



November 4, 2015

By Electronic Mail

Mr. Stephen Luparello
Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-1090

Re: File No. 4-657: National Market System Plan to Implement a Tick Size Pilot Program by BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, The Nasdaq Stock Market LLC, New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc.

Dear Mr. Luparello:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ submits this letter in connection with the Plan to Implement a Tick Size Pilot Program Submitted to the Securities and Exchange Commission (“Commission”) pursuant to Rule 608 of Regulation NMS under the Securities Exchange Act of 1934 (“Tick Size Plan”).² The Tick Size Plan includes data collection requirements, which currently are scheduled to take effect on November 6, 2015. To date, the participant Self-Regulatory Organizations (“SROs”) to the Tick Size Plan have not filed any proposed rule changes with the Commission to implement the data collection requirements of the Tick Size Plan. In fact, it was only on October 12, 2015, that the Financial Industry Regulatory Authority (“FINRA”), which is just one of the participants, issued technical specifications and Frequently Asked Questions (“FAQs”) in connection with the data collection requirements. At this point, there is no practical way for the member firms of the SROs to comply with the data collection requirements in time for a November 6th deadline. Moreover, it is SIFMA’s view that the operative requirements of the Tick Size Plan, including the data collection requirements, are not binding on member firms unless and until the SROs file

¹ The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit <http://www.sifma.org>.

² See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27514 (May 13, 2015), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-05-13/pdf/2015-11425.pdf>; see also <http://www.sec.gov/rules/sro/nms/2015/34-74892-exa.pdf>.

proposed rule changes that are approved by the Commission under Section 19 of the Securities Exchange Act of 1934 (“Exchange Act”).

On numerous occasions since the Tick Size Plan was approved, SIFMA has expressed to the Commission and the SROs the need to have finalized proposed rule changes and related guidance and specifications for the data collection requirements well in advance of the November 6th deadline. Specifically:

- On June 19, 2015, SIFMA emailed the SROs and Commission staff to outline initial concerns and to request clarification about the data collection requirements under the Tick Size Plan. At that time, SIFMA stated that the SROs’ rules must be approved and effective well ahead of the November 6, 2015 data collection start date in order to allow market participants sufficient time to implement the necessary systems and coding changes.
- On July 30, 2015, SIFMA submitted to the Commission and the SROs a comprehensive list of questions and concerns regarding the Tick Size Plan Program’s data collection requirements. In addition, we reiterated that the SROs’ rules must be approved and effective ahead of the November 6, 2015, data collection start date.
- On August 31, 2015, with no SRO rules having even been filed with the Commission and with no FAQs or specifications published, SIFMA requested that the data collection start date be postponed until at least three months after the date that: (1) the SROs’ rules are approved by the Commission; and (2) the SROs publish interpretive guidance and FAQs sufficient to resolve the questions and issues that member firms have raised. Additionally, SIFMA requested a corresponding extension of the implementation date of the pilot itself in order to provide six months worth of data.³

To date, the milestones in our August 31st letter have not been completed. FINRA did not publish FAQs and specifications until October 12, 2015. The Chicago Stock Exchange (“CHX”), one of the SROs that serves as a Designated Examination Authority (“DEA”) under the terms of the Tick Size Plan, has not published any of its own FAQs or specifications for those of its members that operate a trading center.⁴ None of the SROs have filed a proposed rule change to implement the data collection requirements on member firms.⁵ FINRA has indicated

³ See Letter from Theodore R. Lazo, Managing Direct and Associate General Counsel, SIFMA to Stephen Luparello, Director, Division of Trading and Markets, Commission dated August 31, 2015.

⁴ See <http://www.chx.com/regulatory-operations/national-market-system-plans/>

⁵ The New York Stock Exchange (“NYSE”) has stated that it plans to file a proposed rule change to implement the data collection requirements, but it has not stated a date for doing so. See Securities Exchange Act Release No. 76229 (October 22 2015), 80 FR 66065 (October 28, 2015) (“NYSE Proposed Rule 67”). SIFMA is currently evaluating the NYSE proposal and any applicable comments for that or any other SRO proposal in connection with the Tick Size Plan will be provided in a separate comment letter.

that the Commission plans to extend the deadline,⁶ but there has been no official extension so far. Clearly, there is no practical way for member firms to comply with the data collection requirements on a November 6th timeline. And as a legal matter, member firms are not obligated to comply with the data collection requirements without applicable SRO rules in effect.

