should be submitted on or before January 23, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[7]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–31149 Filed 12–31–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59160; File No. SR–FINRA–2008–062]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 2267 (Investor Education and Protection) in the Consolidated FINRA Rulebook

December 23, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 11, 2008, the Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) 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 by FINRA. 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 is proposing to adopt new FINRA Rule 2267 (Investor Education and Protection) based on NASD Rule 2280. The proposed rule change would require member firms, with certain exceptions, to provide customers with FINRA's Web site address and information regarding FINRA's BrokerCheck program at least once every calendar year. The text of the proposed rule change is attached as Exhibit 5.[3]

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

As part of the process of developing a new consolidated rulebook (''Consolidated FINRA Rulebook''),[4] FINRA is proposing to adopt a new FINRA rule based on NASD Rule 2280 (Investor Education and Protection). The proposed rule would require member firms, with certain exceptions, to provide customers with FINRA's Web site address and information regarding FINRA's BrokerCheck program at least once every calendar year.

NASD Rule 2280 currently applies to all member firms that carry customer accounts and hold customer funds or securities. The Rule requires that each such member firm provide its customers with the following information in writing not less than once every calendar year: (1) The ''Public Disclosure Program'' hotline number; (2) the NASD Regulation Web site address; and (3) a statement regarding the availability of an investor brochure that includes information describing the ''Public Disclosure Program.'' There is no comparable Incorporated NYSE Rule.

The proposed rule would apply to all member firms, with two general exceptions: (1) a firm that does not have customers or (2) an introducing firm that is party to a carrying agreement where the carrying firm member complies with the Rule.

Unlike NASD Rule 2280, the proposed rule would apply to member firms that conduct a limited business with customers, such as mutual fund distributors and member firms that deal solely with direct participation programs (''DPPs''). These member firms would be required to comply with the rule and provide the disclosures to their customers at least once every calendar year. To the extent such firms are parties to a carrying agreement and the carrying firm member complies on their behalf, these firms would be excepted from the requirements of the proposed rule.

In December 2003, FINRA announced that its ''Public Disclosure Program'' would thereafter be known as ''BrokerCheck.'' Accordingly, the proposed rule would include references to ''BrokerCheck'' rather than the ''Public Disclosure Program''. Additionally, the proposed rule would include references to the FINRA Web site address rather than the NASD Regulation Web site address. Lastly, the proposed rule would clarify that the information required under the rule may be provided electronically to customers.[5]

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 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,[6] 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, by adopting the investor education and protection rule as a FINRA rule, the proposed rule change will help to ensure that customers continue to receive written information regarding FINRA's BrokerCheck program.

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.

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Commission notes that while provided in Exhibit 5 to the filing, the text of the proposed rule change is not attached to this notice but is available at FINRA, the Commission's Public Reference Room, and at *http://www.finra.org.*

[4] The current FINRA rulebook includes, in addition to FINRA Rules, (1) NASD Rules and (2) rules incorporated from NYSE (''Incorporated NYSE Rules'') (together, the NASD Rules and Incorporated NYSE Rules are referred to as the ''Transitional Rulebook''). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (''Dual Members''). For more information about the rulebook consolidation process, *see* FINRA *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

[5] *See* NASD *Notice to Members* 98–3 (Electronic Delivery of Information Between Members and Their Customers). This *Notice* sets forth the policy applicable to electronic delivery of information between member firms and their customers as permitted or required by NASD rules.

[6] 15 U.S.C. 78*o*–3(b)(6).

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

In May 2008, FINRA published *Regulatory Notice* 08–26 (Proposed Consolidated FINRA Rule Addressing Investor Education and Protection) requesting comment on the proposed rule change. A copy of the *Regulatory Notice* is attached as Exhibit 2a to this rule filing.[7] The comment period expired on June 13, 2008. Nine comment letters were received in response to the *Regulatory Notice.* Copies of the comment letters, and a list of the commenters, are attached as Exhibit 2b to this rule filing.[8]

Certain commenters believe that the proposed rule should not apply to institutional customers of a member. One commenter[9] notes that the proposed rule would continue to benefit retail investors but an exception should be provided for member firms that predominately transact business with institutional investors because these customers do not require the same levels of disclosure as retail investors. If FINRA pursues the rule change as currently proposed, the commenter requests that the required disclosures be made to institutional investors only at the time of account opening instead of once every calendar year. A second commenter[10] requests that the proposed rule state expressly that member firms are not required to provide such items of information to ''institutional accounts'' as defined in NASD Rule 3110(c)(4) or any successor rule thereto. Another commenter,[11] a small introducing broker doing business solely with ''sophisticated municipal market professionals'' and without any retail customers, requests clarification as to whether the rule applies to its business.

NASD Rule 2280 does not provide an exemption for institutional customers, and FINRA continues to believe that institutional customers may benefit from the receipt of the information required by the proposed rule. Thus, at this time, FINRA has not included an institutional exemption in the proposed FINRA rule.

One commenter[12] objects to the scope of the proposed rule stating that the rule should not apply to firms that do not carry customer accounts and do not hold customer funds or securities. The commenter fails to see the benefit of providing this information to customers who have no funds or securities being held with the member firm and believes the proposed rule is unclear in its application to firms that do not carry customer funds or securities. The commenter requests that FINRA retain the exemption in current NASD Rule 2280(b) for these types of firms. If FINRA pursues the rule change as currently proposed, the commenter requests that FINRA clarify which offerees or purchasers of DPPs must receive the annual disclosures. The commenter suggests an alternative proposal to require the disclosures in the subscription documents for future DPPs without an annual requirement or a look-back to any closed offerings.

FINRA understands the noted concerns and believes that if the customer relationship does not extend beyond the offering, then a subsequent annual notice is not needed. However, in such instances, the member must provide the customer with the disclosures during the time a customer relationship exists.

