



DIVISION OF
TRADING AND MARKETS

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

September 9, 2010

Mr. Joseph Cusick
Chief Regulatory Officer
NASDAQ OMX PHLX LLC
1900 Market Street
Philadelphia, PA 19103

Dear Mr. Rogers:

Based on the facts and representations set forth in your letter dated September 9, 2010, we find that it is appropriate in the public interest, and consistent with the protection of investors to grant, and hereby grant, to Member Organizations¹ that execute trades for their customers on the Exchange using the Exchange's PSX System, a limited exemption pursuant to Rule 10b-10(f) under the Exchange Act from the requirement in Rule 10b-10(a)(2)(i)(A) to disclose to their customers the name of the person from whom a security was purchased, or to whom it was sold, or the fact that such information will be provided upon the customer's written request. This exemption is limited to trades that Member Organizations execute on the Exchange using the post trade anonymity feature described in your letter.² In granting this exemption, we note in particular, your representation that all orders submitted to the Exchange's PSX System will automatically match against each other in accordance with a price-size priority algorithm, as described in your letter.

You also request assurance that the Staff will not recommend enforcement action to the Commission under paragraph (a) of Rule 10b-10 under the Exchange Act if a Member Organization confirms its capacity as "agent" when the Member Organization submits a customer's order to the Exchange, in its role as the customer's agent, and the order is executed on the Exchange in a trade with an anonymous contra-party that turns out to be the Member Organization trading in a principal (including proprietary) capacity. Your request is limited to

¹ Unless otherwise noted, each defined term in this letter has the same meaning as defined, directly or by reference, in your letter.

² We note your representation that the Exchange will not be routing orders to away trading centers. If in the future, the Exchange were to route orders to an away trading center for execution, the terms of this exemptive and no-action relief would not be applicable to such orders as such executions would be governed by the rules of the away trading center.

those situations in which both: (1) the No Knowledge Requirement; and (2) the Parity Requirement are satisfied.

Based on the facts and representations set forth in your letter, the Staff will not recommend enforcement action to the Commission under paragraph (a) of Rule 10b-10 if a Member Organization indicates on confirmations to its customers that the Member Organization acted as agent on a customer's behalf when a representative of the Member Organization submits a customer order to the Exchange on an agency basis and that order is executed on the Exchange in a trade with an anonymous contra-party that turns out to be the Member Organization trading in a principal (including proprietary) capacity, provided that the Member Organization complies with all other requirements of Rule 10b-10 in confirming the customer's order, including paragraph (a)(2)(i) thereof, and provided that the handling and execution of the customer order complies with the No Knowledge and Parity Requirements.³

In taking this position, we note in particular your representation regarding your expectation that Same-Firm Volume, as a percentage of Total Volume, will not be material for either high or low trading volume securities.⁴ We also note that Members Organizations continue to have a duty of best execution.⁵

The Office of Financial Responsibility has instructed us to inform you that the Staff will not recommend enforcement action to the Commission if, in lieu of making and preserving a separate record, Member Organizations rely on the Exchange's retention of the identities of the Member Organizations that execute anonymous trades on the Exchange, for the period specified in Rule 17a-4(a), to satisfy the requirements of Rules 17a-3(a)(1) and 17a-4(a) under the Exchange Act. The Staff notes, however, that a Member Organizations has the responsibility to make, keep current, and preserve records of all purchases and sales of securities in accordance with Rules 17a-3 and 17a-4 of the Exchange Act for trades on the Exchange if the Member Organization knows the identity of the contra-party.

These exemptive and no-action positions are subject to modification or revocation if at any time the Commission or Staff determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, these positions are based solely upon the representations you have made and are limited strictly to the facts and conditions described in your incoming letter. Any different facts or circumstances, including any change to

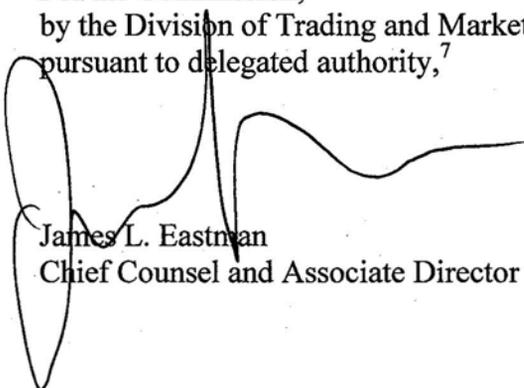
³ This Staff position applies only to trades that Member Organizations execute on the Exchange's PSX System. This Staff position does not apply to orders routed to an away trading center for execution.

