

proposal is consistent with Section 6(c)(4) of the Exchange Act and does not constitute an effort by CBOE to decrease the number of CBOE members.

#### V. Pending State Court Litigation

The Commission wants to emphasize the limited nature of our position on the state law issues we have addressed. The Commission is aware of the state court litigation between the CBOE and members of the CBOT and the state court's decision to stay the litigation until the Commission acts on the CBOE rule proposal. We stress that our consideration of the state law questions in this matter should in no way prejudice or affect the state court's consideration of those questions. As we explained, the state law questions played a role in our analysis of the federal law considerations the Commission is charged with deciding under the Exchange Act. To carry out our responsibilities under the Exchange Act (and also to avoid an endless cycle of our deference to the state court on the state law issues and the state court's deference to us on the federal law issues) we have proceeded to review the CBOE rule proposal. Our decisions about state law matters, however, are only those required to serve as a basis for carrying out our Exchange Act responsibilities.

We also recognize that our review of the CBOE proposed rule involves procedures different from those the state court uses in the pending litigation. This review process is not a forum to litigate state law issues that may arise regarding an SRO's rule proposal. Rather, our review of a proposed rule of an SRO employs public notice and comment, the receipt of written submissions from the SRO and the public, and the possibility of a proceeding to determine whether it should be disapproved. To this process, we bring familiarity with SROs and their rules and extensive knowledge and experience with the relevant provisions of the Exchange Act. The state court applies the range of procedures used in traditional adversarial litigation, including discovery, rules of evidence, witnesses, cross-examination, motions, and the like. It has deep and specialized knowledge of Delaware corporate law.

The state court thus is free to find the relevant facts and determine and apply the relevant state law in its normal fashion without according weight to our evaluation of the state law questions, which was done employing different procedures and for different

purposes.<sup>190</sup> And, as we have explained, if the state law decision calls into question the basis on which our decision here with respect to these state law issues or any other relevant state law issues was made, we would expect CBOE to respond appropriately, or we will act on our own as necessary.

#### VI. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Exchange Act,<sup>191</sup> that the proposed rule change (SR-CBOE-2006-106), as amended, be, and hereby is approved.

By the Commission.

**Florence E. Harmon,**

*Deputy Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

**Release No. 34-57143; File No. SR-FINRA-2007-034]**

#### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Dissemination of Trade Reports for OTC Equity Securities Transactions of Fewer Than 100 Shares**

January 14, 2008.

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 December 19, 2007, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by FINRA. FINRA filed the proposal as a "non-

<sup>190</sup> The Delaware court discussed possible ways in which the Commission's jurisdiction and the court's state law authority might interact. As the court emphasized, the court "has jurisdiction to consider the 'economic rights' issues by the Complaint because those claims emerge from and are governed by state contract or fiduciary duty law." See Memorandum of Opinion, *supra* note 68, at 29. The court also noted that "even if it turns out that the SEC's mandate requires that CBOT Full Members be excluded from trading on the CBOE," then "it does not ineluctably follow that, in these unique circumstances, they are also divested of whatever economic (or contractual) rights they hold as a result of that status." *Id.* at note 48. We agree with the Delaware court and welcome its expert determination of these issues.

<sup>191</sup> 15 U.S.C. 78s(b)(2).

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

controversial" proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders it effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA's proposed rule change relates to the dissemination of last sale information for transactions of fewer than 100 shares in OTC Equity Securities.<sup>5</sup> Specifically, FINRA is proposing that for OTC Equity Securities that traded at or above \$175.00 per share during the fourth calendar quarter of 2007, FINRA will change the "unit of trade" from 100 shares to one share (such that transactions in these securities will no longer be considered "odd-lot transactions" for dissemination purposes) and will disseminate last sale information for all reported transactions of one or more shares in these securities. The proposed rule change amends FINRA's trade report dissemination policy and does not require amendments to any rules.

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

In its filing with the Commission, FINRA 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 those statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in Sections A, B, and C below, of the most significant parts of such statements.

