

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

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Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77580; File No. SR-BOX-2016-13]

### Self-Regulatory Organizations; BOX Options Exchange LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend BOX Rule 100 (Definitions) Relating to Professionals

April 11, 2016.

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 March 29, 2016, BOX Options Exchange LLC (the “Exchange”) 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 the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

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

The Exchange proposes to amend BOX Rule 100 (Definitions) relating to Professionals. The text of the proposed rule change is available from the principal office of the Exchange, at the Commission’s Public Reference Room and also on the Exchange’s Internet Web site at <http://boxexchange.com>.

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

In its filing with the Commission, the self-regulatory organization 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. The self-regulatory organization 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

The Exchange proposes to amend BOX Rule 100 (Definitions) to amend the definition of Professional. This filing that is based on a proposal recently submitted by Chicago Board Options Exchange, Incorporated (“CBOE”) and approved by the Commission.<sup>3</sup>

The Exchange proposes to amend BOX Rule 100(a)(50) relating to Professionals. Specifically, the Exchange proposes to adopt new language to the rule setting forth amended standards for calculating average daily order submissions for Professional order counting purposes. The Exchange believes that the proposed rule change would provide additional clarity in the BOX Rules.

##### Background

In general, “public customers” are granted certain marketplace advantages over other market participants, including Market Makers, brokers and dealers of securities, and industry “Professionals” on most U.S. options exchanges. The U.S. options exchanges, including BOX, have adopted similar definitions of the term “Professional,”<sup>4</sup> which commonly refers to persons or entities that are not a brokers or dealers in securities and who or which place more than 390 orders in listed options per day on average during a calendar month for their own beneficial account(s).<sup>5</sup> Various exchanges adopted similar Professional rules for many of the same reasons, including, but not

limited to the desire to create more competitive marketplaces and attract retail order flow.<sup>6</sup> In addition, as several of the exchanges noted in their original Professional rule filings, their beliefs that disparate Professional rules and a lack of uniformity in the application of such rules across the options markets would not promote the best regulation and could, in fact, encourage regulatory arbitrage.<sup>7</sup>

Similar to other U.S. options exchanges, the Exchange grants “Public Customers” certain marketplace advantages over other market participants pursuant to the Exchange’s Fee Schedule<sup>8</sup> and the BOX Rules.<sup>9</sup> Specifically, Public Customer orders are

<sup>6</sup> See, e.g., Securities Exchange Act Release No. 60931 (November 4, 2009), 74 FR 58355, 58356 (November 12, 2009) (Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Related to Professional Orders) (SR-CBOE-2009-078); Securities Exchange Act Release No. 59287 (January 23, 2009), 74 FR 5694, 5694 (January 30, 2009) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment Nos. 1 and 2 Thereto, Relating to Professional Account Holders) (SR-ISE-2006-026); Securities Exchange Act Release No. 61802 (March 30, 2010), 75 FR 17193, 17194 (April 5, 2010) (Notice of Filing of Amendment No. 2 and Order Granting Accelerated Approval of the Proposed Rule Change, as Modified by Amendment No. 2 Thereto, Relating to Professional Orders) (SR-PHLX-2010-005); Securities Exchange Act Release No. 61629 (March 2, 2010), 75 FR 10851, 10851 (March 9, 2010) (Notice of Filing of Proposed Rule Change Relating to the Designation of a “Professional Customer”) (SR-NYSEMKT-2010-018).

<sup>7</sup> See, e.g., Securities and Exchange Act Release No. 62724 (August 16, 2010), 75 FR 51509 (August 20, 2010) (Notice of Filing of a Proposed Rule Change by the NASDAQ Stock Market LLC To Adopt a Definition of Professional and Require That All Professional Orders Be Appropriately Marked) (SR-NASDAQ-2010-099); Securities and Exchange Act Release No. 65500 (October 6, 2011), 76 FR 63686 (October 13, 2011) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Definition of Professional and Require That All Professional Orders Be Appropriately Marked) (SR-BATS-2011-041); Securities Exchange Act Release No. 65036 (August 4, 2011), 76 FR 49517, 49518 (August 10, 2011) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Adopt a Definition of “Professional” and Require That Professional Orders Be Appropriately Marked by BOX Options Participants) (SR-BX-2011-049); Securities Exchange Act Release No. 60931 (November 4, 2009), 74 FR 58355, 58357 (November 12, 2009) (Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 1, Related to Professional Orders) (SR-CBOE-2009-078); see also Securities Exchange Act Release 73628 (November 18, 2014), 79 FR 69958, 69960 (November 24, 2014) (Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Professional Orders) (SR-CBOE-2014-085).

