



DIVISION OF  
TRADING AND MARKETS

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

November 30, 2016

Ms. Marcia E. Asquith  
Senior Vice President and Corporate Secretary  
Financial Industry Regulatory Authority  
1735 K St NW  
Washington, DC 20006

**Re: Exemption Under 608(e) of Regulation NMS under the Securities Exchange Act of 1934 from Certain Provisions of the “Plan Implement a Tick Size Pilot Program”**

Dear Ms. Asquith,

In your letter dated November 14, 2016,<sup>1</sup> the Financial Industry Regulatory Authority, Inc. ("FINRA"), on behalf of itself and BATS BZX Exchange, Inc., BATS BYX Exchange, Inc., BATS EDGA Exchange, Inc., BATS EDGX Exchange, Inc., Chicago Stock Exchange, Inc., Investors Exchange LLC, NASDAQ BX, Inc., NASDAQ PHLX LLC, the Nasdaq Stock Market LLC, National Stock Exchange, Inc., New York Stock Exchange LLC, NYSE MKT LLC, and NYSE Arca, Inc. (collectively the "Participants") request that the Commission grant an exemption from the data publication requirements of the National Market System Plan to Implement a Tick Size Pilot Program ("Plan" or "Pilot"),<sup>2</sup> as discussed below.

Specifically, the Participants request that the Commission, pursuant to Rule 608(e) of Regulation NMS under the Securities Exchange Act of 1934 ("Exchange Act"), exempt the Participants from the requirements of Rule 608(c) of Regulation NMS that they comply with, and enforce compliance by their members with certain provisions of Section VII and Appendices B and C of the Plan that address, among other things, the collection and publication of Pilot data.

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<sup>1</sup> See letter from Marcia E. Asquith, Senior Vice President and Corporate Secretary, FINRA, to Robert W. Errett, Deputy Secretary, U.S. Securities and Exchange Commission, dated November 14, 2016 ("Exemption Request").

<sup>2</sup> See Securities Exchange Act Release No. 74892 (May 6, 2015), 80 FR 27513 (May 13, 2015) ("Approval Order"). See also Securities and Exchange Act Release No. 76382 (November 6, 2015), 80 FR 70284 (November 13, 2015). Unless otherwise specified, capitalized terms are defined terms of the Plan.

Rule 608(c) of Regulation NMS requires the Participants to comply with the terms of the Pilot.<sup>3</sup> Further, Rule 608(c) of Regulation NMS requires each Participant to enforce compliance with the Pilot by its members and persons associated with its members.<sup>4</sup> Rule 608(e) of Regulation NMS provides that the Commission may exempt from the provisions of Rule 608 of Regulation NMS, either conditionally or on specified terms and conditions, any self-regulatory organization, 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 the perfection of the mechanisms of, a national market system.<sup>5</sup>

As discussed below, the Commission, pursuant to its authority under Rule 608(e) of Regulation NMS, is hereby granting each Participant a limited exemption from the requirement to comply with certain provisions of the Plan as required under Rule 608(c) of Regulation NMS so long as each Participant submits proposed rule changes to reflect the changes described below.

### Exemption from Certain Provisions of the Plan

#### 1. Exemption from the Requirement to Publish Certain Pilot Data on a Monthly Basis

Section VII(A) (Collection of Trading Center Pilot Data) of the Plan provides that the Participants must collect certain data with respect to Pilot Securities, as set forth in Appendix B. Section VII(A) of the Plan further provides, among other things, that on a monthly basis, each Participant and the Designated Examining Authority (“DEA”) for each member of a Participant operating a Trading Center will, as applicable, make the specified data publicly available on its respective website for free. In addition, Section VII(A) of the Plan provides that the data made publicly available will not identify the Trading Center that generated the data.

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

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<sup>3</sup> 17 CFR 242.608(c).

<sup>4</sup> Id.

<sup>5</sup> 17 CFR 242.608(e).

Pursuant to the Plan<sup>6</sup> and Participant rules<sup>7</sup> adopting the requirements of the Plan, Pilot data is currently required to be published on a monthly basis. For example, FINRA Rule 6191(b)(2)(B) and FINRA Rule 6191(b)(3)(B) provide that FINRA shall publish certain Appendix B data on a monthly basis. In addition, FINRA Rule 6191(b)(4)(B) provides that FINRA shall publish certain Appendix C on a monthly basis. FINRA Rule 6191, Supplementary Material .12 provides that the requirement to make data publicly available on the FINRA website pursuant to Appendix B and C to the Plan shall commence at the beginning of the Pilot Period. Pursuant to these rules,<sup>8</sup> the Participants are scheduled to publish the first set of Pilot data November 30, 2016.<sup>9</sup>

The Participants request an exemption from the requirements in Section VII of the Plan that they publish the Pilot data collected pursuant to Appendices B and C of the Plan on a monthly basis in order to allow them to publish the data within 120 calendar days from the month end.<sup>10</sup> The exemption and related proposed rule changes would implement a 90-day delay of the publication of the data. In the Exemption Request, the Participants state that delaying the publication of the Pilot data is intended to address confidentiality concerns by providing for the passage of additional time between when the market information is reflected in the data and the public availability of such information.

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<sup>6</sup> Appendix B to the Plan provides that Participants must submit the data to the SEC within 30 calendar days following month end. Appendix C to the Plan provides that Market Makers must submit Appendix C, Item 1 data to its DEA within 30 calendar days following month end.

