

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-77218; File No. SR-FINRA-2015-047)

February 23, 2016

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 and Order Granting Accelerated Approval to 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

I. Introduction

On November 13, 2015, the Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 FINRA Rule 6191(a) 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 November 25, 2015.⁴ The Commission received three comment letters on the proposal and a response letter from FINRA.⁵ On February 23, 2016,

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. 76483 (November 19, 2015). 80 FR 73853.

⁵ See letters from Mary Lou Von Kaenel, Managing Director, Financial Information Forum, dated December 16, 2015 (“FIF Letter”); Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association, dated December 18, 2015 (“SIFMA Letter”); Brendon J. Weiss, Co-Head, Government Affairs, Intercontinental Exchange, Inc. and John K. Kerin, CEO, Chicago Stock Exchange, Inc., dated January 15, 2016 (“NYSE Letter”); and Andrew Madar, Associate General Counsel, FINRA and Chris Solgan, Assistant General Counsel, BATS, dated February 23, 2016 (“FINRA Response Letter”).

FINRA filed Partial Amendment No. 1.⁶ On January 7, 2016, the Commission designated a longer period for Commission action on the proposal, until February 23, 2016.⁷ This order approves the proposal, as modified by Partial Amendment No. 1.

II. Background

On August 25, 2014, NYSE Group, Inc., on behalf of BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., Financial Industry Regulatory Authority, 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”⁸), filed with the Commission, pursuant to Section 11A of the Act⁹ and Rule 608 of Regulation NMS thereunder,¹⁰ the Plan to Implement the Tick Size Pilot.¹¹ The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.¹² The Plan was published for comment in the Federal

⁶ In Partial Amendment No. 1, FINRA proposes to: (1) add 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 FINRA Rule 5320 under limited circumstances; (2) add exceptions to the Trade-at Prohibition for certain error correction transactions; (3) modify the stopped order exception to the Trade-at Prohibitions to better align it with the stopped order exception in Rule 611; and (4) clarify the use of Trade-at Intermarket Sweep Orders in connection with the Trade-At Prohibition.

⁷ See Securities Exchange Act Release No. 76855, 81 FR 1670 (January 13, 2016).

⁸ 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. This amendment is effective upon filing pursuant to Rule 608(b)(3)(iii) of Regulation NMS.

⁹ 15 U.S.C. 78k-1.

¹⁰ 17 CFR 242.608.

¹¹ See letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

¹² See Securities Exchange Act Release No. 72460, 79 FR 36840 (June 30, 2014).

Register on November 7, 2014,¹³ and approved by the Commission, as modified, on May 6, 2015.¹⁴ On November 6, 2015, the Commission issued an exemption to the Participants from implementing the Plan until October 3, 2016.¹⁵

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 Plan.¹⁶ 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.¹⁷ FINRA is proposing to adopt FINRA Rule 6191(a) and certain Supplementary Material to implement the quoting and trading requirements of the Tick Size Pilot.¹⁸

¹³ See Securities Exchange Act Release No. 73511 (November 3, 2014), 79 FR 66423.

¹⁴ See Approval Order, supra note 3.

¹⁵ See Securities Exchange Act Release No. 76382, 80 FR 70284 (November 13, 2015).

¹⁶ Rule 608(c) of Regulation NMS. 17 CFR 242.608(c). See also Plan Sections II.B and IV.

¹⁷ The data collection requirements for the Plan are specified in Appendices B and C. See Approval Order, supra note 3. FINRA has adopted rules to implement the data collection requirements under the Plan. See FINRA Rule 6191(b). Securities Exchange Act Release No. 77164 (February 17, 2016), 81 FR 9043, (February 23, 2016).

¹⁸ NYSE, on behalf of the Plan Participants, submitted a letter to the Commission requesting 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

III. Description of the Proposed Rule Change

A. Policies and Procedures to Comply with the Plan

Proposed FINRA Rule 6191(a) would establish the rules necessary for compliance with the applicable quoting and trading requirements specified in the Plan for FINRA and its members.¹⁹

Proposed FINRA Rule 6191(a)(1) provides that members shall establish, maintain, and enforce written policies and procedures that are reasonably designed to comply with the applicable quoting and trading requirements of the Plan. Proposed FINRA Rule 6191(a)(2) sets forth that FINRA systems will not display quotations in violation of the Plan or its proposed rule.

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

Proposed FINRA Rule 6191(a)(3) sets forth the procedures for Pilot Securities whose price drops below \$1.00 during the Pilot Period.²⁰ If the price of a Pilot Security drops below \$1.00 during regular trading hours on any trading day, the Pilot Security will continue to trade according to the quoting and trading requirements of its originally assigned Test Group within the Plan. If a Pilot Security has a Closing Price²¹ below \$1.00 on any trading day the Pilot

Commission, pursuant to its authority under Rule 608(e) of Regulation NMS, has granted FINRA 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 Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, dated February 23, 2016 (“SEC Exemption Letter”).

¹⁹ FINRA proposed that its Rule 6191 be in effect during a pilot period to coincide with the Pilot Period of the Plan, including any extensions. See Proposed FINRA Rule 6191(a) Supplementary Material .03.

²⁰ FINRA has requested an exemption from the Plan related to this provision. See October Exemption Request, supra note 18.

²¹ Capitalized terms used in this Order are defined in the Plan, unless otherwise specified herein. Further, FINRA has proposed to use the Plan’s defined terms in its Rule 6191(a). See Proposed FINRA Rule 6191(a) Supplementary Material .01.

Security would be moved from its respective Test Group into the Control Group, and would be quoted and traded at any price increment that is currently permitted for the remainder of the Pilot Period. Proposed FINRA Rule 6191(a)(3) further provides, that notwithstanding anything to the contrary, all Pilot Securities will continue to be subject to FINRA Rule 6191(b), which sets forth FINRA's data collection requirements for Tick Size Pilot.

