



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

November 8, 2006

William C. Meehan, Esq.
General Counsel
Boston Stock Exchange
100 Franklin Street
Boston, MA 02110

Dear Mr. Meehan:

Based on the facts and representations set forth in your letter dated October 27, 2006, we find that it is appropriate in the public interest and consistent with the protection of investors to grant, and hereby grant, to Members (as defined in your letter) that execute trades for their customers on the Boston Equities Exchange ("BeX"), a facility of the Boston Stock Exchange ("BSE"), a limited exemption pursuant to Rule 10b-10(f) under the Securities Exchange Act of 1934 ("Exchange Act") from the requirement in Rule 10b-10(a)(2)(i)(A) to disclose to their customers the name of the person from whom a security was purchased, or to whom it was sold, or the fact that such information will be provided upon the customer's written request. This exemption is limited to trades that Members execute on BeX using the post-trade anonymity feature described in your letter.¹

In granting the exemption, we note in particular that all orders in BeX will automatically match against each other, in strict price/time priority.²

You also request assurance that the staff of the Division of Market Regulation ("Staff") will not recommend enforcement action to the Commission under paragraph (a) of Rule 10b-10 under the Exchange Act if a Member confirms its capacity as "agent" when the Member submits a customer's order through BeX, in the Member's role as the customer's agent, and the order is executed on BeX in a trade with an anonymous contra-party that turns out to be the Member trading in a principal (including proprietary)

¹ This exemption does not apply to those orders submitted by Members as two-sided "cross" orders, in which a Member submits an order to buy and sell the same security. This exemption does apply, however, when the "cross" order is broken up and a portion of the "cross" order is executed anonymously against the BeX Book. In such instances, the exemption applies only to the portion of the trade that executes anonymously against the BeX Book, and not to the other portion of the trade.

² We note your representation that the only exception to this price/time priority matching will occur when "cross with size" orders are executed. See BSE Rule Chapter XXXVII, Section 2(c).

William C. Meehan, Esq.

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capacity. Your request is limited to those situations in which: (1) the representative of the BSE Member submitting customer orders to BeX does not have knowledge of principal (including proprietary) orders ("Principal Orders") submitted by the Member, and the representative of the Member submitting Principal Orders to BeX does not have knowledge of customer orders submitted by the Member (the "No Knowledge Requirement"); and (2) the Member does not determine or influence the selection of the contra-party(ies) against which customer orders will be executed (the "Parity Requirement").

Based on the facts and representations set forth in your letter, the Staff will not recommend enforcement action to the Commission under paragraph (a) of Rule 10b-10 if a Member indicates on confirmations to its customers that the Member acted as agent on a customer's behalf when a representative of the Member submits a customer order to BeX on an agency basis and that order is executed in BeX in a trade with an anonymous contra-party that turns out to be the Member trading in a principal (including proprietary) capacity, provided that the Member complies with all other requirements of Rule 10b-10 in confirming the customer's order, including paragraph (a)(2)(i) thereof, and provided that the handling and execution of the customer order complies with the No Knowledge and Parity Requirements, as described in your letter.³

In taking this position, we note in particular your representation regarding your expectation that same firm volume, *i.e.*, an execution in which a firm's agency order is matched against the same firm's principal (including proprietary) trading interest ("Same Firm Volume"), as a percentage of total volume (other than "cross" order volume) in a security through BeX ("Total Volume") will not be material for either high or low trading volume securities.⁴ We also note that Members continue to have a duty of best execution.⁵

³ This Staff position does not apply to those orders submitted by Members as two-sided "cross" orders, in which a Member submits an order to buy and sell the same security. This position does apply, however, when the "cross" order is broken up and a portion of the "cross" order is executed anonymously against the BeX Book. In such instances, the no-action relief applies only to the portion of the trade that executes anonymously against the BeX Book, and not to the other portion of the trade.

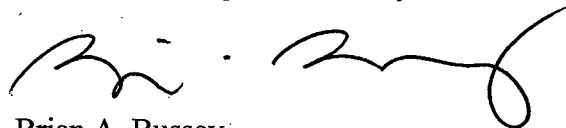
⁴ In this regard, we note your representation that one year following the launch of BeX you will review trade data to determine the actual percentage of Same Firm Volume versus Total Volume in high and low volume securities to confirm that this number is not material, and that you will create and maintain a record of your determination.