⁴ In this regard, we note your representation that, one year after the PSX System becomes fully operational, you will review trade data to determine the actual percentage of same firm volume versus total volume in high and low volume securities to confirm that this number is not material, and that you will create and maintain a record of your determination.

⁵ See, e.g., Regulation NMS, Exchange Act Rel. No. 49325 (February 26, 2004), 69 Fed. Reg. 11126, 11137 (March 9, 2004) ("A broker-dealer still must seek the most advantageous terms reasonably available under the circumstances for all customer orders. A broker-dealer must carry out a regular and rigorous review of the quality of market centers to evaluate its best execution policies, including the determination as to which markets it routes customer order flow.").

the operation of the Exchange, may require a different response.⁶ Finally, we express no view with respect to other questions the proposed activities of the Exchange or any Member Organizations relying on this relief may raise, including the applicability of any other federal or state laws or the applicability of self-regulatory organization rules concerning customer account statements or confirmations.

For the Commission,
by the Division of Trading and Markets,
pursuant to delegated authority,⁷

A handwritten signature in black ink, appearing to read 'James L. Eastman', is written over the typed name and title. The signature is fluid and cursive, with a large loop on the left side and a long horizontal stroke extending to the right.

James L. Eastman
Chief Counsel and Associate Director

⁶ For example, the continued availability of these positions is dependent on Same-Firm Volume as a percentage of Total Volume in fact not being material for either high or low trading volume securities one year following the launch of the PSX System and thereafter.

⁷ 17 CFR § 200.30-3(a)(32).

September 9, 2010

Mr. James L. Eastman
Chief Counsel and Associate Director
Division of Trading and Markets
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0001

Re: Request for a Limited Exemption from Paragraph (a)(2)(i)(A) of Rule 10b-10 Under the Securities Exchange Act of 1934 (the "Exchange Act") and Request for No-Action Relief from Rules 10b-10(a)(2), 17a-3(a)(1), and 17a-4(a) Under the Exchange Act

Dear Mr. Eastman:

NASDAQ OMX PHLX LLC (the "Exchange") respectfully requests a limited exemption from paragraph (a)(2)(i)(A) of Rule 10b-10¹ under the Exchange Act on behalf of the Exchange's member organizations² that execute trades on NASDAQ OMX PSX ("PSX System" or the "System"), the Exchange's new system for trading cash equities for their customers. The Exchange will operate a fully automated electronic book ("order book") for orders to buy or sell securities ("orders") with a continuous, automated matching function in accordance with a price-size priority algorithm.³ The order book and the rules governing operation of the System will also provide for post-trade anonymity through settlement for trades executed through the PSX System.⁴

¹ Paragraph (f) of Rule 10b-10 under the Exchange Act provides the Securities and Exchange Commission ("SEC" or "Commission") authority to issue exemptions from the requirements contained in paragraphs (a) and (b) of the rules promulgated under the Exchange Act.

² Member organizations are registered broker-dealers that have been qualified to trade on the Exchange ("Member Organizations").

³ See Rule 3307. The Exchange's rules do not provide for any special order type that would be an exception to the automated algorithm for execution of orders set forth in Rule 3307. If such an order type were to be offered in the future, the Exchange understands that the relief requested by this letter would not apply to such functionality.

⁴ As explained herein, the Exchange does not request an exemption with respect to revealing the identity of a Member Organization or a Member Organization's clearing firm under the circumstances provided in Rule 3310. Rule 3310 provides that the Exchange shall reveal a Member Organization's identity in the following circumstances:

The Exchange also requests, on behalf of its Member Organizations, your assurance that the staff of the Division of Trading and Markets ("Staff") will not recommend that the Commission take any enforcement action under paragraph (a) of Rule 10b-10 under the Exchange Act in connection with the activities of Member Organizations executing orders for their customers in the circumstances described below. Specifically, the Exchange requests this relief to permit a Member Organization to indicate on a customer confirmation that the Member Organization acted as agent (where the Member Organization submits a customer's order on the Exchange in the Member Organization's role as the customer's agent (hereinafter "Customer Order")) and the order is executed in a trade with an anonymous contra-party that turns out to be the Member Organization or one of its affiliates trading in a principal (including proprietary) capacity (hereinafter "Principal Order"), so long as the conditions set out below are met and the Member Organization otherwise complies with all other requirements of Rule 10b-10 in confirming the customer's order, including paragraph (a)(2)(i) thereof.