<sup>8</sup> See, e.g., BOX Fee Schedule (Exchange Fees).

<sup>9</sup> Public Customers receive allocation priority above equally priced competing interests of Market Makers, broker-dealers, and other market participants in the PIP and COPIP. See, e.g., BOX Rule 7150(g)(1) (Public Customer Allocation in PIP), BOX Rule 7245(g)(2) (Public Customer Allocation in COPIP).

<sup>23</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. 77450 (March 25, 2016) (Order Approving SR-CBOE-2016-005).

<sup>4</sup> Some U.S. options exchanges refer to “Professionals” as “Professional Customers” or non-“Priority Customers.” Compare BATS Exchange, Inc. (“BZX”) Rule 16.1(a)(45) (Professional); BOX Options Exchange LLC (“BOX”) Rule 100(a)(50) (Professional); CBOE Rule 1.1(ggg) (Professional); C2 Rule 1.1; BX Chapter I, Sec. 1(49) (Professional); NASDAQ OMX PHLX LLC (“PHLX”) Rule 1000(b)(14) (Professional); Nasdaq Options Market (“NOM”) Chapter I, Sec. 1(a)(48) (Professional); with ISE Rule 100(a)(37A) (Priority Customer); Gemini Rule 100(a)(37A) (Priority Customer); Miami International Securities Exchange LLC (“MIAX”) Rule 100 (Priority Customer); NYSE MKT LLC (“NYSE MKT”) Rule 900.2NY(18A) (Professional Customer); NYSE Arca, Inc. (“Arca”) Rule 6.1A(4A) (Professional Customer).

<sup>5</sup> See, e.g., BZX Rule 16.1(a)(45); BOX Rule 100(a)(50); CBOE Rule 1.1(ggg); C2 Rule 1.1; BX Chapter I, Sec. 1(49); PHLX Rule 1000(b)(14); NOM Chapter I, Sec. 1(a)(48); see also ISE Rule 100(a)(37A) (Priority Customer); Gemini Rule 100(a)(37A) (Priority Customer); MIAX Rule 100 (Priority Customer); NYSE MKT Rule 900.2NY(18A) (Professional Customer); Arca Rule 6.1A(4A) (Professional Customer).

generally exempt from transaction fees and certain Exchange surcharges. Similar to other U.S. options exchanges, the Exchange affords these marketplace advantages to Public Customers based on various business- and regulatory-related objectives, including, for example, to attract retail order flow to the Exchange and to provide competitive pricing.

Currently, BOX Rule 100(a)(50) defines a Professional as “any person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s).” The Exchange’s Professional order rule was adopted to distinguish non-broker dealer individuals and entities that have access to information and technology that enable them to professionally trade listed options in a manner similar to brokers or dealers in securities from retail investors for order priority and/or transaction fees purposes. In general, Professionals are treated as brokers or dealers in securities under the Exchange’s rules, including, but not limited to with respect to order priority and fees.<sup>10</sup> BOX Rule 100(a)(50) is substantially similar to the Professional order rules of other exchanges and was materially based upon the preexistent Professional order rules of other exchanges.

In September 2015, the Exchange clarified its Professional order rule by distributing a Regulatory Circular to its Participants.<sup>11</sup> Specifically, the Exchange codified its interpretation that, for Professional order counting purposes, “parent” orders that are placed on a single ticket and entered for the beneficial account(s) of a person or entity that is not a broker or dealer in securities and that are broken into multiple parts by a broker or dealer, or by an algorithm housed at a broker or dealer, or by an algorithm licensed from a broker or dealer that is housed with the customer in order to achieve a specific execution strategy, should count as one single order for Professional order counting purposes. This interpretation was a clarification in the Rules based on the Exchange’s past interpretations of Rule 100 (a)(50) and similar interpretations set forth in a previously issued ISE/ISE Gemini, LLC (“Gemini”) Joint Regulatory Information Circular.<sup>12</sup>

The Exchange’s Informational Circular, however, has not clarified the Exchange’s Professional rule completely. The advent of new multi-leg spread products and the proliferation of the use of complex orders and algorithmic execution strategies by both institutional and retail market participants continue to raise questions as to what constitutes an “order” for Professional order counting purposes. For example, do complex orders (which on the Exchange may be up to 4 legs) constitute a single order or multiple orders for Professional order counting purposes? The Exchange’s Professional rule does not fully address these issues and there is no common interpretation across the U.S. options markets.

