

November 4, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: File No. SR-FINRA-2011-051; Response to Comments

Dear Ms. Murphy:

On September 16, 2011, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (the “SEC”) proposed rule change SR-FINRA-2011-051, which proposes to (1) adopt new Rules 6183 and 6625 to provide FINRA with authority to exempt a member’s alternative trading system (“ATS”) that meets certain specified criteria from the trade reporting obligation under the equity trade reporting rules, and (2) make a conforming change to Rule 9610 to specify that FINRA has exemptive authority under proposed Rules 6183 and 6625 (the “original filing”). On September 29, 2011, the SEC published the proposed rule change for comment in the Federal Register.¹ The comment period closed on October 20, 2011. The SEC received three comment letters in response to the Federal Register publication.² The commenters raise several issues relating to the proposed rule change that are summarized and responded to below.

One commenter³ asserts that the proposed rule change contradicts FINRA rules and should not be approved because an ATS that meets the criteria set forth in the proposed rule does not meet the definition of an “executing party” under FINRA trade reporting rules. This assertion is based on an erroneous interpretation of FINRA rules, and in fact, is directly at odds with statements made by FINRA in the original filing. FINRA previously has stated that an ATS is the “executing party” and has the trade

¹ See Securities Exchange Act Release No. 65388 (September 23, 2011), 76 FR 60567 (September 29, 2011) (Notice of Filing of SR-FINRA-2011-051).

² See Letter from Daniel Zinn, OTC Markets Group Inc., to Elizabeth Murphy, dated October 20, 2011 (“OTC Markets Letter”); Letter from Suzanne H. Shatto to Elizabeth Murphy, dated October 20, 2011 (“Shatto Letter”); and Letter from Naphtali M. Hamlet to Elizabeth Murphy, dated October 21, 2011 (“Hamlet Letter”).

³ See OTC Markets Letter.

reporting obligation where the transaction is executed on the ATS.⁴ As stated in the original filing, FINRA believes that an ATS that satisfies the criteria set forth in the proposed rule has a more limited involvement in the trade execution than the member subscribers and therefore the proposed exemption is appropriate in this narrow instance.

This same commenter also argues that the proposed rule change should apply to the reporting of transactions in TRACE-eligible securities. Given that the TRACE rules and the equity trade reporting rules provide for different reporting structures, FINRA will consider this comment separately. If it is determined that a similar exemption is appropriate for TRACE reporting, we will submit a separate rule filing.

This commenter also asserts that several amendments are necessary to clarify the rule text proposed in the original filing. FINRA does not agree and is not proposing any changes in response to these comments. First, the commenter asserts that the requirement in paragraph (2)(D) that the ATS demonstrate that it does not exchange shares or funds on behalf of the member subscribers should be amended to clarify that it relates only to funds transferred in settlement of a trade and not to any fees the ATS may charge its subscribers. FINRA believes that the proposed rule text is clear that the exchange of funds on behalf of the subscribers relates solely to settlement of the trade, in particular because that provision states that the ATS does not “in any *other* way insert itself into the trade” (emphasis added).

Second, the commenter asserts that the requirement in paragraph (2)(B) that the member subscriber take affirmative steps beyond the submission of an order to agree to a trade with another subscriber should be amended to indicate that a subscriber sending a directed trade message in response to a published quote has taken an appropriate affirmative step under the proposed rule. FINRA believes that the proposed rule text is sufficiently broad to encompass such a scenario. The key element is that the ATS system does not permit automatic trade execution and an additional affirmative step by the subscribers must be taken.

Finally, with respect to the commenter’s suggestion that exemptions under the proposed rule change should be automatically granted, FINRA believes that it is important for FINRA staff to have the opportunity to review an ATS’s application for exemptive relief and to make a determination whether the ATS meets the criteria in the proposed rule before the ATS is able to rely on the exemption. Further, it is important for FINRA to know in advance which party, a member subscriber or the ATS, will have the trade reporting obligation under FINRA rules. In addition, FINRA

⁴ See Securities Exchange Act Release No. 58903 (November 5, 2008), 73 FR 67905 (November 17, 2008) (Order Approving 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 www.finra.org/Industry/Regulation/Guidance/P038942.

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plans to post the exemptive response on its web site to make public which ATSS are operating under this exemption. While FINRA expects to grant an exemption to any ATS that can demonstrate that it meets all of the criteria set forth in the proposed rule, we believe that FINRA staff should have notice and discretion in the event that we disagree with an ATS's assertion that it qualifies under the proposed rule.

The other two commenters essentially assert that dark pool transactions should be transparent to the marketplace.⁵ While these arguments are not germane to this filing, FINRA notes that all trades executed on an ATS, including a dark pool, must be reported for public dissemination purposes. With respect to any ATS that qualifies for an exemption under the proposed rule change, all of the trades executed on the ATS will continue to be reported for public dissemination and the level of transparency that currently exists will not change.

If you have any questions, please contact me at (202) 728-8190 or Stephanie Dumont at (202) 728-8176.

Very truly yours,



Lisa C. Horrigan
Associate General Counsel

⁵ See Shatto Letter and Hamlet Letter.