

## SECURITIES AND EXCHANGE COMMISSION

### Proposed Collection; Comment Request

Upon written request, copies available from: Securities and Exchange Commission, Office of Investor Education and Advocacy, Washington, DC 20549-0213.

Extension: Form 1-E, Regulation E; SEC File No. 270-221; OMB Control No. 3235-0232.

Notice is hereby given that, pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), the Securities and Exchange Commission (the "Commission") is soliciting comments on the collection of information summarized below. The Commission plans to submit this existing collection of information of the Office of Management and Budget for extension and approval.

Form 1-E (17 CFR 239.200) under the Securities Act of 1933 (15 U.S.C. 77a *et seq.*) ("Securities Act") is the form that a small business investment company ("SBIC") or business development company ("BDC") uses to notify the Commission that it is claiming an exemption under Regulation E from registering its securities under the Securities Act. Rule 605 of Regulation E (17 CFR 230.605) under the Securities Act requires an SBIC or BDC claiming such an exemption to file an offering circular with the Commission that must also be provided to persons to whom an offer is made. Form 1-E requires an issuer to provide the names and addresses of the issuer, its affiliates, directors, officers, and counsel; a description of events which would make the exemption unavailable; the jurisdictions in which the issuer intends to offer the securities; information about unregistered securities issued or sold by the issuer within one year before filing the notification on Form 1-E; information as to whether the issuer is presently offering or contemplating offering any other securities; and exhibits, including copies of the rule 605 offering circular and any underwriting contracts.

The Commission uses the information provided in the notification on Form 1-E and the offering circular to determine whether an offering qualifies for the exemption under Regulation E. It is estimated that approximately six issuers file eight notifications, together with attached offering circulars, on Form 1-E with the Commission annually. The Commission estimates that the total burden hours for preparing these notifications would be 800 hours in the

aggregate. Estimates of the burden hours are made solely for the purposes of the PRA, and are not derived from a comprehensive or even a representative survey or study of the costs of SEC rules and forms.

Written comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology. Consideration will be given to comments and suggestions submitted in writing within 60 days of this publication.

Please direct your written comments to Charles Boucher, Director/CIO, Securities and Exchange Commission, C/O Shirley Martinson, 6432 General Green Way, Alexandria, VA 22312; or send an e-mail to: [PRA\\_Mailbox@sec.gov](mailto:PRA_Mailbox@sec.gov).

Dated: August 21, 2009.

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60534; File No. SR-FINRA-2009-036]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval to a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt FINRA Rules 2124 (Net Transactions With Customers), 2220 (Options Communications), 4370 (Business Continuity Plans and Emergency Contact Information) and 5250 (Payment for Market Making) in the Consolidated FINRA Rulebook

August 19, 2009.

#### I. Introduction

On May 21, 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 Rules 2220 (Options Communications), 2441 (Net Transactions with Customers), 2460 (Payment for Market Making), 3510 (Business Continuity Plans) and 3520 (Emergency Contact Information) as FINRA Rules in the consolidated FINRA rulebook ("Consolidated FINRA Rulebook"). The proposed rule change would renumber NASD Rule 2220 as FINRA Rule 2220, NASD Rule 2441 as FINRA Rule 2124, and NASD Rule 2460 as FINRA Rule 5250 and would combine NASD Rules 3510 and 3520 as FINRA Rule 4370 in the consolidated FINRA Rulebook. The proposed rule change was published for comment in the **Federal Register** on June 15, 2009.<sup>3</sup> The Commission received one comment letter on the proposed rule change.<sup>4</sup> FINRA submitted a letter responding to the commenter<sup>5</sup> and on July 24, 2009, filed Amendment No. 1 to the proposed rule change.<sup>6</sup>

#### II. Discussion and Commission Findings

After careful review of the proposed rule change, the comment letter, and FINRA's response, the Commission 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>7</sup> In particular, the Commission finds that the proposed rule change is consistent with 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.

<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. 60066 (June 8, 2009), 74 FR 28308 ("Notice").

<sup>4</sup> See letter from Pamela Ziermann, Dougherty and Company LLC to Elizabeth M. Murphy, Secretary, Commission, dated June 30, 2009 ("Dougherty Letter").

<sup>5</sup> See letter from Patricia Albrecht, Assistant General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated July 24, 2009.

<sup>6</sup> In Amendment No. 1, FINRA would revise proposed FINRA Rule 4370 to require that only one of a member's two designated emergency contact persons must be a member of senior management and a registered principal of the firm.