Moreover, the Exchange believes that the proposed rule change would serve to accomplish the Exchange’s stated goals for its Professional rule. Under current Rule 100(a)(50) many market participants using sophisticated execution strategies and trading algorithms who would typically be considered professional traders are not identified under the Exchange’s Professional rule. The Exchange believes that these types of market participants have access to technology and market information akin to broker-dealers. The Exchange also believes that the proposed rule is warranted to ensure that Public Customers are afforded the marketplace advantages that they are intended to be afforded over other types of market participants on the Exchange.

The Exchange notes that despite the adoption of materially similar Professional rules across the markets, exchanges’ interpretations of their respective Professional rules vary. Although Professionals are similarly defined by exchanges as non-broker-dealer persons or entities that place more than 390 orders in listed options for their own beneficial account(s) per day on average during a calendar month, there is no consistent definition across the markets as to what constitutes an “order” for Professional order counting purposes. While several options exchanges, including BOX, have attempted to clarify their interpretations of their Professional rules through regulatory and information notices and circulars,<sup>13</sup> many of the options

exchanges have not issued any guidance regarding the application of their Professional rules. Furthermore, where exchanges have issued such interpretive guidance, those interpretations have not necessarily been consistent.<sup>14</sup> As a result, the Exchange believes that the rather than helping to promote the best regulation and discourage regulatory arbitrage, the Professional rules have become a basis of intermarket competition.

The Exchange believes that a new set of standards and a more detailed counting regime than the Exchange’s current Professional order rules provide would allow the Exchange to better compete for order flow and help ensure deeper levels of liquidity on the Exchange. The Exchange also believes that the proposed rule change would help to remove impediments to and help perfect the mechanism of a free and open market and a national market system by increasing competition in the marketplace. Accordingly, the Exchange proposes to amend the Rules by amending BOX Rule 100(a)(50) to adopt new rules with respect to Professional order counting.

#### Proposal

The Exchange proposes to add additional details to Rule 100(a)(50) setting forth a more in depth counting regime for calculating average daily orders for Professional order designation purposes. Specifically, the Exchange’s proposed rule would make clear how to count complex orders, “parent/child” orders that are broken into multiple orders, and “cancel/replace” orders for Professional order counting purposes.

Under the Exchange’s proposed rule change all orders would count as one single order for Professional counting purposes, unless otherwise specified under the Rules. Proposed Rule 100(a)(50) would provide that except as noted below, each order of any order type counts as one order for Professional order counting purposes. Paragraph (a) of proposed Rule 100(a)(50) would discuss Complex Orders.<sup>15</sup> Under

<sup>14</sup> Compare NYSE Joint Regulatory Bulletin, NYSE Acra RBO–15–03, NYSE Amex RBO–15–06) (Professional Customer Orders) with Interpretation and Policy .01 to Rule 1.1(ggg); Regulatory Circular RG09–148 (Professional Orders); ISE Regulatory Information Circular 2014–007/Gemini Regulatory Information Circular 2014–011 (Priority Customer Orders and Professional Orders (FAQ)); and ISE Regulatory Information Circular 2009–179 (Priority Customer Orders and Professional Orders (FAQ)).

<sup>15</sup> A Complex Order is defined as any order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, for the same account, in a ratio that is equal to or greater than one-to-three (.333) and less than or equal to three-to-one (3.00) and for

Continued

<sup>10</sup> See BOX Rule 100(a)(50).

<sup>11</sup> See RC–2015–21.

<sup>12</sup> See ISE Regulatory Information Circular 2014–007/Gemini Regulatory Information Circular 2014–011 (Priority Customer Orders and Professional Orders (FAQ)).

<sup>13</sup> See BOX Regulatory Circulars RC–2015–21 (Professional Orders) and RC–2015–22 (Professional Order Implementation); Regulatory Circular RG09–148 (Professional Orders); ISE Regulatory Information Circular 2014–007/Gemini Regulatory Information Circular 2014–011 (Priority Customer Orders and Professional Orders (FAQ)); MIAX Regulatory Circular 2014–69 (Priority Customer and Professional Interest Order Summary); NYSE Joint Regulatory Bulletin, NYSE Acra RBO–15–03, NYSE Amex RBO–15–06) (Professional Customer Orders).