⁵ See, e.g., Regulation NMS, Exchange Act Rel. No. 49325 (February 26, 2004), 69 Fed. Reg. 11126, 11137 (March 9, 2004) ("A broker-dealer still must seek the most advantageous terms reasonably available under the circumstances for all customer orders. A broker-dealer must carry out a regular and rigorous review of the quality of market centers to evaluate its best execution policies, including the determination as to which markets it routes customer order flow.").

The Office of Financial Responsibility has instructed us to inform you that the Staff will not recommend enforcement action to the Commission if, in lieu of making and preserving a separate record, the Member relies on BSE's retention of the identities of the Members that execute anonymous trades through BeX, for the period specified in Rule 17a-4(a), to satisfy the requirements of Rules 17a-3(a)(1) and 17a-4(a) under the Exchange Act. The Staff notes, however, that a Member has the responsibility to make, keep current, and preserve records of all purchases and sales of securities in accordance with Exchange Act Rules 17a-3 and 17a-4 for trades through BeX if the Member knows the identity of the contra-party.

These exemptive and no-action positions are subject to modification or revocation if at any time the Commission or Staff determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. In addition, these positions are based solely upon the representations you have made and are limited strictly to the facts and conditions described in your incoming letter. Any different facts or circumstances, including any change to the operation of BeX, may require a different response.⁶ Finally, we express no view with respect to other questions the proposed activities of BeX or any Member relying on this relief may raise, including the applicability of any other federal or state laws or the applicability of self-regulatory organization rules concerning customer account statements or confirmations.

For the Commission,
by the Division of Market Regulation,
pursuant to delegated authority,⁷



Brian A. Bussey
Assistant Chief Counsel

⁶ For example, the continued availability of these positions is dependent on Same Firm Volume as a percentage of Total Volume in fact not being material for either high or low trading volume securities one year following the launch of BeX and thereafter.

⁷ 17 C.F.R. § 200.30-3(a)(32).



BOSTON
STOCK EXCHANGE

October 27, 2006

Catherine McGuire
Associate Director and Chief Counsel
Division of Market Regulation
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Boston Stock Exchange Request for a Limited Exemption from Paragraph (a)(2)(i)(A) of Rule 10b-10 under the Securities Exchange Act of 1934 (the “Act”) and Request for No-Action Relief from Rules 10b-10(a)(2), 17a-3(a)(1) and 17a-4(a) under the Act for the Boston Equities Exchange (“BeX”)

Dear Ms. McGuire:

The Boston Stock Exchange (“BSE” or “Exchange”) is respectfully requesting from the Staff (“Staff”) of the Securities and Exchange Commission (“Commission”) a limited exemption from paragraph (a)(2)(i)(A) of Rule 10b-10 under the Securities Exchange Act of 1934 (“Act”) on behalf of BSE Members¹ (“Members”) who execute trades on the Boston Equities Exchange (“BeX”), a facility of the BSE.² BSE is also requesting assurance that the Staff will not recommend enforcement action to the Commission under paragraph (a) of Rule 10b-10 if Members indicate on confirmations to their customers that the Members acted as agent on its customers behalf when the Member submits a customer order to BeX on an agency basis and that order is filled by an execution against an anonymous contra-party that turns out to be the Member trading in a principal (including proprietary) capacity, so long as the conditions set forth below are met and the Member otherwise complies with all other requirements of Rule 10b-10 in

¹ BSE Members include Member Organizations and Electronic Access Members (“EAMs”), which are a subset of BSE Membership and allow a person or firm to conduct business on the Exchange without having to purchase seats. The Exchange will issue EAMs to persons or entities that wish to engage in equity transactions on the Exchange. For purposes of this letter only, the term “Member” shall include Sponsored Participants. Sponsored Participants must enter into a BeX Participant Agreement in order to obtain authorized access to BeX. See BSE Rules, Chapter XXXVII, Section 12(b).

