

it would share on different levels of market share because of the extent to which members use the NASD/Nasdaq TRF to report trades in different stocks. For example, FINRA stated that members report higher volumes of trades in Tape C stocks than in Tape A or Tape B stocks, justifying a higher level of market share for Tape C transactions.

FINRA will calculate a participant's market share separately for each tape. To calculate a participant's market share, FINRA will divide the total number of shares represented by trades reported by members to the NASD/Nasdaq TRF during a calendar quarter by the total number of shares represented by all trades reported to the Consolidated Tape Association or Securities Information Processor during that quarter.

### III. Summary of Comments

The Commission received one comment letter in response to the proposed rule change.<sup>7</sup> The commenter stated that the proposed rebate demonstrated that market data fees are excessive, and do not have a fair and reasonable basis.<sup>8</sup> The commenter noted that, in its capacity as the "SRO Member," FINRA allocates and deducts costs before passing market data revenue to each TRF. According to the commenter, this ability to allocate costs in the context of a TRF rebuts earlier arguments, made by the exchanges, that costs of collection and distribution of market data cannot be allocated, and should thus not be a basis for determining the reasonableness of market data fees.<sup>9</sup> The commenter also asserted that the proposed rule change did not address the competitive impact of the filing, and that any short-term benefits from the market data revenue rebates could be diminished by the long-term impact of less competition.<sup>10</sup> Finally, the commenter said that the proposal addresses issues that are also present in the NetCoalition Petition.<sup>11</sup>

FINRA responded that the arguments made by the commenter were not germane to the proposed rule change. For example, FINRA stated that the issue of the reasonableness of market data fees and the purported lack of transparency regarding the cost of collecting market data are at issue in the NetCoalition Petition and need not be

resolved in connection with this filing.<sup>12</sup> FINRA also stated that the costs of collecting and distributing market data are not necessarily determinative of the reasonableness of the proposed rebate.<sup>13</sup> Finally, FINRA stated that the proposed rebate does not constitute an undue burden on competition that is not in furtherance of the Act.<sup>14</sup>

### IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letter, and FINRA's response to the comment letter, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association<sup>15</sup> and, in particular, the requirements of Section 15A(b)(5) of the Act,<sup>16</sup> which requires that FINRA rules provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

The Commission believes that it is reasonable for FINRA to amend Rule 7001B to adjust the percentage of market data revenue shared with NASD/Nasdaq TRF participants, effective retroactively to January 1, 2008. FINRA seeks to modify the rebate of market data revenue to NASD/Nasdaq TRF participants. Neither the costs incurred in collecting that market data, nor the calculation of market data fees is directly at issue in this filing. The fact that Nasdaq, as the Business Member, has determined to adjust its rebate schedule such that participants may receive a greater percentage of market data revenue does not establish that the fees are excessive. The SIFMA letter does not raise any other issue that would preclude approval of the FINRA proposal.

### V. Conclusion

The Commission finds that the proposed rule change is consistent with the requirements of the Act and, in particular, Section 15A of the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>17</sup> that the proposed rule change (SR-FINRA-2007-041) be, and hereby is, approved.

<sup>12</sup> See FINRA letter at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>16</sup> 15 U.S.C. 78o-3(b)(5).

<sup>17</sup> 15 U.S.C. 78s(b)(2).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57784; File No. SR-FINRA-2007-039]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change as Modified by Amendment Nos. 1 and 2 Thereto To Establish an Exemption for Certain Regulation NMS-Compliant Intermarket Sweep Orders from the Requirements in IM-2110-2 (Trading Ahead of Customer Limit Order) and Rule 2111 (Trading Ahead of Customer Market Orders)

May 6, 2008.

#### I. Introduction

On December 21, 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"), 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> a proposed rule change to establish an exemption for certain Regulation NMS-compliant Intermarket Sweep Orders ("ISOs") from the requirements governing trading ahead of customer limit orders and customer market orders. On February 11, 2008, FINRA filed Amendment No. 1 to the proposed rule change. The proposed rule change, as amended, was published for comment in the **Federal Register** on March 5, 2008.<sup>3</sup> The Commission received one comment letter regarding the proposal.<sup>4</sup> FINRA responded to the comment letter on March 26, 2008.<sup>5</sup> On April 30, 2008, FINRA filed Amendment No. 2 to the proposed rule change.<sup>6</sup>

<sup>18</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> See Securities Exchange Act Release No. 57388 (February 27, 2008), 73 FR 11963.

<sup>4</sup> See submission via SEC WebForm from Craig Carlino, Monroe Securities, dated March 13, 2008.

<sup>5</sup> See letter from Andrea D. Orr, Assistant General Counsel, FINRA, to Nancy M. Morris, Secretary, Commission, dated March 26, 2008 ("FINRA letter").

<sup>6</sup> In Amendment No. 2, FINRA deleted definitions that were either unnecessary or duplicative from

Continued

<sup>7</sup> *Supra* note 4.

<sup>8</sup> SIFMA letter at 1.

<sup>9</sup> *Id.* at 2.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> SIFMA letter at 1. See Securities Exchange Act Release No. 55011 (December 27, 2006) (order granting petition for review of SR-NYSEArca-2006-21).