paragraph (a)(1) of proposed Rule 100(a)(50), a complex order comprised of eight (8) legs or fewer would count as a single order. Conversely, paragraph (a)(2) of proposed Rule 100(a)(50) would provide that a complex order comprised of nine (9) legs or more counts as multiple orders with each option leg counting as its own separate order.<sup>16</sup> The Exchange believes the distinction between complex orders with up to eight legs from those with nine or more legs is appropriate in light of the purposes for which Rule 100(a)(50) was adopted. In particular, the Exchange notes that multi-leg complex order strategies with nine or more legs are more complex in nature and thus, more likely to be used by professional traders than traditional two, three, and four leg complex order strategies such as the strangle, straddle, butterfly, collar, and condor strategies, and combinations thereof with eight legs or fewer, which are generally not algorithmically generated and are frequently used by retail investors. Thus, the types of complex orders traditionally placed by retail investors would continue to count as only one order while the more complex strategy orders that are typically used by professional traders would count as multiple orders for Professional order counting purposes.

Paragraph (b) of proposed Rule 100(a)(50) would provide details relating to the counting of “parent/child” orders. Under paragraph (b)(1), a “parent” order that is placed for the beneficial account(s) of a person or entity that is not a broker or dealer in securities that is broken into multiple “child” orders on the same side (buy/sell) and series as the “parent” order by a broker or dealer, or by an algorithm housed at a broker or dealer or by an algorithm licensed from a broker or dealer, but which is housed with the Public Customer, counts as one order even if the “child” orders are routed across multiple exchanges. Essentially, this paragraph would describe how orders placed for Public Customers, which are “worked” by a broker in order to receive best execution should be counted for Professional order counting purposes. Paragraph (b)(1) of proposed Rule 100(a)(50) would permit larger “parent” orders (which may be simple orders or complex orders consisting of up to eight legs), to be broken into multiple smaller orders on the same side (buy/sell) and in the same

the purpose of executing a particular investment strategy. See BOX Rule 7240(a)(5).

<sup>16</sup> The Exchange notes that it does not currently accept complex orders comprised of more than four legs.

series (or complex orders consisting of up to eight legs) in order to attempt to achieve best execution for the overall order.

For example, if a Public Customer were to enter an order to buy 1,000 XYZ \$5 January calls at a limit price of \$1, which the Public Customer’s broker then broke into four separate orders to buy 250 XYZ \$5 January calls at a limit price of \$1 in order to achieve a better execution, the four “child” orders would still only count as one order for Professional order counting purposes (whether or not the four separate orders were sent to the same or different exchanges for execution).<sup>17</sup> Similarly, in the case of a complex order, if a Public Customer were to enter an order to buy 1,000 XYZ \$5 January(sell)/March(buy) calendar spreads (with a 1:1 ratio on the legs), at a net debit limit price of \$0.20, which the Public Customer’s broker then broke into four separate orders to buy 250 XYZ \$5 January/March calendar spreads (each with a 1:1 ratio on the legs), each at a net debit limit price of \$0.20, the four “child” orders would still only count as one order for Professional order counting purposes (whether or not the four separate orders were sent to the same or different exchanges for execution).

Conversely, under paragraph (b)(2) of proposed Rule 100(a)(50), a “parent” order (including a strategy order)<sup>18</sup> that is broken into multiple “child” orders on both sides (buy/sell) of a series and/or multiple series counts as multiple orders, with each “child” order counting as a new and separate order. Accordingly, under this provision, strategy orders, which are most often used by sophisticated traders best characterized as “Professionals,” would count as multiple orders for each child order entered as part of the overall strategy. For example, if a customer were to enter an order with her broker by which multiple “child” orders were then sent to the Exchange across multiple series in a particular option

<sup>17</sup> Notably, however, if the customer herself were to enter the same four identical orders to buy 250 XYZ \$5 January calls at a limit price of \$1 prior to sending the orders, those orders would count as four separate orders for Professional order counting purposes because the orders would not have been broken into multiple “child” orders on the same side (buy/sell) and series as the “parent” order by a broker or dealer, or by an algorithm housed at a broker or dealer or by an algorithm licensed from a broker or dealer, but which is housed with the customer.