<sup>7</sup> In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

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

### A. Proposed FINRA Rule 2220

FINRA is proposing to adopt NASD Rule 2220 (Options Communications) without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 2220. NASD Rule 2220 sets forth a member's obligations with respect to its options communications with the public. In 2008, the Commission approved FINRA's proposed revisions to NASD Rule 2220 to make it more consistent with FINRA's general rules on communications with the public and the options communications rules of other self-regulatory organizations ("SROs").<sup>9</sup> The amended rule became effective on March 4, 2009.<sup>10</sup> As amended, NASD Rule 2220, among other things: (1) Uses, to the extent appropriate, the same terminology and definitions as in FINRA's general rules on communications with the public; (2) makes the requirements for principal review of correspondence concerning options the same as for correspondence generally; and (3) updates the standards on the content of communications that precede the delivery of the options disclosure document (ODD). The Commission believes that it is appropriate to transfer NASD Rule 2220 into the Consolidated FINRA Rulebook as FINRA Rule 2220 with the non-substantive changes proposed by FINRA.

### B. Proposed FINRA Rule 2124

FINRA is proposing to adopt NASD Rule 2441 (Net Transactions with Customers) without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 2124. NASD Rule 2441 requires members to provide disclosure and obtain consent when trading on a "net" basis with customers.<sup>11</sup> The Commission approved NASD Rule 2441

in 2006.<sup>12</sup> With respect to non-institutional customers, the member must obtain the customer's written consent on an order-by-order basis prior to executing the transaction and such consent must evidence the customer's understanding of the terms and conditions of the order. With respect to institutional customers, a member must obtain the customer's consent prior to executing the transaction and such consent may be obtained by either: (1) Use of a negative consent letter; (2) oral disclosure and consent on an order-by-order basis; or (3) written consent on an order-by-order basis. The Commission believes that it is appropriate to transfer NASD Rule 2441 into the Consolidated FINRA Rulebook as FINRA Rule 2124 with the non-substantive changes proposed by FINRA.

### C. Proposed FINRA Rule 5250

FINRA is proposing to adopt NASD Rule 2460 (Payment for Market Making) without substantive change into the Consolidated FINRA Rulebook as FINRA Rule 5250. The Commission approved NASD Rule 2460 in 1997.<sup>13</sup> NASD Rule 2460 prohibits any payments by an issuer or an issuer's affiliates and promoters, directly or indirectly, to a member or person associated with a member for publishing a quotation, acting as a market maker, or submitting an application in connection therewith. The rule contains two exceptions that permit a member to accept: (1) Payment for bona fide services, including, but not limited to, investment banking services; and (2) reimbursement for registration or listing fees. The Commission believes that it is appropriate to transfer NASD Rule 2460 into the Consolidated FINRA Rulebook as FINRA Rule 5250 with the non-substantive changes proposed by FINRA.

### D. Proposed FINRA Rule 4370

FINRA is proposing to adopt NASD Rule 3510 (Business Continuity Plans) and NASD Rule 3520 (Emergency Contact Information) into the Consolidated FINRA Rulebook and combine the rules as FINRA Rule 4370 (Business Continuity Plans and Emergency Contact Information). NASD Rule 3510 requires members to create and maintain a written business continuity plan identifying procedures relating to an emergency or significant business disruption and enumerates the

minimum elements that a member's business continuity plan must address, to the extent those elements are applicable and necessary to the member's business. NASD Rule 3510 further requires members to update their business continuity plans upon any material change and, at a minimum, conduct an annual review of their plans. Each member also must disclose to its customers how its business continuity plan addresses the possibility of a future significant business disruption and how the member plans to respond to events of varying scope. Each member must make this disclosure, at a minimum, in writing to customers at account opening, by posting it on the member's Web site (if the member maintains a Web site), and by mailing it to customers upon request.

NASD Rule 3510 is one part of the NASD Rule 3500 Series (Emergency Preparedness), which requires members to establish emergency preparedness plans and procedures. NASD Rule 3520, which comprises the remainder of the NASD Rule 3500 Series, requires members to designate two emergency contact persons and provide this information to FINRA via electronic process.<sup>14</sup>

The Dougherty Letter generally supported the proposal, but recommended one change in the area of emergency contact information. The proposed rule, as is the case today in NASD Rule 3510, originally required that each member report to FINRA two emergency contact persons and that each person be a member of senior management and a registered principal of the firm.<sup>15</sup> The Dougherty Letter stated that "[t]here may be situations where perhaps the best contact person may not be a registered principal but rather a Financial and Operations Principal or a technology manager."<sup>16</sup> The Dougherty Letter emphasized that the "purpose of this rule is for FINRA to be able to contact individuals for business continuity purposes."<sup>17</sup> The commenter pointed out that "the person most knowledgeable on computer

<sup>9</sup> See Securities Exchange Act Release No. 58738 (October 6, 2008), 73 FR 60371 (October 10, 2008) (order approving File No. SR-FINRA-2008-013).