C. Quoting and Trading Rules for Test Group One

Proposed FINRA Rule 6191(a)(4) describes the quoting and trading requirements for Pilot Securities in Test Group One. Specifically, FINRA 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. Orders priced at either 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 a Participant-operated retail liquidity program may be ranked and accepted in increments of less than \$0.05. The provision also sets forth that Pilot Securities in Test Group One would continue to be able to trade at any price increment that is currently permitted by applicable Participant, Commission, and FINRA rules.

D. Quoting and Trading Rules for Test Group Two

Proposed FINRA Rule 6191(a)(5) describes the quoting and trading requirements of Pilot Securities in Test Group Two. Specifically, FINRA 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.²²

²² Similar to the exception in Test Group One, orders priced to trade at the midpoint of the NBBO or PBBO and orders entered into a Participant-operated retail liquidity price

Further, FINRA proposes that absent any enumerated exceptions, no member organization may execute an order in any increment other than \$0.05 for Pilot Securities in Test Group Two.²³

Proposed FINRA Rule 6191(a)(5)(C) provides that Test Group Two Pilot Securities may trade in increments less than \$0.05 in three circumstances: (1) trading may occur at the midpoint between the NBBO or the PBBO; (2) Retail Investor Orders that are provided with price improvement that is at least \$0.005 better than the PBBO; and (3) Negotiated Trades may trade in increments less than \$0.05.

In Partial Amendment No. 1, FINRA proposes an additional exception from the requirement that trades in Test Group Two must be in \$0.05 increments. Specifically, FINRA proposes to permit members to execute customer orders to comply with FINRA Rule 5320 following the execution of a proprietary trade by the member at an increment other than \$0.05, where such proprietary trade was permissible pursuant to an exception under the Plan.²⁴

E. Quoting and Trading Rules for Test Group Three

Proposed FINRA Rule 6191(a)(6) describes the quoting and trading requirements of Pilot Securities in Test Group Three. FINRA proposes for Pilot Securities in Test Group Three 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 \$0.05.²⁵ Proposed FINRA

program may be ranked and accepted in increments of less than \$0.05. See Proposed FINRA Rule 6191(a)(5)(A).

²³ Proposed FINRA Rule 6191(a)(5)(B) applies to all trades, including Brokered Cross Trades. A Brokered Cross Trade is defined in the Plan as a trade that a broker-dealer that is a member of a Participant executes directly by matching simultaneous buy and sell orders for a Pilot Security. See Plan Section I.G.

²⁴ See Partial Amendment No. 1, supra note 6. FINRA has requested an exemption from the Plan related to this provision. See February Exemption Request, supra note 18.

²⁵ Similar to the exceptions for Test Group One and Test Group Two, orders priced to trade at the midpoint of the NBBO or PBBO and orders entered in a Participant-operated retail

Rule 6191(a)(6)(B) states that for Test Group Three Pilot Securities no member would be permitted to execute an order, including Brokered Cross Trades, in an increment other than \$0.05 unless there was an exception enumerated by the rule. Proposed FINRA Rule 6191(a)(6)(C) sets forth four exceptions for trading of Test Group Three Pilot Securities to occur in increments of less than \$0.05: (1) at the midpoint between the NBBO or the PBBO; (2) for Retail Investor Orders that are provided with price improvement at least \$0.005 better than the PBBO; (3) for Negotiated Trades; and (4) for executions of a customer order to comply with FINRA Rule 5320 following the execution of a proprietary trade by the member at an increment other than \$0.05, where such proprietary trade was permissible pursuant to an exception under the Plan.²⁶

Proposed FINRA Rule 6191(a)(6)(D)(i) sets forth that, absent an exception set forth in proposed FINRA Rule 6191(a)(6)(D)(ii), no member that operates a Trading Center 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 during regular trading hours (i.e., the “Trade-at Prohibition”). Under the Trade-at Prohibition, a member that operates a Trading Center that is displaying a quotation, via either a processor or an SRO quotation feed, that is at a price equal to the traded-at Protected Bid or Protected Offer is permitted to execute orders at that level, but only up to the amount of its displayed size. A member that operates a Trading Center that was not displaying a quotation at a price equal to the traded-at Protected Quotation, via either a processor or an SRO quotation feed, is prohibited from price-matching protected quotations unless at least one of the exceptions applies.

liquidity program may be ranked and accepted in increments of less than \$0.05. See Proposed FINRA Rule 6191(a)(6)(A).

²⁶ See Partial Amendment No. 1, supra note 6. FINRA has requested an exemption from the Plan related to this provision. See February Exemption Request, supra note 18.

Proposed FINRA Rule 6191(a)(6)(D)(ii) sets forth the exceptions to the Trade-at Prohibition for members that operate Trading Centers as follows:

(a) the order is executed within the same independent aggregation unit²⁷ of the member that operates the Trading Center that displayed the quotation via either a processor or an SRO quotation feed, to the extent such member uses independent aggregation units, 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 aggregation unit's previously displayed quote. Further, proposed FINRA Rule 6191(a)(6)(D)(ii)(a) also specifies that a Trading Center that is displaying a quotation as agent or riskless principal may only execute as agent or riskless principal and a Trading Center displaying a quotation as principal (excluding riskless principal) may execute as principal, agent or riskless principal;

(b) the order that is of Block Size²⁸ 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;

(c) the order is a Retail Investor Order²⁹ that is executed with at least \$0.005 price improvement;

²⁷ FINRA proposes that, "Independent aggregation unit" has the same meaning as provided under Rule 200(f) of Regulation SHO. See 17 CFR 242.200(f).

²⁸ "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.

