

September 23, 2016

VIA EMAIL: rule-comments@sec.gov

Mr. Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F. Street, N.E.
Washington, D.C. 20549-0609

Re: Exchange Act Release No. 34-74581; File No. S7-05-15

Dear Mr. Fields:

The Chicago Board Options Exchange, Inc. ("CBOE"), the New York Stock Exchange, LLC ("NYSE"), on behalf of NYSE Amex Options and NYSE Arca Options, and The NASDAQ OMX Group, Inc., on behalf of the options markets of NASDAQ OMX PHLX LLC, NASDAQ OMX BX, Inc., and The NASDAQ Stock Market LLC (collectively, the "Exchanges"), appreciate the opportunity to comment on the Securities and Exchange Commission ("SEC" or "Commission") proposal to amend Rule 15b9-1 under the Securities Exchange Act of 1934 ("Act"), which will require non-FINRA member broker-dealers that primarily conduct business on their home exchanges to become members of FINRA ("Proposal").[1] Several of the Exchanges previously submitted letters to the Commission identifying areas where the Proposal could adversely impact non-FINRA member broker-dealers, especially options market-makers providing meaningful liquidity.[2]

The Exchanges support the objective of the Proposal insofar as the rulemaking seeks to require FINRA membership of proprietary non-market-making trading firms whose primary business is executing transactions off-exchange. However, the Proposal does not account for the nuances of today's listed option marketplace, which includes market-makers streaming quotes electronically on multiple exchanges and floor brokers executing multi-legged options orders with stock legs.

[1] Securities Exchange Act Release No. 74581 (March 25, 2015), 80 FR 18036 (April 2, 2015).
[2] *See* e.g., Letter dated June 10, 2015 from Angelo Evangelou, Associate General Counsel, CBOE, to Brent J. Fields, Secretary, Securities and Exchange Commission and Joint Letter dated June 4, 2015 from Elizabeth King, Secretary and General Counsel, NYSE, and Joan C. Conley, Senior Vice President and Corporate Secretary, NASDAQ, to Brent J. Fields, Secretary, Securities and Exchange Commission.

Floor-Based Activity

In 1965 the Commission adopted Rule 15b8-1 (hereinafter "Rule 15b9-1").[3] The Proposal claims that the Rule 15b9-1 exemption from association membership is rooted in participants conducting activities that are ancillary to "floor-based" businesses.[4] However, the 1965 adopting release does not emphasize "floor-based" activity as a justification for exempting certain participants from association membership. At most, the 1965 Adopting Release appears to provide a non-exclusive list of market participants that qualified for the exemption *in 1965*.[5] In fact, Rule 15b9-1 predates the advent of exchange transactions occurring off of the physical trading floor; thus, when the Commission adopted and subsequently amended Rule 15b9-1, on-floor versus off-floor exchange transactions could not have been a distinguishing factor for applying the association membership exemption. Furthermore, if the original intent of Rule 15b9-1 truly was to focus on "floor-based" activity it is reasonable to assume the Commission would have included a reference to "floor-based" activity in the rule text, but there is no such reference in the original Rule.[6]

More illustrative are the 1976 amendments to Rule 15b9-1.[7] The 1976 Release states that "[t]o avoid unnecessary duplication of regulation the SECO rules [including 15b9-1] were, in general, intended to apply only to those broker-dealers whose principal business activities were not subject to regulations of the various self-regulatory bodies."[8] Today, the "principal business activities" of options market-makers consist of making markets on options exchanges that are self-regulatory organizations. Additionally, the "principal business activities" of the options market-makers are properly regulated by the options exchanges on which they are members. The options exchanges are well-equipped to surveil activity by options market-makers and to determine whether the off-exchange activity of an options market-maker is for the purpose of hedging on-exchange market-making activity (i.e., the principal business activities of options market-makers).

The Exchanges do not believe it is proper to limit the Proposal's hedging exemption to "floor-based" activity. Such a focus is not justified by the history of Rule 15b9-1, and it does not

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[3] *See* Qualifications and Fees Relating to Brokers or Dealers Who Are Not Member of National Security [sic] Association, Exchange Act Release No. 7697 (September 7, 1965), 30 FR 11673 (September 11, 2065) ("1965 Release"). Rule 15b8-1 is the predecessor to Rule 15b9-1.

[4] Proposal at 18037.

[5] The 1965 Adopting Release states: "Among the broker-dealers that are not members of a registered national securities association are several specialists and other floor members of national securities exchanges, some of whom introduce accounts to other members. The over-the-counter business of these broker-dealers may be limited to reception of a portion of the commissions paid on occasional over-the counter transaction in these introduced accounts, and to certain other transaction incidental to their activities as specialists." 1965 Release at 11675.

