

December 9, 2015

Robert W. Errett  
Deputy Secretary  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549-1090

**Re: Exemptive Application Pursuant to Rule 608 of Regulation NMS – NMS  
Plan to Implement a Tick Size Pilot Program**

Dear Mr. Errett:

Pursuant to Rule 608(e) of Regulation NMS under the Securities Exchange Act of 1934 (“Exchange Act”), Financial Industry Regulatory Authority, Inc. (“FINRA”), on behalf of itself and BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, the Nasdaq Stock Market LLC, New York Stock Exchange LLC (“NYSE”), NYSE MKT LLC, and NYSE Arca, Inc. (collectively, “Participants”), requests that the Securities and Exchange Commission (“Commission” or “SEC”) grant an exemption from the data collection requirements in the National Market System Plan to Implement a Tick Size Pilot Program (“Plan” or “Pilot”), as discussed below. The Participants also seek an exemption from the requirement that, prior to the start of the Pilot, certain data collection requirements commence within 30 calendar days following month-end of the initial data collection date. Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to them in the Plan.

In consultation with the Commission, the Participants have submitted proposed rule changes to modify certain aspects of the Plan’s data collection requirements (“Data Collection Rule Filings”).<sup>1</sup> To the extent that the provisions contained in the Data Collection Rule Filings alter the data collection requirements in the Plan, as approved by the Commission, the Participants respectfully request that the Commission grant an exemption from those provisions of the Plan. Specifically, the Participants request exemptive relief relating to (1) the retail investor order flag requirement of Appendix B.II(n); (2) the microsecond reporting requirements of Appendix B.I.a(14), (15), (21) and (22); (3) the order execution time reporting requirements of Appendix B.I.a(31) through (33); and (4) the Market Maker profitability calculation methodology for purposes of Appendix C.I(b) to the Plan, including the utilization of a LIFO-like method for calculating

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<sup>1</sup> See, e.g., Securities Exchange Act Release No. 76484 (November 19, 2015), 80 FR 73858 (November 25, 2015) (File No. SR-FINRA-2015-048) (Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 6191(b) and Amend FINRA Rule 7440 to Implement the Data Collection Requirements of the Regulation NMS Plan to Implement A Tick Size Pilot Program).

raw Market Maker realized trading profits. The Participants believe that the modifications to the requirements set forth in the Plan sought to be adopted in the Data Collection Rule Filings will more efficiently and accurately facilitate the collection of the desired data, consistent with the objectives of the Pilot. Therefore, the Participants believe that the proposed exemptive relief is consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets.

### Background

On August 25, 2014, the Participants filed with the Commission, pursuant to Section 11A of the Act<sup>2</sup> and Rule 608 of Regulation NMS thereunder,<sup>3</sup> the Plan to Implement a Tick Size Pilot Program.<sup>4</sup> The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.<sup>5</sup> The Plan was published for comment in the Federal Register on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.<sup>6</sup>

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

The Plan provides for the creation of a group of Pilot Securities, which shall be placed in a control group and three separate test groups, with each subject to varying quoting and trading increments. Pilot Securities in the control group will be quoted at the current tick size increment of \$0.01 per share and will trade at the currently permitted increments. Pilot Securities in the first test group will be quoted in \$0.05 minimum increments but will continue to trade at any price increment that is currently permitted.<sup>7</sup> Pilot Securities in the second test group (“Test Group Two”) will be quoted in \$0.05 minimum increments and will trade at \$0.05 minimum increments subject to a midpoint exception, a retail investor order exception, and a negotiated trade exception.<sup>8</sup> Pilot Securities in the third test group (“Test Group Three”) will be subject to the same quoting

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<sup>2</sup> 15 U.S.C. 78k-1.

<sup>3</sup> 17 CFR 242.608.

<sup>4</sup> See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

<sup>5</sup> See Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

<sup>6</sup> See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (“Approval Order”).

<sup>7</sup> See Section VI(B) of the Plan.

<sup>8</sup> See Section VI(C) of the Plan.

and trading increments as Test Group Two, and also will be subject to the “Trade-at” requirement to prevent price matching by a market participant that is not displaying at the price of a Trading Center’s “Best Protected Bid” or “Best Protected Offer,” unless an enumerated exception applies.<sup>9</sup> In addition to the exceptions provided under Test Group Two, an exception for Block Size orders and exceptions that mirror those under Rule 611 of Regulation NMS<sup>10</sup> will apply to the Trade-at requirement.