² See Securities Exchange Act Release No. 54364 (Aug. 25, 2006), 71 Fed. Reg. 52185 (Sept. 1, 2006) (SR-BSE-2006-20); Securities Exchange Act Release No. 54365 (Aug. 25, 2006), 71 Fed. Reg. 52192 (Sept. 1, 2006) (SR-BSE-2006-22); Securities Exchange Act Release No. 54546, (Sept. 29, 2006) (SR-BSE-2006-30) (Regulation NMS and Phase 2 Filing).

confirming the customer's order, including paragraph (a)(2)(i) thereof. This exemption and no-action request is limited to those trades that Members execute on BeX when using the anonymous feature of BeX's electronic trading system.³ BSE is also requesting assurance that the Staff will not recommend enforcement action to the Commission if, in lieu of making and preserving a separate record, Members rely on BSE's retention of the identities of the Members that execute anonymous trades through BeX to satisfy the requirements of Rules 17a-3(a)(1) and 17a-4(a) under the Act.⁴

Background -- BeX

BeX is a fully-automated electronic book intended to display and match eligible orders in securities listed on any national securities exchange. All such issues are not assigned to a specialist. BeX is owned and operated by BSX Group, LLC ("BSX") and is intended for the use of Members and their customers. The BSE is the self regulatory organization ("SRO") for BeX and will regulate BeX as a facility of the Exchange.⁵

Access and Operations. Upon the implementation of BeX, all transactions on the Exchange will take place within the BeX electronic trading facility and the Exchange's physical trading floor will cease to exist. Orders can be routed to BeX through the Exchange's systems or through other communication lines approved by the Exchange for the delivery of orders by Exchange Members. BeX also accepts and automatically executes commitments sent by market centers that participate in ITS and will be in compliance with Regulation NMS.

All orders sent to BeX are ranked according to their price and time of receipt⁶ and are

³ This exemption and no action request applies only to single-sided orders submitted to BeX's electronic trading system. We are not requesting exemptive or no-action relief for two-sided orders to buy and sell the same security, *i.e.*, "cross" orders, submitted by Members to BeX's electronic trading system when such orders do not execute against the BeX Book. *See* Section 2, Chapter XXXVII of the BSE Rules (describing cross order types). *See also* Securities Exchange Act Release No. 54546 (September 29, 2006) (SR-BSE-2006-30). We are, however, requesting exemptive and no-action relief for those "cross" orders, in which the "cross" order is broken up and a portion of the "cross" order is executed anonymously against the BeX Book. In such instances we are requesting relief for the portion of the trade that executes anonymously against the BeX Book, but not for the other portion of the trade.

⁴ Members that meet the conditions of the relief granted to broker-dealers in a letter to the New York Stock Exchange also intend to issue single confirmations reflecting the average price of multiple transactions and/or multiple capacities of multiple executions executed on BeX's electronic system to fill a single customer order for a reported security (now defined in Rule 600(b)(46) of Regulation NMS as "NMS Security"). *See* SEC No-Action Letter to the New York Stock Exchange, In Re: Rule 10b-10/Average Price, Multiple Capacity Confirmations, dated Mar. 3, 2005.

⁵ *See* Securities Exchange Act Release No. 54364 (Aug. 25, 2006), 71 Fed. Reg. 52185 (Sept. 1, 2006) (SR-BSE-2006-20).

⁶ The only exception to this price/time priority matching would occur when "cross with size" orders are executed. A "cross with size" transaction occurs where there is a two-sided order to buy and sell at least 5,000 shares of the same security with a market value of at least \$100,000 (i) at a price equal to or better than the best bid or offer

displayed to the public when they constitute the Best Bid or Offer in BeX for a security.⁷ Except as otherwise permitted by the BSE Rules, BeX will provide pre-trade anonymity for all submitted orders.⁸ No distinction is made to this priority with regard to agency orders and principal or proprietary orders. All orders at all price levels on BeX shall be displayed to all Members on an anonymous basis and transactions on BeX will be processed anonymously until time of execution, unless otherwise indicated. At the point of order entry, Members may request post-trade anonymity through settlement in addition to the automatic pre-trade anonymity. When at least one Member requests post-trade anonymity, the transaction reports will indicate the details of the transaction, but will not reveal contra-party identities. BSE will maintain a complete time-stamped electronic audit trail of every order submitted to BeX.