This request for no-action relief is limited, however, to those situations in which the following requirements are met: (1) the representatives of the Member Organization or its affiliates submitting Principal Orders do not have knowledge about Customer Orders submitted by the Member Organization and the representatives of the Member Organization submitting Customer Orders do not have knowledge about Principal Orders submitted by the Member Organization or its affiliates (the "No Knowledge Requirement"); and (2) the Member Organization does not determine or influence the selection of the contra-party(ies) against which such Customer Orders will be executed (the "Parity Requirement").

Finally, the Exchange requests certain no-action relief from the requirements of Rules 17a-3(a)(1) and 17a-4(a) under the Exchange Act, as described below.

A. PSX System

The Exchange is a registered national securities exchange under Section 6 of the Exchange Act. The Exchange will operate the PSX System as an order book with a continuous, automated matching function, in compliance with the Exchange's rules and Regulation NMS under the Exchange Act ("Reg NMS"). Liquidity will be derived from orders to buy and to sell submitted to the Exchange electronically by Member Organizations from remote locations. The

(1) when a registered clearing agency ceases to act for the Member Organization, or the Member Organization's clearing firm, and the registered clearing agency determines not to guarantee the settlement of the Member Organization's trades; (2) for regulatory purposes or to comply with an order of an arbitrator or court; (3) if both participants to the transaction consent; (4) unless otherwise instructed by a Member Organization, when the Member Organization's order has been decremented by another order submitted by that same Member Organization.

System will permit entry of orders whose price and size are displayed to market participants (“Displayed Orders”), orders that are not displayed but that nevertheless remain available for execution (“Non-Displayed Orders”), and orders with a displayed portion and a non-displayed reserve portion (“Reserve Orders”).

The PSX System will use a price/size algorithm that is designed to encourage market participants to display large orders in transparent markets, thereby enhancing the quality of price discovery processes. The algorithm executes trading interest in the System in the following order:

- Price—Better priced trading interest will be executed ahead of inferior-priced trading interest.
- Display—Displayed Orders at a particular price with a size of at least one round lot will be executed ahead of Non-Displayed Orders, the reserve portion of Reserve Orders, and odd-lot orders at the same price. Undisplayed liquidity receives lower priority than displayed liquidity.
- Pro-Rata Allocation to Size Among Displayed Orders With a Size of One Round Lot or More—As among equally priced Displayed Orders with a size of at least one round lot, the System will allocate round lot portions of incoming marketable orders to displayed trading interest within the PSX System pro rata based on the size of the Displayed Orders. Portions of an order that would be executed in a size other than a round lot if they were allocated on a pro rata basis will be allocated for execution against available displayed trading interest on the basis of a random function that assigns probability of execution based on the size of displayed interest.
- Displayed Odd-Lot Orders—As among equally priced Displayed Orders with a size of less than one round lot, the PSX System will allocate incoming orders based on the size of the Displayed Orders, but not in a pro rata fashion.
- Pro-Rata Allocation to Size Among Non-Displayed Interest With a Size of One Round Lot or More—As among equally priced Non-Displayed Orders and the reserve portion of Reserve Orders (collectively, “non-displayed interest”) with a size of at least one round lot, the PSX System will allocate round lot portions of incoming executable orders to non-displayed interest within the PSX System pro rata based on the size of non-displayed interest. Portions of an order that would be executed in a size other than a round lot if they were allocated on a pro rata basis will be allocated for execution against available non-displayed interest on the basis of a random function that assigns probability of execution based on the size of non-displayed interest.
- Non-Displayed Odd-Lot Orders—As among equally priced Non-Displayed Orders with a size of less than a round lot, the PSX System will allocate incoming orders based on the size of the Non-Displayed Orders, but not in pro rata fashion.

All trades will be executed through the PSX System on an anonymous basis. The transaction reports produced by the PSX System will indicate the details of transactions executed in the System but shall not reveal contra party identities. Transactions executed in the PSX

System will also be cleared and settled anonymously.⁵ The PSX System will not route orders to other market centers. Rather, all orders will be processed by the PSX System in a manner that avoids trading through protected quotations and avoids locked and crossed markets.⁶

The order book's matching system algorithm permits orders originated by a Member Organization to execute against other orders from the same participant on the same basis as orders from other Member Organizations. In the order book's handling of orders, which is based on strict adherence to the algorithm described above, a Member Organization could receive an execution against itself, and under the Exchange's Rules, the Member Organization would not know that it was the contra-side of the trade at the time of execution.