One commenter[13] notes that variable annuity issuers typically distribute their products through a principal underwriter (a registered broker-dealer) that enters into selling agreements with other member firms (''selling firms''). The commenter believes that the purchaser of the variable annuity contract should only be viewed as a customer of the selling firm and that the principal underwriter should be able to rely on the exception in the proposed rule for a firm with ''no customers.'' The commenter further seeks clarification as to whether a selling firm may rely on appropriate disclosure in a variable annuity prospectus.

FINRA agrees that a purchaser of a variable annuity contract generally may be viewed as the customer of the selling firm and not of the principal underwriter, for purposes of complying with the proposed rule. However, although the rule does not prescribe the manner in which the annual disclosures must be provided to customers, the selling firm would not be permitted to provide such disclosures in the variable annuity prospectus. FINRA does not believe that such manner of delivery is sufficiently prominent so as to provide customers with the requisite information regarding BrokerCheck. In contrast, in response to a separate commenter,[14] FINRA believes that such disclosures may be included on periodic account statements and/or trade confirmations.

According to one commenter,[15] the proposed rule is unnecessary because customers do not value receiving such information. The commenter questions the usefulness of providing this notice to customers. FINRA, however, believes that the proposed rule, like its predecessor NASD Rule 2280, serves an important regulatory purpose as it provides customers with information regarding the availability and purpose of the BrokerCheck program.

Another commenter[16] requests that the proposed rule have an effective date beginning in January 2009 to avoid the administrative costs of sending a separate all-client mailing at the end of the 2008 calendar year. The commenter notes that a January 1, 2009 effective date for the proposed rule would allow member firms to combine the proposed disclosures in a mailing with the required SIPC written disclosures for 2009,[17] since most member firms have already sent the SIPC disclosures for the 2008 calendar year. In this regard, FINRA notes that the proposed rule change would not become effective prior to January 1, 2009. Further, it is FINRA's view that any firm subject to NASD Rule 2280 that complies with its annual (calendar year) mailing requirement on or after January 1, 2009 but prior to the effective date of the proposed rule change (*i.e.*, the effective date of FINRA Rule 2267) will be deemed to have complied with FINRA Rule 2267 for the 2009 calendar year.

Two commenters[18] submitted letters that are outside the scope of the proposed rule change.

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

Within 35 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 publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) by order approve such proposed rule change, or

[7] The Commission notes that while provided in Exhibit 2a to the filing, the *Regulatory Notice* is not attached to this notice.

[8] All references to commenters under this Item are to the commenters as listed in Exhibit 2b. (The Commission notes that Exhibit 2b is not attached to this notice.)

[9] UBS.

[10] Baum.

[11] Gilboy.

[12] Kinkade.

[13] Sutherland.

[14] Baum.

[15] FFSI.

[16] MMLISI.

[17] *See* NASD Rule 2342.

[18] FSI and Wachovia.

(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 e-mail to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2008–062 on the subject line.

Paper Comments

• Send paper comments in triplicate to Florence E. Harmon, Acting Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–1090.

All submissions should refer to File Number SR–FINRA–2008–062. 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 on official business days between the hours of 10 a.m. and 3 p.m. Copies of the 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–2008–062 and should be submitted on or before January 23, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[19]

Florence E. Harmon,

Acting Secretary.

[FR Doc. E8–31204 Filed 12–31–08; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–59159; File No. SR–ISE–2008–97]

Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Amendment of the International Securities Exchange Holdings, Inc.'s Certificate of Incorporation

December 23, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on December 23, 2008, the International Securities Exchange, LLC (the ''Exchange'' or ''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 Exchange. ISE has filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act[3] and Rule 19b–4(f)(3) thereunder,[4] 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 Exchange is proposing to make technical changes to the certificate of incorporation (the ''Certificate of Incorporation'') of its parent, International Securities Exchange Holdings, Inc. (''Holdings''), which will be adopted in connection with a corporate transaction (the ''Transaction''), in which the ISE Stock Exchange, LLC (''ISE Stock''), a Delaware limited liability company, will merge with and into Maple Merger Sub, LLC (''Maple Merger Sub''), a Delaware limited liability company and a wholly owned subsidiary of Direct Edge Holdings LLC (''Direct Edge''), with Maple Merger Sub being the surviving entity.

Certificate of Incorporation

The Exchange is proposing to make a technical change to the Certificate of Incorporation to: (1) Correct the date of incorporation; (2) correct the address of Holdings' registered address in the state of Delaware; and (3) adopt the attestation language on the signature page. Specifically, the title of the document, Article FIRST and Article SECOND of the Certificate of Incorporation and the attestation language would be amended or adopted, as applicable, to read in its entirety as follows:

Amended and Restated Certificate of Incorporation of International Securities Exchange Holdings, Inc.

First: The name of the corporation is International Securities Exchange Holdings, Inc. (the ''Corporation''). The Corporation was incorporated on November 16, 2004 by filing its Certificate of Incorporation with the Secretary of State of the State of Delaware under the name International Securities Exchange Holdings, Inc.

Second: The address of the Corporation's registered office in the State of Delaware is 160 Greentree Drive, Suite 101, in the City of Dover, County of Kent, Delaware 19904. The name of its registered agent at such address is National Registered Agents, Inc.

* * * * *

IN WITNESS WHEREOF, this Amended and Restated Certificate of Incorporation has been duly adopted in accordance with the provisions of Sections 242 and 245 of the DGCL and has been executed by a duly authorized officer of the Corporation this 23rd day of December, 2008.

Name: _____

Title: _____

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 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 self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

[19] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] 15 U.S.C. 78s(b)(3)(A)(iii).

[4] 17 CFR 19b–4(f)(3).