²⁹ FINRA proposes to clarify the Retail Investor Order definition for purposes of FINRA's rules to include an 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. Any member that operates a Trading Center may execute against a Retail Investor Order otherwise than on an exchange to satisfy the Retail Investor Order exceptions to the Tick Size Pilot. Further, any member for whom FINRA

- (d) the order is executed when the Trading Center displaying the Protected Quotation that was traded-at was experiencing a failure, material delay, or malfunction of its systems or equipment;
- (e) the order is executed as part of a transaction that was not a “regular way” contract;
- (f) the order is executed as part of a single-priced opening, reopening, or closing transaction by the Trading Center;
- (g) the order is executed when a Protected Bid is priced higher than a Protected Offer in the Pilot Security;
- (h) the order is identified as a Trade-at Intermarket Sweep Order (“ISO”);³⁰
- (i) the order is executed by a Trading Center that simultaneously routed Trade-at ISO to execute against the full displayed size of the Protected Quotation with a price that is better than, or equal to, the limit price of the limit order identified as a Trade-at ISO;
- (j) the order is executed as part of a Negotiated Trade;
- (k) 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

is the Designated Exchange Authority (“DEA”) who executes Retail Investor Orders must submit a signed attestation that substantially all orders utilizing the Retail Investor Order exception meet the qualifications. Finally, a member relying on an exception to the Trade-at Prohibition for a transaction otherwise than on an exchange must include all applicable modifiers in trade reports pursuant to FINRA Rule 6282, 6380A and 6380B. See Proposed FINRA Rule 6191(a)(7)(A).

³⁰ See Partial Amendment No. 1, supra note 6. In Partial Amendment No. 1, FINRA proposes to define 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 a Trade-at ISO; and 2. simultaneously with the routing of the limit order identified as a Trade-at ISO, one or more additional limit orders, as necessary, are routed to execute against the full 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 better than or equal to the limit price of the limit order identified as a Trade-at ISO. These additional routed orders also must be marked as Trade-at ISO.

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.;

(l) 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: (1) the stopped order was for the account of a customer; (2) the customer agreed to the specified price on an order-by-order basis; and (3) 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;³¹

(m) 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 order³² 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; and

(n) the order is to correct a bona fide error, which is recorded by the Trading Center in its error account. FINRA proposes to define a bond fide error as: 1. 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

³¹ See Partial Amendment No. 1, supra note 6. FINRA has requested an exemption from the Plan related to this provision. See February Exemption Request, supra note 18.

³² 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 FINRA Rule 6191(a) Supplementary Material .02.

on the wrong side of a market; 2. the unauthorized or unintended purchase, sale, or allocation of securities, or the failure to follow specific client instructions; 3. the incorrect entry of data into relevant systems, including reliance on incorrect cash positions, withdrawals, or securities positions reflected in an account; or 4. 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.³³

IV. Summary of Comments

As noted above, the Commission received three comment letters concerning the proposed rule change and a response letter from FINRA.³⁴ All three commenters discussed various aspects of the Trade-at Prohibition. The commenters noted differences between the Trade-at Prohibition rules proposed by FINRA and NYSE.³⁵ One commenter noted that the NYSE's proposal would limit a Trading Center from price matching a Protected Quotation to when the Trading Center is displaying in a principal capacity, while FINRA's proposal would not restrict price matching to a Trading Center's principal capacity.³⁶

Two commenters expressed support for FINRA's Trade-at Prohibition proposal.³⁷ However, one commenter stated FINRA's proposal was inconsistent with the goals of the Plan

³³ See Partial Amendment No. 1, supra note 6. FINRA has requested an exemption from the Plan related to this provision. See February Exemption Request, supra note 18.

³⁴ See supra note 5.

³⁵ See Securities Exchange Act Release No. 73229 (October 22, 2015), 80 FR 66065 (October 28, 2015).

³⁶ See SIFMA Letter.

³⁷ See FIF Letter and SIFMA Letter. For example, SIFMA stated that it believed that the Commission should approve FINRA's proposal.

because it would incentivize a migration of trading to dark venues.³⁸ This commenter stated FINRA’s proposal would allow an alternative trading system (“ATS”) to execute matched trades of any of its participants at the Traded-at Protected Quotation if the ATS is displaying on an agency basis, a quotation of another participant at the Protected Quotation.³⁹ The commenter noted that all participant orders displayed by an ATS are agency orders of the ATS and that trades matched by ATS participants without display are also agency orders of that ATS. Therefore, the commenter believes that FINRA’s proposal would allow trades by ATS participants at the Trade-at Protected Quotation without that participant displaying a Protected Quotation. The commenter believes that the proposal allows ATS participants to “free-ride” on the displayed Protected Quotation of other ATS participants.⁴⁰ The commenter stated that if implemented, trading would continue in dark pools at a price of displayed liquidity and that the proposal would result in similar trading behaviors between Test Group Three and Test Group Two.⁴¹

In its response, FINRA disagreed with NYSE’s characterization of the display exception’s operation as set forth in the FINRA proposal, and confirmed that a broker-dealer would not be permitted to trade based on interest that it is not responsible for displaying.⁴² FINRA noted that it would view a broker-dealer that matches orders in the over-the-counter

³⁸ The commenter also indicated that the proposal did not follow the procedure outlined by the Plan’s Operating Committee. See NYSE Letter.

³⁹ See NYSE Letter.

⁴⁰ See NYSE Letter.

⁴¹ See NYSE Letter.

⁴² As noted above, the FINRA Response Letter was also signed by BATS. The Commission notes that BATS has filed a proposal to implement the quoting and trading requirements that is similar to the FINRA proposal. See Securities Exchange Act Release No. 76552 (December 3, 2015), 80 FR 76591 (December 9, 2015).

(“OTC”) market, as principal, agent or riskless principal, to have “executed” such orders as a Trading Center for purposes of proposed FINRA Rule 6191(a), regardless of whether such broker-dealer ultimately executes and reports such trade through an OTC trade reporting facility, an ATS or another Trading Center. Accordingly, if a broker-dealer has displayed, as principal, a buy order at the protected bid on an exchange or Electronic Communications Network (“ECN”) prior to its receipt of a customer sell order, it could internalize that customer sell order, up to its displayed size, in reliance on the proposed FINRA Rule 6191(a)(6)(D)(ii)(a) exceptions. If, however, that broker-dealer has not displayed a principal buy order at the protected bid, but matches its customer order with an order for its own account and submits the paired orders to an ECN where another broker-dealer is displaying a buy order at the protected bid, the broker-dealer submitting the paired orders could not rely on the proposed display exceptions. While the ECN, as a Trading Center, could execute the displayed order as agent with offsetting interest because it was displaying an agency quotation at the protected bid, the broker-dealer submitting the paired orders could not, as a Trading Center, trade with its customer order, because it was not displaying a principal quotation at the protected bid. Accordingly, such a transaction could not be effected consistent with the Trade-at Prohibition under the FINRA proposal.

