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February 23, 2016

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

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

Dear Mr. Errett:

Pursuant to Rule 608(e) of Regulation NMS under the Securities Exchange Act of 1934 (“Exchange Act”), Financial Industry Regulatory Authority, Inc. (“FINRA”), on behalf of itself and BATS Exchange, Inc., BATS Y-Exchange, Inc., Chicago Stock Exchange, Inc., EDGA Exchange, Inc., EDGX Exchange, Inc., NASDAQ OMX BX, Inc., NASDAQ OMX PHLX LLC, the Nasdaq Stock Market LLC, National Stock Exchange, Inc. (“NSX”), New York Stock Exchange LLC (“NYSE”), NYSE MKT LLC, and NYSE Arca, Inc. (collectively, “Participants”), requests that the Securities and Exchange Commission (“Commission” or “SEC”) grant an exemption from the quoting and trading requirements in the National Market System Plan to Implement a Tick Size Pilot Program (“Plan” or “Pilot”), as discussed below. Capitalized terms used herein, but not otherwise defined, shall have the meanings ascribed to them in the Plan.

On November 13, 2015, FINRA filed with the Commission a proposed rule change to adopt FINRA Rule 6191(a) to implement the quoting and trading requirements of the Plan.¹ In response to comments received on its filing, FINRA is proposing to amend its rule change to modify certain aspects of the Plan’s quoting and trading requirements. To the extent that the proposed amendment alters the quoting and trading requirements in the Plan, as approved by the Commission, the Participants respectfully request that the Commission grant an exemption from those provisions of the Plan. Specifically, the Participants request exemptive relief from the Test Group

¹ See Securities Exchange Act Release No. 76483 (November 19, 2015), 80 FR 73853 (November 25, 2015) (Notice of Filing of SR-FINRA-2015-047) (“FINRA Proposal”).

Two and Three requirements in order to permit members to fill a customer order in a Pilot Security at a non-nickel increment to comply with Participant customer order protection rules under limited circumstances. Second, the Participants request exemptive relief from the requirements of the Trade-at requirement so that they may adopt an exception to the Trade-at requirement for certain error correction transactions. Third, the Participants seek exemptive relief from the requirements of the Trade-at requirement so that they may modify the stopped order exception to the Trade-at requirement.

The Participants believe that the proposed exemptive relief is consistent with the public interest, the protection of investors, and the maintenance of fair and orderly markets. With respect to the proposed exemption allowing members to fill a customer order in non-nickel increments in compliance with Participant customer order protection rules, the Participants believe that this approach 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. The Participants believe that the other proposed changes to the Trade-at exemptions will more closely align the Trade-at requirement with the Trade-through requirements of Rule 611 of Regulation NMS,² and are equally applicable to the Trade-at requirement as to the Trade-through requirement.

Background

On August 25, 2014, the Participants filed with the Commission, pursuant to Section 11A of the Act³ and Rule 608 of Regulation NMS thereunder,⁴ the Plan to Implement a Tick Size Pilot Program.⁵ The Participants filed the Plan to comply with an order issued by the Commission on June 24, 2014.⁶ The Plan was published for comment in the Federal Register on November 7, 2014, and approved by the Commission, as modified, on May 6, 2015.⁷

The Plan is designed to allow the Commission, market participants, and the public to study and assess the impact of increment conventions on the liquidity and trading of the common stock of small-capitalization companies. Each Participant is

² 17 CFR 242.611.

³ 15 U.S.C. 78k-1.

⁴ 17 CFR 242.608.

⁵ See Letter from Brendon J. Weiss, Vice President, Intercontinental Exchange, Inc., to Secretary, Commission, dated August 25, 2014.

⁶ See Securities Exchange Act Release No 72460 (June 24, 2014), 79 FR 36840 (June 30, 2014).

⁷ See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) (“Approval Order”).

required to comply, and to enforce compliance by its member organizations, as applicable, with the provisions of the Plan.

The Plan provides for the creation of a group of Pilot Securities, which shall be placed in a control group and three separate test groups, with each subject to varying quoting and trading increments. Pilot Securities in the control group will be quoted at the current tick size increment of \$0.01 per share and will trade at the currently permitted increments. Pilot Securities in the first test group will be quoted in \$0.05 minimum increments but will continue to trade at any price increment that is currently permitted.⁸ Pilot Securities in the second test group (“Test Group Two”) will be quoted in \$0.05 minimum increments and will trade at \$0.05 minimum increments subject to a midpoint exception, a retail investor order exception, and a negotiated trade exception.⁹ Pilot Securities in the third test group (“Test Group Three”) will be subject to the same quoting and trading increments as Test Group Two, and also will be subject to the “Trade-at” requirement to prevent price matching by a market participant that is not displaying at the price of a Trading Center’s “Best Protected Bid” or “Best Protected Offer,” unless an enumerated exception applies.¹⁰ In addition to the exceptions provided under Test Group Two, an exception for Block Size orders and exceptions that mirror those under Rule 611 of Regulation NMS¹¹ will apply to the Trade-at requirement.

