seller and selling to the buyer at the same price.

Trading Outside Normal Market Hours

Under the proposed amendments to Rule 12.6, a Member generally could limit the life of a customer order to the period of normal market hours of 9:30 a.m. to 4:00 p.m. Eastern Time. However, if the customer and Member agreed to the processing of the customer's order outside normal market hours, the protections of Rule 12.6, as amended, would apply to that customer's order at all times the customer order is executable by the Member.

III. Discussion and Commission Findings

After careful review of the proposed rule change, the Commission finds that the Exchange's proposal is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange.[9] In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,[10] which requires that the rules of a national securities exchange be designed, among other things, 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.

The Commission believes that the proposed rule change, which is designed to establish a single standard to protect customer orders from member firms trading ahead of those orders, will help assure the protection of customer orders without imposing undue regulatory costs on industry participants. Moreover, the Commission believes that the proposed rule change will define important parameters by which Members must abide when trading proprietarily while holding customer orders. In addition, because the Exchange is proposing to make its customer order protection rule substantially similar to the customer order protection rules of FINRA [11] and other exchanges,[12] the Commission believes that the proposed rule change will help reduce the complexity of the customer order protection rules for those firms subject to these rules. Taken together, the proposed rule change should provide Members with clarity and guidance and thereby promote the efficient functioning of the securities markets.

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[13] that the proposed rule change (SR–BYX–2013–036) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[14]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28968 Filed 12–3–13; 8:45 am]

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[9] In approving the BYX proposed rule change, the Commission has considered its impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[10] 15 U.S.C. 78f(b)(5).

[11] *See* FINRA Rule 5320, *supra* note 5.

[12] Several national securities exchanges submitted proposed rule changes to adopt customer order protection rules that are substantially similar to FINRA Rule 5320. *See, e.g.,* Securities Exchange Act Release No. 64418 (May 6, 2011), 76 FR 27735 (May 12, 2011) (SR–CHX–2011–08); Securities Exchange Act Release No. 65165 (August 18, 2011), 76 FR 53009 (August 24, 2011) (SR–NYSEAmex–2011–59); Securities Exchange Act Release No. 65166 (August 18, 2011), 76 FR 53012 (August 24, 2011) (SR–NYSEArca–2011–57); Securities Exchange Act Release No. 69504 (May 2, 2013), 78 FR 26828 (May 8, 2013) (SR–CBOE–2013–027); and Securities Exchange Act Release No. 70011 (July 19, 2013), 78 FR 44994 (July 25, 2013) (SR–CBOE–2013–074).

[13] 15 U.S.C. 78s(b)(2).

[14] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70957; File No. SR–FINRA–2013–037]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Amend FINRA Rule 5131 (New Issue Allocations and Distributions)

November 27, 2013.

I. Introduction

On August 23, 2013, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend FINRA Rule 5131 (New Issue Allocations and Distributions) to provide a limited exception to allow members to rely on written representations from certain accounts to comply with Rule 5131(b). The proposed rule change was published for comment in the **Federal Register** on September 10, 2013.[3] The Commission received two comment letters in response to the proposed rule change.[4] On November 22, 2013, FINRA filed Amendment No. 1 with the Commission to respond to the comment letters and to propose a clarifying modification to the proposed exception regarding the eligibility of an unaffiliated private fund where a control person of the fund's investment adviser also is a beneficial owner in the fund. The Commission is publishing this notice and order to solicit comments on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of Proposal

On August 23, 2013, FINRA filed the Original Proposal to amend FINRA Rule 5131 to provide a limited exception to allow members to rely on written representations from certain accounts in complying with FINRA Rule 5131(b) (the ''spinning provision'').[5]

FINRA Rule 5131 addresses abuses in the allocation and distribution of ''new issues,'' [6] and paragraph (b) prohibits the practice of ''spinning,'' which refers to an underwriter's allocation of new issue shares to executive officers and directors of a company as an inducement to award the underwriter with investment banking business, or as consideration for investment banking business previously awarded.

The spinning provision generally provides that no member or person associated with a member may allocate shares of a new issue to any account in which an executive officer or director of a public company [7] or a covered non-public company,[8] or a person materially

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70312 (Sept. 4, 2013), 78 FR 55322 (Sept. 10, 2013) (Notice of Filing of SR–FINRA–2013–037) (''Original Proposal''). The comment period ended on October 1, 2013.

[4] *See* letter to Elizabeth M. Murphy, Secretary, Commission, from William G. Mulligan, CEO, Cordium US., dated Oct. 1, 2013 (''Cordium letter''); and letter to Elizabeth M. Murphy, Secretary, Commission, from Stuart J. Kaswell, Executive Vice President & Managing Director, Managed Funds Association, dated Sept. 30, 2013 (''MFA letter''). The letters are available on the Commission's Web site at *http://www.sec.gov/comments/sr-finra-2013-037/finra2013037.shtml*.

