



Financial Industry Regulatory Authority

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November 14, 2016

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 BZX Exchange, Inc., BATS BYX Exchange, Inc., BATS EDGA Exchange, Inc., BATS EDGX Exchange, Inc., Chicago Stock Exchange, Inc., Investors Exchange LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, the Nasdaq Stock Market LLC, National Stock Exchange, Inc., 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 website data publication requirements of the National Market System Plan to Implement a Tick Size Pilot Program (“Plan” or “Pilot”),<sup>1</sup> as discussed below.<sup>2</sup>

In consultation with the Commission, the Participants intend to submit proposed rule changes to modify certain aspects of the website data publication provisions (“Website Data Publication Rule Filings”). Specifically, the Participants intend to file proposed rule changes, as necessary, to: (1) make the required Appendix B and Appendix C data publicly available on a 90-calendar day delayed basis; and (2)

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<sup>1</sup> See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (“Approval Order”).

<sup>2</sup> Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to them in the Plan.

provide that FINRA will aggregate and publish all of the aggregated Market Maker<sup>3</sup> profitability data on the FINRA website, rather than each Participant that is the designated examining authority (“DEA”) of a Market Maker separately publishing such data on its respective website. To the extent that the provisions contained in the Website Data Publication Rule Filings alter the data 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.

### Background

On August 25, 2014, the Participants filed the Plan<sup>4</sup> with Commission, pursuant to Section 11A of the Act<sup>5</sup> and Rule 608 of Regulation NMS thereunder.<sup>6</sup> The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.<sup>7</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>8</sup> The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.<sup>9</sup> On November 6, 2015, the SEC provided an exemption to the Participants from implementing the Pilot until October 3, 2016.<sup>10</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, placed in a control group and three separate test groups, with each subject to varying quoting and

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<sup>3</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>4</sup> See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

<sup>5</sup> 15 U.S.C. 78k-1.

<sup>6</sup> 17 CFR 242.608.

<sup>7</sup> See Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

<sup>8</sup> See Approval Order.

<sup>9</sup> Id.

<sup>10</sup> See Securities Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015).

trading increments. Pilot Securities in the control group may quote and trade at a tick size increment currently permitted today. Pilot Securities in the first test group are quoted in \$0.05 minimum increments but may continue to trade at currently permitted increments.<sup>11</sup> Pilot Securities in the second test group (“Test Group Two”) are quoted in \$0.05 minimum increments and trade at \$0.05 minimum increments subject to a midpoint exception, a retail investor order exception, and a negotiated trade exception.<sup>12</sup> Pilot Securities in the third test group (“Test Group Three”) are subject to the same quoting and trading increments as Test Group Two, and also are 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<sup>13</sup> “Best Protected Bid” or “Best Protected Offer,” unless an enumerated exception applies.<sup>14</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>15</sup> apply to the Trade-at requirement.

The Plan also provides for the collection of specified data, the transmission of data to the SEC, and the publication of data on Participant websites.<sup>16</sup> The Plan generally requires a Trading Center or a Market Maker to collect and transmit certain data to its 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.

Item I (Market Quality Statistics) and Item II (Market and Marketable Limit Order Data) 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. Item III of Appendix B (Daily Market Maker Registration Statistics) requires a Participant that is a national securities exchange to collect daily Market Maker registration statistics, and transmit this data to the

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<sup>11</sup> See Section VI(B) of the Plan.

<sup>12</sup> See Section VI(C) of the Plan.

<sup>13</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>14</sup> See Section VI(D) of the Plan.

<sup>15</sup> 17 CFR 242.611.

<sup>16</sup> See Section VII of the Plan. See also Appendices B and C to the Plan.

Commission. Item IV of Appendix B (Daily Market Maker Participation Statistics) 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, and transmit this data to the Commission. Appendix C (Data Collected by Market Makers) requires a Market Maker to transmit Appendix C.I data (Market Maker Profitability) to its DEA on a monthly basis, with the DEA providing aggregated Market Maker profitability to the SEC within 30 calendar days following month end. Section VII of the Plan (Collection of Pilot Data) requires that specified information collected pursuant to Appendices B and C to the Plan be made publicly available by each Participant on its respective website for free, and provides that the data made publicly available will not identify the Trading Center that generated the data, in the case of Appendix B data, or the Market Maker or individual securities, in the case of Appendix C data.

#### 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 associated with its members.”<sup>17</sup> Rule 608(e) 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>18</sup> The Participants are seeking exemptive relief from the specific Plan provisions set forth below.

#### Website Data Publication Requirements

Section VII(A) of the Plan (Collection of Trading Center Pilot Data) provides that the Participants must collect the following data with respect to Pilot Securities (as set forth in Appendix B):<sup>19</sup>

- Daily market quality statistics of orders by security, order type, original order size (as observed by the Trading Center), hidden status (as applicable), and coverage under Rule 605 of Regulation NMS;
- Specified data regarding market orders and marketable limit orders;

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

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

<sup>19</sup> See Section VII(A) of the Plan.

- Daily number of registered Market Makers; and
- Daily Market Maker participation statistics.