##### *A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change*

##### 1. Purpose

Only reports of transactions that meet the "unit of trade" test pursuant to FINRA's dissemination protocols are publicly disseminated. As a general matter, OTC Equity Securities have a unit of trade of 100 shares. While

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

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

<sup>5</sup> NASD Rule 6610(d) defines OTC Equity Security as "any non-exchange-listed security and certain exchange-listed securities that do not otherwise qualify for real-time trade reporting."

transactions of fewer than 100 shares (commonly referred to as “odd-lot transactions”) in such securities are reported to FINRA,<sup>6</sup> they are not publicly disseminated. FINRA believes that, consistent with the dissemination protocols for NMS stocks, disseminating last sale information for odd-lot transactions would provide minimal market value, particularly with respect to low-priced OTC Equity Securities. However, with respect to high-priced OTC Equity Securities, many (if not all) transactions may be for fewer than the standard unit of trade of 100 shares. Thus, information regarding trades at these levels is more valuable to the market and investors. In fact, trading data for such securities could effectively be unavailable to market participants if only trades of 100 or more shares were disseminated.

Accordingly, FINRA disseminates last sale information for transactions of fewer than 100 shares in a limited number of high-priced OTC Equity Securities today. For these OTC Equity Securities, the unit of trade has been designated as one share, such that any transaction of one or more shares will meet the unit of trade test for that security and be disseminated. For example, if OTC Equity Security ABCD has a unit of trade of one share, a transaction of 25 shares of ABCD would meet the unit of trade test for that security and last sale information for the transaction would be disseminated. Under past practice, the unit of trade of OTC Equity Securities was changed on a case-by-case basis upon request from a market participant (e.g., a market maker or issuer) to facilitate the dissemination of trades of fewer than 100 shares. Typically, such changes were made in connection with securities trading above \$200.00 per share.

FINRA is proposing to adopt a more uniform policy regarding the dissemination of OTC Equity Securities and will publish a Notice informing members, investors and other interested parties of the new policy.<sup>7</sup> Specifically, for all OTC Equity Securities that traded at or above \$175.00 per share during the fourth calendar quarter of 2007, FINRA will designate the unit of trade as one (such that transactions in these securities will no longer be considered odd-lot transactions for dissemination purposes) and will disseminate last sale

information for all transactions of one or more shares in such securities. FINRA will publish a list of the OTC Equity Securities that meet the stated dissemination criteria in the proposed Notice and will also make this list available on the OTC Bulletin Board Web site (<http://www.otcbb.com>).<sup>8</sup> FINRA staff anticipates that the unit of trade for the vast majority of OTC Equity Securities will remain 100 shares.

Additionally, using the above criteria, FINRA will update the list of OTC Equity Securities at the end of each calendar quarter based on that quarter's trading activity. While OTC Equity Securities may be added to the list, they generally will not be removed.<sup>9</sup> FINRA staff believes that retaining OTC Equity Securities on the list, rather than re-evaluating each security's eligibility every calendar quarter, will achieve greater transparency and consistency with respect to trade data dissemination.

FINRA believes that the proposed rule change will enhance transparency and the amount of information available to market participants with respect to transactions in OTC Equity Securities.

FINRA is filing the proposed rule change for immediate effectiveness. FINRA will publish a Notice announcing the operative date of the new dissemination policy, which date will be at least 30 days after the date of filing.

## 2. Statutory Basis

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>10</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will enhance transparency and the amount of information available to

<sup>8</sup> FINRA notes that all OTC Equity Securities for which the unit of trade is currently designated as one will be included in this list and will remain on this list regardless of whether they meet the stated dissemination criteria.

<sup>9</sup> FINRA may determine that an OTC Equity Security should be removed from the list if, e.g., there has been a significant corporate action, such as a stock split, that has changed the pricing in the security such that a unit of trade of one is no longer appropriate, or if the OTC Equity Security was erroneously included on the list as a result of inaccurate prices included in the trade report(s) that qualified the security for dissemination of last sale transaction information. Telephone conversation between Lisa Horrigan, Associate General Counsel, FINRA, and Ronesha Butler, Special Counsel, Division of Trading and Markets, Commission, on January 14, 2008.

