

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66220; File No. SR-FINRA-2012-001]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change and Partial Amendment No. 1 To Amend FINRA Rule 4560 (Short-Interest Reporting)

January 24, 2012.

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 10, 2012, Financial Industry Regulatory Authority, Inc. (“FINRA”) 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 substantially prepared by FINRA. On January 20, 2012, FINRA filed Partial Amendment No. 1.<sup>3</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Partial Amendment No. 1, from interested persons.

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

FINRA is proposing to amend FINRA Rule 4560 (Short-Interest Reporting).

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.

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

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

<sup>3</sup> The text of proposed Partial Amendment No. 1 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.

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

##### 1. Purpose

FINRA Rule 4560 (“Short-Interest Reporting” or the “Rule”) requires each FINRA member to maintain a record of total short positions in all customer and proprietary firm accounts in all equity securities (other than Restricted Equity Securities as defined in Rule 6420) and regularly report such information to FINRA in the manner prescribed by FINRA. The Rule generally provides that the short positions to be recorded and reported are those resulting from “short sales” as that term is defined in Rule 200(a) of SEC Regulation SHO.<sup>4</sup> FINRA is proposing to amend the Rule to clarify members’ recording and reporting obligations and to delete several exceptions to the Rule.

First, FINRA is proposing to codify interpretive guidance previously issued by the Intermarket Surveillance Group (ISG) that instructed members to report “gross” short positions existing in each proprietary and customer account (rather than net positions across accounts).<sup>5</sup> Thus, the proposed rule change provides that members must report all gross short positions existing in each firm or customer account, including the account of a broker-dealer, that resulted from a “short sale” as that term is defined in Rule 200(a) of SEC Regulation SHO, as well as where the sale transaction that caused the short position was marked “long,” consistent with SEC Regulation SHO, due to the firm’s or the customer’s net long

<sup>4</sup> Rule 200 of SEC Regulation SHO provides that “short sale” means “any sale of a security which the seller does not own or any sale which is consummated by the delivery of a security borrowed by, or for the account of, the seller.” See Rule 200(a) of SEC Regulation SHO, 17 CFR 242.200. SEC Rule 200 further provides, among other things, that a person is deemed to own a security if: (a) The person or his agent has title to it; or (b) The person has purchased, or has entered into an unconditional contract, binding on both parties thereto, to purchase it, but has not yet received it; or (c) The person owns a security convertible into or exchangeable for it and has tendered such security for conversion or exchange; or (d) The person has an option to purchase or acquire it and has exercised such option; or (e) The person has rights or warrants to subscribe to it and has exercised such rights or warrants; or (f) The person holds a security futures contract to purchase it and has received notice that the position will be physically settled and is irrevocably bound to receive the underlying security. See Rule 200(b) of SEC Regulation SHO.

<sup>5</sup> See Intermarket Surveillance Group, Consolidated Reporting of Short Interest Positions, ISG Regulatory Memorandum 95-01 (March 6, 1995).

position at the time of the transaction (e.g., aggregation units).

Second, FINRA is clarifying that members’ short-interest reports must reflect only those short positions that have settled or reached settlement date by the close of the reporting settlement date designated by FINRA. Therefore, short positions resulting from short sales that were effected but have not reached settlement date by the given designated reporting settlement date, should not be included in a member’s short-interest report for that reporting cycle. Of course, short-interest positions resulting from short sales that reached the expected settlement date, but failed to settle (i.e., “fails”), must be included.

Third, FINRA is clarifying that members must reflect company-related actions in their short-interest reports adjusted as of the ex-date of the corporate action (and if no ex-date is declared by a self-regulatory organization (“SRO”), then the payment date).<sup>6</sup> Therefore, for the purposes of short-interest reporting, members must reflect corporate actions (e.g., a reverse or forward split) that impact the total number of shares in the short position in their short-interest report for a reporting cycle if the ex-date of the corporate action occurs by the reporting settlement date designated by FINRA for such cycle (even if payment of the distribution is not received until after the designated reporting settlement date).

Finally, consistent with discussions with the ISG, FINRA is proposing amendments to delete certain existing exceptions to the Rule.<sup>7</sup> At present, the Rule provides five exceptions, including an exception for stabilizing activity, domestic arbitrage and international arbitrage. FINRA, in cooperation with the ISG Short Interest Working Group (“ISG Working Group”), determined that the transactions addressed in these three exceptions result in the type of short positions that would be of interest to regulators and the public, and

<sup>6</sup> The ex-date is the date on or after which a security is traded without a specific dividend or distribution. The ex-date also is the date that DTCC uses to determine who is entitled to the distribution. The payable date is the date that the dividend is sent to the record owner of the security. See e.g., *Regulatory Notice* 00-54 (August 2000).

<sup>7</sup> FINRA has worked closely with other SRO members of the ISG, a group that includes representatives of every U.S. SRO, to address problems that reach across marketplaces. Each ISG member adopted consistent short-interest reporting rules to enhance surveillance capabilities, augment market transparency, enable investors to make more informed decisions, and provide greater disclosure for regulatory purposes.

therefore, determined that these exceptions no longer are appropriate.<sup>8</sup>

FINRA believes that the proposed amendments will remove confusion regarding the operation of the Rule and help facilitate the availability to the public and regulators of accurate and complete short-interest information.

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 120 days following Commission approval. The effective date will be no more than 365 days following Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>9</sup> which requires, among other things, that FINRA rules must 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 promote consistency and accuracy in the calculation and reporting of short-interest positions by members.

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

FINRA does not believe that the proposed rule change will 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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and

<sup>8</sup> FINRA and the ISG Working Group determined that the remaining two exceptions continue to be appropriate. Specifically, the exception for sales for an account in which the person has an interest, owns the security and intends to deliver it as soon as is possible (which FINRA is retaining) is intended to address circumstances where there may be a brief delay in delivery but the sale is a long sale, *i.e.*, exercise of a right, option, or warrant. In addition, the over-allotment exception (which FINRA also is retaining) addresses the narrow circumstance where the underwriter has not received shares and results in a short position for a very brief duration.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

- (A) by order approve or disapprove such proposed rule change, or
- (B) institute proceedings to determine whether the proposed rule change should be disapproved.

## 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2012-001 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-FINRA-2012-001. 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 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-2012-001 and should be submitted on or before February 21, 2012.

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

**Kevin M. O'Neill,**

*Deputy Secretary.*

[FR Doc. 2012-1880 Filed 1-27-12; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-66223; File No. SR-EDGA-2012-02]

### Self-Regulatory Organizations; EDGA Exchange, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Amend EDGA Rule 11.13 To Extend the Operation of a Pilot Program Pursuant to the Rule Until July 31, 2012

January 24, 2012.

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 January 11, 2012, the EDGA Exchange, Inc. (the "Exchange" or the "EDGA") 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 change from interested persons.

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

The Exchange proposes to amend EDGA Rule 11.13 to extend the operation of a pilot pursuant to the Rule (the "Pilot") until July 31, 2012. The text of the proposed rule change is available on the Exchange's Web site at <http://www.directedge.com>, at the principal office of the Exchange, on the Commission's Web site at <http://www.sec.gov>, 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

<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.