<sup>18</sup> For purposes of this proposed Rule 100(a)(50), the term “strategy order” is intended to mean an execution strategy, trading instruction, or algorithm whereby multiple “child” orders on both sides of a series and/or multiple series are generated prior to being sent to any or multiple U.S. options exchange(s).

class, each order entered would count as a separate order for Professional order counting purposes. Likewise, if the Public Customer instructed her broker to buy a variety of calls across various option classes as part of a basket trade, each order entered by the broker in order to obtain the positions making up the basket would count as a separate order for Professional counting purposes.<sup>19</sup>

The Exchange believes that the distinctions between “parent” and “child” orders in paragraph (b) to proposed Rule 100(a)(50) are appropriate. The Exchange notes that paragraph (b) to proposed Rule 100(a)(50) is not aimed at capturing orders that are being “worked” or broken into multiple orders to avoid showing large orders to the market in an effort to elude front-running and to achieve best execution as is typically done by brokers on behalf of retail clients. Rather, paragraph (b) to proposed Rule 100(a)(50) is aimed at identifying “child” orders of “parent” orders generated by algorithms that are typically used by sophisticated traders to continuously update their orders in concert with market updates in order to keep their overall trading strategies in balance. The Exchange believes that these types of “parent/child” orders typically used by sophisticated traders should count as multiple orders.

Paragraph (c) of proposed Rule 100(a)(50), would discuss the counting of orders that are cancelled and replaced. Similar to the distinctions drawn in paragraph (b) of proposed Rule 100(a)(50), paragraph (c) would essentially separate orders that are cancelled and replaced as part of an overall strategy from those that are cancelled and replaced by a broker that is “working” the order to achieve best execution or attempting to time the market. Specifically, paragraph (c)(1) of proposed Rule 100(a)(50) would provide that except as otherwise provided in the rule (and specifically as provided under paragraph (c)(2)), any order that cancels and replaces an existing order counts as a separate order (or multiple new orders in the case of a complex order comprised of nine (9) legs or more). For example, if a trader were to enter a non-marketable limit order to buy an option contract at a certain net debit price, cancel the order in response to market

<sup>19</sup> Notably, with respect to the types of “parent” orders (including strategy orders) described in paragraph (b)(2) to proposed Rule 100(a)(50), such orders would be received only as multiple “child” orders the U.S. options exchange receiving such orders. The “parent” order would be broken apart before being sent by the participant to the exchange(s) as multiple “child” orders.

movements, and then reenter the same order once it became marketable, those orders would count as two separate orders for Professional order counting purposes even though the terms of both orders were the same.

Paragraph (c)(2) of proposed Rule 100(a)(50) would specify the exception to paragraph (c)(1) of proposed Rule 100(a)(50) and would provide that an order that cancels and replaces any “child” order resulting from a “parent” order that is placed for the beneficial account(s) of a person or entity that is not a broker, or dealer in securities that is broken into multiple “child” orders on the same side (buy/sell) and series as the “parent” order by a broker or dealer, by an algorithm housed at a broker or dealer, or by an algorithm licensed from a broker or dealer, but which is housed with the Public Customer, would not count as a new order. For example, if a Public Customer were to enter an order with her broker to buy 10,000 XYZ \$5 January calls at a limit price of \$1, which the Public Customer’s broker then entered, but could not fill and then cancelled to avoid having to rest the order in the book as part of a strategy to obtain a better execution for the Public Customer and then resubmitted the remainder of the order, which would be considered a “child” of the “parent” order, once it became marketable, such orders would only count as one order for Professional order counting purposes. Again, similar to paragraph (b) of proposed Rule 100(a)(50), the Exchange notes that paragraph (c) to proposed Rule 100(a)(50) is not aimed at capturing orders that are being “worked” or being cancelled and replaced to avoid showing large orders to the market in an effort to elude front-running and to achieve best execution as is typically done by brokers on behalf of retail clients. Rather, paragraph (c) to proposed Rule 100(a)(50) is aimed at identifying “child” orders of “parent” orders generated by algorithms that are typically used by sophisticated traders to continuously update their orders in concert with market updates in order to keep their overall trading strategies in balance. The Exchange believes that paragraph (c)(2) to proposed Rule 100(a)(50) is consistent with these goals.