B. Rule 10b-10

1. *Contra-Party Identity Requirement*

Rule 10b-10, among other things, requires a broker-dealer to disclose to its customers the identity of the party the broker-dealer sold to or bought from to fill the customer's order. Specifically, under paragraph (i)(A) of Rule 10b-10(a)(2), when a broker-dealer is acting as agent for a customer, some other person, or for both the customer and some other person, the broker-dealer must disclose "[t]he name of the person from whom the security was purchased, or to whom it was sold, for such customer or the fact that the information will be furnished upon written request of such customer" (the "Contra-Party Identity Requirement"). A broker-dealer can provide this information on the confirmation, or it has the option to provide the information to a customer at a later time after receiving a written request from the customer. A broker-dealer has this option as long as it discloses on the confirmation that the contra-party information is available upon written request.

Trades will be executed with total anonymity at the Exchange, where the identity of the actual contra-party will not be revealed when the trade is executed. Therefore, Member Organizations will not know the identity of the party to whom they sold securities or from whom they purchased securities. Without this information, Member Organizations cannot comply with the Contra-Party Identity Requirement. To permit Member Organizations to utilize the PSX System without violating Rule 10b-10, the Exchange is seeking an exemption, on behalf of such Member Organizations, from the Contra-Party Identity Requirement when Member Organizations execute transactions on the Exchange.

⁵ Limited exceptions to anonymity are provided in Rule 3310. *See id.*

⁶ The Exchange understands that if it routes orders in the future, the exemptive and no-action relief requested in this letter would not apply to any situation in which the System routes an order to an away trading center for execution, as such executions would be governed by the rules of the away trading center.

The Contra-Party Identity Requirement, in conjunction with the other requirements of paragraph (a)(2) of Rule 10b-10, is designed to provide customers with information that could alert them to potential conflicts of interest their broker-dealer may have had when handling their orders.⁷ The Exchange believes an exemption from the Contra-Party Identity Requirement when a Member Organization trades through the PSX System would not diminish the public policy and investor protection objectives of the Contra-Party Identity Requirement of Rule 10b-10. The Exchange believes the potential for a conflict of interest is less likely in those circumstances when a Member Organization trades through the PSX System because the trades are executed at the best price available on the PSX System and the contra-party is determined based upon multiple factors not controlled by the Member Organization. In such situations, Member Organizations are not permitted the discretion in executing the order that would normally give rise to the opportunity for a conflict of interest.

2. *Identification as Agent on Confirmation*

The Exchange requests no-action relief, on behalf of its Member Organizations, to permit Member Organizations to indicate on a customer confirmation that the Member Organization has acted as agent where the Member Organization submits a customer's order through the electronic trading facilities of the Exchange, in the Member Organization's role as the customer's agent, and the order is executed in a trade with an anonymous contra-party that turns out to be the Member Organization or one of its affiliates trading in a principal (including proprietary) capacity.

a. *No Knowledge Requirement*

This request is limited to those circumstances in which the representatives of a Member Organization and its affiliates submitting Principal Orders do not have knowledge about Customer Orders submitted by the Member Organization, and the Member Organization representatives submitting Customer Orders have no knowledge about Principal Orders submitted by the Member Organization or its affiliates. A Member Organization will be able to satisfy the No Knowledge Requirement if it implements and utilizes an effective system of internal controls such as appropriate information barriers, that operate to prevent the representatives of the Member Organization or its affiliates submitting Principal Orders from obtaining knowledge about the Customer Orders submitted by the Member Organization, and the representative of the Member Organization submitting Customer Orders from obtaining knowledge about the Principal Orders submitted by the Member Organization or its affiliates.

⁷ Paragraph (a)(2) of Rule 10b-10 requires a broker-dealer to disclose on a confirmation to a customer the capacity in which the broker-dealer handled the customer's order (i.e., as agent or principal), and whether the broker-dealer acted as agent for some other person, or as agent for both the customer and some other person. Paragraph (i)(D) of Rule 10b-10(a)(2) requires a broker-dealer to disclose to its customer the source and amount of remuneration received, or to be received, by the broker-dealer in connection with the trade.