One commenter discussed the proposal by asking specific questions concerning the operation and interpretation of the Trade-at Prohibition and within their comment provided explanatory examples.⁴³ Further, this commenter either requested clarifying information or sought an amendment to the proposal in order to further the Plan’s purposes.

Specifically, the commenter sought clarification as to whether odd lot orders were subject to the Trade-at Prohibition. The commenter indicated they believed odd lots should be allowed

⁴³ See FIF Letter.

to execute at the price of the Protected Quotation under any circumstance irrespective of whether a Trading Center had satisfied its Trade-at Prohibition obligations.⁴⁴ FINRA, in response stated that a Trading Center would be prevented from executing an odd lot order at the Protected Quotation unless an exception applied and that the proposal does not include a separate odd lot exception to the Trade-at Prohibition.⁴⁵

In addition, the commenter stated the proposal's definition of Block Size order, used for the Block Size exception to the Trade-at Prohibition, would prevent a Trading Center from facilitating a block cross trade.⁴⁶ The commenter requested that the proposal be amended to permit the aggregation of non-block orders as long as at least one component of the order was of the defined Block Size.⁴⁷ In response, FINRA stated it does not believe that such an exception would be consistent with the Plan. FINRA believes that permitting the aggregation of non-block orders or permitting members to combine Block Size orders with non-block orders would overly broaden the Block Size exception and create a means by which members could undermine the exception.

The commenter requested that additional exceptions be provided to the Trade-at Prohibition within the FINRA proposal so that it would more closely align with the exceptions provided to Rule 611 of Regulation NMS.⁴⁸ Specifically, the commenter referenced certain error

⁴⁴ This commenter noted that odd lots are not protected quotes themselves under Rule 611 of Regulation NMS. See FIF Letter.

⁴⁵ See FINRA Response Letter

⁴⁶ According to the commenter, a "block cross trade" is block size order that includes smaller orders. The commenter noted that the three additional qualifications contained within the FINRA proposal are meant to ensure the purpose of the Trade-at Prohibition is not undermined. See FIF Letter. See also Proposed FINRA Rule 6191(a)(6)(D)(i)(b).

⁴⁷ See FIF Letter.

⁴⁸ 17 CFR 242.611.

correction transactions and certain print protection transactions.⁴⁹ FINRA agreed with the commenter regarding certain error correction transactions and amended their proposal to incorporate this additional exception to the Trade-at Prohibition.⁵⁰ FINRA stated that it did not believe that it would be appropriate to provide an exception to the Trade-at Prohibition for print protection transactions.⁵¹

The commenter also noted that for stopped orders there was a distinction between the applicable Rule 611 of Regulation NMS exception and the Trade-at Prohibition exception included within the Plan. The commenter provided an example where an order would satisfy Rule 611 of Regulation NMS but would not satisfy the Plan's Trade-at Prohibition exception. FINRA responded by stating it would amend the stopped trade exception to harmonize the stopped order exception.⁵²

The commenter sought clarification for how undisplayed liquidity is handled when a Trading Center receives a Trade-at ISO that is larger than their displayed liquidity ("Oversize ISO"). FINRA responded by stating that a Trade-at ISO indicates that the sending broker has executed against all other Protected Quotations at that price, satisfying the Trade-at requirements. Therefore, the Trading Center receiving the Trade-at ISO can fill the oversize portion of the order against its undisplayed liquidity.⁵³

⁴⁹ The commenter noted 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.

⁵⁰ See Partial Amendment No. 1, supra note 6.

⁵¹ See Partial Amendment No.1, supra note 6.

⁵² See Partial Amendment No.1, supra note 6.

⁵³ See FINRA Response Letter.

The commenter requested further information and clarification on the operation of the Trade-At Prohibition in the context of FINRA Rule 5320.⁵⁴ This commenter presented, and FINRA responded to, the following four scenarios that were unclear to the commenter.

Scenario 1: The Trading Center receives a customer buy order for 400 shares at \$10.10, and facilitates this order by executing against protected offers at \$10.00, \$10.05, and \$10.10. The Trading Center then fills the customer buy order on a riskless principal basis at an average price of \$10.05. The commenter inquired whether the Trading Center would be obligated to send Trade-at ISOs to execute against the protected offers in allocating the fill to the customer. FINRA responded by stating the second leg of a riskless principal transaction that complies with the relevant SRO riskless principal rule would not constitute a separate transaction for purposes of Rule 611 of Regulation NMS. Similarly, FINRA believes that the second leg of a riskless principal transaction would not constitute a separate transaction for purposes of complying with the Trade-at Prohibition. Therefore, in filing the customer order in the example, the Trading Center would not need to send out ISOs to execute against the protected offers to comply with the Trade-at Prohibition.

Scenario 2: The Trading Center receives a customer buy order for 200 shares at \$9.95 and a customer sell order for 200 shares at \$9.95. The commenter inquired whether the Trading Center would need to route a Trade-at ISO to execute the customer sell order against the displayed order on the exchange. FINRA responded by stating that in the example, the member would be able to comply with both the FINRA Rule 5320 obligations as well as the Trade-at Prohibition by routing a Trade-at ISO.⁵⁵

⁵⁴ See FIF Letter.

⁵⁵ See FINRA Response Letter.

Scenario 3: The Trading Center fills a customer buy order for 200 shares at \$9.954 pursuant to the Negotiated Trade exception to the Trade-at Prohibition, and the Trading Center has a customer sell order for \$9.95. The commenter inquired whether the Trading Center may execute the customer sell order at \$9.954 even though the Plan requires orders be executed in \$0.05 increments. In Partial Amendment No. 1, FINRA proposes to permit the member to execute the customer order in a non-nickel increment in certain limited circumstances.