The Plan also requires a Trading Center<sup>11</sup> or a Market Maker<sup>12</sup> to collect and transmit certain data to its designated examining authority (“DEA”), and requires DEAs to transmit this data to the Commission. Participants that operate a Trading Center also are required under the Plan to collect certain data, which is then transmitted directly to the Commission. With respect to Trading Centers, Appendix B.I to the Plan (Market Quality Statistics) requires a Trading Center to submit to the Participant that is its DEA a variety of market quality statistics. Appendix B.II to the Plan (Market and Marketable Limit Order Data) requires a Trading Center to submit information to its DEA relating to market orders and marketable limit orders, including the time of order receipt, order type, the order size, and the National Best Bid and National Best Offer quoted price.

With respect to Market Makers, Appendix B.III requires a Participant that is a national securities exchange to collect daily Market Maker Registration statistics. Appendix B.IV requires a Participant to collect data related to Market Maker participation with respect to each Market Maker engaging in trading activity on a Trading Center operated by the Participant. Appendix C.I requires a Participant to collect data related to Market Maker profitability from each Market Maker for which it is the DEA. Appendix C.II requires the Participant, as DEA, to aggregate the Appendix C.I data, and to transmit this data to the Commission.

The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.<sup>13</sup> On November 6, 2015, the SEC provided an exemption

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<sup>9</sup> See Section VI(D) of the Plan.

<sup>10</sup> 17 CFR 242.611.

<sup>11</sup> The Plan incorporates the definition of a “Trading Center” from Rule 600(b)(78) of Regulation NMS. Regulation NMS defines a “Trading Center” as “a national securities exchange or national securities association that operates an SRO trading facility, an alternative trading system, an exchange market maker, an OTC market maker, or any other broker or dealer that executes orders internally by trading as principal or crossing orders as agent.” See 17 CFR 242.600(b).

<sup>12</sup> The Plan defines a Market Maker as “a dealer registered with any self-regulatory organization, in accordance with the rules thereof, as (i) a market maker or (ii) a liquidity provider with an obligation to maintain continuous, two-sided trading interest.”

<sup>13</sup> See Approval Order at 27533 and 27545.

to the Participants from implementing the pilot until October 3, 2016.<sup>14</sup> As set forth in Appendices B and C to the Plan, data that is reported pursuant to the appendices shall be provided for dates starting six months prior to the Pilot Period through six months after the end of the Pilot Period. Under the revised Pilot implementation date, the pre-Pilot data collection period commences April 4, 2016.

Items I and II of Appendix B require a Trading Center that is not operated by a Participant to submit the data set forth in those items to its DEA on a monthly basis, and the DEA to transmit the data on a disaggregated basis within 30 calendar days following month end to the SEC.<sup>15</sup> Item III of Appendix B requires a Participant that is a national securities exchange to collect daily Market Maker Registration statistics, which are reported to the Commission. Item IV of Appendix B requires a Participant that operates a Trading Center to collect daily Market Maker participation statistics relating to Market Makers engaging in trading activity on that Trading Center, which also are reported to the Commission. Appendix C requires a Market Maker to transmit Appendix C.I data to its DEA on a monthly basis, with the DEA providing this information to the SEC within 30 calendar days following month end. A DEA also is required to submit aggregated Market Maker profitability data to the SEC on an aggregated basis within 30 calendar days following month end.

In approving the Plan, the Commission noted that the Trading Center data reporting requirements would facilitate an analysis of the effects of the Pilot on liquidity (e.g., transaction costs by order size), execution quality (e.g., speed of order executions), market maker activity, competition between trading venues (e.g., routing frequency of market orders), transparency (e.g., choice between displayed and hidden orders), and market dynamics (e.g., rates and speed of order cancellations).<sup>16</sup> The Commission noted that Market Maker profitability data would assist the Commission in evaluating the effect, if any, of a widened tick increment on market maker profits and any corresponding changes in the liquidity of small-capitalization securities.<sup>17</sup>

#### Rule 608 and the Proposed Exemption

Rule 608(c) of Regulation NMS provides that “[e]ach 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

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<sup>14</sup> See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015) (File No. 4-657).

