

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77703; File No. SR-NYSE -2015-46)

April 25, 2016

Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing of Partial Amendment Nos. 1 and 2 and Order Granting Accelerated Approval to a Proposed Rule Change to Adopt NYSE Rule 67 to Implement the Quoting and Trading Requirements of the Regulation NMS Plan to Implement A Tick Size Pilot Program

I. Introduction

On October 9, 2015, New York Stock Exchange LLC (“Exchange” or “NYSE”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposal to adopt NYSE Rule 67 to implement the quoting and trading requirements of the Plan to Implement Tick Size Pilot Program (“Plan”) submitted to the Commission pursuant to Rule 608 of Regulation NMS under the Act (“Tick Size Pilot”).³ The proposal was published for comment in the Federal Register on October 28, 2015.⁴ The Commission received three comment letters on the proposal⁵ and a response letter from the Exchange.⁶ On December 3,

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (order approving the Tick Size Pilot) (“Approval Order”).

⁴ See Securities Exchange Act Release No. 76229 (October 22, 2015) 80 FR 66065 (“Original NYSE Proposal”).

⁵ See letters from Mary Lou Von Kaenel, Managing Director, Financial Information Forum, dated November 5, 2015 (“FIF Letter I”) and dated February 18, 2016 (“FIF Letter II”); and Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated December 18, 2015 (“SIFMA Letter”).

⁶ See letter from Brendon J. Weiss, Co-Head, Government Affairs, Intercontinental Exchange, Inc. and John K. Kerin, CEO, Chicago Stock Exchange, Inc., dated January 15, 2016 (“Response Letter”). The response letter was filed by the Exchange on behalf of NYSE Arca, Inc., NYSE MKT LLC, and the Chicago Stock Exchange, Inc. (“CHX”).

2015, the Commission designated a longer period for Commission action on the proposal⁷ and on January 25, 2016, instituted proceedings under Section 19(b)(2)(B) of the Act to determine whether to disapprove the proposal.⁸ On March 21, 2016, NYSE filed Partial Amendment No. 1.⁹ On April 21, 2016, the NYSE filed Partial Amendment No. 2.¹⁰ This order approves the proposal, as modified by Partial Amendments No. 1 and No. 2.

II. Background

In the Response Letter, the Exchange also commented on proposed rule changes submitted by the Financial Industry Regulatory Authority, Inc. (“FINRA”) and BATS Exchange, Inc. (“BATS”) to implement the quoting and trading requirements of the Tick Size Pilot. See Securities Exchange Act Release Nos. 76483 (November 19, 2015), 80 FR 73853 (November 25, 2015) (SR-FINRA-2015-047) (“FINRA Proposal”) and 76552 (December 3, 2015), 80 FR 76591 (December 9, 2015) (SR-BATS-2015-108) (“BATS Proposal”). The FINRA Proposal and the BATS Proposal have subsequently been approved by the Commission. See Securities Exchange Act Release Nos. 77218 (February 23, 2016), 81 FR 10290 (February 29, 2016) (“FINRA Approval Order”) and 77291 (March 3, 2016), 81 FR 12543 (March 9, 2016) (“BATS Approval Order”).

⁷ See Securities Exchange Act Release No. 76551, 80 FR 76602 (December 9, 2015).

⁸ See Securities Exchange Act Release No. 76971, 81 FR 5027 (January 29, 2016).

⁹ In Partial Amendment No. 1, NYSE amends its proposed rule change to conform it to the FINRA and BATS Proposals. Specifically, Partial Amendment No. 1: (1) adds an exception to permit members to fill a customer order in a Pilot Security in Test Group Two or Test Group Three at a non-nickel increment to comply with NYSE Rule 5320 under limited circumstances; (2) amends the display exception of Trade-at Prohibition to allow a Trading Center who is displaying as either agent or riskless principal to execute up to the displayed size as agent or riskless principle; (3) removes the explicit odd lot exception from the Trade-at Prohibition; (4) adds exceptions to the Trade-at Prohibition for certain error correction transactions; (5) modifies the stopped order exception to the Trade-at Prohibitions to better align it with the stopped order exception in Rule 611 of Regulation NMS; (6) clarifies the use of Trade-at Intermarket Sweep Orders (“Trade-at ISOs”) in connection with the Trade-At Prohibition; and (7) amends the definition of a “Retail Investor Order.”

¹⁰ In Partial Amendment No. 2, NYSE proposes additional amendments to conform this proposed rule change to the FINRA and BATS Proposals. Specifically, NYSE proposes to (1) delete its proposed definition of Trading Center; (2) refer to independent trading units, as defined in Rule 200(f) of Regulation SHO, in proposed NYSE Rule 67(e)(4)(C)(i) and (ii); and (3) correct a typographical error in the Trade-at ISO definition located in proposed NYSE Rule 67(a)(1)(D)(ii).

On August 25, 2014, NYSE Group, Inc., on behalf of BATS Exchange, Inc., BATS Y-Exchange, Inc., CHX, EDGA Exchange, Inc., EDGX Exchange, Inc., FINRA, 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. (collectively “Participants”¹¹), filed with the Commission, pursuant to Section 11A of the Act¹² and Rule 608 of Regulation NMS thereunder,¹³ the Plan to Implement the Tick Size Pilot.¹⁴ The Participants filed the Plan to comply with a Commission order dated June 24, 2014.¹⁵ The Plan was published for comment in the Federal Register on November 7, 2014,¹⁶ and approved by the Commission, as modified, on May 6, 2015.¹⁷ On November 6, 2015, the Commission issued an exemption to the Participants from implementing the Plan until October 3, 2016.¹⁸

The Tick Size Pilot 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 stocks of certain small-capitalization companies. Each Participant is required to comply, and to enforce compliance by its members, as applicable, with the provisions of the

¹¹ The Commission notes that on February 5, 2016, National Stock Exchange, Inc. (“NSX”) filed a Plan amendment with the Commission to become a Plan Participant pursuant to Section II.C of the Plan. See Securities Exchange Act Release No. 77277 (March 3, 2016).

¹² 15 U.S.C. 78k-1.

¹³ 17 CFR 242.608.

¹⁴ See letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

¹⁵ See Securities Exchange Act Release No. 72460, 79 FR 36840 (June 30, 2014).

¹⁶ See Securities Exchange Act Release No. 73511 (November 3, 2014), 79 FR 66423.

¹⁷ See Approval Order, supra note 3.

¹⁸ See Securities Exchange Act Release No. 76382, 80 FR 70284 (November 13, 2015).

Plan.¹⁹ The Plan requires Participants to develop quoting and trading requirements for the Tick Size Pilot as well as collect, publish, and submit to the Commission a variety of data elements such as market quality statistics and market maker profitability.²⁰ NYSE proposes to adopt certain provisions of NYSE Rule 67 to implement the quoting and trading requirements of the Tick Size Pilot.²¹

III. Description of the Proposed Rule Change

A. Definitions and Policies to Comply with the Plan

NYSE proposes to adopt NYSE Rule 67(a), (c), (d), and (e)²² to implement the quoting and trading requirements of the Tick Size Pilot.²³ Proposed NYSE Rule 67(a)(1) contains

¹⁹ Rule 608(c) of Regulation NMS. 17 CFR 242.608(c). See also Plan Sections II.B and IV.

²⁰ The data collection requirements for the Plan are specified in Appendices B and C. See Approval Order, supra note 3. NYSE has adopted rules to implement the data collection requirements under the Plan. See NYSE Rule 67(b). Securities Exchange Act Release No. 77468 (March 29, 2016), 81 FR 19269, (April 4, 2016).

