

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

Elizabeth M. Murphy,

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65388; File No. SR-FINRA-2011-051]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Create an Exemption From Certain Reporting Obligations Under the Equity Trade Reporting Rules for Certain Alternative Trading Systems

September 23, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on September 16, 2011, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization’s Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt new Rules 6183 and 6625 to provide FINRA with authority to exempt a member alternative trading system (“ATS”) that meets the specified criteria from the trade reporting obligation under the equity trade reporting rules. In addition, FINRA is proposing a conforming change to Rule 9610 to specify that FINRA has exemptive authority under proposed Rules 6183 and 6625.

The text of the proposed rule change is available on FINRA’s Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

#### II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

##### A. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

###### 1. Purpose

FINRA trade reporting rules require that over-the-counter (“OTC”) transactions in equity securities<sup>3</sup> between members be reported to FINRA by the “executing party.”<sup>4</sup> “Executing party” is defined as the member that receives an order for handling or execution or is presented an order against its quote, does not subsequently re-route the order, and executes the transaction. An ATS, which term includes electronic communications networks, is the “executing party” and has the trade reporting obligation where the transaction is executed on the ATS.<sup>5</sup>

FINRA is proposing to adopt new Rules 6183 and 6625 to provide FINRA with authority to exempt, upon application and subject to specified terms and conditions, a member ATS from the trade reporting obligation under certain limited circumstances. FINRA will only grant an exemption

<sup>3</sup> Specifically, these transactions are: (1) Transactions in NMS stocks, as defined in SEC Rule 600(b) of Regulation NMS, effected otherwise than on an exchange, which are reported through the Alternative Display Facility or a Trade Reporting Facility; and (2) transactions in OTC Equity Securities and Restricted Equity Securities, as those terms are defined in Rule 6420, which are reported through the OTC Reporting Facility.

FINRA notes that the proposed rule change applies to OTC transactions in equity securities only. It does not apply to TRACE-eligible securities, nor does it impact the reporting rules applicable to transactions in TRACE-eligible securities, which are subject to a separate reporting structure under the Rule 6700 Series.

<sup>4</sup> See Rules 6282(b), 6380A(b), 6380B(b) and 6622(b). For transactions between a member and a non-member or customer, the member must report the trade.

<sup>5</sup> See Securities Exchange Act Release No. 58903 (November 5, 2008), 73 FR 67905 (November 17, 2008) (Order Approving File No. SR-FINRA-2008-011); and *Regulatory Notice* 09-08 (January 2009). See also, e.g., Trade Reporting Frequently Asked Questions, Sections 307 and 308, available at <http://www.finra.org/Industry/Regulation/Guidance/P038942>.

where all of the conditions set forth in the proposed rule are satisfied.

First, trades must be between ATS subscribers that are both FINRA members. For any trades between non-members or a FINRA member and a non-member, the exemption will not apply, and the ATS will have the trade reporting obligation under FINRA rules.

The ATS also must demonstrate that it meets the following criteria. First, the member subscribers must be fully disclosed to one another at all times on the ATS. Second, although the system brings together the orders of buyers and sellers and uses established, non-discretionary methods under which such orders interact with each other, the system does not permit automatic execution. A member subscriber must take affirmative steps beyond the submission of an order to agree to a trade with another member subscriber. Third, the trade does not pass through any ATS account, and the ATS does not in any way hold itself out to be a party to the trade. Fourth, the ATS does not exchange shares or funds on behalf of the member subscribers, take either side of the trade for clearing or settlement purposes, including, but not limited to, at DTC or otherwise, or in any other way insert itself into the trade.

In addition, the ATS and the member subscribers must acknowledge and agree in writing that the ATS shall not be deemed a party to the trade for purposes of trade reporting and that trades shall be reported by the member subscriber that, as between the two member subscribers, would satisfy the definition of “executing party” under FINRA trade reporting rules. An ATS that is granted an exemption must obtain such written agreements from all of its member subscribers prior to relying on the exemption.<sup>6</sup>

Finally, the ATS must agree to provide to FINRA on a monthly basis, or such other basis as prescribed by FINRA, data relating to the volume of trades by security executed by the ATS’s member subscribers using the ATS’s system (e.g., number of trades, number of shares traded and total settlement value for each security traded). Importantly, although an ATS exempted under the proposed rule will not have trade reporting obligations under FINRA rules, the trading occurring through the ATS is still considered volume of the ATS for purposes of, among other

<sup>6</sup> FINRA reminds members of their books and records obligations under FINRA rules, the Exchange Act and applicable Exchange Act rules. Thus, any ATS that is granted an exemption under the proposed rule change would be required to retain the written agreements and be able to produce them to FINRA upon request.