Scenario 4: A member principally fills a customer buy order for 200 shares at \$9.949 pursuant to a Negotiated Trade exception to the Trade-at Prohibition and owes a fill on a customer order to sell 200 shares with a limit price of \$9.95, pursuant to FINRA Rule 5320. The commenter inquired whether the member may principally fill the customer order at \$9.95 without sending a Trade-at ISO to another displayed Trading Center. FINRA states that the member is not displaying at the price of the Protected Quotation and therefore to comply with the Trade-at Prohibition it must route a Trade-at ISO to fill the customer sell order.⁵⁶

The commenter sought clarification on how an order received with an impermissible trading increment would be handled.⁵⁷ FINRA responded that firms are not permitted to change the price or terms of a customer order without the informed consent of the customer. Accordingly, whether a member may round the limit price down to the nearest valid increment will depend on the specific communication between the member and the customer.

⁵⁶ See FINRA Response Letter.

⁵⁷ See FIF Letter. The commenter also requested clarification on the treatment of a variety of order types, including Good Till Canceled orders entered in non-nickel increments before the Pilot Period, indications of interest priced to execute at the mid-point, and market maker peg orders. FINRA noted that Test Group One permits indications of interest priced to execute at the mid-point. With regard to the other orders, FINRA noted that the Participants are drafting FAQs that will address the commenter's questions.

The commenter sought clarification on whether Market Makers are obligated to send ISOs in connection with executing against Market Maker interest.⁵⁸ In the commenter's example, a Market Maker is displayed on an exchange but may wish to trade without sending an ISO to its displayed interest. In response, FINRA explained that the Market Maker in the example was not obligated to send an ISO to trade against its exchange quote but would be limited to its displayed size.

The commenter sought clarification on whether a Market Maker could increase its quote after it had received a long-lived not held order.⁵⁹ FINRA stated that the Market Maker's quote could increase while working a not held order as long as the price increase was not intentional and the Market Maker had policies and procedures to protect against abuse.⁶⁰

Finally, one commenter expressed concern regarding the differences between the Participants' various proposed quoting and trading rule filings.⁶¹ The commenter noted that there are differences among the Participants' proposed rule changes for certain key defined terms, such as "Retail Investor Order" that should be harmonized across the Participants' proposed rule filings.⁶² The commenter indicated that if the differences persisted it would be "virtually impossible" for its members to comply with the Plan.⁶³

V. Discussion and Findings

⁵⁸ See FIF Letter.

⁵⁹ The commenter noted that the market maker may change their quote numerous times over the life of a long-lived order, which may be worked via an agency algorithm, principal/riskless principal fills, an agency cross or other principal fills. See FIF Letter.

⁶⁰ See FINRA Response Letter.

⁶¹ See SIFMA Letter.

⁶² See SIFMA Letter.

⁶³ See SIFMA Letter.

After carefully considering the proposed rule change, the comments submitted, and FINRA'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 association.⁶⁴ Specifically, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,⁶⁵ which requires, among other things, that FINRA's rules 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 customers, issuers, brokers or dealers. In addition, the Commission finds that the proposed rule change is consistent with Section 15A(b)(9) of the Act,⁶⁶ which requires that FINRA rules 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.⁶⁷ As discussed below, the Commission believes that FINRA's proposal is consistent with the requirements of the Act and would further the purpose of the Plan to provide meaningful data.

FINRA, as a Participant in the Plan, 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

⁶⁴ 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).

⁶⁵ 15 U.S.C. 78o-3(b)(6).

⁶⁶ 15 U.S.C. 78o-3(b)(9).

⁶⁷ See Approval Order, supra note 3.

“[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.”⁶⁸ Proposed FINRA Rule 6191(a) 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 Act because it is designed to assist FINRA in meeting its regulatory obligations pursuant to Rule 608 of Regulation NMS and the Plan.

A. Policies and Procedures to Comply with the Plan

Proposed FINRA Rule 6191(a)(1) provides that FINRA members 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 FINRA Rule 6191(a)(2) states that FINRA systems will not display quotations in violation of the Plan and the rule. 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 FINRA Rules 6191(a)(1) and (2) are consistent with the Act as they implement these Plan provisions.

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

⁶⁸ 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.

Proposed FINRA Rule 6191(a)(3) 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.⁶⁹ 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. Accordingly, 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.

Proposed FINRA Rule 6191(a) Supplementary material .03 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.

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

Proposed FINRA Rule 6191(a)(4) 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. However,

⁶⁹ The Commission notes that it has granted FINRA an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 18.

proposed FINRA Rule 6191(a)(4) also provides that orders priced to execute at the midpoint of the NBBO or best PBBO and orders entered in a Participant-operated retail liquidity program may be ranked and accepted in increments of less than \$0.05. Finally, proposed FINRA Rule 6191(a)(4) provides that Pilot Securities in Test Group One may continue to trade at any price increment that is currently permitted by applicable Participant, SEC and FINRA rules. The Commission finds that proposed FINRA Rule 6191(a)(4) is consistent with the Act because it implements provisions of the Plan.

Proposed FINRA Rule 6191(a)(5) 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 Two in increments other than \$0.05. However, proposed FINRA Rule 6191(a)(5) also provides that orders priced to execute at the midpoint of the NBBO or PBBO and orders entered in a Participant-operated retail liquidity program may be ranked and accepted in increments of less than \$0.05. Proposed FINRA Rule 6191(a)(5)(B) further provides that no member may execute an order in a Test Group Two Pilot Security in an increment other than \$0.05, unless an exception applies. Pilot Securities in Test Group Two may trade in increments less than \$0.05 when trading: (i) at the midpoint between the NBBO or the PBBO; (ii) Retail Investor Orders⁷⁰ that are provided price improvement that is at least \$0.005 better than the PBBO; (iii) Negotiated Trades; and (iv) customer orders to comply with FINRA Rule 5320 following the execution of a proprietary trade that is permissible pursuant to Plan

⁷⁰ See Discussion below related to the proposed Rule 6191(a)(7)(A) related to the Retail Investor Order exception for the trading of Pilot Securities in Test Group Two and Test Group Three.

exception.⁷¹ The Commission finds that proposed FINRA Rules 6191(a)(5)(C)(i), (ii) and (iii) are consistent with the Act because they implement provisions of the Plan.

