

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61693; File No. SR-ISE-2010-16]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Payment for Order Flow Fees

March 11, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on March 1, 2010, the International Securities Exchange, LLC (the "Exchange" or the "ISE") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the self-regulatory organization. The Exchange has designated this proposal as one establishing or changing a due, fee, or other charge imposed by ISE under Section 19(b)(3)(A)(ii) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder,<sup>4</sup> which renders the proposal 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 ISE is proposing to amend its payment for order flow program. The text of the proposed rule change is available on the Exchange's Web site (<http://www.ise.com>), at the principal office of the Exchange, 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 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 currently has a payment-for-order-flow ("PFOF") program that helps its market makers establish PFOF arrangements with an Electronic Access Member ("EAM") in exchange for that EAM preferencing some or all of its order flow to that market maker. This program is funded through a fee paid by Exchange market makers for each customer contract they execute, and is administered by both Primary Market Makers ("PMM")<sup>5</sup> and Competitive Market Makers ("CMM"),<sup>6</sup> depending on who the order is preferenced to. PFOF fees collected by the Exchange that are not distributed are rebated back to the market makers.

The Exchange currently charges a PFOF fee of \$0.65 per contract for all options classes that are not in the penny pilot program. For penny pilot classes, the Exchange charges a PFOF fee of \$0.25 per contract. For competitive reasons, the Exchange now proposes to eliminate the PFOF fee in all options classes executed on the Exchange by persons who are not broker/dealers and who are not Priority Customers.

##### 2. Statutory Basis

The basis under the Securities Exchange Act of 1934 (the "Exchange Act") for this proposed rule change is the requirement under Section 6(b)(4) that an exchange have an equitable allocation of reasonable dues, fees and other charges among its members and other persons using its facilities. In particular, the Exchange believes that eliminating certain PFOF fees will enhance competition.

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

The proposed rule change does not impose 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3) of the Act<sup>7</sup> and Rule 19b-4(f)(2)<sup>8</sup> thereunder. 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 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-ISE-2010-16 on the subject line.

##### Paper Comments

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

All submissions should refer to File Number SR-ISE-2010-16. 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 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

<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)(ii).

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

<sup>5</sup> See Exchange Act Release No. 43833 (January 10, 2001), 66 FR 7822 (January 25, 2001).

<sup>6</sup> See Exchange Act Release No. 53127 (January 13, 2006), 71 FR 3582 (January 23, 2006).

<sup>7</sup> 15 U.S.C. 78s(b)(3)(A). [sic]

<sup>8</sup> 17 CFR 240.19b-4(f)(2).

a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange.<sup>9</sup> 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-ISE-2010-16 and should be submitted on or before April 8, 2010.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61690; File No. SR-NASD-2003-140]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Notice of Filing of Proposed Rule Change, as Modified by Amendment No. 3, Relating to the Prohibition of Certain Abuses in the Allocation and Distribution of Shares in Initial Public Offerings (“IPOs”)

March 11, 2010.

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 September 15, 2003, the National Association of Securities Dealers, Inc. (“NASD”) (n/k/a Financial Industry Regulatory Authority, Inc. (“FINRA”))<sup>3</sup> filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared substantially by FINRA. NASD amended the proposed rule change on December 9, 2003 and

August 4, 2004. FINRA amended the proposed rule change on February 17, 2010.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 3, from interested persons.

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

FINRA is proposing Amendment No. 3 to SR-NASD-2003-140, a proposed rule change to further and more specifically prohibit certain abuses in the allocation and distribution of shares in initial public offerings (“IPOs”). The text of the proposed rule change in Amendment No. 3 replaces and supersedes the text in the original rule filing and Amendment Nos. 1 and 2 thereto.

The text of the proposed rule change is available on FINRA’s Web site at <http://www.finra.org>, at the principal office of FINRA 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, 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 these 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 aspects of such statements.

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

###### 1. Purpose

On September 15, 2003, NASD (n/k/a FINRA) filed with the SEC SR-NASD-2003-140, a proposed rule change to adopt new FINRA Rule 5131 (originally proposed as NASD Rule 2712) to address disclosure and management of conflicts of interests that may adversely affect the allocation and distribution of IPOs. The proposed rule change also is intended to sustain public confidence in the IPO process, which is critical to the continued success of the capital markets. The SEC published the proposed rule change for notice and

comment on December 20, 2004 and received twelve comment letters.<sup>5</sup>

FINRA is filing this Amendment No. 3 to address the substantive issues raised by commenters and to clarify and streamline the proposed rule. Among other things, the revisions simplify the spinning provision, clarify the scope of the lock-up disclosure and returned shares provisions and propose several new defined terms.

##### Proposed Rule 5131(b)—Spinning

FINRA is eliminating the presumption that any allocation within the prior six months of the receipt of investment banking business would violate the spinning provision. Instead, FINRA is proposing an outright prohibition on allocations in certain specified situations where a client relationship exists, where compensation has been received or where a member intends to provide or expects to be retained for investment banking services.

Specifically, FINRA is proposing amendments to clarify that the spinning prohibition would apply to allocations to the account of an executive officer or director of a current investment banking client of the member in addition to companies from which the member has received investment banking compensation during the past twelve months. Further, FINRA is proposing to narrow the forward-looking window to three months in order to capture circumstances during such period where the member intends to provide, or expects to be retained by the company for, investment banking services within the next three months.

FINRA is adding Supplementary Material .01 to provide that the spinning prohibition would not apply to allocations of securities that are directed in writing by the issuer, its affiliates or selling shareholders, so long as the member has no involvement or influence, directly or indirectly, in the allocation decisions of the issuer, its affiliates or selling shareholders with respect to such issuer-directed securities. In addition, to clarify the scope of the types of accounts to which the spinning restrictions would apply, FINRA is proposing a new defined term “account of an executive officer or director.” The proposed definition would mean any account in which an executive officer or director of a company, or a person materially supported by such executive officer or director, has a financial interest or over which such executive officer, director,

<sup>9</sup> The text of the proposed rule change is available on the Commission’s Web site at <http://www.sec.gov>.

<sup>10</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> On July 26, 2007, the Commission approved a proposed rule change filed by the NASD to amend the NASD’s Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (August 1, 2007) (SR-NASD-2007-053).

<sup>4</sup> The text of the proposed rule change in Amendment No. 3 replaces and supersedes the text in the original rule filing and Amendment Nos. 1 and 2 thereto.

<sup>5</sup> See Securities Exchange Act Release No. 50896 (December 20, 2004), 69 FR 77804 (December 28, 2004) (“Proposing Release”).