

later than 60 days following Commission approval. The effective date will be 30 days following publication of the *Regulatory Notice* announcing 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>8</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 more uniform recordkeeping and compliance with SEA Rule 15c2-11's unsolicited customer order exception.

## 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 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

(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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2009-030 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-2009-030. 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, 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-2009-030 and should be submitted on or before July 8, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60086; File No. SR-FINRA-2009-023]

## Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Adopt FINRA Rule 2320 in the Consolidated FINRA Rulebook

June 10, 2009.

## I. Introduction

On March 31, 2009, the 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 2820 as FINRA Rule 2320 in the consolidated FINRA rulebook ("Consolidated FINRA Rulebook")<sup>3</sup> with minor changes. The proposal was published in the **Federal Register** on April 21, 2009.<sup>4</sup> The Commission received one comment letter on the proposal.<sup>5</sup> On June 1, 2009, FINRA responded to the comment letter.<sup>6</sup> This order approves the proposed rule change.

## II. Description of the Proposal

NASD Rule 2820 prohibits members from participating in the offer or sale of variable life insurance and variable annuity contracts unless certain conditions are met (collectively, "variable contract"). Specifically, members: (i) May not participate in the offering or sale of a variable contract on any basis other than at a value to be

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

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

<sup>3</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 FINRA *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>4</sup> See Securities Exchange Act Release No. 59762 (April 14, 2009), 74 FR 18269 ("Notice").

<sup>5</sup> See letter from Clifford E. Kirsch and Eric A. Arnold for the Committee of Annuity Insurers, Sutherland Asbill & Brennan LLP, to Elizabeth M. Murphy, Secretary, Commission, dated May 12, 2009 ("CAI Comment Letter").

<sup>6</sup> See letter from Stan Macel, Assistant General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated June 1, 2009.

<sup>8</sup> 15 U.S.C. 78o-3(b)(6).

<sup>9</sup> 17 CFR 200.30-3(a)(12).

determined following receipt of payment in accordance with the provisions of the contract, the prospectus and the Investment Company Act; (ii) must promptly transmit to the issuing insurance company all contract applications and at least the portion of the purchase payment required to be credited to the contract; and (iii) requires selling agreements between principal underwriters of variable contracts and selling broker-dealers that provide that the sales commission will be returned to the issuer if the contract is rendered for redemption within seven business days after acceptance. Additionally, under NASD Rule 2820, members may not sell variable contracts unless the insurance company promptly honors customer redemption requests in accordance with the contract, its prospectus and the Investment Company Act.

Furthermore, NASD Rule 2820(g) prohibits associated persons of a member from accepting any compensation from any person other than the member with which the person is associated, in connection with the sale and distribution of variable contracts. However, there is an exception permitting arrangements where a non-member pays compensation directly to associated person, provided that the member agrees to the arrangement, and relies on appropriate rules or guidance from the Commission that apply to the specific fact situation of the arrangement, and the relevant associated persons treat the funds as compensation. Additionally, it prohibits associated person from accepting securities as compensation, limits the payment or receipt of non-cash compensation (such as gifts, entertainment, training or education meetings and sales contests), and requires that certain records be kept. Currently, this provision requires a member to keep a record of all compensation received by the member or its associated persons from "offerors," other than small gifts and entertainment permitted by the rule, and include the nature of, and "if known," the value of any non-cash compensation received.

The proposed rule change would renumber NASD Rule 2820 as FINRA Rule 2320 in the Consolidated FINRA Rulebook and eliminate the phrase "if known" regarding the value of non-cash compensation. The deletion would require members to estimate the actual value of non-cash compensation for which a receipt (or similar documentation) assigning a value is not available and would be more consistent with the non-cash compensation

recordkeeping requirements regarding public offerings of securities (FINRA Rule 5110(i)(2)) and direct participation programs (NASD Rule 2810(c)(2)).<sup>7</sup> As stated in the Notice, FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice*.

### III. Summary of Comments and FINRA's Response

As previously noted, the Commission received one comment letter on the proposed rule change.<sup>8</sup> While expressing general approval of the proposed rule change, the commenter expressed concern and sought clarification about the proposed change regarding the rule's non-cash compensation provision. The commenter requested that FINRA confirm that it would respect a member's reasonable estimate of the value of non-cash compensation. Specifically, the commenter asserted that, because the proposed "estimation" standard would be inherently imprecise, it would undoubtedly result in members valuing similar forms of non-cash compensation differently. As such, the commenter requested that a member's estimate of value be respected, unless it is patently unreasonable.

In response, FINRA stated that members would be required to use good faith when estimating the value of non-cash compensation if a receipt or similar documentation is not available. FINRA acknowledged that, while there could be some differences regarding firms' estimates, FINRA believes that a good faith standard should help ensure that such differences are not significant, or can be distinguished based on underlying facts and circumstances. In addition, as stated in the Notice, the change would be consistent with the recordkeeping requirements for non-cash compensation received in connection with public offerings of securities<sup>9</sup> and the offer or sale of direct participation programs.<sup>10</sup>

The commenter also requested no less than 180 days to implement the proposed rule change. It noted that members would need this amount of time to adopt new policies and procedures, modify or create computerized and/or other compensation tracking systems, notify and educate their registered representatives, and adjust their training

programs to ensure compliance with the new requirements.

