PEAK6®

141 W. Jackson Blvd., Ste. 500
Chicago, IL 60604
312.444.8000

September 26, 2022

Via Electronic Mail (rule-comments@sec.gov)

Ms. Vanessa Countryman
Secretary
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

RE: Release 34-95388; File Number S7-05-15; Exemption for Certain Exchange Members

To the Chairman and Commissioners:

PEAK6 Capital Management LLC ("PEAK6") appreciates the opportunity to provide the Securities and Exchange Commission ("the Commission") with comments on the above referenced proposed amendment to Rule 15b9-1 (the "Rule"). PEAK6 is a registered proprietary trading firm regulated by several self-regulatory organizations ("SROs"), discussed herein. PEAK6 does not support the Commission's proposal that proprietary firms should become a member of the Financial Industry Regulatory Authority (FINRA), and more specifically, it does not support membership unless the FINRA application and Trading Activity Fees ("TAF") processes are first modified.

1. **PEAK6 is an options market making and proprietary trading firm.**

PEAK6 is a market maker in equity options and proprietary trading firm, providing liquidity to participants in the equity and equity derivatives markets. PEAK6, acting as principal, buys and sells equity securities and equity derivative financial instruments. In addition, PEAK6 trades across several other asset classes, including options, fixed income securities and futures. PEAK6 is a registered broker-dealer with the Commission and its Designating Examining Authority ("DEA") is the Chicago Board Options Exchange, Inc. ("Cboe"). It is also a member of Cboe BZX Exchange, Inc. (BZX), Cboe EDGX Exchange, Inc., NYSE Arca, Inc., NYSE American LLC, BOX Exchange, LLC, Nasdaq OMX PHLX LLC, Nasdaq ISE, LLC, Nasdaq Gemini, LLC, The Nasdaq Stock Market LLC, and Miami International Securities Exchange, LLC (collectively, the "Member Exchanges"). It has no customers.

2. PEAK6 is effectively regulated.

PEAK6 is regulated in its capacity as a registered broker-dealer and a member of Cboe and the Member Exchanges. As such, PEAK6 is subject to full regulatory oversight and does not require additional oversight by FINRA.

As a registered broker-dealer, PEAK6 is a member of multiple exchanges and therefore is subject to multiple regulators. While each exchange has different rules, Cboe alone provides full regulatory oversight of PEAK6 through its specialization in the operations of proprietary trading firms. PEAK6 is subject to routine and targeted examinations by Cboe. Further, via the Regulatory Services Agreement between Cboe and FINRA ("RSA"), FINRA has access to and can audit any PEAK6 information related to its securities business and trading activities, including off-exchange trading activity. It is unnecessary, then, to join FINRA since PEAK6 is effectively regulated by the Exchanges and FINRA should already have access to the information essential to supervise PEAK6's regulation.

Secondly, FINRA's examination and regulatory programs specialize in investor protection and over-the-counter ("OTC") trading. PEAK6 would not benefit from FINRA's customer-focused oversight, because it has no customers and OTC trading represents a very limited portion of PEAK6's business. Exchange focus on trading activity of proprietary trading firms has developed the securities exchanges' sophisticated understanding of the same, and, as pertaining to PEAK6, options exchanges are more specialized in regulating options trading, which results in more effective regulation. The markets are better served by PEAK6 maintaining only its memberships with Cboe and the Member Exchanges which focus on the trading activity that comprise the components of PEAK6's business.

In addition, the FINRA registration process is overly costly and burdensome, particularly for a regulatory program that does not align well to PEAK6's limited OTC trading business. Common practice suggests that it could take up to six (6) months or longer to complete the FINRA New Membership Application (NMA) process. This would force PEAK6 to either dedicate in-house compliance and legal personnel for lengthy time periods or, alternatively, to pay large sums to engage outside counsel or consultants to aid in completing the NMA process. Moreover, because PEAK6 is already registered with the Commission and with several SROs, including its DEA, Cboe, it has already spent time and resources on similar registration processes that requested much of the same information as FINRA is likely seeking. In the event that broker-dealers currently relying on the existing exemption provided in Rule 15b9-1 become required to register with FINRA, the Commission should insist that FINRA adapt its process to allow for an application waiver for proprietary trading firms who are 1) registered with the Commission and an SRO, 2) whose information has not materially changed from its registration with such entities and 3) who remain in good standing with the Commission and its other regulators.