Execution and Settlement. Orders would automatically match against each other, in strict price/time priority. Upon receipt of an order, BeX will match the incoming order against one or more orders in the BeX Book, in the order of their ranking, at the price of each order, for the full amount of shares available at that price or for the size of the incoming order, if smaller. If an incoming order could not be matched when it is received, and it is not designated as an order that should be immediately cancelled, the order would be placed in the BeX Book. BeX will not reveal the contra-party on trade reports when post-trade anonymity is requested by one of the parties.⁹

Members have the choice to trade on a fully anonymous basis or remain anonymous on a pre-trade basis only. For each trade executed in the system, BeX produces an execution report that is sent to the parties to the trade and it also creates a report in BSE's trade reporting system. Among other things, these reports contain the MPIDs of the Members that executed the trade. When an order is executed on a fully anonymous basis, instead of revealing the Members' MPID on the reports, BeX blacks out the Member's MPID. Blacking out the Members' MPIDs provides anonymity through settlement.¹⁰

displayed in BeX and the National Best Bid or Offer and (ii) where the size of the order is larger than the largest order displayed in BeX at that price. *See* BSE Rules, Chapter XXXVII, Section 2(c)(ii)(B).

⁷ Cross, ISO cross, mid-point cross, post-primary cross, preferred price cross, non-displayed and reserve quantities of reserve orders are exceptions to the display provision. *See* BSE Rules, Chapter XXXVII, Section 2(c)(ii).

⁸ *See* BSE Rules, Chapter XXXVII, Section 3 (i)(v).

⁹ As explained herein, the Exchange does not request an exemption for when it reveals the identity of a contra-party to a Member: (i) for regulatory purposes or to comply with an order of a court or arbitrator; (ii) when the National Securities Clearing Corporation ("NSCC") ceases to act for a Member or the Member's clearing firm, and NSCC determines not to guarantee the settlement of the Member's trades; or (iii) no later than the end of the day on the date an anonymous trade was executed, when the Member's quote or order has been decremented by another quote or order submitted by that same Member, unless otherwise instructed by the Member. *See* BSE Rules, Chapter XXXVII, Section 3, Interpretation and Policies .03.

¹⁰ BSECC through NSCC will perform "Street side" clearance and settlement for all Members requesting full anonymity.

Request for a Limited Exemption from Paragraph (a)(2)(i)(A) of Rule 10b-10

For each fully anonymous trade executed in the system, BeX via BSECC produces an execution report that is sent to the parties to the trade, however, it does not reveal the identity of the Member contra-parties.

The anonymity of BeX entices Members to display quotations and sizes and enter orders that they may not have entered if their trading interest and activity were publicly known. Additionally, Members seek to trade anonymously to prevent market impact and the consequences that arise when the market has knowledge that a large order must be executed. For example, a seller does not want the buyer to know its identity because it may reveal the existence of a large order to be filled.

Rule 10b-10, among other things, requires a broker-dealer to disclose to its customer the identity of the party the broker-dealer sold to or bought from to fill the customer's order. Specifically, under paragraph (i)(A) of Rule 10b-10(a)(2), when a broker-dealer is acting as agent for a customer, some other person, or for both the customer and some other person, the broker-dealer must identify the party to whom securities were sold, or from whom securities were purchased, to fill the customer's order (the "Contra-Party Identification Requirement"). A broker-dealer can provide this information on the confirmation, or it has the option to provide the information to a customer at a later time, after receiving a written request from the customer. A broker-dealer has this option as long as it discloses on the confirmation that the contra-party information is available upon written request.

As described earlier, for orders utilizing the fully anonymous features of BeX's trading system, the identity of the actual contra-party will not be revealed routinely when the order is executed against another Member.¹¹ Therefore, Members will not know the identity of the party to whom they sold securities or from whom they purchased securities. Without this information, Members cannot comply with the Contra-Party Identification Requirement. To permit a Member who has willingly agreed to the condition of anonymity to defeat the legitimate expectations of other participants by using Rule 10b-10 to discover the identity of a counterparty would undermine the operation of BeX. Therefore, in order to permit Members to utilize the full anonymity features of the BeX trading system without violating Rule 10b-10, BSE is seeking an exemption, on behalf of such Members, from the Contra-Party Identification Requirement when Members execute transactions utilizing this feature of BeX's trading system.