This order approves the proposed rule change, as modified by Amendment Nos. 1 and 2.

## II. Description of the Proposed Rule Change

FINRA is proposing to establish an exemption for certain Regulation NMS-compliant ISOs<sup>7</sup> from the Rule and the Interpretive Material (“IM”) that govern trading ahead of customer limit orders and customer market orders. Under the proposed rule, a member will be exempt from its obligations with respect to trading for its own account if an ISO is routed in compliance with Rule 600(b)(30)(ii) of Regulation NMS, and the customer limit order or market order is received after the member routed the ISO. The exemption will also apply if the member executes an ISO to facilitate a customer limit order or market order, and the customer has consented to not receiving the better prices obtained by the ISO.

In its filing with the Commission, FINRA stated that the proposed exemption is similar to an exemption adopted by the New York Stock Exchange LLC to its Rule 92 (Limitations on Members’ Trading Because of Customers’ Orders). The ISO exemption to Rule 92 was approved by the Commission on July 5, 2007.<sup>8</sup>

## III. Summary of Comments

The Commission received one comment letter in response to the proposed rule change.<sup>9</sup> The commenter stated that the implementation of IM-2110-2 will reduce liquidity and result in inferior executions for public investors who own non-penny stock OTC securities.<sup>10</sup> The commenter also objected to the change to the definition of the size of the order on which terms and conditions may be negotiated.<sup>11</sup>

the proposed rule text. Because the Amendment is technical in nature, it is not subject to notice and comment.

<sup>7</sup> Regulation NMS defines an ISO as a limit order for an NMS stock that meets the following requirements: (i) When routed to a trading center, the limit order is identified as an intermarket sweep order; and (ii) simultaneously with the routing of the limit order identified as an intermarket sweep order, one or more additional limit orders, as necessary, are routed to execute against the full displayed size of any protected bid, in the case of a limit order to sell, or the full displayed size of any protected offer, in the case of a limit order to buy, for the NMS stock with a price that is superior to the limit price of the limit order identified as an intermarket sweep order. These additional routed orders also must be marked as intermarket sweep orders. See 17 CFR 242.600(b)(30).

<sup>8</sup> See Securities Exchange Release No. 56017 (July 5, 2007), 72 FR 38110 (July 12, 2007) (SR-NYSE-2007-21).

<sup>9</sup> *Supra* note 4.

<sup>10</sup> *Id.* at 1-2.

<sup>11</sup> *Id.* at 2.

FINRA responded to the comment letter on March 26, 2008.<sup>12</sup> FINRA stated that the comment letter was not germane to the proposed rule change, as it did not pertain to the proposed ISO exemption.<sup>13</sup> According to FINRA, the comments related to a rule change, previously approved by the Commission,<sup>14</sup> which expanded IM-2110-2 to apply to OTC equity securities.<sup>15</sup>

## IV. Discussion and Commission Findings

The Commission has carefully reviewed the proposed rule change, the comment letter, and FINRA’s response to the comment letter, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association<sup>16</sup> and, in particular, Section 15A(b)(6) of the Act,<sup>17</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.

The Commission believes that it is reasonable for FINRA to amend IM-2110-2 and Rule 2111 to exempt members when routing certain Regulation NMS-compliant ISOs. The proposed rule change should enable members to comply with the ISO routing requirements of Rule 611 of Regulation NMS without violating IM-2110-2 and Rule 2111 and, given the ISO routing exemption that currently exists under NYSE Rule 92, will subject ISO routing to consistent standards.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-FINRA-2007-039), as modified by Amendment Nos. 1 and 2, be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Nancy M. Morris,**

*Secretary.*

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<sup>12</sup> *Supra* note 5.

<sup>13</sup> *Id.* at 1.

<sup>14</sup> See Securities Exchange Act Release No. 55351 (February 26, 2007), 72 FR 99810 (March 5, 2007) (SR-NASD-2005-146).

<sup>15</sup> FINRA letter at 2.

<sup>16</sup> In approving this proposed rule change, the Commission has considered the proposed rule’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>17</sup> 15 U.S.C. 78o-3(b)(6).

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-57790; File No. SR-ISE-2008-33]

### Self-Regulatory Organizations; International Securities Exchange, LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Regarding the Block, Facilitation and Solicited Order Mechanisms

May 6, 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 April 30, 2008, the International Securities Exchange, LLC (“ISE” or “Exchange”) 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 substantially by ISE. ISE filed the proposed rule change as a “non-controversial” proposed rule change pursuant to Section 19(b)(3)(A) 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

ISE proposes to amend Supplementary Material .07 to ISE Rule 716 to make it consistent with the definition of a Block Trade under the Exchange’s Intermarket Option Linkage (“options linkage”) rules. The text of the proposed rule amendment is as follows, with deletions in [brackets] and additions *italicized*:

Rule 716. Block Trades

(a) through (e) no change.

Supplementary Material to Rule 716

.01 through .06 no change.

.07 Away Market Prices. Orders of 50 to 499 contracts and orders with a premium value below \$150,000 executed through the Block, [and] Facilitation and Solicited Order Mechanisms will not be executed at a price inferior to the national best bid or offer at the time of execution. Orders of 500 or more contracts with a premium value of at least \$150,000 executed through the Block, Facilitation and

<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).

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