

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

Because the foregoing proposed rule change does not significantly affect the protection of investors or the public interest, does not impose any significant burden on competition, and, by its terms, does not become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>10</sup> and Rule 19b-4(f)(6) thereunder.<sup>11</sup>

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSEAmex-2011-91 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-NYSEAmex-2011-91. 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 the filing also will be available for inspection and copying at the principal office of the Exchange. 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-NYSEAmex-2011-91 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

Kevin M. O'Neill,  
Deputy Secretary.

[FR Doc. 2011-31602 Filed 12-8-11; 8:45 am]

BILLING CODE 8011-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65889; File No. SR-NYSE-2011-60]

### Self-Regulatory Organizations; New York Stock Exchange LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending NYSE Rule 72 Priority of Bids and Offers and Allocation of Executions

December 5, 2011.

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 November 21, 2011, New York Stock Exchange LLC (the "Exchange" or "NYSE") 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 Exchange. The Exchange filed the proposal as a "non-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> 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 NYSE Rule 72 (Priority of Bids and Offers and Allocation of Executions). The text of the proposed rule change is available at the Exchange, at <http://www.nyse.com>, at the Commission's Public Reference Room, and at <http://www.sec.gov>.

### 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 those 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 parts 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 proposes to amend NYSE Rule 72 (Priority of Bids and Offers and Allocation of Executions).<sup>5</sup>

As provided under Rule 72(a)(ii), a bid or offer is considered the "setting interest" when it is established as the only displayable bid or offer made at a particular price and is the only

<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> The provisions of Rule 72 are in effect during a pilot ("New Market Model Pilot") that is set to end on January 31, 2012. See Securities Exchange Act Release No. 58845 (October 24, 2008), 73 FR 64379 (October 29, 2008) (SR-NYSE-2008-46). See also Securities Exchange Act Release Nos. 60756 (October 1, 2009), 74 FR 51628 (October 7, 2009) (SR-NYSE-2009-100) (extending Pilot to November 30, 2009); 61031 (November 19, 2009), 74 FR 62368 (November 27, 2009) (SR-NYSE-2009-113) (extending Pilot to March 30, 2010); 61724 (March 17, 2010), 75 FR 14221 (March 24, 2010) (SR-NYSE-2010-25) (extending Pilot to September 30, 2010); 62819 (September 1, 2010), 75 FR 54937 (September 9, 2010) (SR-NYSE-2010-61) (extending Pilot to January 31, 2011); 63616 (December 29, 2010), 76 FR 612 (January 5, 2011) (SR-NYSE-2010-86) (extending Pilot to August 1, 2011); and 64761 (June 28, 2011), 76 FR 39147 (July 5, 2011) (SR-NYSE-2011-29) (extending Pilot to January 31, 2012).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the Commission written notice of the Exchange's 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 of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>12</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.

displayable interest when such price is or becomes the Exchange best bid or offer ("BBO"). Setting interest is entitled to priority for allocation of executions at that price, as provided for under NYSE Rule 72. In this regard, and as currently provided for under NYSE Rule 72(a)(ii)(G), if non-pegging interest is the setting interest, it retains its priority even if joined at that price by a pegging e-Quote.<sup>6</sup> If, however, at the time non-pegging interest becomes the Exchange BBO, an e-Quote is pegging to such non-pegging interest, all such interest is considered to be entered simultaneously and, therefore, no interest is considered the setting interest.

Since implementing this rule as part of the New Market Model Pilot, the Exchange has determined that Rule 72(a)(ii) may currently disincentivize aggressive displayed quoting by permitting pegging e-Quotes to eliminate the priority to which a non-pegging e-Quote might otherwise be entitled. Specifically, because pegging interest is not displayed until it joins non-pegging interest, the participant entering the non-pegging interest is unaware that one or more pegging e-Quotes at that price may exist. Because the goal of the setting interest, and related priority given to such interest, is to create an incentive for participants to display aggressive prices, a participant may be reluctant to enter such displayed interest if a non-displayed pegging e-Quote could impede such displayed interest from receiving priority. The Exchange therefore proposes to amend NYSE Rule 72(a)(ii)(G) to reflect that non-pegging interest that becomes the Exchange BBO will be considered the setting interest even if an e-Quote is pegging to such non-pegging interest.<sup>7</sup> In this regard, the Exchange believes that this proposed change would enhance the New Market Model's positive impact on the Exchange's market, on the Exchange's members, and on investors generally.