²¹ NYSE, on behalf of the Plan Participants, submitted a letter to the Commission requesting an exemption from certain provisions of the Plan related to the quoting and trading requirements as they apply to Pilot Securities that have a price under \$1.00. See letter from Elizabeth K. King, General Counsel & Corporate Secretary, NYSE, to Brent J. Fields, Secretary, Commission, dated October 14, 2015 (“October Exemption Request”). In addition, FINRA, on behalf of the Plan Participants, submitted a letter to the Commission requesting additional exemptions from certain provisions of the Plan related to the quoting and trading requirements. See letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, to Robert W. Errett, Deputy Secretary, Commission, dated February 23, 2016 (“February Exemption Request”). The Commission, pursuant to its authority under Rule 608(e) of Regulation NMS, has granted NYSE a limited exemption from the requirement to comply with certain provisions of the Plan as specified in the letters and noted herein. See letter from David Shillman, Associate Director, Division of Trading and Markets, Commission to Sherry Sandler, Associate General Counsel, NYSE, dated April 25, 2016 (“SEC Exemption Letter”).

²² NYSE Rule 67(b) sets forth the data collection requirements for the Exchange and its member organizations as required under the Plan. See supra note 20.

²³ The effectiveness of proposed NYSE Rule 67 will coincide with the Pilot Period of the Plan. See Proposed NYSE Rule 67.

definitions²⁴ of “Plan,”²⁵ “Pilot Test Groups,”²⁶ “Retail Investor Order,”²⁷ and “Trade-at Intermarket Sweep Order.”²⁸

Proposed NYSE Rule 67(a)(2) provides that the Exchange is a Participant in the Plan and is subject to the applicable requirements of the Plan. Proposed NYSE Rule 67(a)(3) provides that member organizations shall establish, maintain, and enforce written policies and procedures

²⁴ Proposed NYSE Rule 67(a)(1)(E) provides that all capitalized terms not otherwise defined in proposed NYSE Rule 67 shall have the meanings set forth in the Tick Size Pilot, Regulation NMS under the Exchange Act, or Exchange Rules. In Partial Amendment No. 2, NYSE deletes its originally proposed definition of Trading Center to clarify reliance on the definition set forth in the Plan. See Partial Amendment No. 2, supra note 10.

²⁵ NYSE proposes to define the “Plan” as the Tick Size Pilot plan submitted to the Commission pursuant to Rule 608 of Regulation NMS. See proposed NYSE Rule 67(a)(1)(A).

²⁶ NYSE proposes to define “Pilot Test Groups” as the three test groups established under the Plan, consisting of 400 Pilot Securities each, which satisfy the respective criteria established under the Plan for each such test group. See proposed NYSE Rule 67(a)(1)(B).

²⁷ NYSE proposes to define “Retail Investor Order” as an agency order or riskless principal order that meets the criteria of FINRA Rule 5320.03 that originates from a natural person and is submitted to the Exchange by a retail member organization provided that no change is made to the terms of the order with respect to the price or side of market and the order does not originate from a trading algorithm or any other computerized methodology. See proposed NYSE Rule 67(a)(1)(C). The Retail Investor Order definition was amended to clarify that the Retail Investor Order exceptions under the Plan were not limited to exchange-related executions. See Partial Amendment No. 1, supra note 9. This section was renumbered in Partial Amendment No. 2. See Partial Amendment No. 2, supra note 10.

²⁸ NYSE proposes to define “Trade-at Intermarket Sweep Order” as a limit order for a Pilot Security that is identified as a Trade-at Intermarket Sweep Order and simultaneous to its identification as such has one or more additional limit orders, as necessary, routed to execute against the full size of the respective protected bid or offer of the Pilot Security at a price that is better than or equal to the original limit price of the identified order. These additional orders also must be marked as Trade-at Intermarket Sweep Orders. See proposed NYSE Rule 67(a)(1)(E). This definition was added to clarify the use of such orders under the Plan. See Partial Amendment No. 1, supra note 9. This definition was renumbered and amended to correct a typographical error. See Partial Amendment No. 2, supra note 10.

that are reasonably designed to comply with the applicable requirements of the Plan. Proposed NYSE Rule 67(a)(4) provides that Exchange systems will not display, quote, or trade in violation of the applicable quoting and trading requirements for a Pilot Security as specified in the Plan and NYSE Rule 67, unless such quotation or transaction is specifically exempted under the Plan.

Proposed NYSE Rule 67(a)(5) defines the procedure for dealing with Pilot Securities that drop below \$1.00 during the Pilot Period.²⁹ If the price of a Pilot Security drops below \$1.00 during regular trading on any given business day, the Pilot Security will continue to trade according to the quoting and trading requirements of its originally assigned Test Group in the Plan. If a Pilot Security has a Closing Price below \$1.00, the Pilot Security will be moved from its respective Test Group into the Control Group, and will be quoted and traded-at any price increment that is currently permitted by Exchange rules for the remainder of the Pilot Period.³⁰ Proposed NYSE Rule 67(a)(5) further provides that notwithstanding anything to the contrary, at all times during the Pilot Period, Pilot Securities (whether in the Control Group or any Pilot Test Group) will continue to be subject to the requirements contained in Paragraph (b).³¹

B. Quoting and Trading Rules for Test Group One and Test Group Two

Proposed NYSE Rule 67(c) describes the quoting and trading requirements of Pilot Securities in Test Group One. Specifically, NYSE proposes that no member may display, rank, or accept from any person any displayable or non-displayable bids or offers, orders, or indications of interest in increments other than \$0.05 for Pilot Securities in Test Group One.³²

²⁹ NYSE has requested an exemption from the Plan related to this provision. See October Exemption Request, supra note 21.

³⁰ See Proposed NYSE Rule 67(a)(5).

³¹ NYSE Rule 67(b) implements the data collection provisions required under the Plan. See supra note 20.

³² See Proposed NYSE Rule 67(c).

Orders priced to trade at the midpoint of the national best bid and national best offer (“NBBO”) or best protected bid and best protected offer (“PBBO”) and orders entered into the Exchange’s Retail Liquidity Program as Retail Price Improvement Orders may be ranked and accepted in increments of less than \$0.05. The provision also provides that Pilot Securities in Test Group One would continue to be able to trade at any price increment that is currently permitted.

Proposed NYSE Rule 67(d) describes the quoting and trading requirements of Pilot Securities in Test Group Two. Specifically, NYSE proposes that no member may display, rank, or accept from any person any displayable or non-displayable bids or offers, orders, or indications of interest in increments other than \$0.05 for Pilot Securities in Test Group Two.³³ Further, NYSE proposes that absent any enumerated exceptions, no member organization may execute orders in any Test Group Two Pilot Security in a price increment other than \$0.05.³⁴

Proposed NYSE Rule 67(d)(3) provides that Test Group Two Pilot Securities may trade in increments less than \$0.05 in the following circumstances: (A) trading may occur at the midpoint between the NBBO or the PBBO; (B) Retail Investor Orders may be provided price improvement of at least \$0.005 better than the PBBO; and (C) Negotiated Trades may trade in less than \$0.05 increments.

In Partial Amendment No. 1, NYSE proposes an additional exception from the \$0.05 trading increment requirement for Test Group Two Pilot Securities. Specifically, NYSE proposes to permit members to execute customer orders to comply with NYSE Rule 5320

³³ Similar to the exception in Test Group One, orders priced to trade at the midpoint of the NBBO or PBBO and orders entered into the Exchange’s Retail Liquidity Program as Retail Price Improvement Orders may be ranked and accepted in increments of less than \$0.05. See Proposed NYSE Rule 67(d)(1).