In response, FINRA stated that its general protocol is to announce the effective dates for new FINRA rules in *Regulatory Notices* that are published every other month. Each *Regulatory Notice* announces the effective dates of the new FINRA rules approved by the Commission during the preceding two months. The new FINRA rules' effective dates generally are sixty days following publication of the relevant *Regulatory Notice*. Accordingly, FINRA would announce the effective date of the approved rule change, FINRA Rule 2320, in a *Regulatory Notice* to be published on or about August 17, 2009, which would establish an effective date for the rule on or about October 19, 2009. FINRA believes that an implementation period consistent with this general protocol would be adequate to implement the proposal, considering that the changes proposed are minor.

### IV. Discussion

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rule and regulations thereunder that are applicable to a national securities association,<sup>11</sup> and in particular, with Section 15A(b)(6) of the Act,<sup>12</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. FINRA's adoption of NASD 2820 with minor changes as FINRA Rule 2320 in the Consolidated FINRA Rulebook will continue the regulation of members in connection with the sale and distribution of variable contracts. Requiring members to assign a value for non-cash compensation based on a good faith estimate should make members' records more complete. The Commission also notes that a good faith standard should encourage reasonable estimates of the value of non-cash compensation. The Commission believes FINRA responded appropriately to the issues raised by the commenter.

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>13</sup> that the

<sup>7</sup> FINRA has proposed to transfer NASD Rule 2810 without material change into the Consolidated FINRA Rulebook as FINRA Rule 2310. See SR-FINRA-2009-016.

<sup>8</sup> See CAI Comment Letter, *supra* note 5.

<sup>9</sup> See FINRA Rule 5110(i)(2).

<sup>10</sup> See NASD Rule 2810(c)(2). See also note 7.

<sup>11</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>13</sup> 15 U.S.C. 78s(b)(2).

proposed rule change (SR-FINRA-2009-023) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>14</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60084; File No. SR-Phlx-2009-37]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Order Granting Approval of Proposed Rule Change Relating to Quoting Requirements for Streaming Quote Traders, Remote Streaming Quote Traders and Specialists

June 10, 2009.

On April 21, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") 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 modify the quoting requirements for Streaming Quote Traders ("SQTs"), Remote Streaming Quote Traders ("RSQTs"), and specialists. The proposed rule change was published for comment in the **Federal Register** on May 6, 2009.<sup>3</sup> The Commission received no comments on the proposed rule change. This order approves the proposed rule change.

The Exchange proposes to replace its continuous quoting requirement for SQTs, RSQTs, and specialists with a reference to the portion of the trading day when a quote must be available. Specifically, a market participant that is currently subject to continuous quoting obligations would, instead, be required to maintain a two-sided quote in a series for a total time equal to at least 90% (or higher, if so announced by the Exchange in advance) of the duration of the trading day. If a technical failure or limitation of a system of the Exchange prevents a participant from maintaining, or prevents a participant from communicating to the Exchange, timely and accurate quotes, the duration of such failure or limitation would not be included in any of the calculations with respect to the affected quotes. The

Exchange would have the ability to consider other exceptions to the quoting requirements based on demonstrated legal or regulatory requirements or other mitigating circumstances.

The Exchange also proposes to modify the requirement applicable to Directed SQTs ("DSQTs"), Directed RSQTs ("DRSQTs"), and specialists to quote 99% of their assigned series. Specifically, the Exchange proposes to replace the 99% requirement in all of these instances with the lesser of two alternatives: 99% of the series, or 100% minus a single call-and-put "pair." The eligible pair in this case would consist of two individual options, one call and one put, which cover the same underlying instrument and have the same expiration date and exercise price.

The Commission notes that the Exchange's proposal would make minor adjustments to the quoting requirements of SQTs, RSQTs, DSQTs, DRSQTs, and specialists. The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder that are applicable to a national securities exchange.<sup>4</sup> In particular, the Commission believes that the proposed rule change is consistent with Section 6(b)(5) of the Act,<sup>5</sup> in that it is designed to promote just and equitable principles of trade, 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. In addition, the Commission notes that it has approved similar quoting requirements applicable to market makers on other options exchanges.<sup>6</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>7</sup> that the proposed rule change (SR-Phlx-2009-37) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>8</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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<sup>4</sup> In approving this rule, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

<sup>6</sup> See, e.g., Securities Exchange Act Release Nos. 57109 (January 7, 2008), 73 FR 2295 (January 14, 2008) (SR-CBOE-2007-134); and 57186 (January 22, 2008), 73 FR 4931 (January 28, 2008) (SR-NYSEArca-2007-121).

<sup>7</sup> 15 U.S.C. 78s(b)(2).

<sup>8</sup> 17 CFR 200.30-3(a)(12).

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60096; File No. SR-DTC-2009-10]

### Self-Regulatory Organizations; The Depository Trust Company; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Establish the Web Inquiry Notification System

June 11, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),<sup>1</sup> notice is hereby given that on May 22, 2009, The Depository Trust Company ("DTC") 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 primarily by DTC. DTC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>2</sup> and Rule 19b-4(f)(4) thereunder<sup>3</sup> so that the proposal was 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 proposed rule change will replace DTC's Participant Inquiry Notification System ("PINS") with a new Web Inquiry Notification System ("WINS") as a means for participants and DTC to communicate with each other about records pertaining to various services such as dividends, corporate reorganizations, custody services, and securities processing.

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

In its filing with the Commission, DTC 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. DTC 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> 15 U.S.C. 78s(b)(3)(A)(iii).

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

<sup>14</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. 59842 (April 29, 2009), 74 FR 21037.