) retain and increase order flow by

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

attracting new market makers to the Exchange, and (3) encourage greater depth at or around the national best bid or offer (“NBBO”).

The text of the proposed rule change is available on the Amex’s Web site at <http://www.amex.com>, at the Amex’s Principal Office, 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 Amex 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 these statements may be examined at the places specified in Item IV below. The Amex has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

In order to (1) encourage competitive quoting within the Amex and between the Amex and other market centers, (2) retain and increase ETF order flow in AEMI by attracting new market makers to the Exchange, and (3) encourage greater depth at or around the NBBO, the Exchange proposes to adopt changes to its rules to create a new class of off-floor market makers in all ETF securities that trade on the Exchange, including the implementation of related changes to the Exchange’s AEMI trading platform. These market makers, to be called “Designated Amex Remote Traders” or “DARTs,” will electronically enter competitive quotations on a regular basis sufficient to satisfy market maker regulatory requirements. DARTs will also have to meet certain business requirements, which will include minimum performance standards as discussed

below. The Exchange anticipates that the implementation of the DARTs program should increase the liquidity available in those ETF securities to which DARTs are assigned and reduce the likelihood of tolerance breaches in AEMI due to the resultant additional depth at or around the NBBO.

This proposed rule change replaces a similar proposed rule change for a DARTs program at the Exchange that was recently approved by the Commission.³ The earlier approved rule change was deleted in a subsequent rule filing by the Exchange⁴ in order to allow consideration of certain Amex equity Specialists' comments on the DARTs program that were received but inadvertently overlooked by the Commission.⁵ In the instant filing, the Exchange responds to a number of the issues raised by the Comment Letter. In addition, the proposed rule change contains certain differences from the previously approved rule change for the DARTs program. The most significant difference is that the DARTs program as proposed herein is limited to ETF securities, in contrast to the Exchange's earlier rules which would have allowed DARTs in equity securities as well. The Exchange has determined that the implementation of DARTs for equities requires substantially greater time and effort than that required for ETFs alone, in part due to the substantially different treatment of Crowd Orders in the Exchange's

³ See Securities Exchange Act Release No. 56446 (Sept. 17, 2007), 72 FR 54303 (Sept. 24, 2007) (approving File No. SR-Amex-2007-85).

⁴ See Securities Exchange Act Release No. 56764 (Nov. 7, 2007), 72 FR 64095 (Nov. 14, 2007) (File No. SR-Amex-2007-113).

⁵ See letter dated September 5, 2007 to Nancy M. Morris, Secretary, Commission, from Brendan E. Cryan, Managing Member, Brendan E. Cryan & Company, LLC; Jonathan Q. Frey, Managing Partner, J. Streicher & Co.; Michael Marchisi, Managing Partner, AIM Securities Co.; and Robert B. Nunn, Chief Operating Officer, Cohen Specialist, LLC ("Comment Letter").

priority and parity rules for equities and for ETFs.⁶ Consequently, the Exchange believes that it should focus its initial efforts on creating a DARTs program for ETFs.

DARTs will be members or member organizations physically located off-floor that will electronically enter competitive quotations into AEMI on a regular basis in all ETF securities to which they are assigned in the DARTs program. The proposed DARTs program is similar to the Supplemental Registered Options Traders (“SROT”) program implemented by the Amex for options,⁷ with its own unique caveats. Under the DARTs proposal, Amex Specialist firms may also be DARTs, although they may not be registered as such in securities in which they are also the Specialist. DARTs will trade in an identical way as Registered Traders in the same ETF securities on the Exchange when auto-ex is on, with similar obligations under Exchange rules such as those relating to a course of dealings that contributes to the maintenance of a fair and orderly market.

Due to their lack of a physical presence in the trading crowd, which is a basic requirement of the auction market, DARTs will not participate in any post-trade allocation in connection with an auction trade. Instead, a DART’s participation in an auction pair-off on the Exchange will be limited to the marketable amount of its quotation on the AEMI Book at the time of the pair-off. For example, suppose the breach of a Tolerance has occurred (disabling auto-ex as provided in Rule 128A–AEMI) due to a

⁶ In general, under Rule 126–AEMI (Precedence of Bids and Offers), after giving priority to customer orders, the ETF portion of the rule establishes parity between the Specialist quote, non-customer Crowd Orders (which would include quotes from DARTs), and non-customer public orders (with the latter treated as a group for the initial parity allocation). In contrast, the equity portion of the rule requires the Specialist quote to yield to public orders, as well as any Crowd Orders (including quotes from DARTs) to the extent such Crowd Orders are in parity with the public orders.