³⁴ Proposed NYSE Rule 67(d)(2) applies to all trades, including Brokered Cross Trades.

following the execution of a proprietary trade by the member at an increment other than \$0.05 that was permissible pursuant to an exception under the Plan.³⁵

C. Quoting and Trading Rules for Test Group Three

Proposed NYSE Rule 67(e) describes the quoting and trading requirements of Pilot Securities in Test Group Three. NYSE proposes that no member organization may display, rank, or accept from any person any displayable or non-displayable bids or offers, orders, or indications of interest in increments other than \$0.05, for Pilot Securities in Test Group Three.³⁶

Proposed NYSE Rule 67(e)(2) states that absent an enumerated exception, no member organization may execute orders in any Test Group Three Pilot Security in a price increment other than \$0.05.³⁷ Proposed NYSE Rule 67(e)(3) provides for the same four exceptions to the \$0.05 trading increment requirement specified for Test Group Two.³⁸

Proposed NYSE Rule 67(e)(4) states the Test Group Three Pilot Securities will be subject to a Trade-at Prohibition. Proposed NYSE Rule 67(e)(4)(A) defines “Trade-At Prohibition” as the prohibition against executions by a Trading Center of a sell order for a Pilot Security at the price of a Protected Bid or the execution of a buy order at the price of a Protected Offer during regular trading hours. Proposed NYSE Rule 67(e)(4)(B) states that absent an enumerated exception, no member organization may execute a sell order for a Pilot Security in Test Group Three at the price of a Protected Bid or a buy order at the price of a Protected Offer.

³⁵ See Partial Amendment No. 1, supra note 9. NYSE has requested an exemption from the Plan related to this provision. See February Exemption Request, supra note 21.

³⁶ Similar to the exceptions in Test Group One and Test Group Two, orders priced to trade at the midpoint of the NBBO or PBBO and orders entered into the Exchange’s Retail Liquidity Program as Retail Price Improvement Orders may be ranked and accepted in increments of less than \$0.05. See Proposed NYSE Rule 67(e)(1).

³⁷ Proposed NYSE Rule 67(e)(2) applies to all trades, including Brokered Cross Trades.

³⁸ See Proposed NYSE Rule 67(d)(3). See also, supra note 35.

Proposed NYSE Rule 67(e)(4)(C) sets forth the exceptions to the Trade-at Prohibition for member organizations as follows:

(i) the order is executed as agent or riskless principal by an independent trading unit, as defined in Rule 200(f) of Regulation SHO, of the Trading Center within a member organization that has a displayed quotation as agent or riskless principal, via either a processor or a SRO Quotation Feed, at a price equal to the traded-at Protected Quotation, that was displayed before the order was received, but only up to the full displayed size of that independent trading unit's previously displayed quote;³⁹

(ii) the order is executed by an independent trading unit, as defined in Rule 200(f) of Regulation SHO, of the Trading Center within a member organization that has displayed a quotation for the account of that Trading Center on a principal basis, excluding riskless principal, via either a processor or an SRO Quotation Feed, at a price equal to the traded-at Protected Quotation, that was displayed before the order was received, but only up to the full displayed size of that independent trading unit's previously displayed quote;⁴⁰

(iii) the order that is of Block Size⁴¹ at the time of origin and is not an aggregation of non-block orders; broken into orders smaller than Block Size prior to submitting the order to a Trading Center for execution; or executed on multiple Trading Centers;

(iv) the order is a Retail Investor Order⁴² that is executed with at least \$0.005 price improvement;

(v) the order is executed when the Trading Center displaying the Protected Quotation that

³⁹ See Partial Amendment No. 1, supra note 9 and Partial Amendment No. 2, supra note 10.

⁴⁰ Id.

⁴¹ "Block Size" is defined in the Plan as an order (1) of at least 5,000 shares or (2) for a quantity of stock having a market value of at least \$100,000.

⁴² Proposed NYSE Rule 67(a)(1)(C) defines Retail Investor Order. See supra note 27.

was traded-at was experiencing a failure, material delay, or malfunction of its systems or equipment;

(vi) the order is executed as part of a transaction that was not a “regular way” contract;

(vii) the order is executed as part of a single-priced opening, reopening, or closing transaction on the Exchange;

(viii) the order is executed when a Protected Bid is priced higher than a Protected Offer in the Pilot Security;

(ix) the order is identified as a Trade-at ISO;⁴³

(x) the order is executed by a Trading Center that simultaneously routed Trade-at ISOs to execute against the full displayed size of the Protected Quotation that was traded-at;

(xi) the order is executed as part of a Negotiated Trade;

(xii) the order is executed when the Trading Center displaying the Protected Quotation that was traded-at had displayed, within one second prior to execution of the transaction that constituted the Trade-at, a Best Protected Bid or Best Protected Offer, as applicable, for the Pilot Security with a price that was inferior to the price of the Trade-at transaction;

(xiii) the order is executed by a Trading Center which, at the time of order receipt, had guaranteed an execution at no worse than a specified price (a “stopped order”) where: (A) the stopped order was for the account of a customer; (B) the customer agreed to the specified price on an order-by-order basis; and (C) the price of the Trade-at transaction was, for a stopped buy order, equal to or less than the National Best Bid in the Pilot Security at the time of execution or, for a stopped sell order, equal to or greater than the

⁴³ Proposed NYSE Rule 67(a)(1)(D) defines Trade-at ISO.

National Best Offer in the Pilot Security at the time of execution, as long as such order is priced at an acceptable increment;⁴⁴

(xiv) the order is for a fractional share order of a Pilot Security, provided that such fractional share order was not the result of breaking an order⁴⁵ for one or more whole shares of a Pilot Security into orders for fractional shares or was not otherwise effected to evade the requirements of the Tick Size Pilot; or

(xv) the order is to correct a bona fide error, which is recorded by the Trading Center in its error account. NYSE proposes to define a bond fide error as: (A) the inaccurate conveyance or execution of any term of an order including, but not limited to, price, number of shares or other unit of trading; identification of the security; identification of the account for which securities are purchased or sold; lost or otherwise misplaced order tickets; short sales that were instead sold long or vice versa; or the execution of an order on the wrong side of a market; (B) the unauthorized or unintended purchase, sale, or allocation of securities, or the failure to follow specific client instructions; (C) the incorrect entry of data into relevant systems, including reliance on incorrect cash positions, withdrawals, or securities positions reflected in an account; or (D) a delay, outage, or failure of a communication system used to transmit market data prices or to facilitate the delivery or execution of an order.⁴⁶

⁴⁴ See Partial Amendment No. 1, supra note 9. NYSE has requested an exemption from the Plan related to this provision. See February Exemption Request, supra note 21.

⁴⁵ Additionally, no member shall break an order into smaller orders or otherwise effect or execute an order to evade the requirements of the Trade-at Prohibition or any other provisions of the Plan. See Proposed NYSE Rule 67(e)(4)(D).

⁴⁶ See Partial Amendment No. 1, supra note 9. NYSE has requested an exemption from the Plan related to this provision. See February Exemption Request, supra note 21.

IV. Summary of Comments and the Exchange’s Response

As noted above, the Commission received three comment letters from two commenters concerning the proposed rule change⁴⁷ along with a Response Letter⁴⁸ and Partial Amendments⁴⁹ from the Exchange.

Both commenters discussed aspects of the Trade-at Prohibition. Specifically, the two commenters opposed the Original NYSE Proposal because it restricted the display exception to the Trade-at Prohibition to member organizations displaying Protected Quotations on a principal basis.⁵⁰ The commenters believed that this restriction was not consistent with the Plan.