<sup>10</sup> See Regulatory Notice 08-73 (December 2008) (SEC Approves Amendments to NASD Rule 2220 to Update the Standards for Options Communications). There is no longer a comparable Incorporated NYSE Rule. FINRA previously deleted substantially similar Incorporated NYSE Rule 791 (Communications to Customers) as part of a rule change that, among other things, reduced regulatory duplication for Dual Members during the interim period before the completion of the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 58533 (September 12, 2008), 73 FR 54652 (September 22, 2008) (order approving File No. SR-FINRA-2008-036).

<sup>11</sup> A "net" transaction is a principal transaction in which a market maker, after having received an order to buy (sell) an equity security, purchases (sells) the equity security at one price (from (to) another broker-dealer or another customer) and then sells to (buys from) the customer at a different price.

<sup>12</sup> See Securities Exchange Act Release No. 54088 (June 30, 2006), 71 FR 38950 (July 10, 2006) (order approving File No. SR-NASD-2004-135).

<sup>13</sup> See Securities Exchange Act Release No. 38812 (July 3, 1997), 62 FR 37105 (July 10, 1997) (order approving File No. SR-NASD-97-29).

<sup>14</sup> There is no longer a comparable Incorporated NYSE Rule to NASD Rules 3510 and 3520. FINRA previously deleted from the Transitional Rulebook NYSE Rule 446 (Business Continuity and Contingency Plans), which contained substantially similar requirements as the two NASD rules, as part of the rule change to reduce regulatory duplication for Dual Members during the period before completion of the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 58533 (September 12, 2008), 73 FR 54652 (September 22, 2008) (order approving File No. SR-FINRA-2008-036).

<sup>15</sup> See proposed FINRA Rule 4370.

<sup>16</sup> See Dougherty Letter, *supra* note 4.

<sup>17</sup> *Id.*

systems and business continuity issues may be someone other than a registered principal.”<sup>18</sup>

In response, FINRA proposes to revise FINRA Rule 4370 to require that only one of a member's two designated emergency contact persons must be a member of senior management and a registered principal of the firm.<sup>19</sup> The proposed rule change, however, would require that someone designated as a second emergency contact person who is not a registered principal must be a member of senior management who has knowledge of the member's business operations.<sup>20</sup> The proposed rule change also would clarify that each emergency contact person must be an associated person of the member.<sup>21</sup> In addition, FINRA proposes to amend FINRA Rule 4370 to codify existing guidance that in the case of a member with only one associated person (e.g., a sole proprietorship without any other associated persons), the second emergency contact person may be an individual, either registered with another firm or nonregistered, who has knowledge of the member's business operations, such as the member's attorney, accountant, or clearing firm contact.<sup>22</sup> The Commission believes that transferring and combining NASD Rules 3510 and 3520 into the Consolidated FINRA Rulebook will help ensure that members are prepared in the event of a significant business disruption.

The Commission finds good cause, pursuant to Section 19(b)(2) of the Act,<sup>23</sup> for approving the proposed rule change, as modified, prior to the thirtieth day after the date of publication of notice in the **Federal Register**. FINRA's proposed changes, with the exception of the proposed revisions contained in Amendment No. 1, were published for comment by the Commission.<sup>24</sup> The Commission believes that Amendment No. 1 provides greater clarity regarding the designation of emergency contact persons and is consistent with a purpose of this rule, which is to provide FINRA with a means to contact a member in the event of a significant business disruption.

Accordingly, the Commission finds that there is good cause, consistent with

Section 15A(b)(6) of the Act,<sup>25</sup> to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

### III. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as modified by Amendment No. 1, 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-2009-036 on the subject line.

#### Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.
- All submissions should refer to File Number SR-FINRA-2009-036. 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 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-2009-036 and should be submitted on or before September 18, 2009.

<sup>25</sup> 15 U.S.C. 78o-3(b)(6).

### V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>26</sup> that the proposed rule change (SR-FINRA-2009-036), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>27</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60547; File No. SR-PHLX-2009-70]

### Self-Regulatory Organizations; NASDAQ OMX PHLX, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Eliminate Late Charges and Provide for Suspension or Termination for Failure To Pay Dues, Fees, or Assessments Owed

August 20, 2009.

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 August 12, 2009, NASDAQ OMX PHLX, Inc. (“Phlx” or “Exchange”) 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. 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

NASDAQ OMX PHLX, Inc., pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>3</sup> and Rule 19b-4 thereunder,<sup>4</sup> proposes to amend Exchange By-Law 14-1 to eliminate the reference to late charges for failure to pay any fees, dues or charges owed to the Exchange. The Exchange also proposes to amend Exchange By-Law 14-5 to dispose of the foreign currency options participation of a member, member organization, participant or participant organization if monies due

<sup>26</sup> 15 U.S.C. 78s(b)(2).

<sup>27</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> 15 U.S.C. 78s(b)(1).

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

<sup>18</sup> *Id.*

<sup>19</sup> See Amendment No. 1, *supra* note 6.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 15 U.S.C. 78s(b)(2).

<sup>24</sup> FINRA noted that it proposes to announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.