⁷ See Amex Rule 993–ANTE (Supplemental Registered Options Traders).

large incoming buy order that leaves an imbalance of 100,000 shares of XYZ ETF to be executed. Assume that a DART in that security is offering 10,000 shares at \$9.90, 10,000 shares at \$9.95, and 5,000 shares at \$10.10. If the Specialist sets the auction price at \$10.00 and there are marketable sell orders/offers on the AEMI Book at that price for 70,000 shares (including the 10,000 shares offered by the DART at \$9.90 and the 10,000 shares offered at \$9.95), all of those shares would execute against the imbalance, leaving the remaining 30,000 shares for the post-trade allocation. Even though the DART has a remaining offer of 5,000 shares on the contra side of the aggressing order, he would not be considered an “active crowd participant” for purposes of the post-trade allocation and cannot therefore elect to participate in the disposition of the remaining 30,000 shares.

Amex will establish minimum requirements for a DART to remain in the program, which may be modified by the Exchange from time to time. First, a DART must provide competitive quotations on a regular basis sufficient to satisfy market maker regulatory requirements.⁸ Business requirements will include minimum performance

⁸ See proposed Rule 110A–AEMI(b)(i), which requires DARTs to “provide continuous two-sided quotations in all assigned securities” This basic market maker requirement mirrors the definition of “market maker” set forth in Section 3(a)(38) of the Act, which requires a dealer in the security involved to hold himself out “as being willing to buy and sell such security for his own account on a regular or continuous basis.” The following additional regulatory requirements will be imposed by proposed Rule 110A–AEMI(b)(ii): “With respect to each security to which he/she is assigned by the Exchange, a DART’s transactions must constitute a course of dealings reasonably calculated to contribute to the maintenance of a fair and orderly market. In connection with this function, a DART is required to make competitive bids and offers as reasonably necessary to contribute to the maintenance of a fair and orderly market and shall engage, to a reasonable degree under the existing circumstances, in dealings for his/her own account when there exists a lack of price continuity, a temporary disparity between the supply of and demand for the security(ies) in which he/she is trading, or a temporary distortion of the price relationships between the security(ies) in which he/she is trading and the security(ies)

standards determined from time to time by the Exchange, including volume participation rate and trade participation rate. A DART that fails to comply with one or more of the performance standards, as determined by the Chief Executive Officer of the Exchange or his/her designee, may be subject to loss of all or a portion of any benefits to which they would otherwise be entitled under Amex rules by virtue of its status as a DART, including possible suspension or termination of DART status. A DART may be either a regular member of the Exchange or an associate member of the Exchange that meets the requirements for electronic access to the Exchange's automated systems. The number of ETF securities in which a DART may be permitted to make markets will be determined by the Exchange in accordance with Commentary .05 in proposed Rule 110A–AEMI.

The Exchange expects that the proposed rules for the DARTs program will set a high bar for prospective DART participants, and, while management anticipates starting the program with a limited group of DARTs, no specific upper limit on the number of DARTs is anticipated. In addition to the requirements described above, DARTs shall be required to meet eligibility criteria similar to those specified in the SROT program, which criteria will include:

- adequacy of resources including capital, technology and personnel;
- history of stability, superior electronic capacity, and superior operational capacity;
- level of market-making and/or specialist experience in a broad array of securities;
- ability to interact with order flow in all types of markets;

underlying or otherwise related to such security(ies).”

- existence of order flow commitments;
- willingness and ability to make competitive markets on the Exchange and otherwise promote the Exchange in a manner that is likely to enhance the ability of the Exchange to compete successfully for order flow in the ETF securities it trades;
- the number of member organizations requesting approval to act as a DART; and
- ability to transact in any ETF underlying markets.

The Exchange would use the factor relating to the existence of order flow commitments to evaluate existing order flow commitments between a DART applicant and order flow providers. A future change to, or termination of, any such commitments would not be used by the Exchange at any point in the future to terminate or take remedial action against a DART. Furthermore, the Exchange would not take remedial action solely because orders subject to any such commitments were not subsequently routed to the Exchange. The factor relating to willingness to promote the Exchange includes assisting in meeting and educating market participants, maintaining communications with member firms in order to be responsive to suggestions and complaints, responding to suggestions and complaints, and other similar activities. The Exchange would use this criterion to determine which applicants would best be able to enhance the competitiveness of the Exchange. The Exchange would not apply this factor to in any way restrict, either directly or indirectly, a DART's activities as a market maker or specialist on other exchanges, or to restrict how a DART handles orders it holds in a fiduciary capacity to which it owes a duty of best execution.