In the Response letter, the Exchange described a scenario that it believed could occur under the FINRA and BATS Proposals. Specifically, the Exchange believed that the FINRA and BATS Proposals would allow an alternative trading system (“ATS”) to execute matched trades of any of its participants at the price of a traded-at Protected Quotation if the ATS was displaying, on an agency basis, a quotation of another participant at the Protected Quotation. The Exchange believed that this scenario created a situation where ATS participants could trade at the price of a Protected Quotation without requiring them to display at that price, thus permitting them to “free-ride” on a displayed Protected Quotation of other ATS participants.⁵¹ One commenter stated that this scenario was unlikely to occur and that they were unaware of any current cases in which it would be allowed.⁵² As noted in the FINRA Approval Order, FINRA stated that it did not believe that the scenario described by the Exchange in its Response Letter

⁴⁷ See supra note 5.

⁴⁸ See supra note 6.

⁴⁹ See supra notes 9 and 10.

⁵⁰ See FIF Letter I and SIFMA Letter.

⁵¹ See Response Letter.

⁵² See FIF Letter II.

could occur under its rules. FINRA confirmed that a broker-dealer would not be permitted to trade based on interest that it is not responsible for displaying.⁵³

The Exchange responded in Partial Amendment No. 1 by amending its display exception to the Trade-at Prohibition to allow a Trading Center within a member organization to execute an order at the Protected Quotation as agent or riskless principal if the Trading Center within the member organization has displayed a quotation at the Protected Quotation Price in an agency or riskless principal capacity, which conforms with the FINRA and BATS Proposals.⁵⁴

Commenters also discussed the Retail Investor Order exceptions, Block Size Order exception to the Trade-at Prohibition as well as adding certain exceptions to more closely align the Trade-at Prohibition with Rule 611 of Regulation NMS. The commenters requested that the NYSE's proposed Retail Investor Order definition be amended to clarify that the Retail Investor Order exceptions in the Plan applied to both exchange trading and over-the-counter ("OTC") trading.⁵⁵ Initially, the Exchange agreed with the commenters' Retail Investor Order interpretation, but did not believe that amending the definition was necessary.⁵⁶ Subsequently, the Exchange amended its proposed Retail Investor Order definition to address the concerns of commenters and further clarify its intent.⁵⁷

⁵³ See FINRA Approval Order.

⁵⁴ See proposed NYSE Rule 67(e)(4)(C)(i) and proposed NYSE Rule 67(e)(4)(C)(ii). In Partial Amendment No. 2, Proposed NYSE Rule 67(e)(4)(C)(i) and proposed NYSE Rule 67(e)(4)(C)(ii) were amended to reflect the use of an independent trading unit, as defined in Rule 200(f) of Regulation SHO, by a Trading Center. See Partial Amendment No. 2, supra note 10. See also 17 CFR 242.200(f).

⁵⁵ See SIFMA Letter; FIF Letter I and FIF Letter II.

⁵⁶ See Response Letter.

⁵⁷ The definition was amended to remove references to the Exchange's retail liquidity program. See Partial Amendment No. 1, supra note 9.

One commenter stated the proposed Block Size exception to the Trade-at Prohibition should be amended because it would prevent the facilitation of block crosses that include small orders.⁵⁸ The commenter suggested that the rule be amended to permit the aggregation of non-block orders so long as at least one component of the block itself satisfied the definition of Block Size Order. The Exchange responded by stating that the commenter's suggested changes would be inconsistent with the Plan.⁵⁹

One commenter suggested that the proposed exceptions to the Trade-at Prohibition should more closely align with the exemptions granted to Rule 611 of Regulation NMS.⁶⁰ Specifically, the commenter referenced the Rule 611 of Regulation NMS exemptions for certain error correction transactions and certain print protection transactions.⁶¹ The Exchange agreed with the commenter, in part, and amended the proposal to include a Trade-at Prohibition exception for certain error correction transactions.⁶² The Exchange did not believe it was appropriate to provide a print protect transaction exception and did not directly address or amend its proposal to include such an exception.⁶³

⁵⁸ See FIF Letter I and FIF Letter II.

⁵⁹ See Response Letter.

⁶⁰ 17 CFR 242.611.

⁶¹ The commenter noted the following Commission orders related to Rule 611 of Regulation NMS. Order Exempting Certain Error Correction Transactions from Rule 611 of Regulation NMS under the Securities Exchange Act of 1934 (<http://www.sec.gov/rules/exorders/2007/34-55884.pdf>); Order Exempting Certain Print Protection Transactions from Rule 611 (<http://www.sec.gov/rules/exorders/2007/34-55883.pdf>). See FIF Letter I and FIF Letter II.

⁶² The Exchange stated the error correction transaction exception is “equally applicable in the Trade-at context.” See Partial Amendment No. 1, supra note 9.

⁶³ Similarly, the commenter requested that a print protection transaction exception to the Trade-at Prohibition be added to the FINRA and BATS Proposals. Like the Exchange, neither FINRA nor BATS added the provision to their proposals. See FINRA and BATS Approval Orders, supra note 6.

The two commenters noted the necessity for the Tick Size Pilot rules to be consistent across the Participants.⁶⁴ One commenter indicated the approval of inconsistent proposals would make compliance for market participants “virtually impossible.”⁶⁵ The other commenter stressed the importance of standardization for Tick Size Pilot rules stating it would be unreasonable to comply with different rules across Participants.⁶⁶ In response, the Exchange amended its proposed rule change to conform it to the approved FINRA and BATS Proposals.⁶⁷

V. Discussion and Findings

After carefully considering the proposed rule change, as amended, the comments submitted, and NYSE’s response to the comments, the Commission finds that the proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.⁶⁸ Specifically, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,⁶⁹ which requires, among other things, that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest, and are not designed to permit unfair discrimination between

⁶⁴ See SIFMA Letter and FIF Letter II.

⁶⁵ See SIFMA Letter.

⁶⁶ See FIF Letter II.

⁶⁷ See Partial Amendment No. 1, supra note 9. One commenter raised issues that are tangential and not directly related to the Exchange’s proposal, such as the implementation timeline and questions of interpretation. See FIF Letter I and FIF Letter II. The Commission notes that the Participants are currently drafting FAQs to address interpretative questions.

⁶⁸ In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁶⁹ 15 U.S.C. 78f(b)(5).

customers, issuers, brokers or dealers. In addition, the Commission finds that the proposed rule change is consistent with Section 6(b)(8) of the Act,⁷⁰ which requires that the rules of an exchange not impose any burden on competition that is not necessary or appropriate.

The Commission stated in the Approval Order that the Tick Size Pilot should provide a data-driven approach to evaluate whether certain changes to the market structure for Pilot Securities would be consistent with the Commission’s mission to protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation.⁷¹ As discussed below, the Commission believes that NYSE’s proposal is consistent with the requirements of the Act and would further the purpose of the Plan to provide meaningful data.

NYSE, as a Plan Participant, has an obligation to comply, and enforce compliance by its members, with the terms of the Plan. 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 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.”⁷² Proposed NYSE Rule 67 would impose compliance obligations on its members with the trading and quoting requirements set forth in Section VI of the Plan. As discussed below, the Commission also believes the proposal is consistent with the

⁷⁰ 15 U.S.C. 78f(b)(8).

⁷¹ See Approval Order, *supra* note 3.

⁷² 17 CFR 242.608(c). See also Section II.B of the Plan, which provides that each Participant will adopt rules requiring compliance by its members with provisions of the Plan. In addition, Section IV of the Plan requires all Participants and members of Participants to establish maintain and enforce written policy and procedures that are reasonably designed to comply with the applicable quoting and trading requirements specified in Section VI of the Plan for the Pilot Securities.