To be effective, such a system of internal controls must include specific policies and procedures that prevent each Principal Order submitter separated by the information barriers from obtaining knowledge regarding Customer Orders submitted by the Member Organization, and each Customer Order submitter separated by the information barriers from obtaining knowledge regarding Principal Orders submitted by the Member Organization or its affiliates.

b. Parity Requirement

In addition to this No Knowledge Requirement, this request is limited to those situations in which the Member Organization does not in any way determine or influence the selection of the trading interest against which a customer order will be executed.⁸ As stated, the Exchange's order book will not support functionality that would allow a broker-dealer to select or influence against whom its orders will be executed.⁹

Where the Customer Order and the Principal Order are executed against each other by the order book, a Member Organization indicating in the confirmation that the firm has acted as agent does not increase the risk of fraud against the customer, where the No Knowledge Requirement and the Parity Requirement are met. To the contrary, the matching of the agency and the proprietary trading interests occurs at the best price available and the contra-side is determined based upon priority factors established by the rules of the Exchange.¹⁰ Moreover, the

⁸ The SEC has previously issued no-action relief for Rule 10b-10 under similar circumstances. Letter from Paul Jenson, Deputy Chief Counsel, Division of Trading and Markets, to John Zecca, Chief Regulatory Officer, NASDAQ OMX BX (December 23, 2008); Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Trading and Markets, to Mr. J. Craig Long, Foley & Lardner LLP (October 23, 2008) (BATS Exchange); Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, to William C. Meehan, former General Counsel of the Boston Stock Exchange (November 8, 2006); Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, to James C. Yong, Chief Regulatory Officer, National Stock Exchange (October 13, 2006); Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, to Edward S. Knight, Executive Vice President and General Counsel, Nasdaq (January 26, 2005); and Letter from Brian A. Bussey, Assistant Chief Counsel, Division of Market Regulation, to Aleksandra Radakovic, Vice President, J.P Morgan Securities Inc. (August 4, 2005).

⁹ If such functionality were to be offered in the future, the Exchange understands that the relief requested by this letter would not apply to this functionality.

¹⁰ The Exchange expects that same firm volume, i.e., an execution in which a firm's agency order is matched against the same firm's principal (including proprietary) trading interest, as a percentage of total volume in a security through the PSX System, will not be material for either high or low trading volume securities. The Exchange represents that one year after the PSX System becomes fully operational, the Exchange will review trade

proposed action does not diminish investor protection because it does not relieve a Member Organization's duty of best execution.¹¹

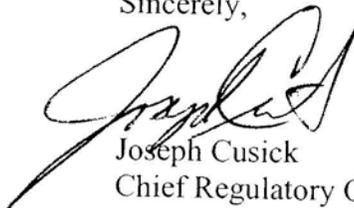
C. Books and Record Retention

Rule 17a-3(a)(1) under the Exchange Act requires that broker-dealers make and keep current records of all purchases and sales of securities, including "the name or other designation of the person from whom purchased or received or to whom sold or delivered." Rule 17a-4(a) under the Exchange Act requires that the records be preserved for six (6) years, the first two (2) years "in an easily accessible place."

The Exchange asks that the Commission staff not recommend enforcement action to the Commission if, in lieu of making and preserving a separate record, a broker-dealer relies on the Exchange's retention of the identities of Member Organizations that execute anonymous trades through the PSX System to satisfy requirements of Rules 17a-3(a)(1) and 17a-4(a) under the Exchange Act. A broker-dealer would retain the responsibility to make, keep current and preserve records of all purchases and sales of securities in accordance with Exchange Act Rules 17a-3 and 17a-4 for trades through the PSX System if the broker-dealer knows of the contra-party, including those instances where the Exchange discloses the contra-party to a trade.

In view of the foregoing, the Exchange respectfully requests that the Commission issue an exemption and such other relief as reflected in this letter. If you have any questions, please contact me at (215) 496-1576, or John Yetter at (301) 978-8497.

Sincerely,



Joseph Cusick
Chief Regulatory Officer
NASDAQ OMX PHLX LLC

cc: Ignacio Sandoval, SEC

data to determine the actual percentage of same firm volume versus total volume in high and low volume securities to confirm that this number is not material. The Exchange will create and maintain a record of the determination.

¹¹ See Regulation NMS, Securities Exchange Act Release No. 49325 (February 26, 2004), 69 FR 11126, 11137 (March 9, 2004) ("A broker-dealer still must seek the most advantageous terms reasonably available under the circumstances for all customer orders. A broker-dealer must carry out a regular and rigorous review of the quality of the market centers to evaluate its best execution policies, including the determination as to which markets it routes customer order flow.")