The Commission approved the Pilot on a two-year basis, with implementation to begin no later than May 6, 2016.¹² On November 6, 2015, the SEC provided an exemption to the Participants from implementing the pilot until October 3, 2016.¹³

Rule 608 and the Proposed Exemption

Rule 608(c) of Regulation NMS provides that “[e]ach self-regulatory organization shall comply with the terms of any effective national market system plan of which it is a sponsor or a participant. Each self-regulatory organization also shall, absent reasonable justification or excuse, enforce compliance with any such plan by its members and persons associated with its members.”¹⁴ Rule 608(e) allows the Commission to “exempt from the provisions of this section, either unconditionally or on specified terms and conditions, any self-regulatory organization, member thereof,

⁸ See Section VI(B) of the Plan.

⁹ See Section VI(C) of the Plan.

¹⁰ See Section VI(D) of the Plan.

¹¹ 17 CFR 242.611.

¹² See Approval Order at 27533 and 27545.

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

¹⁴ 17 CFR 242.608(c).

or specified security, if the Commission determines that such exemption is consistent with the public interest, the protection of investors, the maintenance of fair and orderly markets and the removal of impediments to, and perfection of the mechanisms of, a national market system.”¹⁵ The Participants are seeking exemptive relief from the specific Plan provisions set forth below.

Executions of Customer Orders Pursuant to Participant Customer Order Protection Rules

The Participants believe it is in the best interest of investors to permit members to execute customer orders in Pilot Securities in Test Group Two and Test Group Three at other than a \$0.05 increment to allow members to meet customer order protection obligations under Participant rules prohibiting trading ahead of customer orders (*i.e.*, SRO “Manning” rules, such as FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders)) by matching the price of its proprietary trade under limited circumstances, as discussed below. As part of its amendments to the quoting and trading rule filing, FINRA is proposing an exception that would allow members to execute customer orders in non-nickel increments in compliance with Rule 5320 in limited circumstances. The Participants seek exemptive relief from complying with the applicable Test Group Two and Test Group Three requirements as currently set forth in the Plan to adopt an exception for these customer order protection trades.

The SRO Manning rules generally prohibit a member from trading in a security for its own account on the same side of the market and at prices that would satisfy a customer order, unless the member immediately thereafter executes the customer order up to the size and at the same price or better than the price at which it traded for its own account. Thus, a member’s Manning obligation is triggered by a proprietary trade that is at (or within the prescribed amount of)¹⁶ the price of the customer order. Under certain circumstances, the minimum trading increment requirements of the Plan may prevent a member from filling a customer order by matching the price of the proprietary transaction that triggered the firm’s Manning obligation with regard to that customer order.

Specifically, where a member engages in a proprietary transaction at a non-nickel increment that is permissible pursuant to an exception from the Plan (*e.g.*, a sale at \$6.001 pursuant to the negotiated price exception), and that transaction triggers a

¹⁵ 17 CFR 242.608(e).

¹⁶ FINRA Rule 5320 sets out the minimum amount of price improvement necessary for a member to execute an order on a proprietary basis when holding an unexecuted limit order in that same security, and not be required to execute the held limit order. For customer limit orders in NMS stocks priced greater than or equal to \$1.00, the minimum amount of price improvement required is \$0.01.

member's obligation to fill a customer order (*e.g.*, a customer sell limit order priced at \$6.00), the member would not be allowed to match the \$6.001 price for the customer (unless a Plan exception separately is available to permit the execution of the customer order at that price). Thus, without a separate Plan exception to execute the customer order at \$6.001, the member would be required to comply with Manning by filling the customer order at \$6.05. To avoid such instances, a member would be obligated to ensure that it does not engage in principal transactions at prices that it cannot match or improve upon in compliance with both the Plan and SRO Manning rules.

To address these situations, FINRA is amending its quoting and trading rule filing to permit members to execute customer orders for which a member owes a fill pursuant to SRO Manning rules at the same price as the trigger trade, where the trigger trade was executed at a non-nickel increment pursuant to a Plan exception. The Participants believe that this approach 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. The Participants seek exemptive relief from complying with the applicable Test Group Two and Test Group Three requirements as currently set forth in the Plan that otherwise would apply to such trades.