Act because it is designed to assist NYSE in meeting its regulatory obligations pursuant to Rule 608 of Regulation NMS and the Plan.⁷³

A. Definitions and Policies to Comply with the Plan⁷⁴

Proposed NYSE Rule 67 (a)(1) sets forth certain definitions to ensure consistency and compliance with the Plan. In Partial Amendment No. 1, the Exchange amended its proposed definition for Retail Investor Orders.⁷⁵ The term Retail Investor Order was amended to clarify that under the Plan Retail Investor Orders are eligible for the Plan's exceptions whether on the Exchange or OTC. Under the Plan, Retail Investor Orders are able to trade in increments other than \$0.05 when they are provided with price improvement of at least \$0.005. The exception is permitted on exchange Trading Centers as well as OTC. NYSE's proposed rule, as amended, clarifies this exception. The amended definition is intended to conform with FINRA Rule 6191(a)(7)(A)⁷⁶ and would apply to all member organizations' trading activities pursuant to the Plan, and not solely member organizations' trading through the Exchange's retail liquidity program. The Commission finds the definition consistent with the Act because it implements the Plan.

⁷³ The Commission understands that the Participants are developing interpretative guidance on the quoting and trading rules under the Plan and expects that Participants will continue to work with market participants on the implementation of the quoting and trading rules of the Tick Size Pilot.

⁷⁴ The preamble to proposed NYSE Rule 67 specifies that the rule's effectiveness shall be contemporaneous with the pilot period. The Commission believes that this proposed rule is consistent with the Act because it reinforces and clarifies important dates and obligations under the Plan.

⁷⁵ See proposed NYSE Rule 67(a)(1)(C). This section was renumbered in Partial Amendment No. 2. See Partial Amendment No. 2, supra note 10.

⁷⁶ See FINRA Approval Order, supra note 6.

In Partial Amendment No. 1, the Exchange added a definition for Trade-at ISO⁷⁷ to clarify the use of such orders under the Plan. The Commission notes that while the NYSE definition is similar to the Plan definition, the NYSE definition differs in that it requires that a Trade-at ISO be identified as a Trade-at ISO whereas under the Plan definition a Trade-at ISO would be identified as an ISO.⁷⁸ As noted in the FINRA Approval Order, the use of the term ISO in the context of Test Group Three Pilot Securities Three could be unclear as an ISO used for compliance with Rule 611 of Regulation NMS may differ from an ISO used for compliance with the Trade-at Prohibition. Accordingly, by requiring Trade-at ISOs to be identified as such, the Commission believes that NYSE's proposal should clarify and distinguish the use of ISOs and Trade-at ISOs under the Tick Size Pilot. The Commission believes that this should also facilitate implementation of the Plan.

In Partial Amendment No. 2, NYSE proposes to remove its proposed definition of Trading Center and instead rely on the definition of Trading Center set forth in the Plan. In the Original NYSE Proposal, NYSE proposed to define Trading Center with a reference to independent trading units, as defined in Rule 200(f) of Regulation SHO. In Partial Amendment No. 2, NYSE noted that this proposed definition could be interpreted in a manner that would be inconsistent with the intentions of the Exchange and the Plan. As discussed below, the concept of an independent trading unit would only apply to the display exception to the Trade-at

⁷⁷ See proposed NYSE Rule 67(a)(1)(D). This section was renumbered in Partial Amendment No. 2. See Partial Amendment No. 2, *supra* note 10.

⁷⁸ Section I(MM) defined a Trade-at ISO as a limit order for a Pilot Security that meets the following requirements: (1) when routed to a Trading Center, the limit order is identified as an ISO; and (2) simultaneously with the routing of the limit order identified as an ISO, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of any protected bid, in the case of a limit order to sell, or the full displayed size of any protected offer, in the case of a limit order to buy, for the Pilot Security with a price that is equal to the limit price of the limit order identified as an ISO. These additional routed orders also must be marked as ISO.

Prohibition. Accordingly, the Commission finds that the definitions set forth in NYSE Rule 67(a) are consistent with the Act because they implement and clarify provisions of the Plan.

Proposed NYSE Rule 67(a)(2) provides that NYSE, as a Plan Participant, is subject to the applicable requirements of the Plan. Proposed NYSE Rule 67(a)(3) provides that member organizations must establish, maintain, and enforce written policies and procedures that are reasonably designed to meet the applicable quoting and trading requirements of the Plan. Proposed NYSE Rule 67(a)(4) provides that the Exchange systems will not display, quote, or trade in violation of the applicable quoting and trading requirements for a Pilot Security specified in the Plan and its rule, unless such quotation or transaction is specifically exempted under the Plan. As noted above, Sections II.B and IV of the Plan provide that each Participant must establish, maintain and enforce written policies and procedures that are reasonably designed to comply with the quoting and trading requirements of the Plan and adopt rules requiring compliance by its members with the terms of the Plan. Accordingly, proposed NYSE Rules 67(a)(2), (3) and (4) are consistent with the Act as they clarify and implement these Plan provisions.

B. Pilot Securities Under \$1.00 during the Pilot Period

Proposed NYSE Rule 67(a)(5) provides a mechanism to address instances where the price of a Pilot Security assigned to a Test Group falls below \$1.00. Specifically, if the price of a Pilot Security assigned to a Test Group falls below \$1.00 during a trading day, the Pilot Security would remain in its assigned Test Group. If, however, a Pilot Security has a Closing Price below \$1.00 during any trading day that Pilot Security would be moved out of its respective Test Group and into the Control Group. Proposed NYSE Rule 67(a)(5) also sets forth that notwithstanding the foregoing, Pilot Securities would continue to be subject to the data collection requirements

set forth in NYSE Rule 67(b). The Commission notes that the selection criteria for Pilot Securities were developed to minimize the likelihood of the inclusion of securities that trade with a share price of \$1.00 or less. However, the Commission understands that there could be instances over the course of the Pilot Period where a Pilot Security's price falls below \$1.00. According to the Participants, a \$0.05 quoting and/or trading increment could be harmful to trading for such low priced Pilot Securities. Therefore, the Commission believes that this provision is consistent with the Act because it should help to ensure that the universe of Pilot Securities remains constant over the Pilot Period while also addressing trading concerns for Pilot Securities that experience a fall in price.⁷⁹

C. Quoting and Trading Rules for Test Group One and Test Group Two

Proposed NYSE Rule 67(c) provides that no member may display, rank, or accept from any person any displayable or non-displayable bids or offers, orders, or indications of interest in any Pilot Security in Test Group One in increments other than \$0.05. Proposed NYSE Rule 67(c) also provides that orders priced to execute at the midpoint of the NBBO or best PBBO and orders entered in the Exchange's Retail Liquidity Program as Retail Price Improvement Orders may be ranked and accepted in increments of less than \$0.05. Finally, proposed NYSE Rule 67(c) provides that Pilot Securities in Test Group One may continue to trade at any price increment that is currently permitted by NYSE Rule 62.10. The Commission finds that proposed NYSE Rule 67(c) is consistent with the Act because it implements provisions of the Plan.⁸⁰

Proposed NYSE Rule 67(d)(1) provides that no member may display, rank, or accept from any person any displayable or non-displayable bids or offers, orders, or indications of

⁷⁹ The Commission notes that it has granted NYSE an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 21.

