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SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-69398; File No. SR-FINRA-2013-020)

April 18, 2013

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to FINRA Rule 5250 (Payments for Market Making)

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 15, 2013, 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 prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by 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

FINRA is proposing to amend FINRA Rule 5250 (Payments for Market Making) to create an exception for payments to members that are expressly provided for under the rules of a national securities exchange.

The text of the proposed rule change is available on FINRA’s website at <http://www.finra.org>, at the principal office of FINRA and at the Commission’s Public Reference Room.

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

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

FINRA Rule 5250 (Payments for Market Making or “Rule”) explicitly prohibits any payment by issuers or issuers’ affiliates and promoters, directly or indirectly, to a member for publishing a quotation, acting as a market maker, or submitting an application in connection therewith. The Rule is intended, among other things, to prohibit members from receiving compensation or other payments from an issuer for quoting or making a market in the issuer’s securities and to assure that members act in an independent capacity when publishing a quotation or making a market in an issuer’s securities.

FINRA’s policy concerning payments for market making was first set forth in Notice to Members 75-16 and then codified as NASD Rule 2460 (now FINRA Rule 5250) in 1997.<sup>4</sup>

Among other things, FINRA recognized that members generally have considerable latitude and freedom to make or terminate market making activities and was concerned that payments by an issuer to a market maker could influence a firm’s decision to make a market. In particular, the

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<sup>4</sup> See Notice to Members 75-16 (February 20, 1975) and Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (“Order Approving File No. SR-NASD-97-29”).

existence of undisclosed, private arrangements between market makers and an issuer and/or its promoters may make it difficult for investors to ascertain the true market for the securities, such that what might appear to be independent trading activity may well be illusory.<sup>5</sup>

FINRA staff has received inquiries regarding the application of the Rule to various types of arrangements provided for by the rules of a national securities exchange (an “exchange”). For example, the Commission has approved a rule change by NASDAQ Stock Market implementing a voluntary program for market makers that would be funded through fees by the issuer or an affiliate of the issuer (“NASDAQ MQP”).<sup>6</sup> The Commission also currently is considering a proposed rule change by NYSE Arca to adopt a voluntary market maker program for certain exchange-traded products that would be funded through fees by the issuer.<sup>7</sup>

FINRA believes certain exchange program structures, such as the one adopted by NASDAQ, could be deemed an indirect payment under Rule 5250; however, FINRA does not believe that such arrangements should be prohibited under the Rule because those payments would be made as part of a transparent structure put in place by another self-regulatory organization pursuant to a rule change, which generally must be approved by the SEC following

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<sup>5</sup> “If payments . . . were permitted, investors would not be able to ascertain which quotations in the marketplace are based on actual interest and which quotations are supported by issuers or promoters. This structure would harm investor confidence in the overall integrity of the marketplace.” See Order Approving File No. SR-NASD-97-29 at 37107.

<sup>6</sup> See Securities Exchange Act Release No. 69195 (March 20, 2013), 78 FR 18393 (March 26, 2013) (Order Granting Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 3 Thereto, To Establish the Market Quality Program) (File No. SR-NASDAQ-2012-137) (“SEC Approval Order”).

<sup>7</sup> See Securities Exchange Act Release No. 69335 (April 5, 2013), 78 FR 21681 (April 11, 2013) (Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto To Implement a One-Year Pilot Program for Issuers of Certain Exchange-Traded Products Listed on the Exchange) (File No. SR-NYSEArca-2013-34). This proposal has not been acted upon by the Commission. The Commission has solicited comment on the proposed rule change, which are due by May 2, 2013.

publication for public comment in the Federal Register.<sup>8</sup> Accordingly, where a market maker payment is provided for under the rules of an exchange that are effective after being filed with, or filed with and approved by, the SEC pursuant to the requirements of the Act, it is FINRA's view that comity should be afforded to such exchange rulemaking and the payment should not be prohibited under Rule 5250.

FINRA also believes the NASDAQ MQP contains several features that mitigate the concerns the Commission discussed when approving the predecessor rule to FINRA Rule 5250.<sup>9</sup> For example, the terms of the NASDAQ MQP generally are "objective, clear, and transparent"<sup>10</sup> and includes [sic] disclosure requirements to help alert and educate potential and existing investors about the program.<sup>11</sup> Specifically, and among other things, the NASDAQ program provides for website disclosure of certain information, including the identities of the companies, securities and market makers participating in the NASDAQ MQP, as well as the amount of the supplemental fee, if any, per security that would be in addition to the fixed basic fee. FINRA believes the level of transparency available regarding the structure of the program, participation of the parties and possible payments to market makers, provides important disclosure to investors in NASDAQ MQP securities, enabling them to identify which exchange-traded funds are and are not subject to the NASDAQ MQP. FINRA, therefore, believes it is appropriate to create an exception to Rule 5250 for payments to members expressly provided for under the rules of an

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<sup>8</sup> See, e.g., Securities Exchange Act Release No. 68515 (December 21, 2012), 77 FR 77141 (December 31, 2012) (Notice of Filing of a Proposed Rule Change and Amendment No. 1 Thereto to Establish the Market Quality Program) (File No. SR-NASDAQ-2012-137).

<sup>9</sup> See supra text accompanying note 5.

<sup>10</sup> See SEC Approval Order at 18401.

<sup>11</sup> See SEC Approval Order.

exchange where the Commission has analyzed the payments and determined that the concerns Rule 5250 was designed to address have been sufficiently mitigated.

FINRA has filed the proposed rule change for immediate effectiveness. The implementation date of the proposed rule change will be May 15, 2013.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>12</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 meets these requirements in that it excepts payments to market makers that are provided for under the rules of a national securities exchange, which are adopted pursuant to the Act's Section 19(b) rule filing process. In addition, these payments and related activity would be governed by the established market surveillance and oversight procedures of a national securities exchange.

FINRA believes that the proposed rule change also maintains the protections the rule was designed to provide, while refining the proper scope of the Rule to exclude payments made pursuant to objective, clear and transparent programs that are established by a national securities exchange to improve the market quality, depth and/or liquidity of securities traded on such exchange.

### 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 in that

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<sup>12</sup> 15 U.S.C. 78o-3(b)(6).

it treats all national securities exchanges equally by uniformly excepting payments made to market makers pursuant to the rules of an exchange that are effective after being filed with, or filed with and approved by, the SEC pursuant to the requirements 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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) 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>13</sup> and Rule 19b-4(f)(6) thereunder.<sup>14</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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

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<sup>13</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>14</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6) requires a self-regulatory organization to give the Commission written notice of its intent to file 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. FINRA has satisfied this requirement.

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-FINRA-2013-020 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-2013-020. 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 website (<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 website 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 10:00 a.m. and 3:00 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-2013-020 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>15</sup>

Kevin M. O'Neill  
Deputy Secretary

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<sup>15</sup> 17 CFR 200.30-3(a)(12).