Accordingly, consistent with paragraph (c)(1) of proposed Rule 100(a)(50), under paragraph (c)(3) of proposed Rule 100(a)(50), an order that cancels and replaces any “child” order resulting from a “parent” order (including a strategy order) that generates “child” orders on both sides (buy/sell) of a series and/or in multiple series would count as a new order. For

example, if an investor were to seek to make a trade (or series of trades) to take a long position at a certain percentage limit on a basket of options, the investor may need to cancel and replace several of the “child” orders entered to achieve the overall execution strategy several times to account for updates in the prices of the underlyings. In such a case, each “child” order placed to keep the overall execution strategy in place would count as a new and separate order even if the particular “child” order were being used to replace a slightly different “child” order that was previously being used to keep the same overall execution strategy in place. The Exchange believes that the distinctions between cancel/replace orders in paragraph (c) to proposed Rule 100(a)(50) are appropriate as such orders are typically generated by algorithms used by sophisticated traders to keep strategy orders continuously in line with updates in the markets. As such, the Exchange believes that in most cases, cancel/replace orders should count as multiple orders.

Under current BOX Rule 100(a)(50), in order to properly represent orders entered on the Exchange, BOX Participants are required to indicate whether Public Customer orders are “Professional” orders. This requirement will remain the same. To comply with this requirement, Participants are required to review their customers’ activity on at least a quarterly basis to determine whether orders that are not for the account of a broker or dealer should be represented as customer orders or Professional orders. Orders for any Public Customer that had an average of more than 390 orders per day during any month of a calendar quarter must be represented as Professional orders for the next calendar quarter. Participants are required to conduct a quarterly review and make any appropriate changes to the way in which they are representing orders within five days after the end of each calendar quarter. While Participants only will be required to review their accounts on a quarterly basis, if during a quarter the Exchange identifies a customer for which orders are being represented as public customer orders but that has averaged more than 390 orders per day during a month, the Exchange will notify the Participant and the Participant will be required to change the manner in which it is representing the Public Customer’s orders within five days. Because BOX Rule 100(a)(50) only requires that Participants conduct a look-back to determine whether their Public

Customers are averaging more than 390 orders per day at the end of each calendar quarter, the Exchange proposes an effective date of April 1, 2016 for proposed calculation details to ensure that all orders during the next quarterly review will be counted in the same manner and that proposed language will not be applied retroactively.

## 2. Statutory Basis

The Exchange believes that the proposal is consistent with the requirements of Section 6(b) of the Securities Exchange Act of 1934 (the “Act”),<sup>20</sup> in general, and Section 6(b)(5) of the Act,<sup>21</sup> in particular, in that it is 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 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. In particular, the Exchange believes that proposed changes to Rule 100(a)(50) provides a more conservative order counting regime for Professional order counting purposes that would identify more traders as Professionals to which the Exchange’s definition of Professional was designed to apply and create a better competitive balance for all participants on the Exchange, consistent with the Act. As the options markets have evolved to become more electronic and more competitive, the Exchange believes that the distinction between registered broker-dealers and professional traders who are currently treated as Public Customers has become increasingly blurred. More and more, the category of Public Customer today includes sophisticated algorithmic traders including former market makers and hedge funds that trade with a frequency resembling that of broker-dealers. The Exchange believes that it is reasonable under the Act to treat those customers who meet the high level of trading activity established in the proposal differently than customers who do not meet that threshold and are more typical retail investors to ensure that professional traders do not take advantage of priority and fee benefits intended for Public Customers.

The Exchange notes that it is not unfair to differentiate between different types of investors in order to achieve certain marketplace balances. The Rules currently differentiate between Public

<sup>20</sup> 15 U.S.C. 78f(b).

<sup>21</sup> 15 U.S.C. 78f(b)(5).

Customers, Broker-Dealers, Market Makers, and the like. These differentiations have been recognized to be consistent with the Act. The Exchange does not believe that the current BOX Rules and other exchanges that accord priority to all Public Customers over broker-dealers are unfairly discriminatory. Nor does the Exchange believe that it is unfairly discriminatory to accord priority to only those Public Customers who on average do not place more than one order per minute (390 per day) under the counting regime that the Exchange proposes. The Exchange believes that such differentiations drive competition in the marketplace and are within the business judgment of the Exchange. Accordingly, the Exchange also believes that its proposal is consistent with the requirement of Section 6(b)(8) of the Act that the rules of an exchange not impose an unnecessary or inappropriate burden upon competition in that it treats persons who should be deemed Professionals, but who may not be under current Rule 100(a)(50) in a manner so that they do not receive special priority benefits.