⁸⁰ See Section VI.B of the Plan.

interest in any Pilot Security in Test Group Two in increments other than \$0.05. However, proposed NYSE Rule 67(d)(1) provides that orders priced to trade at the midpoint of the NBBO or PBBO or orders entered in the Exchange's Retail Liquidity Program as Retail Price Improvement Orders may be ranked and accepted in increments of less than \$0.05. Proposed NYSE Rule 67(d)(2) provides that members may not execute trading in increments other than \$0.05 including Brokered Cross Trades, unless there is an applicable exception provided in proposed NYSE Rule 67(d)(3). Proposed Rule 67(d)(3) provides that Pilot Securities in Test Group Two may trade in increments less than \$0.05 in the following circumstances: (A) trading may occur at the midpoint between the NBBO or the PBBO; (B) Retail Investor Orders may be provided with price improvement of at least \$0.005 better than the PBBO; (C) Negotiated Trades may trade in increments less than \$0.05; and (D) customer orders to comply with NYSE Rule 5320 following the execution of a proprietary trade at an increment other than \$0.05 that is permissible pursuant to a Plan exception.⁸¹ The Commission finds that proposed NYSE Rules 67(d)(1), (2) and (3)(A), (3)(B) and (3)(C) are consistent with the Act because they implement provisions of the Plan.⁸²

In Partial Amendment No. 1, NYSE proposes to add a trading increment exception in NYSE Rule 67(d)(3)(D), which would allow the execution of a customer order following a proprietary trade by a NYSE member at an increment other than \$0.05 in the same security, on the same side and at the same price as (or within the prescribed amount of) a customer order owed a fill pursuant to NYSE Rule 5320, where the triggering proprietary trade at an increment other than \$0.05 was permissible pursuant to an exception under the Plan. The Exchange believes that this exception should facilitate the ability of its members to continue to protect

⁸¹ See Partial Amendment No. 1, supra note 9.

⁸² See Section VI.C of the Plan.

customer orders while retaining the flexibility to engage in proprietary trades that comply with an exception to the Plan.⁸³ Based on the foregoing, the Commission finds that proposed NYSE Rule 67(d)(3)(D) is consistent with the Act.⁸⁴

D. Quoting and Trading Rules for Test Group Three

Proposed NYSE Rule 67(e)(1) provides that no member may display, rank, or accept from any person any displayable or non-displayable bids or offers, orders, or indications of interest in any Pilot Security in Test Group Three in increments other than \$0.05. However, proposed NYSE Rule 67(e)(1) provides that orders may be ranked and accepted in increments of less than \$0.05 for Test Group Three Pilot Securities if such order is priced to trade at the midpoint of the NBBO or PBBO or is entered in the Exchange's Retail Liquidity Program as Retail Price Improvement Orders. Proposed NYSE Rule 67(e)(2) provides that the \$0.05 trading increment applies to all trades for Test Group Three Pilot Securities, including Brokered Cross Trades, unless there is an applicable exception to the \$0.05 trading increment requirement. Proposed Rule 67(e)(3) provides that Pilot Securities in Test Group Three may trade in increments less than \$0.05 in the following circumstances: (A) trading may occur at the midpoint between the NBBO or the PBBO; (B) Retail Investor Orders may be provided price improvement of at least \$0.005 better than the PBBO; (C) Negotiated Trades may trade in an increment less than \$0.05; and (D) customer orders executed to comply with NYSE Rule 5320 following the execution of a proprietary trade at an increment other than \$0.05 that is permissible pursuant to a Plan exception.⁸⁵ The Commission finds that proposed NYSE Rules 67(e)(1), (2)

⁸³ The Commission notes that a similar exception was added to the FINRA Proposal in response to a commenter's request. See FINRA Approval Order, supra note 6.

⁸⁴ The Commission notes that it has granted NYSE an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 21.

⁸⁵ See Partial Amendment No. 1, supra note 9.

and (3)(A), (3)(B) and (3)(C) are consistent with the Act because they implement provisions of the Plan.⁸⁶ In addition, as discussed above,⁸⁷ the Commission finds that proposed NYSE Rule 67(e)(3)(D) is consistent with the Act.

1. Quoting and Trading Rules for Test Group Three: Trade-at Prohibition

Proposed NYSE Rule 67(e)(4) describes the Trade-at Prohibition for Test Group Three Pilot Securities and applicable exceptions. Specifically, proposed NYSE Rule 67(e)(4)(A) defines the Trade-at Prohibition as the prohibition against executions by a Trading Center of a sell order for a Pilot Security at the price of a Protected Bid or the execution of a buy order for a Pilot Security at the price of a Protected Offer during regular trading hours. Proposed NYSE Rule 67(e)(4)(B) sets forth that, absent any of the exceptions listed in subparagraph (C), no member organization may execute a sell order for a Pilot Security in Test Group Three at the price of a Protected Bid or execute a buy order for a Pilot Security in Test Group Three at the price of a Protected Offer. The Commission finds these provisions consistent with the Act because they implement provisions set forth in the Plan.⁸⁸

Proposed NYSE Rule 67(e)(4)(C) lists the exceptions to the Trade-at Prohibition. The proposed exceptions set forth in NYSE Rules 67(e)(4)(C)(iv), (v), (vi), (vii), (viii), (x), (xi), (xii), (xiv) mirror the exceptions set forth in the Plan.⁸⁹ The Commission finds these exceptions to be consistent with the Act because they implement Plan provisions.⁹⁰

⁸⁶ See Section VI.D of the Plan.

⁸⁷ See Section V.C above related to the discussion of proposed NYSE Rule 67(d)(3)(D). The Commission notes that it has granted NYSE an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 21.

⁸⁸ See Section VI.D of the Plan.

⁸⁹ See Section VI.D(3) through (7), (9), (10), (11) and (13) of the Plan.

⁹⁰ Id.

In Partial Amendment No. 1, NYSE amended its display exception to the Trade-At Prohibition. Specifically, NYSE proposed to add new language in proposed NYSE Rule 67(e)(4)(C)(i) to permit the execution of an order as agent or riskless principal by a Trading Center within a member organization that has displayed a quotation as agent or riskless principal, via either a processor or an SRO Quotation Feed, at a price equal to the traded-at Protected Quotation, that was displayed before the order was received but only up to the full displayed size of the Trading Center's previously displayed quote.

In Partial Amendment No. 1, the Exchange also rennumbers the originally proposed subsection (i) as subsection (ii) to proposed NYSE Rule 67(e)(4)(C). Consistent with the discussion above, the provision was also amended to exclude displayed quotations on a riskless principal basis from the types of quotations that a Trading Center may rely on as an exception to the Trade-at Prohibition under NYSE Rule 67(e)(4)(C)(ii). Proposed NYSE Rule 67(e)(4)(ii) now permits the execution of an order by a Trading Center within a member organization that has displayed a quotation for the account of that Trading Center on a principal basis (excluding riskless principal), via either a processor or an SRO Quotation Feed, at a price equal to the traded-at Protected Quotation, that was displayed before the order was received, but only up to the full displayed size of the Trading Center's previously displayed quote. A Trading Center that has displayed a quotation as principal, excluding riskless principal, may execute an order as principal, agent or riskless principal.

In Partial Amendment No. 2, NYSE proposes to specify that a Trading Center that uses independent trading units, as defined under Rule 200(f) of Regulation SHO, must execute orders

that rely on the display exception set forth in NYSE Rules 67(e)(4)(C)(i) or (ii) within the same independent trading unit that displayed the relevant quotation.⁹¹

The Commission finds that proposed NYSE Rule 67(e)(4)(C)(i) and (ii) are consistent with the Act. The Commission believes that the proposed rule clarifies the operation of the display exception for the Trade-at Prohibition in a manner consistent with the goals of the Plan. Under the proposed rule, a Trading Center would only be able to execute an order in the same capacity in which it has displayed a quotation. Accordingly, a Trading Center could not rely on an agency quotation to execute on a principal basis. Further, a Trading Center that uses independent trading units would be restricted in its ability to rely on quotations displayed by other independent trading units. As noted above, a Trading Center that utilizes independent trading units may only execute an order in the independent trading unit that displayed the quotation. The Commission believes that these additional proposed rules implement the display exception to the Trade-at Prohibition in a manner that should incentivize the display of liquidity.⁹²

In Partial Amendment No. 1, NYSE proposes to remove an exception related to odd lot orders and odd lot portions of partial round lot orders. The Exchange noted that it agreed with FINRA and BATS in that a separate exception was unnecessary and that while odd lots are not Protected Quotations, a Trading Center displaying an odd lot order via an SRO Quotation Feed would be able to execute the odd lot order based on such display and the price and size

⁹¹ See Partial Amendment No. 2, supra note 10. See also 17 CFR 242.200(f). As noted in the Original NYSE Proposal, a Trading Center cannot rely on the quotations displayed by that broker-dealer from a different independent trading unit. The Original NYSE Proposal contained the independent trading unit limitation in its proposed definition of Trading Center. As noted above, NYSE removed its proposed definition of Trading Center in Partial Amendment No. 2.