The Contra-Party Identification Requirement, in conjunction with the other requirements of paragraph (a)(2) of Rule 10b-10, is designed to provide customers with information that can alert them to potential conflicts of interest their broker-dealer may have had when handling their

¹¹ When an order is executed against another Member, BSE will reveal contra-party identities only when both parties to a trade do not request post-trade anonymity and when the trade involves a two-sided "cross" order that does not execute against the BeX Book. See BSE Rules Chapter XXXVII, Section 2(c)(ii). See footnote 9.

orders. BSE believes an exemption from the Contra-Party Identification Requirement when a Member trades anonymously would not diminish the public policy and investor protection objectives of Rule 10b-10. BSE believes the potential for conflict is less likely in those circumstances when a Member trades through BeX's full anonymity trading system because the trade occurs at the best price available and the contra-party is determined randomly based upon multiple factors not controlled by either Member. In such situations, Members do not have the discretion in executing the order that would normally give rise to the opportunity for a conflict of interest.

BSE respectfully requests that the Commission issue an exemption from paragraph (a)(2)(i)(A) of Rule 10b-10 for Members that execute trades in BeX for their customers using the full anonymity features of the BeX anonymous trading system.¹² The exemption requested under Rule 10b-10 for anonymous trading is similar to situations for which the Staff, pursuant to delegated authority, has previously granted exemption requests.¹³

Capacity Requirement Under Rule 10b-10

The BSE, on behalf of its Members, is requesting assurance that the Staff will not recommend enforcement action to the Commission under paragraph (a) of Rule 10b-10 if Members indicate on confirmations to their customers that the Members acted as agent on its customer's behalf when the Member submits a customer order to BeX on an agency basis and that order is filled by an execution against an anonymous contra-party, even if the anonymous contra-party could be the same Member, trading in a principal (including proprietary) capacity, provided that the respective Member complies with all other applicable requirements of Rule 10b-10 in confirming the customer order, including paragraph (a)(2)(i) thereof, and meets the No Knowledge and Parity Requirements described further in this letter ("Member Capacity Relief"). The capacity relief requested herein would apply when a Member is inadvertently on both sides of the transaction (Member has submitted two one-sided orders).

We believe our request for Member Capacity Relief is similar to a request filed with the Staff by J.P. Morgan Securities Inc. ("J.P. Morgan").¹⁴ In its no-action letter, J.P. Morgan requested relief from the requirements of Rule 10b-10(a)(2) under circumstances where representatives of J.P. Morgan and its affiliates submitting customer orders met the No Knowledge Requirement and the Parity Requirement discussed below.¹⁵ This Member Capacity

¹² BSE is not requesting an exemption for those orders submitted by Members as two-sided "cross" orders, in which a Member submits an order to buy and sell the same security. BSE is, however, requesting an exemption for the portion of breakable "cross" orders that execute anonymously against the BeX Book. See BSE Rules, Chapter XXXVII, Section 2(c). The requested exemption would include those orders which inadvertently execute against each other and happen to originate from the same Member.

¹³ See, e.g., SEC No-Action Letter re: Nasdaq Stock Market, Inc. (publicly available Sept. 26, 2003).

¹⁴ See SEC No-Action Letter re: J.P. Morgan Securities Inc. (publicly available Aug. 4, 2005).

¹⁵ *Id.*

Relief request is limited to those circumstances in which the Members comply with the No Knowledge and Parity Requirements.

i. No Knowledge Requirement

The Member Capacity Relief request is limited to those situations in which the representatives of the Member submitting principal (including proprietary) orders (“Principal Orders”) do not have knowledge about customer orders submitted by the same Member, and the representatives of the Member submitting customer orders do not have knowledge about the Principal Orders submitted by the same Member (“No Knowledge Requirement”).¹⁶ To meet this requirement, Members must implement and utilize an effective system of internal controls, such as appropriate information barriers between various order submitters within the entity.

