

Commission to waive the 30-day operative delay, noting that doing so would provide clarity as to what functionality is offered by the Exchange and would enable the Exchange's rules to immediately reflect the functionality available on the Exchange. The Exchange also notes that, since the PNPLO Quotation functionality is not actually available, its removal would not have a negative effect on investors. The Commission believes that waiving the 30-day operative delay is consistent with the protection of investors and the public interest. Therefore, the Commission hereby waives the 30-day operative delay and designates the proposal operative upon filing.¹⁴

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings under Section 19(b)(2)(B) of the Act¹⁵ to determine whether the proposed rule change should be approved or 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 email to rule-comments@sec.gov. Please include File Number SR-NYSEArca-2013-51 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-NYSEArca-2013-51. 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

¹⁴ For purposes only of waiving the 30-day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹⁵ 15 U.S.C. 78s(b)(2)(B).

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 Section, 100 F Street NE., Washington, DC 20549-1090. Copies of the filing will also be available for inspection and copying at the NYSE's principal office and on its Internet Web site at www.nyse.com. 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-NYSEArca-2013-51 and should be submitted on or before June 24, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁶

Kevin M. O'Neill,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69643; File Nos. SR-BYX-2013-008]

Self-Regulatory Organizations; BATS Y-Exchange, Inc.; Order Granting Approval to Proposed Rule Change Amending the Attestation Requirement of Rule 11.24 Allowing a Retail Member Organization To Attest That "Substantially All" Orders Submitted to The Retail Price Improvement Program Will Qualify As "Retail Orders"

May 28, 2013.

I. Introduction

On February 12, 2013, BATS Y-Exchange, Inc. (the "Exchange" or "BYX") 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 allow Retail Member Organizations ("RMOs") to attest that "substantially all," rather than all, orders submitted to the Retail Price Improvement Program ("Program") qualify as "Retail Orders." The proposed rule change was published for comment in the **Federal Register** on March 1, 2013.³ The Commission received one comment on the proposal.⁴ On April 12, 2013, the Commission extended the time for Commission action on the proposed rule change to May 30, 2013.⁵ The Exchange submitted a response to the comment letter on May 17, 2013.⁶ This order approves the proposed rule change.

II. Description of the Proposal

The Exchange began operating its Program after it was approved by the Commission on a pilot basis in November, 2012.⁷ Under the current rules, a member organization that wishes to participate in the Program as a RMO must submit: (A) An application form; (B) supporting documentation; and (C) an attestation that "any order" submitted as a Retail Order⁸ will qualify as such under BYX Rule 11.24.

The proposal seeks to lessen the attestation requirements of RMOs that submit "Retail Orders" eligible to receive potential price improvement through participation in the Program. Specifically, the Exchange proposes to amend Rule 11.24 to provide that an RMO may attest that "substantially all"—rather than all—of the orders it submits to the Program are Retail Orders as defined in Rule 11.24(a)(2).

The Exchange represented that it believes the categorical nature of the current "any order" attestation requirement is preventing certain member organizations with retail

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 68975 (Feb. 25, 2013), 78 FR 13915.

⁴ See Letter to the Commission from Theodore R. Lazo, Managing Director and Associate General Counsel, Securities Industry and Financial Markets Association (SIFMA), dated March 11, 2013.

⁵ See Securities Exchange Act Release No. 69369, 78 FR 23320 (April 18, 2013).

⁶ See Letter to the Commission from Eric J. Swanson, Senior Vice-President and General Counsel, BATS Y-Exchange, dated May 24, 2013 ("Response Letter").

⁷ See Securities Exchange Act Release No. 68303 (November 27, 2012), 77 FR 71650 (December 3, 2012) ("Program Approval Order").

⁸ A Retail Order is defined in Rule 11.24(a)(2) as "an agency order that originates from a natural person and is submitted to the Exchange by a Retail Member Organization, provided that no change is made to the terms of the order with respect to price or side of market and the order does not originate from a trading algorithm or any other computerized methodology."

¹⁶ 17 CFR 200.30-3(a)(12).

customer business from participating in the Program. According to the Exchange, some of these member organizations that wish to participate in the Program represent both "Retail Orders," as defined in Rule 11.24(a)(2), as well as other agency order flow that may not meet the strict definition of "Retail Order." The Exchange understands that, due to technical limitations in order management systems and routing networks, such member organizations may not be able to fully segregate Retail Orders from other agency, non-Retail Order flow. As a result, the Exchange believes that some member organizations have chosen not to participate in the Program because they cannot satisfy the current categorical attestation requirement, although they could satisfy the proposed "substantially all" requirement.