[5] *See supra* note 3.

[6] The term ''new issue'' has the same meaning as in Rule 5130(i)(9). *See* Rule 5130(i)(9).

[7] A ''public company'' is any company that is registered under Section 12 of the Act or files periodic reports pursuant to Section 15(d) thereof. *See* Rule 5131(e)(1).

[8] The term ''covered non-public company'' means any non-public company satisfying the following criteria: (i) Income of at least $1 million in the last fiscal year or in two of the last three fiscal years

supported [9] by such executive officer or director, has a beneficial interest [10] if such public company or covered non-public company has certain current, recent or anticipated investment banking relationships with the member.

Rule 5131.02 (Annual Representation) provides that, for the purposes of the spinning provision, a member may rely on a written representation obtained within the prior 12 months from the beneficial owner(s) of an account, or a person authorized to represent the beneficial owner(s), as to whether such beneficial owner(s) is an executive officer or director or person materially supported by an executive officer or director and if so, the company on whose behalf such executive officer or director serves. Therefore, to comply with the spinning provision, firms typically issue questionnaires to their customers to ascertain whether any of the persons covered by the spinning provision has a beneficial interest in the account.

Under the spinning provision, whether an account in which an executive officer or director of a company (or person materially supported by such executive officer or director) has a beneficial interest will be eligible to purchase shares of a new issue will depend upon whether the company is a current, recent or prospective investment banking client of the firm, as set forth in the rule. Where an executive officer or director of a company (or a person materially supported by such executive officer or director) has a beneficial interest in an account, a member must also be able to identify the company on whose behalf such executive officer or director serves to determine whether the company is a current, recent or prospective investment banking client of the firm under the rule; if the member is unable to obtain such information, it has to resort to restricting all new issue allocations to such account, which is not the intended purpose of the rule.

The spinning provision went into effect on September 26, 2011. and, since then, FINRA has received feedback from industry participants that obtaining the information necessary to ensure compliance with the rule, and eligibility for the *de minimis* exception, has proved difficult.[11] In particular, FINRA understands that members (and their customers) have had difficulty obtaining, tracking and aggregating information from funds regarding indirect beneficial owners, such as participants in a fund of funds (''FOF''), for use in determining an account's eligibility for the *de minimis* exception and that this has resulted in compliance difficulties and restrictions, including in situations where the ability of an underwriter to confer any meaningful financial benefit to a particular investor by allocating new issue shares to the account is impracticable.[12]

Thus, in the Original Proposal, FINRA proposed a limited exception from the spinning provision, subject to a set of conditions, designed to ensure the important protections of Rule 5131(b) continue to be preserved, while offering meaningful relief for members and investors in situations where spinning abuse is not likely. Specifically, the Original Proposal provided that members may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of a fund invested in the account, provided that such fund:

- Is a ''private fund'' as defined in the Investment Advisers Act of 1940;
- is managed by an investment adviser;
- has assets greater than $50 million;
- owns less than 25% of the account and is not a fund in which a single investor has a beneficial interest of 25% or more;
- is ''unaffiliated'' with the account in that the private fund's investment adviser does not have a control person in common with the account's investment adviser; and
- was not formed for the specific purpose of investing in the account.

The Original Proposal also required that, to be eligible for the exception, the unaffiliated private fund may not have a beneficial owner that also is a control person of such fund's investment adviser.

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.

III. Summary of Comments, FINRA's Response and Amendment No. 1

As stated above, the Commission received two comment letters in response to the Original Proposal.[13] Both commenters strongly support the adoption of the proposed amendment and stated that the proposed rule would ease the tracking burden for allocations to accounts that do not raise the concerns the spinning rule is designed to address, while also preserving the efficacy of the rule.[14] However, the commenters also suggest certain modifications that they believe improve the usefulness of the proposed exception without compromising the objectives of the rule.[15]

Both commenters asked that FINRA eliminate the proposed condition that the unaffiliated private fund must not have a beneficial owner that also is a control person of such fund's investment adviser.[16] The commenters noted that it is not uncommon for an FOF to have an investor that is both a beneficial owner of the FOF and a control person of such fund's investment adviser.[17] One commenter noted that investment in the fund by a control person serves the purpose of aligning the interests of a control person with the interests of the fund's investors and, therefore, is a practice that institutional investors often require from fund managers.[18] The other commenter stated that this condition does not further the purposes of the spinning rule and recommended eliminating this aspect of the proposal.[19]

As an alternative, one commenter recommended that, rather than excluding funds with a beneficial owner that also is a control person of the investment adviser, the proposal instead should be amended to provide that a member may rely upon a written representation obtained within the prior 12 months from a person authorized to represent an account that does not look through to the beneficial owners of a fund invested in the account (other than a beneficial owner that is a control person of the investment adviser to such private fund), subject to the other

and shareholders' equity of at least $15 million; (ii) shareholders' equity of at least $30 million and a two-year operating history; or (iii) total assets and total revenue of at least $75 million in the latest fiscal year or in two of the last three fiscal years. *See* Rule 5131(e)(3).