In Partial Amendment No. 1, FINRA proposes to add a trading increment exception in FINRA Rule 6191(a)(5)(C)(iv), which would allow the execution of a customer order following a proprietary trade by a FINRA member at an increment less 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 FINRA Rule 5320, where the triggering proprietary trade was permissible pursuant to an exception under the Plan. FINRA believes that this customer order protection exception should facilitate the ability of its members to continue to protect customer orders while retaining the flexibility to engage in proprietary trades that comply with an exception to the Plan. Based on the foregoing, the Commission finds that proposed FINRA Rule 6191(a)(5)(C)(iv) is consistent with the Act.⁷²

D. Quoting and Trading Rules for Test Group Three

Proposed FINRA Rule 6191(a)(6)(A) 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. Proposed FINRA Rule 6191(a)(6)(A) also provides that for Test Group Three Pilot Securities orders priced to execute at the midpoint of the NBBO or PBBO and orders entered in a Participant-operated retail liquidity program may be ranked and accepted in increments of less than \$0.05. Proposed FINRA Rule 6191(a)(6)(B) specifies that the \$0.05 trading increment will apply to all trades, including Brokered Cross Trades; and that trades for Test Group Three Pilot Securities may not

⁷¹ See Partial Amendment No. 1, supra note 6.

⁷² The Commission notes that it has granted FINRA an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 18.

occur in increments of less than \$0.05 unless there is an applicable exception listed in proposed Rule FINRA Rule 6191(a)(6)(C). Pursuant to proposed Rule FINRA Rule 6191(a)(6)(C), Test Group Three Pilot Securities may trade in increments less than \$0.05 when trading: (i) at the midpoint between the NBBO or the PBBO; (ii) Retail Investor Orders⁷³ that are provided price improvement that is at least \$0.005 better than the PBBO and; (iii) Negotiated Trades; and (iv) customer orders to comply with FINRA Rule 5320 following the execution of a proprietary trade that is permissible pursuant to Plan exception.⁷⁴

The Commission finds that proposed FINRA Rule 6191(a)(6)(A), proposed FINRA Rule 6191(a)(6)(B), and proposed FINRA Rules 6191(a)(6)(C)(i), (ii) and (iii) are consistent with the Act because they implement provisions of the Plan. In addition, as discussed above,⁷⁵ the Commission finds that proposed FINRA Rule 6191(a)(6)(C)(iv) is consistent with the Act.

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

Proposed FINRA Rule 6191(a)(6)(D) describes the Trade-at Prohibition and the exceptions applicable thereto.⁷⁶ Specifically, proposed FINRA Rule 6191(a)(6)(D)(i) sets forth that absent any of the exceptions listed in subparagraph (D)(ii), no member that operates a

⁷³ See Discussion below related to the proposed FINRA Rule 6191(a)(7)(A) related to the Retail Investor Order exception for the trading of Pilot Securities in Test Group Two and Test Group Three.

⁷⁴ See Partial Amendment No. 1, supra note 6.

⁷⁵ See Section V.C above related to the discussion of proposed FINRA Rule 6191(a)(5)(C)(iv). The Commission notes that it has granted FINRA an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 18.

⁷⁶ The Commission notes that one commenter submitted extensive interpretative questions on the implementation and operation to the Trade-at Prohibition. See FIF Letter. As noted above, FINRA provided detailed responses to the interpretative questions. See FINRA Response Letter. 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.

Trading Center 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 during regular trading hours (i.e., the Trade-at Prohibition). Proposed FINRA Rule 6191(a)(6)(D)(i) also states that under the Trade-at Prohibition, a member that operates a Trading Center that is displaying a quotation, via either a processor or an SRO quotation feed, that is at a price equal to the traded-at Protected Bid or Protected Offer is permitted to execute orders at that level, but only up to the amount of its displayed size. Finally, proposed FINRA Rule 6191(a)(6)(D)(i) states that a member that operates a Trading Center that was not displaying a quotation at a price equal to the traded-at Protected Quotation, via either a processor or an SRO quotation feed, is prohibited from price-matching protected quotations unless an exception applies.

Proposed FINRA Rule 6191(a)(6)(D)(ii) lists the exceptions to the Trade-at Prohibition.⁷⁷ The proposed exceptions set forth in FINRA Rules 6191(a)(6)(D)(ii)(c) through (g), (j), (k), and (m) mirror the exceptions set forth in the Plan.⁷⁸ The Commission finds these exceptions to be consistent with the Act because they implement Plan provisions.

In proposed FINRA Rule 6191(a)(6)(D)(ii)(a), FINRA proposes to implement the display exception to the Trade-at Prohibition. As proposed, FINRA has added several details about its operation and implementation. For example, FINRA proposes that a Trading Center that uses independent aggregation units execute orders within the same independent aggregation unit that displayed the quotation. In addition, FINRA proposes to specify that Trading Centers that display a quotation as agent or riskless principal may only execute as agent or riskless principal.

⁷⁷ One commenter requested that odd lot orders be exempt from the Trade-at Prohibition. See FIF Letter. The Commission notes that the Approval Order addressed odd lot orders under the Trade-at Prohibition. See Approval Order, supra note 3.

⁷⁸ See Section VI.D(3) through (7), (10), (11) and (13) of the Plan.

If the Trading Center is displaying a quotation as principal (excluding riskless principal), the Trading Center may execute as principal, agent or riskless principal.