Proposed Exception for Certain Error Correction Trades

The Participants also seek exemptive relief from aspects of the Trade-at requirement so that they may propose an additional exception to Trade-at. The exceptions to the Trade-at requirement set forth in the Plan and in FINRA's proposed rule are, in part, based on the exceptions to the trade-through requirement set forth in Rule 611,¹⁷ including exceptions for an order that is executed as part of a transaction that was not a "regular way" contract, and an order that is executed as part of a single-priced opening, reopening, or closing transaction by the trading center.¹⁸ Following the adoption of Rule 611 and its exceptions, the Commission issued exemptive relief that created an exception from Rule 611 for certain error correction transactions.¹⁹ This exception is not set forth in the Plan, and thus does not currently apply to the Trade-at requirement. FINRA has determined that it is appropriate to incorporate the error correction exemption to the Trade-at prohibition, as this exception is equally applicable to the Trade-at context. Accordingly, FINRA is proposing to amend Rule 6191(a)(6) to exempt certain transactions to correct bona fide errors in the execution of customer orders from the Trade-at prohibition, subject to the conditions set forth the

¹⁷ See 17 CFR 242.611.

¹⁸ See 17 CFR 242.611(b)(2) and (b)(3).

¹⁹ See Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007); Securities Exchange Act Release No. 55883 (June 8, 2007), 72 FR 32927 (June 14, 2007).

SEC's order exempting these transactions from Rule 611.²⁰ In connection with this proposed amendment, the Participants seek exemptive relief from complying with Trade-at requirement as currently set forth in the Plan, which does not contain this exception.

Trade-at and Stopped Trades

The Participants also seek exemptive relief from complying with the Trade-at exception for stopped orders as set forth in the Plan. The current Trade-at stopped order exception applies where “the price of the Trade-at transaction was, for a stopped buy order, equal to the national best bid in the Pilot Security at the time of execution or, for a stopped sell order, equal to the national best offer in the Pilot Security at the time of execution.”²¹ The Rule 611 stopped order exemption applies where “[t]he price of the trade-through transaction was, for a stopped buy order, lower than the national best bid in the NMS stock at the time of execution or, for a stopped sell order, higher than the national best offer in the NMS stock at the time of execution.”²² The Participants believe that the application of the stopped order exception as set forth in

²⁰ As with the corresponding exception under Rule 611, FINRA proposes to define a “bona fide error” as: (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. Second, the bona fide error must be evidenced by objective facts and circumstances, and the Trading Center maintains documentation of such facts and circumstances. Third, the Trading Center must record the transaction in its error account. Fourth, 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 exemption. Fifth, 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. See Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007).

²¹ See Plan, Section VI(D)(12).

²² See 17 CFR 242.611(b)(9).

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the Plan would produce an inconsistent result with the application of the stopped order exception as set forth in Rule 611, and therefore seek exemptive relief from this provision.

To illustrate the application of the stopped trade exemption as it currently operates under Rule 611 and as it is currently proposed for Trade-at, assume the National Best Bid (“NBB”) is \$10.00 and another protected quote is at \$9.95. Under Rule 611, a stopped order to buy can be filled at \$9.95 and the firm does not have to send an Intermarket Sweep Order (“ISO”) to access the protected quote at \$10.00 since the price of the stopped order must be lower than the National Best Bid. In order for the stopped order to also be executed at \$9.95 and satisfy the Trade-at requirements, the Trade-at exception would have to be revised to allow an order to execute at the price of a protected quote which, in this case, could be \$9.95.

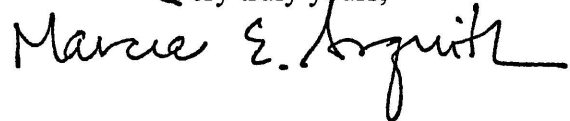
Based on the fact that a stopped order would be treated differently under the Rule 611 exception than under the proposed Trade-at exception, the Participants believes that it is appropriate to amend the stopped order exception for Trade-at to ensure that the application of this exception will produce a consistent result under both Rule 611 and Trade-at. FINRA therefore proposes to amend the stopped order exception to allow a transaction to satisfy the Trade-at requirement if, for stopped buy order, the price of the Trade-at transaction was 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 connection with that proposed amendment, the Participants seek exemptive relief from complying with the stopped order exception as currently set forth in the Plan.

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

Thank you in advance for your consideration of this request.

Very truly yours,



Marcia E. Asquith
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