Legal Effect of NMS Plans

The statutory authority for NMS Plans is set forth in Section 11A of the Exchange Act. Section 11A(a)(3)(B) of the Exchange Act provides that the Commission is authorized, “by rule or order, to authorize or require self-regulatory organizations to act jointly with respect to matters as to which they share authority under this chapter in planning, developing, operating, or regulating a national market system (or a subsystem thereof) or one or more facilities thereof.”

The Commission’s regulatory implementation of the NMS Plan approval and effectiveness process is set forth in Rule 608 of Regulation NMS under the Exchange Act. Rule 608(c) of Regulation NMS states that

Each self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant. Each self-regulatory organization also shall, absent reasonable justification or excuse, *enforce compliance with* any such plan by its members and persons associated with its members. (emphasis added)

In our reading of these two provisions, members of SROs are not legally bound by the terms of an NMS Plan, because Rule 608 specifically provides that the SROs must separately enforce compliance with the terms of the plans. To that end, the SROs must file proposed rule changes to enforce compliance with the terms of NMS Plans, and those proposed rule changes must be approved by the Commission pursuant to Section 19 of the Exchange Act before they can take effect.

This construct is reflected in the specific language of the Tick Size Plan. For example, Section II(B) of the Tick Size Plan, titled “Compliance Undertaking,” states that “...each Participant will adopt rules requiring compliance by its members with the provisions of the Plan, as applicable, and adopt such other rules as are needed for such compliance.” In connection with the data collection requirements of the Tick Size Plan, Section IV of the Plan states that “each Participant that is the Designated Examining Authority of a member of a Participant operating a

⁶ “UPDATE October 27, 2015: In light of FINRA’s understanding that the SEC is considering an extension to the data collection start date of the Tick Size Pilot, FINRA is delaying testing of the changes described in the October 12, 2015 edition of the OATS Reporting Technical Specifications, which were scheduled to be placed into the CT environment on October 26, 2015 (and the Production environment on November 9, 2015).” See FINRA Tick Size Pilot Program OATS Reporting Technical Specifications, *available at* <http://www.finra.org/industry/oats/oats-technical-specifications>.

trading center will require such member to develop appropriate policies and procedures for collecting and reporting the data described in Items I and II of Appendix B, as applicable, to the Designated Examining Authority.”⁷ The Plan also states in Section VII(B) that “[e]ach Participant that is the Designated Examining Authority of a Market Maker will require such Market Maker to provide to the Designated Examining Authority the data specified in Appendix C regarding daily Market Maker trading profits with respect to Pilot Securities on a monthly basis.”

Taking all of these together, it is SIFMA’s view that the Tick Size Plan, and for that matter any NMS Plan, does not directly obligate compliance by broker-dealers. The Exchange Act and applicable rules provide the authority to establish NMS Plans, but they do not include operative language to make the Plans directly binding on members of SROs. Reflecting this notion, the Tick Size Plan itself provides for the extra step of the SROs adopting rules to enforce compliance with the Plan. The Tick Size Plan does not include any operative language to make its terms applicable to member firms. This is reinforced by the fact that NYSE has filed its own proposed rule change to enforce compliance.

* * *

SIFMA appreciates the Commission’s consideration of the issues and concerns raised above in connection with the Tick Size Plan. If you have any questions or require further information, please contact me at [REDACTED] ([REDACTED]), or Timothy Cummings at [REDACTED] ([REDACTED]).

Sincerely,



Theodore R. Lazo
Managing Director and
Associate General Counsel

⁷ Consistent with that requirement, Appendix B of the Tick Size Plan states that “...each Participant that is the Designated Examining Authority of a member of a Participant operating a trading center will require such member, as applicable, to collect and transmit the data described in Items I and II with respect to Pilot Securities to the Designated Examining Authority in a pipe delimited format on a monthly basis.”

Mr. Stephen Luparello, Director, Securities and Exchange Commission

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cc: The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner

Gary Goldsholle, Deputy Director, Division of Trading and Markets
David S. Shillman, Associate Director, Division of Trading and Markets

Brendon Weiss, Intercontinental Exchange