Notices

Regulatory Notices

10-35	SEC Approval and Effective Date for New Consolidated FINRA Rule; Effective Date: October 15, 2010
10-36	Amendments to Standardized Options Exercise Procedures and Extension of Contrary Exercise Advice Cut-Off Time; Effective Date: September 7, 2010
10-37	Increase in Number of Arbitrators Available for Review When Parties Choose Arbitration Panels; Effective Date: September 27, 2010
10-38	SEC Approves New FINRA Rule Relating to the Processing of and Fees for Company-Related Actions for Non-Exchange-Listed Securities; Effective Date: September 27, 2010

Information Notice

08/03/10 FINRA Reminds Firms of Upcoming Changes to BrokerCheck

Trade Reporting Notice

08/19/10 Weighted-Average Price/Special Pricing Formula Trade Modifier



© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission.

FINRA *Notices* are published monthly by FINRA Corporate Communications, Michelle Volpe-Kohler, Editor, 1735 K Street, NW, Washington, DC 20006-1506, (202) 728-8289. No portion of this publication may be copied, photocopied or duplicated in any form or by any means, except as described below, without prior written consent of FINRA. FINRA member firms are authorized to photocopy or otherwise duplicate any part of this publication without charge, only for internal use by the member firm and its associated persons. Nonmembers of FINRA may obtain permission to photocopy for internal use through the Copyright Clearance Center (CCC) for a \$3-per-page fee to be paid directly to CCC, 222 Rosewood Drive, Danvers, MA 01923.

Notices (December 1996 to current) are also available on the Internet at www.finra.org/notices.

Regulatory Notice

10-35

SEC Approves New Consolidated FINRA Rule

SEC Approval and Effective Date for New Consolidated FINRA Rule

Effective Date: October 15, 2010

Executive Summary

Following the consolidation of NASD and the member regulation, enforcement and arbitration functions of NYSE Regulation into FINRA, FINRA established a process to develop a new consolidated rulebook (Consolidated FINRA Rulebook), which FINRA has discussed in previous *Information Notices*. FINRA is proposing new consolidated rules in phases for approval by the Securities and Exchange Commission (SEC) as part of the Consolidated FINRA Rulebook. In June and July, the SEC approved five new consolidated FINRA Rules. This *Regulatory Notice* specifically addresses the approval and effective date of new FINRA Rule 4320 (Short Sale Delivery Requirements).

Text of new FINRA Rule 4320 is available in the online *FINRA Manual* at www.finra.org/finramanual/rules/r4320.⁵

Questions regarding this *Notice* should be directed to Racquel Russell, Assistant General Counsel, Office of General Counsel, at (202) 728-8363.

August 2010

Notice Type

- Consolidated Rulebook
- Rule Approval

Suggested Routing

- Compliance
- ➤ Legal
- Operations
- Senior Management
- > Trading and Market Making

Key Topics

- ➤ Short Sale Delivery
- Short Sales

Referenced Rules & Notices

- ➤ FINRA Rule 4320
- ➤ Information Notice 03/12/08
- ➤ Information Notice 10/06/08
- ➤ Regulatory Notice 08-57
- Regulation SHO



Background & Discussion

On July 20, 2010, the SEC approved a FINRA proposed rule change to adopt NASD Rule 3210, with minor changes, as FINRA Rule 4320 in the Consolidated FINRA Rulebook.6 FINRA Rule 4320 applies short sale delivery requirements to equity securities not otherwise covered by the close-out requirements of Regulation SHO.7 Among other things, FINRA Rule 4320 requires participants of registered clearing agencies to take action on failures to deliver that exist for 13 consecutive settlement days in certain non-reporting securities. In addition, if the fail to deliver position is not closed out in the requisite time period, a participant of a registered clearing agency or any brokerdealer for which it clears transactions is prohibited from effecting further short sales in the particular specified security without borrowing, or entering into a bona fide arrangement to borrow, the security until the fail to deliver position is closed out.8