<sup>10</sup> 15 U.S.C. 78o-3(b)(6).

market participants with respect to transactions in OTC Equity Securities.

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

The proposed rule change will not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

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

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not: (1) Significantly affect the protection of investors or the public interest; (2) impose any significant burden on competition; and (3) become operative for thirty days from the date on which it was filed, or such shorter time as the Commission may designate if consistent with the protection of investors and the public interest, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>11</sup> and Rule 19b-4(f)(6)<sup>12</sup> thereunder.<sup>13</sup>

At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in the furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2007-034 on the subject line.

<sup>11</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>12</sup> 17 CFR 240.19b-4(f)(6).

<sup>13</sup> FINRA has given the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date on which it filed the proposed rule change. See 17 CFR 240.19b-4(f)(6)(iii).

<sup>6</sup> See NASD Rule 6620.

<sup>7</sup> With the exception of NASD Rule 6250, which applies to dissemination of transaction information for TRACE-eligible securities, dissemination of trade reports is typically not governed by FINRA's rules, but rather by its protocols. Thus, FINRA is not proposing to amend any rules to effectuate the change discussed herein.

*Paper Comments*

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

All submissions should refer to File Number SR-FINRA-2007-034. This file number should be included on the subject line if e-mail 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 inspection and copying in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2007-034 and should be submitted on or before February 12, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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**SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-57144; File No. SR-ISE-2008-03]

**Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Extending the Pilot Program Increasing Position and Exercise Limits for Options on the iShares® Russell 2000® Index Fund**

January 14, 2008.

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 January 8, 2008, the International Securities Exchange, LLC ("Exchange" or "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I and II below, which Items have been substantially prepared by the Exchange. The Exchange has designated this proposal as non-controversial under Section 19(b)(3)(A)(iii) of the Act<sup>3</sup> and Rule 19b-4(f)(6) thereunder,<sup>4</sup> which renders the proposed rule change effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

**I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change**

The Exchange is proposing to extend an existing pilot program that increases the position and exercise limits for options on the iShares® Russell 2000® Index Fund ("IWM") traded on the Exchange ("IWM Pilot Program"). The text of the proposed rule change is available on the Exchange's Web site (<http://www.ise.com>), at the Exchange's principal office, and at the Commission's Public Reference Room.

**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 Exchange 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 Exchange 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 IWM Pilot Program provides for increased position and exercise limits for IWM options traded on the Exchange.<sup>5</sup> Specifically, the IWM Pilot Program increases the position and exercise limits for IWM options from 250,000 contracts to 500,000 contracts.<sup>6</sup>

The purpose of the proposed rule change is to extend the IWM Pilot Program until March 1, 2008. The Exchange is not proposing any other changes to the IWM Pilot Program. The Exchange believes that extending the IWM Pilot Program is warranted due to the positive feedback received from market participants and for the reasons cited in the original rule filing that proposed the adoption of the IWM Pilot Program. Further, the Exchange represents that it has not encountered any problems or difficulties relating to the IWM Pilot Program since its inception.

The Exchange believes that maintaining the increased position and exercise limits for IWM options will lead to a more liquid and more competitive market environment for IWM options that will benefit customers interested in trading this product. As a result, the Exchange requests that the Commission extend the pilot through March 1, 2008.

<sup>5</sup> The proposal that established the IWM Pilot Program was designated by the Commission to be effective and operative upon filing. See Securities Exchange Act Release No. 55175 (January 25, 2007), 72 FR 4753 (February 1, 2007) (SR-ISE-2007-07). The IWM Pilot Program was extended by the Commission and is due to expire on January 18, 2008. See Securities Exchange Act Release No. 56020 (July 6, 2007), 72 FR 38109 (July 12, 2007) (SR-ISE-2007-56).

<sup>6</sup> Pursuant to ISE Rule 414, the exercise limit established under Rule 414 for IWM options shall be equivalent to the position limit prescribed for IWM options in Supplementary Material .01 to Rule 412. The increased exercise limits would only be in effect during the pilot period, to run from January 22, 2007 through March 1, 2008.

<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

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

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

<sup>14</sup> 17 CFR 200.30-3(a)(12).