As noted above, one commenter suggested that FINRA's proposal would create an incentive for trading in Test Group Three to migrate to dark venues.⁷⁹ According to the commenter, FINRA's proposal would permit a non-displayed Trading Center to submit matched trades to an ATS that was displaying on an agency basis the quotation of another ATS subscriber.⁸⁰ FINRA responded that it did not believe this scenario could occur under its proposal, and confirmed that the broker-dealer submitting the matched trade could not, as a Trading Center trade with its customer order because it was not displaying a principal quotation. The Commission finds that FINRA's proposed Rule 6191(a)(6)(D)(ii)(a) to be consistent with the Act. The Commission believes that FINRA's proposed rule clarifies the operation of the display exception in a manner consistent with the goals of the Plan. First, 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 aggregation units would be restricted in its ability to rely on quotations displayed by other independent aggregation units. As noted above, a Trading Center that utilizes independent aggregation units may only execute an order in the independent aggregation unit that displayed the quotation. The Commission believes that these additional rules implement the display exception to the Trade-at Prohibition in a manner that should incent the display of liquidity.⁸¹

⁷⁹ See NYSE Letter.

⁸⁰ Id.

⁸¹ See Approval Order, supra note 3. In the Approval Order, the Commission stated that the Trade-at Prohibition should test whether market participants are incentivized to display more liquidity in a wider tick environment.

Proposed FINRA Rule 6191(a)(6)(D)(ii)(b) sets forth the exception to the Trade-at Prohibition for orders of Block Size. FINRA proposes additional provisions with respect to Block Size orders including that orders at the time of origin may not be: (1) an aggregation of non-block orders; (2) broken into orders smaller than Block Size prior to submitting the order to a Trading Center for execution; or (3) executed on multiple Trading Centers.

As noted above, one commenter suggested that these additional provisions would limit firms' ability to facilitate block cross trades.⁸² FINRA responded that the additional criteria would clarify this Trade-at Prohibition exception. Further, FINRA noted that permitting the aggregation of non-block orders or permitting members to combine a block order with non-block orders would overly expand the scope of the exception.

The Commission believes that the additional criteria for the Block Size exception are consistent with the Act. 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.⁸³ The Commission believes proposed FINRA Rule 6191(a)(6)(D)(ii)(b) 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.

Proposed FINRA Rule 6191(a)(6)(D)(ii)(h) sets forth the exception to the Trade-at Prohibition for orders identified as Trade-at ISO. In Partial Amendment No. 1, FINRA proposes to clarify the definition of a Trade-at ISO for purposes of the exception. Specifically, FINRA proposes to define 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 a Trade-at

⁸² See FIF Letter.

⁸³ See Approval Order, *supra* note 3.

ISO; and (2) simultaneously with the routing of the limit order identified as a Trade-at ISO, one or more additional limit orders, as necessary, are routed to execute against the full 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 better than or equal to the limit price of the limit order identified as a Trade-at ISO. These additional routed orders also must be marked as Trade-at ISO.⁸⁴

According to FINRA, the use of the term ISO as set forth in the Plan could be unclear in Test Group Three.⁸⁵ As noted in FINRA's Partial Amendment No. 1, an ISO may mean that the sender of the ISO has swept better-priced protected quotations, so that the recipient of that ISO may trade through the price of the protected quotation (in compliance with Rule 611 of Regulation NMS⁸⁶), or it could mean that the sender of the ISO has swept protected quotations at the same price at which it wishes to execute (in addition to any better-priced quotations), so that the recipient of that ISO may trade at the price of the protected quotation (as an exception to the Trade-at Prohibition). Accordingly, since the meaning of an ISO may differ under Rule 611 of Regulation NMS and the Trade-at Prohibition under the Plan, FINRA proposes Rule 6191(a)(6)(D)(ii)(h) to reflect that the order is a Trade-at ISO so that a receiving Trading Center in a Test Group Three Pilot Security would know, upon receipt of that Trade-at ISO, that the

⁸⁴ See Proposed FINRA Rule 6191(a)(7)(B)(i).

⁸⁵ Section VI.D(8) of the Plan provides an exception to the Trade-at Prohibition for ISOs. In addition, 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 market as ISO.

⁸⁶ 17 CFR 242.611.

Trading Center that sent the Trade-at ISO had already executed against the full size of displayed quotations at that price (e.g., the recipient of that Trade-at ISO could permissibly trade at the price of the protected quotation). In addition, FINRA proposes to make a corresponding change to FINRA Rule 6191(a)(6)(D)(ii)(i).

The Commission believes that proposed FINRA Rule 6191(a)(6)(D)(ii)(h) and FINRA Rule 6191(a)(6)(D)(ii)(i) are consistent with the Act because they clarify the use and operation of ISOs under the Plan. The definition in the Plan provided that an ISO received under the Plan would indicate to the recipient that orders to execute against the full displayed size at a price equal to the ISO's limit price had been routed. However, the Commission understands that the use of the term ISO in connection with the exception to the Trade-at Prohibition could cause confusion. Therefore, the Commission believes that FINRA's proposal should clarify the use of ISOs under the Plan and facilitate their implementation.

Proposed FINRA Rule 6191(a)(6)(D)(ii)(l) 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: (1) the stopped order was for the account of a customer; (2) the customer agreed to the specified price on an order-by-order basis; and (3) 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.

As noted above, one commenter raised questions about how the stopped order exception would operate as an exception to the Trade-at Prohibition.⁸⁷ In Partial Amendment No. 1, FINRA amended the rule text of proposed FINRA Rule 6191(a)(6)(D)(ii)(l) to clarify its operation under the Trade-at Prohibition. The Commission finds that proposed FINRA Rule 6191(a)(6)(D)(ii)(l), 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.⁸⁸

In Partial Amendment No. 1, FINRA proposes an additional exception to the Trade-at Prohibition.⁸⁹ Specifically, proposed FINRA Rule 6191(a)(6)(D)(ii)(n) sets forth an exception to the Trade-at Prohibition for “bona fide errors.”⁹⁰ Proposed FINRA Rule 6191(a)(6)(D)(ii)(n) provides 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

⁸⁷ See FIF Letter.