<sup>11</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

things, the recordkeeping requirements of Rule 302 of SEC Regulation ATS<sup>7</sup> and determining whether the ATS triggers the Fair Access requirements under Rule 301(b)(5) of Regulation ATS or the Capacity, Integrity and Security of Automated Systems requirements of Rule 301(b)(6) of Regulation ATS. The ATS also must acknowledge that failure to report such data to FINRA, in addition to constituting a violation of FINRA rules, will result in revocation of any exemption granted pursuant to the proposed rule change.

Where an exemption is granted, the ATS will not be deemed a party to the trade for purposes of FINRA trade reporting rules and will not be identified in trade reports submitted to FINRA. As expressly stated in the proposed rule, the trade must be reported to FINRA by the member subscriber that, as between the two member subscribers, satisfies the definition of “executing party” under paragraph (b) of Rules 6282, 6380A, 6380B or 6622.<sup>8</sup> For example, FINRA member BD1 displays a quote through ATS X and member BD2 routes an order to BD1 for the price and size of BD1’s quote using a messaging system provided by ATS X. BD1 does not subsequently re-route the order and executes the trade. Assuming that ATS X meets all of the criteria set forth in the proposed rule and has been granted an exemption by FINRA, it will not be deemed a party to the trade for trade reporting purposes and should not be identified as such in the trade report submitted to FINRA. In this example, BD1 is the “executing party” and has the obligation to report the trade between BD1 and BD2.

FINRA believes that the proposed rule change will reduce potential confusion and possible misreporting by clearly identifying the member with the trade reporting obligation in this instance. FINRA believes that an ATS that satisfies all conditions of the proposed rule change has a more limited involvement in the trade execution than the member subscribers and therefore the proposed exemption is appropriate in this narrow instance. FINRA expects that a large majority of ATSs will not qualify for the exemption, and the proposed rule change will not result in a change to their reporting. These ATSs

will continue to report, as “executing party,” trades that are matched and executed on their systems.

FINRA also is proposing a conforming change to Rule 9610 to add proposed Rules 6183 and 6625 to the list of rules pursuant to which FINRA has exemptive authority.

FINRA is proposing that the proposed rule change will be effective on the date of Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>9</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will reduce potential confusion and possible misreporting and enhance market transparency by clearly identifying the member with the trade reporting obligation (i.e., the party to the trade that meets the definition of “executing party” for purposes of trade reporting to FINRA).

### B. Self-Regulatory Organization’s Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization’s Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2011-051 on the subject line.

### Paper Comments

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

All submissions should refer to File Number SR-FINRA-2011-051. 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 Web site (<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 Web site 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 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. 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-2011-051 and should be submitted on or before October 20, 2011.

<sup>7</sup> 17 CFR 242.300-303.

<sup>8</sup> FINRA notes that where an ATS has been granted an exemption under the proposed rule, the member subscribers, as the parties identified in the trade report, will be assessed regulatory transaction fees under Section 3 of Schedule A to the FINRA By-Laws and the Trading Activity Fee under FINRA By-Laws, Schedule A, § 1(b)(2). The ATS will not be assessed such fees.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Elizabeth M. Murphy,**  
Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65387; File No. SR-BX-2011-034]

### Self-Regulatory Organizations; NASDAQ OMX BX, Inc.; Order Approving Proposed Rule Change Amending Chapter V, Section 31 of the Rules of the Boston Options Exchange Group, LLC To Establish Facilitation and Solicitation Auction Mechanisms

September 23, 2011.

#### I. Introduction

On June 17, 2011, NASDAQ OMX BX, Inc. (“BX” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”) <sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to amend Chapter V (Doing Business on BOX), Section 31 (Block Trading) of the Rules of the Boston Options Exchange Group, LLC (“BOX”), to establish facilitation and solicitation auction mechanisms. The proposed rule change was published for comment in the *Federal Register* on June 29, 2011.<sup>3</sup> The Commission received no comments on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

**Facilitation Auction**—The Facilitation Auction will allow Order Flow Providers (“OFPs”) on BOX to enter crossing transactions in which an OFP represents, as agent, an order (“Agency Order”) of 50 contracts or more and (a) is trading against the Agency Order as principal, and/or (b) has solicited an order to take the opposite side of the Agency Order. To utilize the Facilitation Auction, an OFP must be willing to execute the entire size of the Agency Order through the submission of a contra “Facilitation Order.”