The Exchange clarified in its proposal that the "substantially all" standard is meant to allow only *de minimis* amounts of orders to participate in the Program that do not meet the definition of a Retail Order in Rule 11.24 and that cannot be segregated from bona fide Retail Orders due to systems limitations. Under the proposal, the Exchange would require that RMOs retain in their books and records adequate substantiation that substantially all orders sent to the Exchange as Retail Orders met the strict definition and that those orders not meeting the strict definition are agency orders that cannot be segregated from Retail Orders due to system limitations, and are *de minimis* in terms of the overall number of Retail Orders sent to the Exchange.⁹

III. Comment Letter and the Exchange's Response

The Commission received one comment letter on the proposal. The comment letter expressed concern over the proposed "substantially all" attestation requirement primarily for four reasons.

First, the comment letter questioned whether the proposal would undermine the rationale on which the Commission approved the Retail Price Improvement Program. According to the commenter, when the Commission granted approval of the Program, along with exemptive relief in connection with the operation of the Program, it did so with the understanding that the Program would service "only" retail order flow. To the

extent the proposal would potentially allow non-Retail Orders to receive price improvement in the Program, the commenter suggested that the Commission should reexamine its rationale for granting the exemptive relief relating to the Program.

In response, the Exchange noted that the proposed amendment is designed to permit isolated and *de minimis* quantities of agency orders that do not qualify as Retail Orders to participate in the Program because such orders cannot be segregated from Retail Orders due to systems limitations. The Exchange also noted that several significant retail brokers have chosen not to participate in the Program currently because of the categorical "any order" standard, and that the proposed "substantially all" standard would allow the significant amount of retail order flow represented by these brokers the opportunity to receive the benefits of the Program. Additionally, the Exchange noted that the Program is designed to replicate the existing practices of broker-dealers that internalize much of the market's retail order flow off-exchange, and that the Program, as modified by the "substantially all" proposal, would offer a competitive and more transparent alternative to internalization.

Second, the commenter expressed its belief that the Exchange did not sufficiently explain why retail brokers are not able to separate all Retail and non-Retail Orders, and thereby satisfy the current attestation requirement. The commenter expressed its belief that the Commission should require additional explanation as to how retail brokers could satisfy the proposed "substantially all" standard if they could not satisfy the current standard, including an analysis of the costs and benefits to retail brokers of implementing technology changes to identify orders as Retail or non-Retail. Furthermore, the commenter suggested that the Exchange's proposal is at odds with the situation found in options markets where exchanges and brokers distinguish between public and professional customers—a distinction the commenter analogized to the Retail v. non-Retail distinction.

The Exchange responded that several retail brokers have explained that their order flow is routed in aggregate for retail execution purposes and that a *de minimis* amount of such flow may have been generated electronically, thus not meeting the strict Retail Order definition. According to the Exchange, these retail brokers have chosen not to direct any of their significant shares of retail order flow to the Program because the cost of complying with the current

"any order" standard, such as implementing any necessary systems changes, is too high. The Exchange represented that the retail brokers have indicated their willingness to comply with the proposed "substantially all" standard, as well as their ability to implement the proposed standard on their systems with confidence. The Exchange further responded that the distinction between public and professional customers in the options market is not like distinction between Retail and non-Retail Orders; the former distinction turns on volume and is thus an easier bright-line threshold to implement, while the distinction between Retail and non-Retail Orders turns on whether the order originated from a natural person, which imposes a higher threshold for order flow segmentation purposes.

Third, the commenter contended that the proposed "substantially all" standard is overly vague. According to the commenter, the Exchange's proposed guidance on what constitutes "substantially all" is so vague that it could allow a material amount of non-retail order flow to qualify for the Program. The commenter suggested that, should the Commission approve the proposal, it should first establish a bright-line rule to define what constitutes "substantially all" retail order flow.¹⁰

The Exchange responded that the proposal represents only a modest modification of the attestation requirement. In this respect, the Exchange noted that the proposal would permit only isolated and *de minimis* quantities of agency orders to participate in the Program that do not satisfy the strict definition of a Retail Order but that cannot be segregated from Retail Orders due to systems limitations. Furthermore, the Exchange noted that an RMO's compliance with this requirement would be monitored and subject to books and record-keeping requirements.

Fourth, the commenter stated that the proposal may cause an exponential increase in monitoring and recordkeeping burdens associated with the Program. The commenter expressed its belief that it could be especially difficult for the Exchange not just to identify non-retail order flow, but also to monitor whether such flow exceeded a *de minimis* amount. The commenter also questioned whether the potential difficulty of the Exchange monitoring its

⁹The Exchange noted in its Response Letter that the Chicago Board Options Exchange, Incorporated ("CBOE"), on behalf of the Exchange, will review a member organization's compliance with these requirements. See Response Letter, *supra* note 6 at 3.