[9] ''Material support'' means directly or indirectly providing more than 25% of a person's income in the prior calendar year. Persons living in the same household are deemed to be providing each other with material support. *See* Rule 5131(e)(6).

[10] The term ''beneficial interest'' has the same meaning as in Rule 5130(i)(1). *See* Rule 5130(i)(1).

[11] Among other exceptions, Rule 5131(b)(2) provides a *de minimis* exception for new issue allocations to any account in which the beneficial interests of executive officers and directors of a company subject to the rule, and persons materially supported by such executive officers and directors, do not exceed in the aggregate 25% of such account.

[12] For example, members have noted that broker-dealers normally do not know the identity of the beneficial owners of the fund of funds invested in the account.

[13] *See supra* note 4.

[14] *See* Cordium letter and MFA letter.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *See* MFA letter.

[19] *See* Cordium letter.

proposed conditions.[20] FINRA agrees with this comment and, therefore, proposed a clarifying amendment to delete the proposed condition that the unaffiliated private fund must not have a beneficial owner that also is a control person of such fund's investment adviser and, instead, to include language substantially similar to that suggested by the commenter.[21]

Therefore, where a beneficial owner also is a control person of the FOF's adviser, a member must ascertain whether such person is a covered person based upon the standards set forth in Rule 5131(b). If a member obtains a written representation from an account that a beneficial owner in an unaffiliated private fund is a control person of such fund's investment adviser, but is not a covered person under the spinning provision, an allocation to such account would still be eligible for the proposed exception, if the conditions, as amended, are met. If a beneficial owner in an unaffiliated private fund is both a control person and a covered person under the spinning provision, a new issue allocation to such covered persons would be impermissible, unless such allocation is permitted under another exception (*e.g.,* the *de minimis* exception).[22]

As stated above, the commenters noted that it is not uncommon for an FOF to have an investor that is both a beneficial owner of the FOF and a control person of such fund's investment adviser. Therefore, the Original Proposal would not have provided the intended relief for members in many cases where the efficacy of the spinning provision would still be preserved. Thus, instead of eliminating eligibility for the exception for any FOF with a beneficial owner that also is a control person of such fund's investment adviser, the revised proposal would permit a member to avail itself of the exception with respect to other beneficial owners (that are not also control persons of the FOF's investment adviser). FINRA believes that this revision to the proposal strikes the proper balance between members' concerns regarding the difficulty of identifying indirect beneficial owners of an account and preserving the important protections of Rule 5131(b).

One commenter also recommended that FINRA either reduce or eliminate the proposal's condition that, to be eligible under the exception, the unaffiliated private fund must have assets greater than $50 million.[23] This commenter believes that the percentage ownership threshold conditions, which require that the unaffiliated private fund own less than 25% of the account and does not have a single investor with a beneficial interest of 25% or more, along with the other conditions, are sufficient to ensure that spinning would be unlikely.[24]

FINRA is of the view that the percentage ownership threshold conditions alone are not sufficient to ensure that the protections of the spinning rule are preserved and, therefore, continues to believe that the ''assets greater than $50 million'' component is an appropriate additional safeguard. Specifically, FINRA believes that this requirement helps ensure a sufficient degree of dilution that would reduce the economic meaningfulness to a potentially covered person of any single IPO allocation, and therefore, does not propose eliminating or reducing this condition at this time.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date will be no later than 120 days following Commission approval.

IV. Commission Findings

After carefully considering the proposed rule change, as modified by Amendment No. 1, the comments submitted, and FINRA's responses to the comments, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.[25] In particular, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with Section 15A(b)(6) of the Act,[26] 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.

Specifically, the Commission believes that the proposed exception and required conditions, as amended, are consistent with the provisions of the Act noted above by promoting capital formation and aiding member compliance efforts, while maintaining investor confidence in the capital markets. In simplifying and clarifying the operation of the proposed exception for FINRA members and other industry participants, the Commission believes that the proposed rule change, as modified by Amendment No. 1, reasonably balances the compliance concerns and the burdens noted by the industry while preserving the efficacy of the spinning provision and FINRA's goal of assuring that the rule continues to be designed to promote capital formation and investor confidence and prevent fraudulent and manipulative behaviors.

In addition, the Commission does not believe that the proposed rule change, as modified by Amendment No. 1, will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act in that the proposed rule change provides an exception to Rule 5131(b) for accounts with unaffiliated private fund investors that face special difficulties under the existing exceptions from the rule, and thus reduces differential impacts of the rule without compromising the objectives of the spinning provision.