We note that potential conflicts of interest associated with principal and customer orders from the same Member executing against each other are mitigated by BeX Rules. For example, Members (and their affiliates) that are engaged in market making and customer agency lines of business (collectively, “Firms”) are required to implement an effective system of internal controls between the Firms’ proprietary and customer lines of business.¹⁷ Moreover, various BSE Rules also require Members to maintain the integrity of nonpublic information and to conduct their business operations in accordance with all legal requirements.¹⁸ Collectively, these legal requirements operate to require Members to implement and utilize effective systems of internal controls, such as information barriers, to prevent the sharing of information between representatives of Members (or their affiliates) that enter Principal Orders and representatives that enter customer orders. These legal requirements make it less likely that a Member may use information from one line of its business to advantage another line of business.

The anonymous nature of the BeX system lessens the possibility that Members will be able to misuse nonpublic information. To be effective, the system of internal controls mentioned above must include specific policies and procedures that prevent each Principal Order submitter separated by the information barriers from obtaining knowledge regarding customer orders submitted by the same Member, and each customer order submitter separated by the information barriers from obtaining knowledge regarding Principal Orders submitted by the same respective

¹⁶ This capacity relief would not apply to two-sided “cross” orders that do not execute against the BeX Book as the representative of the Member submitting the two-sided cross order would have knowledge of both sides of the order, and therefore, such Member would not satisfy the No Knowledge Requirement. However, when a Member submits a two-sided “cross” order which is subsequently broken up and ultimately executed against the BeX Book, either in whole or in part, that portion of the cross order that executes against the BeX Book will be eligible for post-trade anonymity and the capacity relief requested herein. Members will be notified by BSE when their “cross” orders are broken up, and therefore executed on a fully anonymous basis for the portion of the order that executes against the BeX Book.

¹⁷ See BSE Rule, Chapter XXXVII, Section 11 “Limitations on Dealings.”

¹⁸ See BSE Rules, Chapter II, Section 37 “ITSFEA Procedures.”

Member. In addition, to satisfy the No Knowledge Requirement all customer orders of Members and all Principal Orders of the same respective Member must be submitted on an anonymous basis.¹⁹

ii. Parity Requirement

In addition to the No Knowledge Requirement, the request for Member Capacity Relief is limited to those situations in which Members do not determine or influence the selection of the trading interest against which a customer order will be executed (“Parity Requirement”).²⁰

iii. Member Capacity Relief Request Consistent with the Purposes of Rule 10b-10

The Exchange believes that if the No Knowledge and Parity Requirements are met it is appropriate and consistent with the purposes of Rule 10b-10 for a Member who submits an order for execution on BeX to indicate on the customer's confirmation that, in executing the customer order, the Member was acting as agent, even if the order was executed against a Principal Order submitted by the same respective Member.

The Exchange believes that stating in the customer's confirmation that the Member acted as agent, under such circumstances, would not contravene any of the purposes of Rule 10b-10. In particular, the Exchange notes that the Commission has indicated that the purposes of Rule 10b-10 are to provide basic investor protection by conveying information allowing investors to verify the terms of their transactions; alerting investors to potential conflicts of interest with their broker-dealers; acting as a safeguard against fraud; and providing investors a means to evaluate the costs of their transactions and the quality of their broker-dealer execution.²¹ The Member Capacity Relief sought herein is discussed below in light of each of the aforementioned purposes of Rule 10b-10.

By submitting an order to BeX marked as an agency order, Members have evidenced their intent to act in an agency capacity. Further, the No Knowledge and Parity Requirements

¹⁹ BSE understands that this no-action position will not apply to Members who choose to trade on a non-anonymous basis.

²⁰ BSE notes that BeX does not currently provide its users the ability to direct or rank their orders by preference for particular contra-parties within the BeX trading system. Should BeX offer this functionality in the future, we understand that the no-action position of the Staff would not apply to preferred orders. BSE currently offers its Members the ability to submit a two-sided cross order, in which a Member may execute an order against him or herself or against another agency order of the Member. If the “cross” order does not execute against the BeX Book, it would not be eligible for the relief requested herein.

²¹ Confirmation Requirements for Transactions of Security Futures Products Effected in Futures Accounts, Securities Exchange Act Release No. 46471, 67 Fed. Reg. 58303 (Sept. 13, 2002) (adopting amendments to Rule 10b-10 under the Act).

are designed to ensure that this intent to act as agent and the actual handling and execution of the order as agent are not compromised.