Upon the entry of an Agency Order and Facilitation Order into the Facilitation Auction, a broadcast message, which will include the proposed execution price of the cross

(the “Facilitation Price”), will be sent to Options Participants giving them one second to enter responses (“Responses”)<sup>4</sup> with the prices and sizes at which they would be willing to participate in the facilitation opposite the Agency Order. At the end of the one second period for the entry of Responses, the Agency Order will be automatically executed, as follows:

Unless there is sufficient size to execute the entire Agency Order at a price better than the Facilitation Price, Public Customer bids (offers) and Public Customer Responses on BOX at the time the Agency Order is executed that are priced higher (lower) than the Facilitation Price will be executed at the facilitation price. Non-Public Customer and Market Maker bids (offers) and Non-Public Customer and Market Maker Responses on BOX at the time the Agency Order is executed that are priced higher (lower) than the Facilitation Price will be executed against the Agency Order at their stated price.

The facilitating OFP will execute at least forty percent of the original size of the Facilitation Order, but only after better-priced bids (offers) and Responses on BOX, as well as Public Customer bids (offers) and Responses at the facilitation price, are executed in full. After the facilitating OFP has executed its forty percent, Non-Public Customer and Market Maker bids (offers) and Responses on BOX at the Facilitation Price will participate in the execution of the Agency Order based upon price and time priority.<sup>5</sup>

**Solicitation Auction**—The Solicitation Auction will allow OFPs to attempt to execute Agency Orders of 500 or more contracts against contra orders that the OFP has solicited (“Solicited Orders”).<sup>6</sup> Executions will occur only if the price is at or between the national best bid or offer (“NBBO”). Each Agency Order entered into the Solicitation Auction must be an all-or-none order.

When a proposed solicited cross is entered into the Solicitation Auction, BOX will broadcast a message, which will include the proposed execution price of the cross, to Options Participants, and they will have one second to enter Responses with the prices and sizes at which they would be willing to participate in the execution of

the Agency Order. At the end of the one second period for the entry of Responses, the Agency Order will be automatically executed in full or cancelled.

The Agency Order will be executed against the Solicited Order at the proposed execution price unless (a) There is sufficient size to execute the entire Agency Order at a better price or prices, or (b) there is a Public Customer order resting on the BOX Book at a price equal to or better than the proposed execution price within the depth of the BOX Book that would have traded with the Agency Order if the Agency Order had been submitted to the BOX Book instead of to the mechanism (a “Book Priority Public Customer Order”).<sup>7</sup>

If there is sufficient size to execute the entire Agency Order at a better price or prices at the time of execution, the Agency Order will be executed at the improved price(s) and the Solicited Order will be cancelled. The aggregate size of all bids (offers) and Responses at each price will be used to determine whether the entire Agency Order can be executed at an improved price (or prices).<sup>8</sup>

If there is not sufficient size to execute the entire Agency Order at a better price or prices, whether the Agency Order will be executed against the Solicited Order at the proposed execution price depends on whether there is one or more Book Priority Public Customer Order(s) on the BOX Book at the time of execution. If no such Book Priority Public Customer Orders are on the BOX Book at the time of execution, the Agency Order will be executed against the Solicited Order at the proposed execution price.<sup>9</sup> However, if there is one or more Book Priority Public Customer Orders on the Book, then BOX will calculate whether sufficient size exists to execute the Agency Order at its proposed price. In making this calculation, the Exchange will include the aggregate size of all bids (offers) on the BOX Book at or better than the proposed execution price but exclude Responses.<sup>10</sup>

<sup>7</sup> See chapter V, Section 31(b)(ii)(1) of the BOX Rules.

<sup>8</sup> See chapter V, section 31(b)(ii)(3) of the BOX Rules.

<sup>9</sup> See chapter V, section 31(b)(ii)(1) of the BOX Rules. In addition, the Agency Order will not be executed against the Solicited Order unless the execution price is equal to or better than the NBBO at the time of execution. If an execution would take place at a price that is inferior to the best bid or offer on BOX or the NBBO, both the Solicited Order and Agency Order will be cancelled. *Id.* Thus, a Solicited Order cannot trade through a better price on an away market or on the BOX Book.

<sup>10</sup> See chapter V, section 31(b)(ii)(2) of the BOX Rules.

<sup>4</sup> Responses are permitted to be entered on behalf of any customer.

<sup>5</sup> The Exchange provided a more detailed explanation regarding the Facilitation Auction in the Notice. See Notice, *supra* note 3.

<sup>6</sup> The Exchange provided a more detailed explanation of how the Solicitation Auction will work, with examples, in the Notice. See Notice, *supra* note 3.

<sup>10</sup> 17 CFR 200.30-3(a)(12).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

<sup>3</sup> See Securities Exchange Act Release No. 64734 (June 23, 2011), 76 FR 38226 (“Notice”).