The Commission believes that FINRA adequately addressed the comments raised in response to FINRA's notice.

V. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,[27] for approving the proposed rule change, as modified by Amendment No. 1 thereto, prior to the 30th day after publication of Amendment No. 1 in the **Federal Register**. The changes proposed in Amendment No. 1 respond to the comment letters received by the Commission in response to the Original Proposal and further simplify the operation of the spinning provision for members and other industry participants.[28] In addition, accelerating approval of this proposed rule change, as modified by Amendment No. 1, should benefit FINRA members by aiding member compliance efforts while preserving the efficacy of the spinning provision and should benefit investors by maintaining investor protection in the capital markets.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No.

[20] *See* MFA letter.

[21] *See* MFA letter.

[22] *See supra* note 11.

[23] *See* Cordium letter.

[24] *See* Cordium letter.

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

[26] 15 U.S.C. 78o–3(b)(6).

[27] 15 U.S.C. 78s(b)(2).

[28] *See* MFA letter. *See also* Cordium letter.

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://sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2013–037 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–2013–037. This file number should be included on the subject line if email 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 person 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–2013–037 and should be submitted on or before December 26, 2013.

VII. Conclusion

It is therefore ordered pursuant to Section 19(b)(2) of the Act,[29] that the proposed rule change (SR–FINRA–2013–037), as modified by Amendment No. 1, be and hereby is approved on an accelerated basis.

[29] 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[30]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2013–28975 Filed 12–3–13; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–70952; File No. SR–BATS–2013–056]

Self-Regulatory Organizations; BATS Exchange, Inc.; Order Approving a Proposed Rule Change To Amend Rule 12.6 To Conform to FINRA Rule 5320 Relating to Trading Ahead of Customer Orders

November 27, 2013.

I. Introduction

On October 3, 2013, BATS Exchange, Inc. (the ''Exchange'' or ''BATS'') 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 proposed rule change to amend BATS Rule 12.6 (''Rule 12.6'') to make it substantially similar to Financial Industry Regulatory Authority (''FINRA'') Rule 5320. The proposed rule change was published for comment in the **Federal Register** on October 22, 2013.[3] The Commission received no comments on the proposal. This order approves the proposed rule change.

II. Description of the Proposed Rule Change

The Exchange proposes to amend Rule 12.6, which limits trading ahead of customer orders by Members,[4] to have the rule substantially conform to FINRA Rule 5320.[5] As with FINRA Rule 5320, the proposed amendments to Rule 12.6 would prohibit Members from trading ahead of customer orders, subject to specified exceptions. Rule 12.6, as proposed to be amended, would include exceptions for large orders and institutional accounts, proprietary transactions effected by a trading unit of a Member with no knowledge of customer orders held by another trading unit of the Member, riskless principal transactions, intermarket sweep orders (''ISOs''), and odd lot and bona fide error transactions, described below. Rule 12.6 also would provide the same guidance as FINRA Rule 5320 with respect to minimum price improvement standards, order handling procedures, and trading outside normal market hours.

Background

Current Rule 12.6, the customer order protection rule, generally prohibits Members from trading on a proprietary basis ahead of, or along with, customer orders that are executable at the same price as the proprietary order. The current rule contains several exceptions that make it permissible for a Member to enter a proprietary order while representing a customer order that could be executed at the same price, including permitting transactions for the purpose of facilitating the execution, on a riskless principal basis, of one or more customer orders.

Proposal To Adopt Text of FINRA Rule 5320

To harmonize its rules with FINRA, the Exchange proposes to delete the current text of Rule 12.6 and its supplementary material and adopt the text and supplementary material of FINRA Rule 5320, with certain changes, as Rule 12.6. FINRA Rule 5320 generally provides that a FINRA member that accepts and holds an order in an equity security for its own customer, or a customer of another broker-dealer, without immediately executing the order is prohibited from trading that security on the same side of the market for its own account at a price that would satisfy the customer order, unless it immediately thereafter executes the customer order up to the size and at the same or better price at which it traded for its own account.

Exceptions

The proposed amendments to Rule 12.6 would include exceptions to the prohibition against trading ahead of customer orders. A Member that meets the conditions of an exception would be permitted to trade a security on the same side of the market for its own account at a price that would satisfy a customer order in certain circumstances. The exceptions are set forth below.

Large Orders and Institutional Accounts

One exception would permit a Member to negotiate terms and

[30] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 70662 (October 11, 2013), 78 FR 62828 (SR–BATS–2013–056) (''Notice'').

[4] Members are registered brokers or dealers that have been admitted to membership at the Exchange. BATS Rule 1.5(n).

[5] *See* Securities Exchange Act Release No. 63895 (February 11, 2011), 76 FR 9386 (February 17, 2011) (SR–FINRA–2009–90).