3. **The Commission should demand collaboration among the exchanges for more integrated and effective regulation.**

Regulation of proprietary trading firms engaging in on-exchange cross-market trading activity should be accomplished by exchanges collaborating to create a more integrated regulatory program that promotes market transparency. Since exchanges are registered with, and regulated by, the Commission, each exchange has the responsibility of regulating all activity that takes place on it. To the extent that transactions are on-exchange cross-market trades, the exchanges involved in those transactions should share data as necessary to regulate the market effectively. Because such data sharing would generate market transparency, the Commission should first demand exchange collaboration instead of FINRA membership for proprietary trading firms that engage in on-exchange cross-market trading. Off-exchange trading by non-FINRA member firms should be reviewed by such firms' respective DEAs. Indeed, there is greater transparency available with Consolidated Audit Trail ("CAT") data.

4. **The proposal would not provide additional information on securities transactions.**

The CAT provides the data necessary for exchanges and FINRA to review OTC transactions. The exchanges have enacted CAT rules intended to capture order data for all transactions made by a broker-dealer. All broker-dealers are required to submit data to CAT; it is not limited to FINRA members. Regulation ATS requires every alternative trading system to be a broker-dealer, which requires them to be a member of a national securities exchange or FINRA. Accordingly, the securities transactions data by proprietary traders are available to regulators.

CAT is now live and option data for options from all size firms has only been available since December 13, 2021. The data is available in CAT for exchanges to work together with FINRA to review for cross-market manipulation. Requiring proprietary traders to become FINRA members would not increase the amount of data available for the review of securities transactions.

5. **Alternatives exist to obtain Treasury securities data.**

A key piece of the proposal is the need to capture all trade data for Treasury securities. The proposal notes that non-FINRA members are not required to submit Treasury trade data to the Trade Reporting and Compliance Engine ("TRACE"). The Commission can require broker-dealers that transact in Treasury securities to report trade data to the TRACE system without requiring FINRA membership. As an alternative, the Commission can create new rules or regulations that require firms that trade in Treasury securities to become FINRA members. Requiring all proprietary trading firms to become FINRA members so the few firms that trade Treasury securities will be required to become FINRA members is overreaching.

6. A hedging exemption is warranted.

The Proposal seeks input on whether the Commission should adopt a hedging exemption outside of the stock-option order exemption. PEAK6 believes a separate hedging exemption must be created to properly accommodate options market makers. Thus, we strongly believe that any final rule should clearly exempt brokers-dealers from FINRA membership if their away exchange activity in equities or options is for the purpose of hedging the risk of their home exchange activity. Especially if the routing of those orders is through a broker or dealer that is itself a FINRA member, whereby the non-FINRA member is simply acting in a customer capacity. Options market making firms serve a crucial role in the options ecosystem and hedging their options transactions with the underlying equities and transacting in options on away exchanges are necessary parts of their business model. These firms are already sufficiently regulated, and this type of hedging activity should be expressly exempt from requiring membership with FINRA.

Furthermore, options markets are exceedingly electronic, yet the Proposal references exchanges with physical exchange floors. PEAK6 strongly believes that a hedging exemption should apply to broker-dealers that trade in any off-exchange or off-member-exchange, so long as that trading is bona fide hedging of its market making business and is conducted through a FINRA member broker-dealer.

7. Regardless of whether the Commission ultimately requires FINRA registration, FINRA should change its TAF structure before any proprietary trading firm is required to become a member.

There is no certainty that a regulatory notice published in 2015 will turn into a new rule in 2022. The FINRA Board of Governors has changed significantly since 2015, and there is no indication in the rule proposal that the new Board will support the 2015 regulatory notice. As a majority of the commentors to FINRA Regulatory Notice 15-13 originally noted, the proposed exemption to TAF should more broadly address the exclusion of proprietary trades made by the broker-dealer, instead of an exemption for trades made where a firm is an exchange member. There is currently no certainty that FINRA's TAF change proposals will be incorporated in a new rule. We think it is necessary that a FINRA rule change regarding TAF fees for proprietary trades be completed before the proposed SEC rule is enacted so that firms can consider the true impact of the proposed SEC rule change and make informed comments on the proposal.