The regulatory requirements applicable to DARTs will be surveilled for by the FINRA Amex Regulation Division (“FINRA Amex”) consistent with current surveillance procedures for Registered Traders on the Exchange. FINRA Amex staff will work with Amex technical staff on planning the necessary changes to AEMI to capture required surveillance data and in surveilling the increased number of market makers that the program is expected to attract. Adjustments to current technology and surveillance procedures will likely also be necessitated by the fact that the DARTs will not be physically located on the floor of the Exchange.

DARTs will interface with the Amex’s Floor Officials in the case of trade disputes substantially in accordance with existing procedures used for SROTs, another off-floor market participant. DARTs accordingly will be required to designate persons on and/or off-floor to be in direct real-time contact with Floor Officials on such matters.⁹

⁹ In accordance with the current Amex service desk written procedures manual, SROTs have floor representation through their affiliated member firm or clearing entity. Service desk personnel have direct contact with the SROTs by telephone and e-mail. An SROT can request a trade review under obvious error rules through initial contact with the service desk, which will take specified follow-up steps. The service desk serves as the liaison between the SROT and floor activity, and in all situations requiring involvement by the Trading Floor Regulatory Liaison Group and a Floor Official. The service desk, in a customer service capacity, will present all data and communicate the SROT requests and follow-up detail to the appropriate parties. Documentation associated with corrective actions and/or floor rulings is presented to the SROT’s on-floor representation for signature/stamp of approval and relevant documentation is recorded and saved. In situations involving clearly erroneous transactions or other events involving the SROT (although not initiated by the SROT), the Amex service desk will contact the SROT by phone or e-mail to provide notification of a possible dispute involving one or more SROT trades.

A similar provision relating to DARTs will be added to the manual. However, Amex has recently received Commission approval of a proposed rule change making an on-floor presence to resolve trade disputes optional, with an off-floor presence to resolve disputes mandatory. Consequently, corresponding changes will be made to the above-referenced manual provisions. See Securities

Regulation M will apply to DARTs in the same way that it applies to any other market participants, as will Amex Rule 193 to the extent the DART is affiliated with a Specialist member organization. However, no expansion of the application of Amex Rule 193 beyond current practice is intended.¹⁰

Finally, the Comment Letter had observed that a provision in previously proposed Rule 110A–AEMI(a) relating to minimum capital requirements for DARTs is unnecessary due to its current inapplicability to DARTs (who will be subject to the Commission’s net capital rule).¹¹ The Exchange has eliminated the provision from the rule change proposed herein.

The specific AEMI rules to which changes are being proposed are discussed below.

Rule 110A–AEMI. Designated Amex Remote Traders

This proposed new rule will contain the basic requirements for DARTs as described herein, in the same manner that Rule 110–AEMI contains the basic requirements for Registered Traders.

Rule 1A–AEMI. Applicability, Definitions, References and Phase-In

The Exchange is proposing revisions to Rule 1A–AEMI in order to (1) update the definition of the AEMI Book to include electronic submissions from DARTs, (2) provide

Exchange Act Release No. 56882 (December 3, 2007), 72 FR 69261 (December 7, 2007) (approving File No. SR-Amex-2007-56).

¹⁰ The language in Rule 110A–AEMI(c)(ii) cross-referencing Amex Rule 193 is substantively identical to language also contained in Amex Rules 993–ANTE(d)(iii) (Supplemental Registered Options Traders) and 994–ANTE(d)(iii) (Remote Registered Options Traders), neither of which have been interpreted to expand the applicability of Amex Rule 193 beyond affiliates of Specialists.

¹¹ Rule 15c3-1 under the Act, 17 CFR 240.15c3-1.

that a Crowd Order includes any bid or offer in the AEMI Book entered by a DART, (3) provide a definition of a DART with a cross-reference to proposed Rule 110A–AEMI, (4) update the definition of the Specialist Order Book to exclude bids and offers of DARTs, and (5) make a minor unrelated correction to the definition of Exchange Traded Funds (“ETFs”).

Rule 109–AEMI. “Stopping” Stock

The Exchange proposes to revise Rule 109–AEMI to add DARTs to the list of Amex market participants prohibited from granting or accepting a stop with respect to a security traded in AEMI.

Rule 112–AEMI. Suspension of Registration of Registered Trader or Designated Amex Remote Trader

The Exchange is proposing to add a provision to this rule to provide for the suspension of the registration of a DART under circumstances similar to the current provision that provides for the suspension of a Registered Trader. Both types of participants are market makers with respect to securities traded in AEMI.