Because of the related technology changes that this proposed rule change would require, the Exchange proposes to announce the initial implementation date and related roll-out schedule, if applicable, via Trader Update.

## 2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Securities Exchange Act of 1934 (the "Act"),<sup>8</sup> in general, and furthers the

objectives of Section 6(b)(5),<sup>9</sup> in particular, because it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange believes that the proposed rule change meets these requirements because it would permit non-pegging interest that sets a new BBO to be considered the setting interest and therefore retain priority, as provided for under NYSE Rule 72, over a pegging e-Quote that reacts and pegs to such non-pegging interest. Accordingly, the proposal is designed to incentivize and reward aggressive displayed quoting by market participants, which contributes to the market quality of the Exchange. In this regard, the Exchange believes that this proposed change would enhance the New Market Model's positive impact on the Exchange's market, on the Exchange's members, and on investors generally.

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

The Exchange does not believe that the proposed rule change will 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

No written comments were solicited or received with respect to the proposed rule change.

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At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend 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 email to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-NYSE-2011-60 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-NYSE-2011-60. 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 the filing also will be available for inspection and

Commission written notice of the Exchange's 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 of filing of the proposed rule change, or such shorter time as designated by the Commission. The Exchange has satisfied this requirement.

<sup>6</sup> See Rule 70.26—Pegging for d-Quotes and e-Quotes.

<sup>7</sup> Non-pegging interest that is the setting interest will continue to retain its priority even if joined at that price by a pegging e-Quote. See *id.*

<sup>8</sup> 15 U.S.C. 78f(b).

<sup>9</sup> 15 U.S.C. 78f(b)(5).

<sup>10</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires the Exchange to give the

copying at the principal office of the Exchange. 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–NYSE–2011–60 and should be submitted on or before December 30, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>12</sup>

**Kevin M. O'Neill,**  
Deputy Secretary.

[FR Doc. 2011–31604 Filed 12–8–11; 8:45 am]

BILLING CODE 8011–01–P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–65895; File No. SR–FINRA–2011–052]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change To Adopt NASD Rule 2320 (Best Execution and Interpositioning) and Interpretive Material (“IM”) 2320 as FINRA Rule 5310 in the Consolidated Rulebook

December 5, 2011.

#### I. Introduction

On October 4, 2011, 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 adopt NASD Rule 2320 (Best Execution and Interpositioning) and Interpretive Material (“IM”) 2320 (Interpretive Guidance with Respect to Best Execution Requirements) as a FINRA rule in the consolidated FINRA rulebook with four notable changes. The proposed rule change was published for comment in the **Federal Register** on October 21, 2011. <sup>3</sup> The Commission received one comment letter on the proposal. <sup>4</sup> FINRA filed a response to

this comment on December 1, 2011. <sup>5</sup> This order approves the proposed rule change.

#### II. Description of the Proposal

As part of the process of developing a new consolidated rulebook (“Consolidated FINRA Rulebook”), <sup>6</sup> FINRA is proposing to adopt NASD Rule 2320 (Best Execution and Interpositioning) and IM–2320 (Interpretive Guidance with Respect to Best Execution Requirements) as a FINRA rule in the consolidated FINRA rulebook with four notable changes. <sup>7</sup> Specifically, the proposed rule change would combine and renumber NASD Rule 2320 and IM–2320 as FINRA Rule 5310 in the Consolidated FINRA Rulebook.