Furthermore, the Exchange believes that the proposed rule change will protect investors and the public interest by helping to assure that retail customers continue to receive the appropriate marketplace advantages in the BOX marketplace as intended, while furthering competition among marketplace professionals by treating them in the same manner as other similarly situated market participants. The Exchange believes that it is consistent with Section 6(b)(5) of the Act not to afford market participants with similar access to information and technology as that of brokers and dealers of securities with marketplace advantages over such marketplace competitors. The Exchange also believes that the proposed rule change would help to remove burdens on competition and promote a more competitive marketplace by affording certain marketplace advantages only to those for whom they are intended. Finally, the Exchange believes that the proposed rule change sets forth a more detailed and clear regulatory regime with respect to calculating average daily order entry for Professional order counting purposes. The Exchange believes that this additional clarity and detail will eliminate confusion among market participants, which is in the interests of all investors and the general public.

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

The Exchange does not believe that the proposed rule change will impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. In this regard and as indicated above, the Exchange notes that the rule change is substantially similar to a recent CBOE filing.<sup>22</sup> As discussed above, the Exchange does not believe that the current BOX Rules and other exchanges that accord priority to all Public Customers over broker-dealers are unfairly discriminatory. Nor does the Exchange believe that it is unfairly discriminatory to accord priority to only those customers who on average do not place more than one order per minute (390 per day) under the counting regime that the Exchange proposes. The Exchange believes that its proposal does not impose an undue burden on competition. The Exchange notes that one of the purposes of the Professional rules is to help ensure fairness in the marketplace and promote competition among all market participants. The Exchange believes that proposed BOX Rule 100(a)(50)(a) would help establish more competition among market participants and promote the purposes for which the Exchange's Professional rule was originally adopted. The Exchange does not believe that the Act requires it to provide the same incentives and discounts to all market participants equally, so as long as the exchange does not unfairly discriminate among participants with regard to access to exchange systems. The Exchange believes that here, that is clearly the case.

Rather than burden competition, the Exchange believes that the proposed rule change promotes competition by ensuring that retail investors continue to receive the appropriate marketplace advantages in the BOX marketplace as intended, while furthering competition among marketplace professionals by treating them in the same manner under the BOX Rules as other similarly situated market participants by ensuring that market participants with similar access to information and technology (*i.e.* Professionals and broker-dealers), receive similar treatment under the BOX Rules while retail investors receive the benefits of order priority and fee waivers that are intended to apply to Public Customers.

<sup>22</sup> See *supra*, note 3.

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

The Exchange has neither solicited nor received comments on the proposed rule change.

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

Because the foregoing proposed rule change does not: (i) Significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>23</sup> and subparagraph (f)(6) of Rule 19b-4 thereunder.<sup>24</sup> A proposed rule change filed under Rule 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing.<sup>25</sup> Rule 19b-4(f)(6)(iii), however, permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest.<sup>26</sup>

The Exchange has requested that the Commission waive the 30-day operative delay. The Commission notes that it has considered a substantially similar proposed rule change filed by CBOE which it approved after a notice and comment period.<sup>27</sup> This proposed rule change does not raise any new or novel issues from those considered in the CBOE proposal. Based on the foregoing, the Commission believes that it is consistent with the protection of investors and the public interest to waive the 30-day operative date so that the proposal may take effect upon filing.<sup>28</sup>

#### **IV. Solicitation of Comments**

Interested persons are invited to submit written data, views, and arguments concerning the foregoing,

<sup>23</sup> 15 U.S.C. 78s(b)(3)(a)(iii).

<sup>24</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file the proposed rule change at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>25</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>26</sup> *Id.*

<sup>27</sup> See Securities Exchange Act Release No. 77450 (March 25, 2016) (Order Approving SR-CBOE-2016-005).

<sup>28</sup> 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).

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](mailto:rule_comments@sec.gov). Please include File No. SR-BOX-2016-13 on the subject line.

#### *Paper Comments*

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

All submissions should refer to File No. SR-BOX-2016-13. 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 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. 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 No. SR-BOX-2016-13, and should be submitted on or before May 6, 2016.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>29</sup>

**Robert W. Errett,**  
*Deputy Secretary.*

[FR Doc. 2016-08645 Filed 4-14-16; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-77581; File No. SR-FINRA-2015-054]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Partial Amendment No. 1 to Proposed Rule Change Relating to Proposed Rule Change To Adopt FINRA Capital Acquisition Broker Rules

April 11, 2016.

#### I. Introduction

On December 4, 2015, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission (the "Commission" or "SEC") proposed rule change SR-FINRA-2015-054, pursuant to which FINRA proposed to adopt a rule set that would apply exclusively to firms that meet the definition of "capital acquisition broker" and that elect to be governed under this rule set (collectively, the "CAB Rules").