Rule 115–AEMI. Exchange Procedures for Use of Unusual Market Exception

The Exchange proposes to revise Rule 115–AEMI to provide procedures that will cover situations in which a DART is unable to publish quotations or is streaming in incorrect quotes under unusual market conditions. The Exchange also is proposing to correct an inaccuracy in the current rule in order to clarify that such issues with respect to Registered Traders are handled via the Service Desk and not by a Floor Official.

Rule 123–AEMI. Manner of Bidding and Offering

The Exchange is proposing revisions to this rule to provide that AEMI shall accept electronic bids and offers from DARTs and include them in the AEMI Book. The

proposed changes would also place DARTs on a par with Specialists and Registered Traders in terms of their ability to stream bids and offers into AEMI at multiple price levels (with the maximum number being changed from five to four to reflect current AEMI system capabilities) and would require (as with Specialists and Registered Traders) that all quotes provided be two-sided. A DART would also be prohibited from streaming in a quote that locks or crosses an existing quote that the same DART has previously streamed in for the same security.

Rule 128A–AEMI. Automatic Execution

The Exchange is proposing two minor changes to Rule 128A–AEMI so that DARTs will be treated in the same manner as Registered Traders in connection with certain automatic executions when a DART’s quotation (1) matches the APQ on the other side of the market or (2) would lock or cross the APQ in certain circumstances.

Rule 128B–AEMI. Auction Trades

The changes being proposed to this rule would exclude DARTs from participation in any post-trade allocation in connection with an auction, as described above.

Rule 719–AEMI. Comparison of Exchange Transactions

The Exchange is proposing to add DARTs to one of the equity account type codes used for market maker transactions in the AEMI securities in which they are registered.

Rule 957. Accounts, Orders and Records of Registered Traders, Designated Amex Remote Traders, Specialists and Associated Persons

The Exchange is proposing changes to Rule 957 that will place the same requirements on DARTs that Registered Traders are subject to with respect to reporting certain trading accounts and orders to the Exchange and producing books, records and other information pertaining to certain transactions.

2. Statutory Basis

The proposed rule change is designed to be consistent with Regulation NMS, as well as consistent with Section 6(b) of the Act,¹² in general, and furthers the objectives of Section 6(b)(5),¹³ in particular, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and national market system, and, in general, to protect investors and the public interest.

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

The proposed rule change does not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Exchange notes that a substantial portion of the Comment Letter on the Exchange's earlier rule filing on DARTs was devoted to business-side critiques of how best to allocate Amex resources to craft a market structure that will best ensure Amex's future success. The suggestion was made that adding DARTs to the Amex would somehow degrade market quality and injure Amex's competitive position. However, Amex management believes that, in the post-Regulation NMS world, it is essential that the Exchange's existing structure be enhanced by the introduction of additional quoting participants, while preserving those aspects of the Specialist system that order flow providers still value. Combined with other changes to Amex's market structure, Amex management believes that the addition of DARTs will create additional resident liquidity at the Amex needed to better compete with other trading centers for order flow.

¹² 15 U.S.C. 78f(b).

¹³ 15 U.S.C. 78f(b)(5).

Further, the Exchange notes that most of the concerns expressed in the Comment Letter regarding the potential negative impact of the DARTs program on competition seemed focused on preventing the introduction of competitive market makers into the marketplace for equities, as opposed to the marketplace for ETFs in which market makers (Registered Traders) already participate.¹⁴ Now that the proposed scope of the DARTs program is limited to ETFs only, such concerns – with which the Exchange takes strong issue in any event – are moot. Other statements in the Comment Letter regarding the stabilization rules are moot for the same reason.

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

As noted in Section II.A.(1) above, the Comment Letter was the only comment letter received on the Exchange's earlier DARTs rule filing that relates to the substance of the rule change proposed herein, and the Exchange has addressed herein a number of issues raised in that letter.

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

Within 35 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

¹⁴ For example, the Comment Letter at page 2 states, "This business as usual approach entirely ignores the fact that Registered Traders are not allowed to make markets in equities, which DARTs would be entitled to do should the Proposal be approved" and "we believe that the introduction of market makers into the Exchange's equity marketplace raises a number of significant concerns." In addition, the Comment Letter at page 3 states, "While it is true that the Proposal appears to leave the role of equity specialists unchanged, the introduction of market makers, whether they act from on or off-floor, into the Amex's equity marketplace, is clearly duplicative of the specialist function."

such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Exchange consents, the Commission will:

- (A) by order approve such 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. Please include File Number SR-Amex-2007-138 on the subject line.

Paper comments:

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

All submissions should refer to File Number SR-Amex-2007-138. 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 Web site (<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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Amex. 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-Amex-2007-138 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.¹⁵

Florence E. Harmon
Deputy Secretary

¹⁵ 17 CFR 200.30-3(a)(12).