⁸⁸ The Commission notes that it has granted FINRA an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, *supra* note 18.

⁸⁹ This additional exception was requested by a commenter. See FIF Letter.

⁹⁰ The Commission notes that one commenter suggested that there should be a print protection exception to the Trade-at Prohibition that corresponds to the print protection exemption that is applicable to Rule 611 of Regulation NMS. See FIF Letter. The Commission does not agree that a print protection exception would be consistent with the Trade-At Prohibition in the Plan. First, the print protection exemption applicable to Rule 611 is inconsistent with the Trade-at Prohibition because the Rule 611 print protection exemption 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 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 FINRA Rule 6191(a)(6)(D)(i) and the Plan. Moreover, providing a print protection 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. Finally, the Commission notes that FINRA represents that the print protection exemption applicable to Rule 611 of Regulation NMS is rarely used by its members.

“bona fide error” is: (i) 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; (ii) the unauthorized or unintended purchase, sale, or allocation of securities, or the failure to follow specific client instructions; (iii) the incorrect entry of data into relevant systems, including reliance on incorrect cash positions, withdrawals, or securities positions reflected in an account; or (iv) 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.⁹¹ 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.⁹²

⁹¹ 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.

⁹² See Partial Amendment No. 1, supra note 6. See also Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007).

The Commission finds that the exception to the Trade-at Prohibition for the correction of bona fide errors is consistent with the Act.⁹³ The Commission believes that this exception should promote efficiency and the best execution of investor orders. As noted in the Commission's order exempting such orders from Rule 611 of Regulation NMS, the 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.⁹⁴

Proposed FINRA Rule 6191(a)(7)(A) addresses the execution of Retail Investor Orders other than on a national securities exchange.⁹⁵ FINRA proposes that any member that operates a Trading Center may execute against an order received directly from a natural person that did not originate from a trading algorithm or any other computerized methodology. This proposed provision generally tracks the Plan's definition of "Retail Investor Order" while allowing a member to execute against orders received directly from retail customers. FINRA contends that in the absence of this proposal, many orders that are currently sent to Trading Centers that

⁹³ 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 would apply only to the error correction transaction itself and would not, for example, apply to any subsequent trades effected by a Trading 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).

⁹⁴ The Commission notes that it has granted FINRA an exemption from Rule 608(c) related to this provision. See SEC Exemption Letter, supra note 18.

⁹⁵ Proposed Rule 6191(a)(7)(A)(iii) provides that any member for which FINRA is the DEA that operates a Trading Center and executes Retail Investor Orders must submit a signed attestation to FINRA that substantially all orders to be executed as Retail Investor Orders will qualify as such under this Rule. The Plan provides that the Trading Center executing a Retail Investor Order must sign an attestation that substantially all orders to be executed as Retail Investor Orders will qualify as such under the Plan.

otherwise satisfy the Retail Investor Order definition would not be eligible for the exceptions of the Plan in the OTC market solely due to the capacity (or lack thereof) of that order.

The Plan defines a Retail Investor Order as an agency or riskless principal order. Therefore, according to FINRA orders received directly from a customer, without an accompanying capacity, and executed by the receiving Trading Center would not currently fall within the scope of the Plan's definition of "Retail Investor Order" and the corresponding exceptions from the \$0.05 trading increment in Test Groups Two and Three.

The Commission believes that proposed FINRA Rule 6191(a)(7)(A) is consistent with the Act as it implements provisions of the Plan. The provisions related to Retail Investor Orders permit such orders to receive price improvement. In the Approval Order, the Commission noted that allowing Retail Investor Orders to receive price improvement could minimize some of the concerns related to costs for retail investors. FINRA's proposal to accommodate price improvement for Retail Investor Orders executed in the OTC market is consistent with the intent and goals of the Plan for such orders.

The Commission finds that the FINRA proposal to implement the Tick Size Pilot quoting and trading requirements, including the Supplementary Material, 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 No. 1

Interested persons are invited to submit written data, views, and arguments concerning Partial Amendment No. 1, including whether the proposed rule change, as modified by Partial Amendment No. 1, 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-FINRA-2015-047 on the subject line.

Paper comments:

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2015-047. 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-FINRA-2015-047 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 No. 1

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 No. 1, prior to the 30th day after the date of publication of Partial Amendment No. 1 in the Federal Register. Partial Amendment No. 1 amends four of the requirements set forth in this proposed rule change. First, FINRA proposes to 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 FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders) under limited circumstances. Second, FINRA is amending the proposal to adopt an exception to the Trade-at Prohibition for certain error correction transactions. Third, FINRA is proposing to modify the stopped order exception to the Trade-at Prohibition to clarify its operation under the Plan. Finally, FINRA is proposing to clarify the use of ISOs in connection with the Trade-at Prohibition.

FINRA believes that the change to allow members to fill a customer order at a non-nickel increment to comply with 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. FINRA believes adding an 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, FINRA believes that amending the stopped order exception will result in more consistent treatment under Regulation NMS and the Plan, which should ease compliance burdens for members. Finally, FINRA 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.

Based on the foregoing, the Commission believes that the changes to: (1) add an exception to FINRA Rule 6191(a)(5)(C)(iv) and 6191(a)(6)(C)(iv) to permit members to fill a customer order in a Pilot Security at a non-nickel increment to comply with FINRA Rule 5320 under limited circumstances, (2) create an exception to the Trade-at Prohibition for certain error correction transactions, (3) modify the stopped order exception to the Trade-at Prohibition, and (4) to clarify the use of ISOs in connection with the Trade-at Prohibition are all consistent with the Act. Accordingly, the Commission finds good cause for approving the proposed rule change, as modified by Partial Amendment No. 1, 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 Act⁹⁶ that the proposed rule change, as modified by Partial Amendment No. 1 (SR-FINRA-2015-047) be, and it hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹⁷

Robert W. Errett
Deputy Secretary

⁹⁶ 15 U.S.C. 78s(b)(2).

⁹⁷ 17 CFR 200.30-3(a)(12).