Where the customer order and the Principal Order are executed against each other by the electronic order execution system of BeX, indicating in the confirmation that the Member has acted as agent does not increase the risk of fraud against the customer, so long as the No Knowledge Requirement and Parity Requirement are met. To the contrary, the matching of the agency and proprietary trading interests occurs at the best price available and the contra-party is determined randomly based upon priority factors established by the rules of the Exchange, which have been approved by the Commission.²² In such circumstances, the broker-dealer cannot disadvantage the customer.

Additionally, stating in a confirmation that the Member acted as an agent is an accurate statement of the Member's manner of handling the customer order. Therefore, it is not inconsistent with the purposes of the Capacity Requirement to allow a Member to indicate that it executed the customer's order on an agency basis.

Moreover, the proposed Member Capacity Relief will not diminish investor protection because it does not relieve any Member of its duty of best execution.²³ In these circumstances, the conflicts that can arise when an order is handled and executed as principal are not present, and therefore it is not inconsistent with the purposes of the Capacity Requirement to allow Members to indicate they executed the customer order on an agency basis.

The requests for relief from the specific requirements of Rule 10b-10 contained herein will provide customers the necessary information to allow them to verify the terms and evaluate the costs of their transactions, as well as evaluate the quality of the Members' execution. In addition, the relief will provide efficiencies in reporting that may reduce a customer's execution charges. Further, we believe that these requests are appropriate in furtherance of the public interest and protection of the investor. Without this relief, Members could be precluded from utilizing BeX.

²² BSE expects that same firm volume, *i.e.*, an execution in which a firm's agency order is matched against the same firm's principal (including proprietary) trading interest, as a percentage of total volume (other than "cross" order volume) in that security through BeX will not be material for either high or low trading volume securities. The Exchange represents that one year following the launch of BeX, the Exchange will review trade data to determine the actual percentage of same firm volume versus total volume in high and low volume securities to confirm that this number is not material. The Exchange will create and maintain a record of the determination.

²³ See Regulation NMS, Securities Exchange Act Release No. 49325 (Feb. 26, 2004), 69 Fed. Reg. 11126, 11137 (Mar. 9, 2004) ("A broker-dealer still must seek the most advantageous terms reasonably available under the circumstances for all customer orders. A broker-dealer must carry out a regular and rigorous review of the quality of market centers to evaluate its best execution policies, including the determination as to which markets it routes customer order flow").

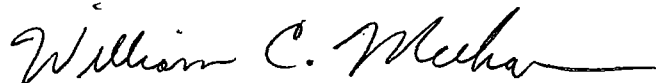
Request for No-Action Relief - Rule 17a-3 and Rule 17a-4

Rule 17a-3(a)(1) under the Act requires that broker-dealers make and keep current records of all purchases and sales of securities, including “the name or other designation of the person from whom purchased or received or to whom sold or delivered.”²⁴ Rule 17a-4(a) under the Act requires that the records be preserved for six (6) years, the first two (2) years “in an easily accessible place.”²⁵

BSE is requesting assurance that the Staff will not recommend enforcement action to the Commission if, in lieu of making and preserving a separate record, the Member relies on BSE’s retention of the identities of Members that execute anonymous trades through BeX, for the period specified in Rule 17a-4(a), to satisfy the requirements of Rules 17a-3(a)(1) and 17a-4(a) under the Act.²⁶ A Member could not rely on BSE for this purpose if the Member knows the identity of the contra-party.²⁷

We are available at your convenience to answer any questions concerning our request.

Sincerely,



William C. Meehan
General Counsel

cc: Brian Bussey
Matthew Daigler
Kevin Zambrowicz

²⁴ 17 CFR § 240.17a-3(a)(1).

²⁵ 17 CFR § 240.17a-4(a).

²⁶ See BSE Rule, Chapter XXXVII, Section 3(i)(vi).

²⁷ For example, when a Member executes a “cross” order that does not execute against the BeX Book, such Member must maintain its own records for purposes of Rule 17a-3 and 17a-4.