Section VII(A) of the Plan further provides, among other things, that on a monthly basis, each Participant and the DEA for each member of a Participant operating a Trading Center will, as applicable, make specified data publicly available on its respective website for free. The data made publicly available will not identify the Trading Center that generated the data.

In addition, Section VII(B) of the Plan (Collection of Market Maker Profitability Data) provides that each Participant that is the DEA of a Market Maker will require such Market Maker to provide to the DEA the data specified in Item I of Appendix C to the Plan regarding daily Market Maker trading profits.<sup>20</sup> Section VII(B) of the Plan further provides, among other things, that on a monthly basis, the DEA will aggregate such data related to Market Makers categorized by the Control Group and each Test Group and make the aggregated data publicly available on its website for free and will report such data to the SEC, provided, however, the data reported to the SEC shall include the profitability statistics categorized by security. The data made publicly available will not identify the Market Makers that generated the data or the individual securities.<sup>21</sup>

The Participants adopted rule amendments to implement the data collection requirements of the Plan, including provisions relating to the website data publication requirements.<sup>22</sup> Pursuant to the Plan and Participant rules, website publication is currently required to begin on November 30, 2016.<sup>23</sup> The Participants are requesting an exemption from Section VII of the Plan and Appendices B and C to the Plan to permit the Participants to adopt rule amendments, as necessary, to: (1) make the required Appendix B and Appendix C data publicly available on a 90-calendar day delayed basis; and (2) provide that FINRA will aggregate and publish all of the

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<sup>20</sup> See Section VII(B) of the Plan.

<sup>21</sup> See Section VII(B) of the Plan.

<sup>22</sup> See, e.g., Securities Exchange Act Release No. 76484 (November 19, 2015), 80 FR 73858 (November 25, 2015) (Notice of Filing of File No. SR-FINRA-2015-048); see also Securities Exchange Act Release No. 77164 (February 17, 2016), 81 FR 9043 (February 23, 2016) (Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval of File No. SR-FINRA-2015-048) (“Accelerated Approval Order”); see also Letter from David S. Shillman, Associate Director, Division of Trading and Markets, Commission, to Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 17, 2016.

<sup>23</sup> See, e.g., FINRA Rule 6191.12.

aggregated Market Maker profitability data on the FINRA website, rather than each Participant that is the DEA of a Market Maker separately publishing such data on its respective website.<sup>24</sup>

The Participants intend to file proposed rule changes to provide for delayed publication of the website data, such that data for the Pre-Pilot Period,<sup>25</sup> currently required to be published on November 30, 2016, would be delayed by 90 days until February 28, 2017. Website data for the Pilot Period (and post-Pilot Period) would be delayed by ninety days such that it would be published within 120 calendar days following the end of the month.<sup>26</sup> Thus, for example, data for the month of October 2016 would be made available on Participant websites by February 28, 2017, data for the month of November 2016 would be made available on Participant websites by March 31, 2017, data for the month of December 2016 would be made available on Participant websites by April 30, 2017, and data for the month of January 2017 would be made available on Participant websites by May 30, 2017. The Participants also intend to amend their rules, as necessary, to provide that the aggregated Market Maker profitability data required to be made publicly available by each Participant that is a DEA on such Participant's website shall, instead, be aggregated together and published by FINRA on the FINRA website, including Market Makers for which FINRA is not the DEA.<sup>27</sup>

Extending the period by which Participants must make publicly available the required data on Participant websites is intended to address confidentiality concerns by providing for the passage of additional time between the market information reflected in the data and the public availability of such information.<sup>28</sup> Likewise, the publication

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<sup>24</sup> FINRA will aggregate and publish, by Control Group and each Test Group: (1) Market Maker profitability statistics for Market Makers for which FINRA is the DEA, (2) Market Maker profitability statistics collected from other Participants that are DEAs, and (3) Market Maker profitability statistics for Market Makers whose DEA is not a Participant.

<sup>25</sup> The Pre-Pilot period began six months before the start of the Pilot (*i.e.*, began on April 4, 2016).

<sup>26</sup> Currently, Pilot Period data is required to be published on Participant websites within 30 calendar days following month end. Under the exemption, that period would be extended by an additional 90 calendar days to 120 calendar days.

<sup>27</sup> Each Participant will publish the required Appendix B data on their respective websites. The Participants do not seek to modify the requirements regarding the submission of Appendix B or Appendix C data to the SEC.

<sup>28</sup> See, e.g., Accelerated Approval Order at 9049. See also Letter from Mary Lou Von Kaenel, Managing Director, Financial Information Forum, to David S.

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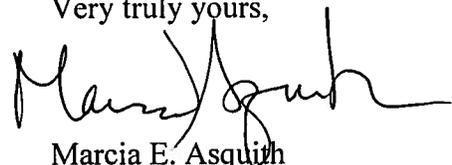
by FINRA of aggregated Market Maker profitability data on the FINRA website, including Market Makers for which FINRA is not the DEA, is intended to address confidentiality concerns with respect to the Appendix C data required to be made publicly available.

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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  
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