¹⁰The commenter cited one example where a "de minimis" transaction is defined in 17 CFR 242.101(b)(7), in connection with a distribution of securities, as "less than 2%."

Program might increase the likelihood that members may be subject to unfair discrimination in the Program's approval and disqualification process.

In response, the Exchange noted that it will issue Trader Notices to provide clear guidance on how the "substantially all" standard will be implemented and monitored. The Exchange also noted that the Program is designed to attract as much retail order flow as possible, and that, should RMOs begin submitting substantial amounts of non-retail order flow, liquidity providers would become less willing to participate in the Program. Finally, the Exchange disagreed with the commenter's statement that a standard that provides a *de minimis* number of exceptions would be any harder to enforce than a standard that permitted no exceptions.

IV. Discussion and Commission Findings

After careful review of the proposal, the comment letter received, and the Exchange's response, the Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.¹¹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,¹² which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, 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; and not be designed to permit unfair discrimination between customers, issuers, brokers or dealers.

The Commission finds that the proposed "substantially all" standard is a limited and sufficiently-defined modification to the Program's current RMO attestation requirements that does not constitute a significant departure from the Program as initially approved by the Commission.¹³ The proposal

makes clear that to comply with the standard, RMOs may submit only isolated and *de minimis* amounts of agency orders that cannot be segregated from Retail Orders due to systems limitations.¹⁴ Furthermore, as the Exchange noted, RMOs will need to adequately document their compliance with the "substantially all" standard in their books and records. Specifically, an RMO would need to retain adequate documentation that substantially all orders sent to the Exchange as Retail Orders met that definition, and that those orders not meeting that definition are agency orders that cannot be segregated from Retail Orders due to system limitations, and are *de minimis* in terms of the overall number of Retail Orders sent to the Exchange. The Commission also notes that the CBOE will, on behalf of the Exchange, monitor an RMO's compliance with this requirement.

Additionally, the Commission finds that the Exchange has provided adequate justification for the proposal. The Exchange represented that, as several significant retail brokers explained to them, the current "any order" standard is effectively prohibitive, given the brokers' order flow aggregation and management systems. The Exchange further represented that these retail brokers indicated their systems would allow them to comply with the "substantially all" standard, as proposed. By allowing these retail brokers to participate in the Program, the proposal could bring the potential benefits of the Program, including price improvement and increased transparency,¹⁵ to the retail order flow that these brokers represent.¹⁶

¹⁴ While the Commission recognizes the potential benefit of the commenter's suggestion concerning a bright-line definition of *de minimis*, see *supra* note 10, the Commission believes that, in light of the facts surrounding the instant proposal, the proposal, and the guidance that the Exchange will provide to its members on this point, are sufficiently clear. The Commission also notes that the example the commenter cites is found in Regulation M, which governs different circumstances than those at issue here.

¹⁵ For a more detailed discussion of the Program's potential benefits, see Program Approval Order, *supra* note 7.

¹⁶ The commenter also expressed concern that this proposal may increase the burden upon the Exchange in monitoring compliance with the Program. The Commission finds that any potential concerns raised by this assertion, which is disputed by the Exchange, are outweighed by the potential benefits of the proposal; namely, that the proposal may allow more retail orders the opportunity to participate in the Program and receive the attendant benefits of the Program. With respect to the commenter's concern that members may be subject to unfair discrimination in the approval and disqualification process for participation in the Program, the Commission notes that it previously

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,¹⁷ that the proposed rule change (SR-BYX-2013-008) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Kevin M. O'Neill,
Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-69642; File No. SR-OCC-2013-05]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing of Proposed Rule Change To Provide That OCC, Rather Than an Adjustment Panel of the Securities Committee, Will Determine Adjustments to the Terms of Options Contracts to Account for Certain Events, Such as Certain Dividend Distributions or Other Corporate Actions, That Affect the Underlying Security or Other Underlying Interest

May 28, 2013.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on May 15, 2013, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by OCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Clearing Agency's Statement of the Terms of Substance of the Proposed Rule Change

OCC proposes to provide that OCC, rather than an adjustment panel of the Securities Committee, will determine adjustments to the terms of options contracts to account for certain events, such as certain dividend distributions or other corporate actions, that affect the underlying security or other underlying interest.

found that the Program's provisions concerning the certification, approval, and potential disqualification of RMOs not inconsistent with the Act. See Program Approval Order, *supra* note 7, at note 41.

¹⁷ 15 U.S.C. 78s(b)(2).

¹⁸ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹¹ In approving the proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

¹² 15 U.S.C. 78f(b)(5).

¹³ The Commission notes that it approved the Program on a pilot basis subject to ongoing Commission review.