⁹² See Approval Order, supra note 3. See also FINRA and BATS Approval Orders, supra note 6.

requirements of the Trade-at Prohibition. The Commission notes that the Plan does not include a separate exception for odd lots orders. In addition, the Commission notes that it addressed the treatment of odd lots orders in the Approval Order.⁹³ Accordingly, the Commission believes that the NYSE's proposed rule, as amended by Partial Amendment No. 1, is consistent with the Act because the rule reflects the provisions of the Plan.

Proposed NYSE Rule 67(e)(4)(C)(iii) sets forth an exception to the Trade-at Prohibition for orders of Block Size that differs from the exception to the Trade-at Prohibition set forth in the Plan. NYSE proposes additional provisions with respect to Block Size orders including that such orders at the time of origin may not be: (A) an aggregation of non-block orders; (B) broken into orders smaller than Block Size prior to submitting the order to a Trading Center for execution; or (C) executed on multiple Trading Centers.

As noted above, one commenter stated that the proposed rule would prevent the facilitation of block crosses that include small orders.⁹⁴ The commenter suggested that the rule be amended to permit the aggregation of non-block orders so long as at least one component of the block itself satisfied the definition of Block Size Order. The NYSE believes that the commenter's suggestion is inconsistent with the Plan.⁹⁵

The Commission believes that the additional criteria proposed by NYSE for the Block Size exception to the Trade-at Prohibition are consistent with the Act.⁹⁶ In the Approval Order, the Commission modified the Block Size definition for the purposes of the Plan to more closely reflect the trading characteristics of potential Pilot Securities. The Commission believes that

⁹³ See Approval Order, supra note 3

⁹⁴ See FIF Letters I and II, supra note 5.

⁹⁵ See Response Letter, supra note 6.

⁹⁶ The Commission notes that the NYSE's rule is consistent with the FINRA and BATS Rules. See FINRA and BATS Approval Orders, supra note 6.

proposed NYSE Rule 67(e)(4)(C)(iii) appropriately limits the scope and applicability of the Block Size exception, and should help to exclude trades and order handling scenarios that were not contemplated or intended to be considered for an exception for the Trade-at Prohibition.

As noted above, the Exchange proposes in NYSE Rule 67(a)(1)(D)⁹⁷ to clarify the definition of Trade-at ISOs in connection with the Trade-at Prohibition exception listed in proposed NYSE Rule 67(e)(4)(C)(ix) and (x). NYSE proposes to reflect its proposed Trade-at ISO definition in its proposed NYSE Rule 67(e)(4)(C)(ix) to reflect that orders are identified as Trade-at ISOs. The Commission believes that NYSE's proposal in its proposed Rule 67(e)(4)(C)(ix) should clarify the use of ISOs and Trade-at ISOs under the Plan and facilitate their implementation.⁹⁸

Proposed NYSE Rule 67(e)(4)(C)(xiii) sets forth an exception to the Trade-at Prohibition for stopped orders. A stopped order is defined as an order executed by a Trading Center which, at the time of order receipt, the Trading Center had guaranteed an execution at no worse than a specified price where: (A) the stopped order was for the account of a customer; (B) the customer agreed to the specified price on an order-by-order basis; and (C) the price of the Trade-at transaction was, for a stopped buy order, equal to or less than the National Best Bid in the Pilot Security at the time of execution or, for a stopped sell order, equal to or greater than the National Best Offer in the Pilot Security at the time of execution, as long as such order is priced at an acceptable increment.

In Partial Amendment No. 1, NYSE amended the rule text of proposed NYSE Rule 67(e)(4)(C)(xiii) to clarify its operation under the Trade-at Prohibition, which would conform the

⁹⁷ See supra Section V.A.

⁹⁸ The Commission notes that the NYSE definition is consistent with the FINRA and BATS rules. See FINRA and BATS Approval Orders, supra note 6.

NYSE rule to the previously approved FINRA and BATS Proposals.⁹⁹ The Commission finds that proposed NYSE Rule 67(e)(4)(C)(xiii), as modified by Partial Amendment No. 1, is consistent with the Act because it implements the Plan provision in a manner that clarifies its operation for these order types.¹⁰⁰

In Partial Amendment No. 1, NYSE proposes an additional exception to the Trade-at Prohibition related to “bona fide errors.”¹⁰¹ Specifically, proposed NYSE Rule 67(e)(4)(C)(xv) would provide an exception to the Trade-at Prohibition where the order is to correct a bona fide error, which is recorded by the Trading Center in its error account. The proposed definition for a “bona fide error” is: (A) the inaccurate conveyance or execution of any term of an order including, but not limited to, price, number of shares or other unit of trading; identification of the security; identification of the account for which securities are purchased or sold; lost or

⁹⁹ See FINRA and BATS Approval Orders, *supra* note 6.

¹⁰⁰ The Commission notes that it granted NYSE an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, *supra* note 21.

¹⁰¹ A commenter requested this particular exception to the Trade-at Prohibition. See FIF Letter I and FIF Letter II, *supra* note 5. The Commission notes that this commenter also suggested that there should be a print protection transaction exception to the Trade-at Prohibition that corresponds to the print protection transaction exemption that is applicable to Rule 611 of Regulation NMS. See FIF Letter I and FIF Letter II. As noted in the FINRA and BATS Approval Orders, the Commission does not agree that a print protection transaction exception would be consistent with the Trade-At Prohibition in the Plan. First, the print protection transaction exemption applicable to Rule 611 of Regulation NMS is inconsistent with the Trade-at Prohibition because the print protection exemption under Rule 611 of Regulation NMS explicitly contemplates protection for both displayed and reserve (undisplayed) size of orders. In this regard, the Commission believes that such an exception for the Trade-at Prohibition often will be unnecessary because a print protection transaction exception for the Trade-at Prohibition would need to be premised upon a displayed customer order, which already is excepted from the Trade-at Prohibition if it satisfies the requirements of proposed NYSE Rule 67(e)(4)(C)(i) and (ii) and the Plan. Moreover, providing a print protection transaction exemption from the Trade-At Prohibition would create the potential for trading scenarios that would result in better-priced, displayed orders being bypassed for the execution of inferior, same-priced orders. The Commission believes such a result is inconsistent with the Plan in general, and the Trade-at Prohibition in particular.

otherwise misplaced order tickets; short sales that were instead sold long or vice versa; or the execution of an order on the wrong side of a market; (B) the unauthorized or unintended purchase, sale, or allocation of securities, or the failure to follow specific client instructions; (C) the incorrect entry of data into relevant systems, including reliance on incorrect cash positions, withdrawals, or securities positions reflected in an account; or (D) a delay, outage, or failure of a communication system used to transmit market data prices or to facilitate the delivery or execution of an order.¹⁰² In order to utilize this exception to the Trade-at Prohibition, the following conditions must be met: (1) the bona fide error must be evidenced by objective facts and circumstances, the Trading Center must maintain documentation of such facts and circumstances, and the Trading Center must record the transaction in its error account; (2) the Trading Center must establish, maintain, and enforce written policies and procedures that are reasonably designed to address the occurrence of errors and, in the event of an error, the use and terms of a transaction to correct the error in compliance with this exception; and (3) the Trading Center must regularly surveil to ascertain the effectiveness of its policies and procedures to address errors and transactions to correct errors and takes prompt action to remedy deficiencies in such policies and procedures.¹⁰³

The Commission finds that the exception to the Trade-at Prohibition for the correction of bona fide errors is consistent with the Act.¹⁰⁴ The Commission believes that this exception

¹⁰² Absent a bona fide error as defined above, the proposed exception would not apply to a broker dealer's mere failure to execute a not-held order in accordance with a customer's expectations.