<sup>15</sup> For a Trading Center that is operated by a Participant, Appendices B.I and B.II require that Participant to gather data for the period beginning six months prior to the Pilot Period and submit this data to the SEC.

<sup>16</sup> See Approval Order at 27543.

<sup>17</sup> Id.

associated with its members.”<sup>18</sup> Rule 608(c) allows the Commission to “exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof, or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.”<sup>19</sup> The Participants are seeking exemptive relief from the specific Plan provisions set forth below.

#### Retail Investor Flag

Appendix B.II(n) of the Plan states that market and marketable limit orders shall include a “yes/no” field relating to the Retail Investor Order flag.<sup>20</sup> The Participants propose that, for purposes of this requirement, a Trading Center shall report “y” where it is relying upon the Retail Investor Order exception to Test Group Two and Test Group Three, and “n” for all other instances. The Participants believe that requiring the identification of a Retail Investor Orders only where the exception is being applied (i.e., Pilot Securities in Test Group Two and Test Group Three) is consistent with Appendix B.II(n).

#### Requirement to Report Certain Order Information in Microsecond Increments

Appendix B.I.a(14), (15), (16), (21), (22) and (23) require that order information time ranges be reported in microseconds or milliseconds.<sup>21</sup> Not all Participants and non-

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<sup>18</sup> 17 CFR 242.608(c).

<sup>19</sup> 17 CFR 242.608(e).

<sup>20</sup> The Plan defines a Retail Investor Order, in part, as an “agency order or riskless principal order originating from a natural person, provided that, prior to submission, no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.” FINRA proposed to adopt a modified version of “Retail Investor Order” by revising the definition to remove the order capacity requirements. Thus, FINRA’s proposed definition of “Retail Investor Order” is “an order that originates from a natural person, provided that, prior to submission, no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology.” See Securities Exchange Act Release No. 76483 (November 19, 2015), 80 FR 73853 (November 25, 2015) (File No. SR-FINRA-2015-047) (Notice of Filing of a Proposed Rule Change to Adopt FINRA Rule 6191(a) to Implement the Quoting and Trading Requirements of the Regulation NMS Plan to Implement A Tick Size Pilot Program).

<sup>21</sup> Specifically, Appendix B.I.a(14) requires reporting of the cumulative number of shares of orders executed from 0 to less than 100 microseconds after the time of order receipt; Appendix B.I.a(15) requires reporting of the cumulative number of shares of orders executed from 100 microseconds to less than 100 milliseconds after the time of order receipt; Appendix B.I.a(16) requires reporting of the cumulative

Participant Trading Centers currently capture or report all orders and trades in either microseconds or milliseconds. The Participants therefore seek exemptive relief from these requirements, so that Trading Centers and Participants may submit data pursuant to Appendix B.I.a based on seconds, or such smaller increments as are available.

Requirement to Report Certain Order Information “At the Time of Order Execution”

The Plan states that the data required pursuant to Appendix B.I.a(31) through (33) shall be reported as of the time of order execution.<sup>22</sup> The Participants believe that this information should be captured at the time of order receipt, as evaluating share-weighted average prices at the time of order receipt is more consistent with the goal of observing the effect of the Pilot on the liquidity of Pilot Securities. The Participants therefore request exemptive relief from this requirement, and propose to instead require the Appendix B.I.a(31) through (33) data be reported as of the time of order receipt.

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number of shares of orders executed from 100 milliseconds to less than 1 second after the time of order receipt; Appendix B.I.a(21) requires reporting of the cumulative number of shares of orders cancelled from 0 to less than 100 microseconds after the time of order receipt; Appendix B.I.a(22) requires reporting of the cumulative number of shares of orders cancelled from 100 microseconds to less than 100 milliseconds after the time of order receipt; and Appendix B.I.a(23) requires reporting of the cumulative number of shares of orders cancelled from 100 milliseconds to less than 1 second after the time of order receipt.

In the data collection rule filing, the Participants proposed to modify these categories to add additional reporting fields. The Participants propose to add Appendix B.I.a(14A), which will require Trading Centers to report the cumulative number of shares of orders executed from 100 microseconds to less than 1 millisecond after the time of order receipt. The Appendix B.I.a(15) requirement will be changed to require the cumulative number of shares of orders executed from 1 millisecond to less than 100 milliseconds after the time of order receipt. The Participants also propose to modify the Appendix B.I.a(21) requirement to require Trading Centers to report the cumulative number of shares of orders canceled from 100 microseconds to less than 1 millisecond after the time of order receipt. The Appendix B.I.a(22) requirement will be changed to require the cumulative number of shares of orders canceled from 1 millisecond to less than 100 milliseconds after the time of order receipt.