<sup>7</sup> See, e.g., BATS BZX Rule 11.27; BATS BYX Rule 11.27; BATS EDGA Rule 11.21; BATS EDGX Rule 11.22; CHX Article 20, Rule 13; IEX Rule 11340; Nasdaq BX Rule 4770; Nasdaq Rule 4770; Nasdaq Phlx Rule 3317; NSX Rule 11.26; FINRA Rule 6191; NYSE Rule 67; NYSE MKT Rule Equities 67; and NYSE ARCA Rule 7.46.

<sup>8</sup> Id.

<sup>9</sup> The Participant rules provide that the publication of Pilot data collected during the Pre-Pilot Period would also occur on November 30, 2016. See e.g., FINRA Rule 6191, Supplementary Material .12.

<sup>10</sup> FINRA has submitted a proposed rule change to provide that FINRA would publish Appendix B and C data within 120 calendar days from the month end. See Securities Exchange Act Release No. 79424 (November 29, 2016) (“FINRA Proposal”). The proposed rule change would also provide for the publication of data collected during the Pre-Pilot Period within 120 calendar days following the month end starting at the beginning of the Pilot Period. As noted above, the Commission grants each Participant a limited exemption from the certain provisions of the Plan so long as each Participant submits a proposed rule change to reflect the changes in the publication of Pilot data as described herein.

The Commission grants the exemption to the Participants from the requirements in Section VII of the Plan to publish Pilot data collected pursuant to Appendices B and C of the Pilot on a monthly basis so long as the Participants make the Pilot data publically available within 120 calendar days from the month end. Accordingly, the Participants would publish on their websites data for the Pre-Pilot Period currently required to be published on November 30, 2016, on February 28, 2017. In addition, the Participants would publish Pilot data collected during the Pilot Period within 120 calendar days following the end of the month. Thus, for example, data for the month of October 2016 would be made available on Participant websites by February 28, 2017. The Commission notes that this exemption does not modify the requirements regarding the submission of Appendix B or C data to the SEC. The Commission has determined 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 the perfection of a national market system because it should address concerns related to data confidentiality while ensuring that the data continues to be publicly available and useful during the Pilot Period.

## 2. Exemption from the Requirement to Publish Certain Pilot Data

As noted above, Section VII(B) of the Plan provides, among other things, that each Participant that is the DEA of a Market Maker will collect data specified in Item I of Appendix C to the Plan regarding daily Market Maker trading profits. Further, the Plan provides that the DEA will aggregate such data categorized by the Control Group and each Test Group and make the aggregated data publicly available for free on its website on a monthly basis. Section VII(B) of the Plan further provides that the data made publicly available will not identify the Market Makers that generated the data or the individual securities. These provisions are also reflected in Participant rules.<sup>11</sup>

The Participants request an exemption from the provisions in Section VII(B) of the Plan to permit FINRA to aggregate all Appendix C data and publish such data on the FINRA website, rather than each Participant that is the DEA of a Market Maker separately publishing Appendix C data on its respective website. As described in the Exemption Request, FINRA would collect, aggregate and publish, by Control Group and each Test Group: (1) Market Maker profitability statistics for Market Makers for which FINRA is the DEA, (2) Market Maker profitability statistics collected from other Participants that are DEAs, and (3) Market Maker profitability statistics for Market Makers whose DEA is not a Participant. In the Exemption Request, the Participants state that the aggregation of all Market Maker profitability data is intended to address confidentiality concerns. In particular, the FINRA Proposal notes that some Participants are the DEAs for a small number of Market Makers, and the publication of Market Maker data collected by such DEAs raise concerns about the potential for identifying Market Makers that correspond to the published statistics.<sup>12</sup>

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<sup>11</sup> See supra note 7.

<sup>12</sup> The Commission notes that those Participants that are DEAs for Market Makers have proposed rules to provide that they would transmit Appendix C data to

The Commission grants the exemption to the Participants that are DEAs from the requirement in Section VII(B) of the Plan to publish data specified in Appendix C of the Plan so long as the Participants that are DEAs of Market Markers provide their Appendix C data to FINRA and FINRA collects, aggregates and publishes all of the Appendix C data collected from all DEA Participants on its website within 120 calendar days from month end, as described above and specified in the FINRA Proposal. The Commission has determined 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 the perfection of a national market system because it should address concerns related to confidentiality of Market Maker Profitability data while ensuring that the data continues to be publicly disseminated and useful.

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FINRA for further aggregation and publication. See SR-CHX-2016-21; SR-Phlx-2016-118; and SR-NYSEArca-2016-159.

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This exemption is conditioned on the facts and representations presented in the Exemption Request. In the event any material change occurs with respect to any of the facts or representations presented, the exemption will expire and the Participants must immediately resume operating in accordance with all of the provisions in the Pilot.

For the Commission,  
by the Division of Trading and Markets,  
pursuant to delegated authority.<sup>13</sup>



David S. Shillman  
Associate Director

cc: BATS BZX Exchange, Inc.  
BATS BYX Exchange, Inc.  
BATS EDGA Exchange, Inc.  
BATS EDGX Exchange, Inc.  
Chicago Stock Exchange, Inc.  
Investors Exchange LLC  
National Stock Exchange, Inc.  
New York Stock Exchange LLC  
NYSE MKT LLC  
NYSE Arca, Inc.  
NASDAQ OMX BX, Inc.  
NASDAQ OMX PHLX LLC  
The Nasdaq Stock Market LLC

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<sup>13</sup> 17 CFR 200.30-3(a)(42).