##### *Current NASD Rule 2320 and IM–2320*

NASD Rule 2320 currently requires a member, in any transaction for or with a customer or a customer of another broker-dealer, to use “reasonable diligence” to ascertain the best market for a security and to buy or sell in such market so that the resultant price to the customer is as favorable as possible under prevailing market conditions. The rule identifies five factors that are among those to be considered in determining whether the member has used reasonable diligence. <sup>8</sup> The rule also includes provisions related to interpositioning (i.e., interjecting a third party between the member and the best available market), the use of a broker’s broker, <sup>9</sup> the staffing of order rooms, and

the application of the best execution requirements to other parties.

In addition to these provisions, NASD Rule 2320(f) (commonly referred to as the “Three Quote Rule”) generally requires members that execute transactions in non-exchange-listed securities on behalf of customers to contact a minimum of three dealers (or all dealers if three or fewer) and obtain quotations from those dealers subject to certain exclusions. <sup>10</sup> The Three Quote Rule establishes a minimum standard, and compliance with the Three Quote Rule, in and of itself, does not mean that a member has met its best execution obligations under NASD Rule 2320. <sup>11</sup>

IM–2320 was adopted in 2006 to codify interpretive guidance that FINRA staff had provided involving compliance with NASD Rule 2320. <sup>12</sup> Specifically, IM–2320 addresses issues involving the term “market” for purposes of the rule as well as the application of the rule to debt securities and to broker-dealers that are executing a customer’s order against the broker-dealer’s quote.

##### *Proposed Adoption and Changes to NASD Rule 2320 and IM–2320 as FINRA Rule 5310*

FINRA is proposing to adopt NASD Rule 2320 (Best Execution and Interpositioning) and IM–2320 (Interpretive Guidance with Respect to Best Execution Requirements) as FINRA rule 5310 in the Consolidated FINRA Rulebook with four notable changes, discussed in turn.

##### (1) Three Quote Rule

Although the original concerns the Three Quote Rule was designed to address are still valid, FINRA represents that the current requirements in the Three Quote Rule, even with the various exclusions, are overly prescriptive and can often result in unnecessary delay in the execution of a customer’s order or impose requirements that do not benefit the customer. <sup>13</sup> Accordingly, rather than maintain the Three Quote Rule and the various exclusions in their current format, the proposed rule change replaces the Three Quote Rule with Supplementary Material emphasizing a member’s best execution obligations

<sup>5</sup> See Letter from Brant K. Brown, Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated December 1, 2011 (“FINRA Response to Comment”).

<sup>6</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) 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”). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>7</sup> As part of adopting the NASD rule as a FINRA rule, FINRA has also proposed various technical and conforming changes.

<sup>8</sup> These five factors are: (1) The character of the market for the security; (2) the size and type of transaction; (3) the number of markets checked; (4) the accessibility of the quotation; and (5) the terms and conditions of the order as communicated to the member.

<sup>9</sup> The proposed rule change moves part of the provision concerning the use of a broker’s broker from paragraph (b) of the rule to Supplementary Material .05.

<sup>10</sup> The Three Quote Rule does not apply, for example, when two or more priced quotations for a non-exchange-listed security are displayed in an inter-dealer quotation system that permits quotation updates on a real-time basis. Also excluded from the Three Quote Rule are certain transactions in non-exchange-listed securities of foreign issuers that are part of the FTSE All-World Index.

<sup>11</sup> See NASD Notice to Members 00–78 (November 2000).

<sup>12</sup> See Securities Exchange Act Release No. 54339 (August 21, 2006), 71 FR 50959 (August 28, 2006).

<sup>13</sup> See Notice at 65550.

<sup>12</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> Securities Exchange Act Release No. 65579 (October 17, 2011), 76 FR 65549 (“Notice”).

<sup>4</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from David T. Bellaire, Esq., General Counsel and Director of Government Affairs, Financial Services Institute, dated November 14, 2011 (“FSI Letter”).