FINRA charges its members regulatory fees that are calculated based on both revenue and the number of transactions members make in certain products, whereas Cboe's regulatory fees are computed solely based on revenue. FINRA's fee calculation is structured under the customer-focused theory that more transactions amount to proportionately more financial monitoring and trade surveillance to protect investors. However, as applied to proprietary trading firms, this theory does not hold. The level of effort expended by FINRA to regulate trading activity is not proportionate to the amount of fees it charges for the actual activity. As such, the current FINRA fee structure is imbalanced and risks stifling liquidity in the markets that is provided by

proprietary trading firms regardless of whether such firms are serving as market makers.

Because of this fee structure, FINRA regulation would be much more expensive than existing exchange regulation, but as mentioned, is also disproportionate to FINRA's actual cost to monitor such trading firms. The estimate in the proposal ranges from hundreds of thousands of dollars to millions of dollars in additional costs. Any number would be too large compared to the benefits gained. As such, PEAK6 proposes that FINRA revise its fee structure to more accurately and fairly represent the cost of regulation over currently exempt proprietary trading firms.

The SEC proposal notes that in 2015, FINRA proposed a change to its TAF schedule in Regulatory Notice 15-13 whereby transactions on exchanges of which a firm is a member would be exempt from TAF. PEAK6 provides a significant source of liquidity to the listed equity options market including by sending orders to some exchanges that it is not a member of and through hedging its listed options trading with stock transactions that may be executed off-exchange. According to FINRA's TAF proposal, PEAK6 would still be subject to transaction fees both for options executed on non-member exchanges as well as for off-exchange stock transactions for hedging market maker activity and other proprietary trading that creates market liquidity and contributes to price discovery. It becomes less appealing for PEAK6 to provide the same liquidity under FINRA's proposed fee structure than we currently do under Cboe's regulatory fee structure. PEAK6 believes that the proposed revision to the TAF structure would still be disproportionately costly to currently exempt broker-dealers because it may discourage such firms from routing trades to certain markets, thereby disrupting market efficiency. Proprietary trading firms typically route orders to the markets that can offer the best price, which may result in off-exchange or OTC trading. This process creates fair, efficient and orderly markets by providing significant liquidity, contributing to accurate price discovery and narrowing bid-ask spreads. To avoid diminished efficiency on the securities markets due to market participants changing their order routing practices and size parameters in order to avoid FINRA-imposed fees, the Commission should not approve a TAF structure proposal that does not represent true regulatory costs including tiered transaction fee thresholds with deep discounts at higher volume tiers, since the resources necessary to regulate incremental trading activity decline per economies of scale.

8. PEAK6 supports a notice requirement for firms claiming an exemption to the Rule.

Should the Commission determine that certain proprietary trading firms remain exempt from the Rule, PEAK6 supports the requirement that notice of claiming such exemption be filed. Filing this exemption promotes greater transparency in firms' regulatory status. Form BD should be reviewed to include a section to designate whether a firm is claiming this exemption. Form BD is already required for broker-dealers and automatically makes such information available in CRD and FINRA's BrokerCheck. Therefore, an exemption filing would not be burdensome for the exempt firm. Exemption notices should include exchange memberships, DEA identification

and estimated percentage of annual revenue generated on each exchange and a schedule of all off-exchange activities.

PEAK6 appreciates the opportunity to provide comments on this proposed rule change. If we can clarify or answer any questions, please contact Andrew Tourney at [redacted] or [redacted].

Thank you,

Tom Simpson
Chief Executive Officer

cc: The Honorable Gary Gensler, Chair
Commissioner Hester M. Peirce
Commissioner Caroline A. Crenshaw
Commissioner Mark T. Uyeda
Commissioner Jaime Lizárraga
Haoxiang Zhu, Director, Division of Trading and Markets
David S. Shillman, Division of Trading and Markets