[6] *See* 1965 Release at 11676 (providing that "[a]ny nonmember broker or dealer who is a member of a national securities exchange shall be exempt from this section if (1) he carries no accounts of customers, and (2) his annual gross income derived from purchases and sales of securities otherwise than on a national securities exchange is in an amount no greater than $1,000.").

[7] *See* Adoption of Amendments to SECO Rules, Exchange Act Release No. 12160 (March 3, 1976), 41 FR 10599 (March 12, 1976) ("1976 Release").

[8] Id.

comport with today's marketplace where on-floor and off-floor market-makers perform identical functions—providing liquidity and hedging on-exchange market-making activity with off-exchange activity. Thus, the hedging exemption should apply to all options market-makers (floor-based or not).

Single Exchange Membership

To the extent the Commission is considering modifying the hedging exemption to off-floor market-makers, provided that the off-floor market-makers' market-making activity is conducted *on a single exchange*, we have serious reservations. While the Exchanges support an expansion of the hedging activity exemption to off-floor market-makers, limiting the exemption to options market-makers making markets on a single exchange is not supported by the Act or history of the rule, and could actually impede critical liquidity provision in today's options marketplace. Today's interconnected marketplace frequently involves options market-makers being members of multiple options exchanges in order to interact with order flow. If the Commission intends to include a single exchange element, the Exchanges respectfully request that the Commission provide justification for that position and re-propose the rulemaking in order for the public and impacted firms to provide further comment.

Linkage

This Proposal should in no way hinder a broker-dealer's ability to access the National Best Bid or Offer on an away exchange when attempting to prevent a trade-through on their home exchange. However, as noted in our previous letter, the Proposal does not recognize the fact that: 1) broker-dealers need not utilize exchange routing mechanisms to route an order to an away exchange as the proposed rule would require and 2) an options order routed to an away exchange by an exchange's routing mechanism is routed pursuant to the Options Intermarket Linkage Plan[9] and an exchange's own rules,[10] not Rule 611 of Regulation NMS.

Thus, we believe the Proposal should be modified to expressly provide relief for broker-dealers that utilize linkage routing mechanisms offered by home options exchanges, as well as those brokers-dealers that route orders to away exchanges without utilizing the linkage routing mechanisms offered by a home exchange.

De Minimis Exception

With regards to the de minimis exception, the Proposal fails to recognize the expectations customers have for their brokers. At the behest of their customers, brokers (whether floor-based or not) execute multi-legged orders that may contain a stock component. It is entirely reasonable for brokers to receive a commission for executing an order that contains a stock component;

[9] *See* Securities Exchange Act Release 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000)(Approval Order)(approving the Options Intermarket Linkage Plan).
[10] *See, e.g.,* CBOE Rule 6.81.

however, the Proposal implies that all brokers must become FINRA members if a stock leg is executed on a venue at which the broker is not a member.

We believe the rulemaking should be modified to allow brokers to execute the stock portion of a multi-legged order on a stock venue without the requirement to become a member of FINRA or the venue on which the stock component is executed. Additionally, if the de minimis standard is maintained, the $1,000 limit should be significantly increased to allow brokers to receive reasonable compensation for providing meaningful services to their customers.

Re-Propose the Rulemaking

The Exchanges support the requirement of FINRA membership for proprietary trading firms whose primary business is executing transactions off-exchange. However, as proposed, the rulemaking will also affect non-FINRA broker-dealers that primarily conduct business on their home exchanges. If the Commission's true intent of this rulemaking is to require firms to become FINRA members when they primarily conduct business off-exchange, then the rulemaking should focus on the distinct profile of those firms instead of incorporating options market-making firms that primarily conduct business on their home exchanges. If the Commission's actual intent is to incorporate market-making firms that primarily conduct business on their home exchanges, the Exchanges respectively requests that the Commission justify that position and re-propose the rulemaking in order for the public and interested parties to provide further comment.

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We appreciate the opportunity to comment on this Proposal and urge the Commission to consider the above modifications. As noted above, we believe re-proposing the rulemaking may prove especially valuable to the Commission. The Exchanges are available to discuss any questions regarding our comments.

Sincerely,

Joanne Moffic-Silver
Executive Vice President, General Counsel and Corporate Secretary
Chicago Board Options Exchange

Elizabeth K. King
Secretary and General Counsel
New York Stock Exchange

Joan C. Conley
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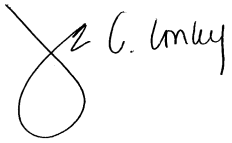

cc: Mary Jo White, Chair
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