¹⁰³ See Partial Amendment No. 1, *supra* note 9. See also Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007).

¹⁰⁴ The Commission notes that the conditions for a bona fide error exception for the Trade-at Prohibition would be consistent with the corresponding bona fide error exemption for Rule 611 of Regulation NMS and would apply only to the error correction transaction itself and would not, for example, apply to any subsequent trades effected by a Trading

should promote efficiency and the best execution of investor orders. Analogous to the Commission's order exempting such orders from Rule 611 of Regulation NMS, this exemption will allow Trading Centers to execute error correction transactions at the appropriate prices to correct bona fide errors without having to qualify for one of the exceptions to the Trade-at Prohibition.¹⁰⁵

The Commission finds that the NYSE proposal to implement the Tick Size Pilot quoting and trading requirements are consistent with the Act. The proposal clarifies and implements the quoting and trading requirements set forth in the Plan.

VI. Solicitation of Comments of Partial Amendment Nos. 1 and 2

Interested persons are invited to submit written data, views, and arguments concerning Partial Amendment Nos. 1 and 2, including whether the proposed rule change, as modified by Partial Amendment Nos. 1 and 2, is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-NYSE-2015-46 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission,

Center to eliminate a proprietary position connected with the error correction transaction or a broker dealer's mere failure to execute a not-held order in accordance with a customer's expectations. See also Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007).

¹⁰⁵ The Commission notes that it has granted NYSE an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 21.

100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-NYSE-2015-46. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-NYSE-2015-46 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

VII. Accelerated Approval of Proposed Rule Change, as Modified by Partial Amendment Nos. 1 and 2

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act, to approve the proposed rule change, as modified by Partial Amendment Nos. 1 and 2, prior to the 30th day after the date of publication of Partial Amendment Nos. 1 and 2 in the Federal Register. Partial Amendment Nos. 1 and 2 were submitted to conform the NYSE Proposal to the previously approved FINRA and BATS Proposals. To achieve this uniformity, NYSE amends several

requirements set forth in this proposed rule change. In Partial Amendment No. 1, NYSE proposes to first, add an exception to permit members to fill a customer order in a Pilot Security in Test Group Two or Three at a non-nickel increment to comply with NYSE Rule 5320 (Prohibition Against Trading Ahead of Customer Orders) under limited circumstances; second, amend the display exception of Trade-at Prohibition to allow a Trading Center who is displaying as either agent or riskless principal to execute as agent or riskless principal up to the displayed size; third, remove the explicit odd lot exception from the Trade-at Prohibition; fourth, amend the proposal to adopt an exception to the Trade-at Prohibition for certain error correction transactions; fifth, modify the stopped order exception to the Trade-at Prohibition to clarify its operation under the Plan; sixth, clarify the use of Trade-at ISOs in connection with the Trade-at Prohibition, and finally, amend the definition of a “Retail Investor Order.”

NYSE believes that the change to allow members to fill a customer order at a non-nickel increment to comply with NYSE Rule 5320 under limited circumstances best facilitates the ability of members to continue to protect customer orders while retaining the flexibility to engage in proprietary trades that comply with an exception to the Plan. NYSE believes the amendment to the display exception to the Trade-at Prohibition would allow a Trading Center to execute an order at the Protected Quotation in the same capacity in which it has displayed a quotation, at a price equal to the Protected Quotation and up its displayed size would be consistent with the previously stated Commission view on the display exception.¹⁰⁶ NYSE believes removing its proposed odd lot exception to the Trade-at Prohibition is appropriate because it is unnecessary and that a Trading Center displaying an odd lot would be able to execute the trade based on display, price and size requirements. NYSE believes adding an

¹⁰⁶ See FINRA and BATS Approval Orders, supra note 6.

exception to the Trade-at Prohibition for error correction transactions is appropriate as this exception is equally applicable to the Trade-at Prohibition as to Rule 611 of Regulation NMS, and that adopting this exception appropriately aligns the requirements of the Trade-at Prohibition with Rule 611 of Regulation NMS. Similarly, NYSE believes that amending the stopped order exception will result in more consistent treatment under Regulation NMS and the Plan. NYSE believes that amending the reference to ISOs in connection with the Trade-at Prohibition is consistent with the Act because it will better align that reference to the definition of “Trade-At Intermarket Sweep Order” as set forth in the Plan. Finally, NYSE believes the amended definition of “Retail Investor Order” clarifies that the exception should be generally applicable and not solely to the Exchange’s retail liquidity program.

In Partial Amendment No. 2, NYSE proposes to (1) delete its proposed definition of Trading Center; (2) add a reference to independent aggregation units to its proposed NYSE Rule 67(e)(4)(C)(i) and (ii); and (3) correct a typographical error in proposed the Trade-at ISO definition located in proposed NYSE 67(a)(1)(D)(ii). NYSE believes that removing the definition of Trading Center and referring to independent trading units in proposed Rule 67(e)(4)(C)(i) and (ii) makes its rule consistent with the FINRA and BATS Proposals and further clarifies the intent of its rule and the Plan. In addition, NYSE believes that the correction of the typographical error is minor and non-substantive.

Based on the foregoing, the Commission believes that the changes in Partial Amendment Nos. 1 and 2 to: (1) add an exception to NYSE Rule 67(d)(3)(D) and NYSE Rule 67(e)(3)(D) to permit members to fill a customer order in a Pilot Security at a non-nickel increment to comply with NYSE Rule 5320 under limited circumstances, (2) amend the NYSE Rule 67(e)(4)(C)(i) and NYSE Rule 67(e)(4)(C)(ii) relating to the display exception of the Trade-at Prohibition for a

Trading Center displaying as agent or riskless principle, (3) remove the explicit odd lot exception to the Trade-at Prohibition that was previously listed as NYSE Rule 67(e)(4)(C)(i) and Supplementary Material .10, (4) add NYSE Rule 67(e)(4)(C)(xv) to create an exception to the Trade-at Prohibition for certain error correction transactions, (5) modify NYSE Rule 67(e)(4)(C)(xiii) to amend the stopped order exception to the Trade-at Prohibition, (6) add the definition of Trade-at ISO as NYSE Rule 67(a)(1)(E) to clarify the use of ISOs in connection with the Trade-at Prohibition, (7) modify the definition of Retail Investor Order contained in NYSE Rule 67(a)(1)(D) to clarify the rule's applicability, (8) delete the NYSE definition of Trading Center, (9) add references to independent trading units in proposed NYSE Rules 67(e)(4)(C)(i) and (ii), and (10) correct non substantive typographical errors are all consistent with the Act. Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Partial Amendment Nos. 1 and 2, on an accelerated basis, pursuant to Section 19(b)(2) of the Act.

VIII. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act¹⁰⁷ that the proposed rule change, as modified by Partial Amendment Nos. 1 and 2 (SR-NYSE-2015-46) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁰⁸

Robert W. Errett
Deputy Secretary

¹⁰⁷ 15 U.S.C. 78s(b)(2).

¹⁰⁸ 17 CFR 200.30-3(a)(12).