The Commission published the proposed rule change for public comment in the **Federal Register** on December 23, 2015.<sup>1</sup> The Commission received 17 comment letters in response to the proposed rule change.<sup>2</sup> On January 28, 2016, FINRA extended the time period in which the Commission

<sup>1</sup> Securities Exchange Act Release No. 76675 (December 17, 2015), 80 FR 79969 (December 23, 2015) (Notice of Filing of File No. SR-FINRA-2015-054) ("Notice of Filing").

<sup>2</sup> Letters from Peter W. LaVigne, Esq., Chair, Securities Regulation Committee, Business Law Section, New York State Bar Association, dated January 22, 2016; Judith M. Shaw, President, North American Securities Administrators Association, Inc., dated January 15, 2016; Timothy Cahill, President, Compass Securities Corporation, dated January 13, 2016; Mark Fairbanks, President, Foreside Distributors, dated January 13, 2016; Dan Glusker, Perkins Fund Marketing, LLC, dated January 13, 2016; Steven Jafarzadeh, CAIA, Managing Director, CCO Partner, Stonehaven, dated January 13, 2016; Richard A. Murphy, Manager, North Bridge Capital LLC, dated January 13, 2016; Ron Oldenkamp, President, Genesis Marketing Group, dated January 13, 2016; Michael S. Quinn, Member and CCO, Q Advisors LLC, dated January 13, 2016; Lisa Roth, President, Monahan & Roth, LLC, dated January 13, 2016; Howard Spindel, Senior Managing Director, and Cassandra E. Joseph, Managing Director, Integrated Management Solutions USA LLC, dated January 13, 2016; Sajjan K. Thomas, President, and Stephen J. Myott, Chief Compliance Officer, Thomas Capital Group, Inc., dated January 13, 2016; Donna DiMaria, Chairman of the Board of Directors, and Lisa Roth, Board of Directors, Third Party Marketers Association, dated January 12, 2016; Frank P. L. Minard, Managing Partner, XT Capital Partners, LLC, dated January 12, 2016; Arne Rovell, Coronado Investments, LLC, dated January 6, 2016; Daniel H. Kolber, President/CEO, Intellivest Securities, Inc., dated December 30, 2016; and Roger W. Mehle, Chairman and CEO, Archates Capital Advisors LLC, dated December 29, 2015.

must approve the proposed rule change, disapprove the proposed rule change or institute proceedings to determine whether to approve or disapprove the proposed rule change to March 22, 2016.

On March 23, 2016, the Commission published in the **Federal Register** an order to solicit comments on the proposed rule change and to institute proceedings pursuant to Section 19(b)(2)(B) of the Securities Exchange Act of 1934 ("Exchange Act")<sup>3</sup> to determine whether to approve or disapprove the proposed rule change.<sup>4</sup>

As described further below, on March 29, 2016 FINRA filed a partial amendment to its proposed rule change in response to comments on the Notice of Filing.

#### II. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Amendment

In response to comments on the Notice of Filing, FINRA filed a Partial Amendment No. 1 to amend proposed CAB Rule 016(c)(2) to clarify that the definition of "capital acquisition broker" does not include any broker or dealer that effects securities transactions that would require the broker or dealer to report the transaction under the FINRA Rules 6300 Series, 6400 Series, 6500 Series, 6600 Series, 6700 Series, 7300 Series or 7400 Series. With this Partial Amendment No. 1, FINRA filed: (1) Exhibit 4, which reflects changes to the text of the proposed rule change pursuant to this Partial Amendment No. 1, marked to show additions to the text as proposed in the original filing; and (2) Exhibit 5, which reflects the changes to the current rule text that are proposed in the proposed rule change, as amended by this Partial Amendment No. 1.

#### III. Date of Effectiveness of the Proposed Rule Change as Modified by Partial Amendment No.1 and Timing for Commission Action

Within 180 days after the date of publication of the initial Notice of Filing in the **Federal Register** or within such longer period up to an additional 60 days (i) as the Commission may designate 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 issue an

<sup>3</sup> 15 U.S.C. 78s(b)(2)(B).

<sup>4</sup> Securities Exchange Act Release No. 77391 (March 17, 2016), 81 FR 15588 (March 23, 2016) (Order Instituting Proceedings To Determine Whether to Approve or Disapprove Proposed Rule Change to Adopt FINRA Capital Acquisition Broker Rules on File No. SR-FINRA-2015-054).

<sup>29</sup> 17 CFR 200.30-3(a)(12).