<sup>22</sup> Appendix B.I.a(31) requests the share-weighted average of the consolidated quoted size at the inside price at the time of order execution; Appendix B.I.a(32) requests the share-weighted average NBBO Spread at the time of order execution; and Appendix B.I.a(33) requests the share-weighted average BBO Spread of the reporting exchange at the time of order execution.

### Calculation of Market Maker Profitability

The Participants also propose to change how the Participants must calculate Market Maker profitability.<sup>23</sup> Appendix C.I(b) to the Plan also requires that the calculation of raw Market Maker realized trading profits utilize a last in, first out (“LIFO”) like method to determine which share prices shall be used in that calculation. For purposes of Item I of Appendix C, the Participants propose to calculate daily Market Maker realized profitability statistics for each trading day on a daily LIFO basis using reported trade price and shall include only trades executed on the subject trading day. The daily LIFO calculation shall not include any positions carried over from previous trading days. For purposes of Item I.c of Appendix C, the Participants propose to calculate daily Market Maker unrealized profitability statistics for each trading day on an average price basis. Specifically, the Participants must calculate the volume weighted average price of the excess (deficit) of buy volume over sell volume for the current trading day using reported trade price. The gain (loss) of the excess (deficit) of buy volume over sell volume shall be determined by using the volume weighted average price compared to the closing price of the security as reported by the primary listing exchange. In reporting unrealized trading profits, the Participant shall also report the number of excess (deficit) shares held by the Market Maker, the volume weighted average price of that excess (deficit) and the closing price of the security as reported by the primary listing exchange used in reporting unrealized profit. The Participants believe that this methodology will result in a more consistent calculation of Market Maker profitability, and therefore seek exemptive relief from the current requirements.

The Participants believe that these proposed exemptions will result in data collection requirements that produce data that is more consistent with the goals of the Pilot. The Participants also believe that some of the proposed exemptions, such as the exemption from the microsecond and millisecond reporting requirements for purposes of Appendix B.I.a(14), (15), (16), (21) (22) and (23), more closely reflect the reporting capabilities of market participants. The Participants therefore believe that the proposed exemptive relief is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

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<sup>23</sup> Appendix C.I currently requires Market Maker profitability statistics to include (1) the total number of shares of orders executed by the Market Maker; (2) raw Market Maker realized trading profits, which is the difference between the market value of Market Maker shares and the market value of Market Maker purchases, using a LIFO-like method; and (3) raw Market Maker unrealized trading profits, which is the difference between the purchase or sale price of the end-of-day inventory position of the Market Maker and the Closing Price. In the case of a short position, the Closing Price from the sale will be subtracted; in the case of a long position, the purchase price will be subtracted from the Closing Price.

Submission of Initial Data to the SEC

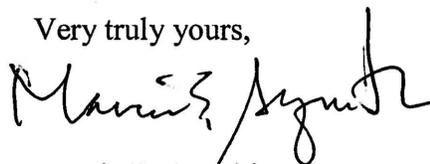
The Participants also seek an exemption from the requirement that, prior to the start of the Pilot, certain data submission requirements commence within 30 calendar days following month-end of the initial data collection date. As noted above, under the revised Pilot implementation date, the pre-Pilot data collection period commences April 4, 2016. The Participants therefore request that the initial submission of pre-Pilot data occur on August 30, 2016, at which time the Participants shall submit pre-Pilot data for the months of April, May, June and July. Extending the period by which Participants that operate a Trading Center or that are DEAs must transmit the initial data to the SEC will provide the necessary time to conduct testing to ensure the accuracy of the data prior to the first transmission to the SEC and publication of such data on each DEA's respective website.

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For the reasons set forth above, the Participants respectfully request that, pursuant to Rule 608(e), the Commission grant exemptive relief to the provisions in the Plan as set forth above. The Participants therefore believe that this exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.

Thank you in advance for your consideration of this request.

Very truly yours,



Marcia E. Asquith  
Senior Vice President and  
Corporate Secretary