With a few exceptions, new FINRA Rule 4320 is identical to former NASD Rule 3210, and the changes made to the text do not alter the operation and application of the rule. For example, the new FINRA rule omits language that provided allowances for "grandfathered" securities during the initial implementation period of NASD Rule 3210 which no longer is relevant. In addition, FINRA Rule 4320 clarifies, consistent with Regulation SHO, the borrowing requirements for clearing agency participants including broker-dealers for which they clear transactions—that sell short nonreporting threshold securities for which a fail to deliver position has not been closed out in the requisite time.9

In addition, FINRA will apply to FINRA Rule 4320 all interpretive positions issued by the SEC and its staff with respect to the parallel provisions of Regulation SHO (i.e., Rule 203(b)(3) of Regulation SHO), as was the case with NASD Rule 3210. Therefore, FINRA continues to expect firms to observe all interpretive views issued by the SEC and its staff with respect to Rule 203(b)(3) and apply such positions to FINRA Rule 4320.¹⁰

Rule Conversion Charts

As discussed in additional detail in Information Notice 10/06/08 and Regulatory Notice 08-57, FINRA has posted three Rule Conversion Charts on its website to help firms become familiar with the new rules and show how the new rules relate to the NASD and/or Incorporated NYSE Rules in the Transitional Rulebook that they will replace.

Firms should be aware that the charts are intended as a reference aid only. FINRA reminds firms that the charts do not in any way serve as a substitute for diligent review of the relevant new rule language. The Rule Conversion Charts are located at www.finra.org/ruleconversionchart.

Endnotes

- L See Information Notice 10/06/08 (Rulebook Consolidation Process: Effective Dates of New Consolidated Rules; Introduction of Rule Conversion Chart); see also Information Notice 03/12/08 (Rulebook Consolidation Process).
- 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 member firms, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (Dual Members). The new FINRA Rules apply to all member firms, unless such rules have a more limited application by their terms. As the Consolidated FINRA Rulebook expands with the SEC's approval and with the new FINRA Rules taking effect, the rules in the Transitional Rulebook that address the same subject matter of regulation will be eliminated. When the Consolidated FINRA Rulebook is completed, the Transitional Rulebook will have been eliminated in its entirety.
- In July 2010, the SEC approved three FINRA proposed rule changes to adopt five new rules in the Consolidated FINRA Rulebook. See Securities Exchange Act Release No. 62482 (July 12, 2010), 75 FR 41562 (July 16, 2010) (SR-FINRA-2010-024); Securities Exchange Act Release No. 62533 (July 20, 2010), 75 FR 43588 (July 26, 2010) (SR-FINRA-2010-028); and Securities Exchange Act Release No. 62539 (July 21, 2010), 75 FR 44033 (July 27, 2010) (SR-FINRA-2010-029).

- 4 See Securities Exchange Act Release No. 62533 (July 20, 2010), 75 FR 43588 (July 26, 2010) (SR-FINRA-2010-028). FINRA will issue separate Regulatory Notices announcing the effective dates of the approved rules set forth in SR-FINRA-2010-024 and SR-FINRA-2010-029. See supra note 3.
- 5 FINRA updates the rule text on its online Manual within two business days of SEC approval of changes to the rule text.
- 6 See Securities Exchange Act Release No. 62533 (July 20, 2010), 75 FR 43588 (July 26, 2010) (SR-FINRA-2010-028).
- 7 The Regulation SHO close-out requirements apply only to "reporting" securities (i.e., issuers that are registered pursuant to Section 12 of the Exchange Act or that are required to file reports pursuant to Section 15(d) of the Exchange Act).
- In July 2009, the SEC adopted Rule 204 under Regulation SHO as a permanent rule. This rule is intended to further the goal of reducing fails to deliver and addressing potentially abusive "naked" short selling in all equity securities by requiring the delivery of securities by settlement date or, in connection with a short sale, the immediate purchase or borrow of such securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the following settlement day.

Notwithstanding the SEC's adoption of Rule 204, the provisions of NASD Rule 3210 continue to be necessary to provide regulatory coverage for fails to deliver in non-reporting over-the-counter equity securities that preexist the SEC's implementation of temporary Rule 204 in September 2008. Thus, FINRA has adopted NASD Rule 3210 with minor changes as FINRA Rule 4320.

© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission. *Regulatory Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Regulatory Notice

Endnotes continued

- 9 Specifically, if a fail to deliver position is not closed out in accordance with FINRA Rule 4320(a), the clearing agency participant and any broker-dealer for which it clears, including market makers otherwise entitled to rely on the Rule 203(b)(2)(iii) exception of Regulation SHO, would not be able to short sell the non-reporting threshold security either for itself or for the account of another, unless it has previously arranged to borrow or borrowed the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled at a registered clearing agency.
- 10 For example, with respect to the requirement that participants "immediately" close out a fail to deliver position by purchasing securities of like kind and quantity, the SEC has clarified that "immediately" should be interpreted to mean that close out is required no later than the morning of the fourteenth business day. Likewise FINRA expects that, under FINRA Rule 4320, firms "immediately" close out fail to deliver positions no later than the morning of the fourteenth business day.

4

Regulatory Notice

10-36

Options: Contrary Exercise Advice

Amendments to Standardized Options Exercise
Procedures and Extension of Contrary Exercise Advice
Cut-Off Time

Effective Date: September 7, 2010

Executive Summary

Effective September 7, 2010, amendments to FINRA Rule 2360 (Options) extend the cut-off time for the submission of certain contrary exercise advices (CEAs)¹ by one hour to 7:30 p.m. Eastern Time (ET).² Additionally, in the event of a modified close of trading, the amendments extend the deadline for option holders to make a final exercise decision for an expiring standardized option by two minutes to one hour and 30 minutes following the modified closing time.

The amended rule text is set forth in Attachment A.

Questions concerning this *Notice* should be directed to:

- ➤ Gary Goldsholle, Vice President and Associate General Counsel, Office of General Counsel (OGC), at (202) 728-8104; or
- ➤ Kathryn Moore, Assistant General Counsel, OGC, at (202) 974-2974.

August 2010

Notice Type

Rule Amendment

Suggested Routing

- Compliance
- Institutional
- Legal
- Operations
- > Options
- > Senior Management
- ➤ Trading

Key Topics

- Contrary Exercise Advice (CEA)
- Expiring Exercise Declaration (EED)
- ➤ Options Expiration
- Standardized Options

Referenced Rules & Notices

➤ FINRA Rule 2360



Background & Discussion

FINRA Rule 2360(b)(23)(A) and similar rules of the options exchanges set forth procedures for the exercise of standardized options on the last business day before expiration. An option holder with an expiring standardized option has two choices:

- take no action and permit the option to automatically be exercised in accordance with The Options Clearing Corporation's (OCC) exercise-by-exception (Ex-by-Ex) procedures3; or
- submit a CEA that overrides the Ex-by-Ex procedures; i.e., an instruction to let expire an option that otherwise would be exercised, or an instruction to exercise an option that otherwise would expire.

The rule provides that option holders have until 5:30 p.m. ET on the business day immediately prior to the expiration date to make a final decision to exercise or not exercise an expiring option. Firms may not accept exercise instructions for any account (customer or non-customer) after this time. This deadline has not been changed.

If the option holder elects not to follow the Ex-by-Ex procedure, then the firm must submit a CEA. The rule change has extended by one hour (from 6:30 p.m. to 7:30 p.m. ET) the time by which firms must submit a CEA for customer accounts, and for noncustomer accounts if the firm uses an electronic submission procedure with a time stamp for the submission of exercise instructions by option holders. For firms that do not use such electronic time stamps, the deadline to submit such CEAs continues to be 5:30 p.m. ET.

In addition, if a modified close of trading is announced (i.e., a time other than 4 p.m. ET), the rule change extends by two minutes (from one hour and 28 minutes to one hour and 30 minutes) the time by which option holders must make a final exercise decision following the modified closing time.⁴ In these circumstances, the rule change affords a firm up to 7:30 p.m. ET to submit a CEA for customer accounts, and for non-customer accounts if the firm uses an electronic submission procedure with a time stamp for the submission of exercise instructions by option holders. However, for firms that do not employ an electronic time stamp, the rule change only extends by two minutes the time by which firms must submit a CEA, requiring such CEAs to be submitted within one hour and 30 minutes after the modified close of trading for its non-customer accounts.

Finally, FINRA made certain changes to reorganize the rule text to improve readability.

As noted above, the implementation date of these amendments is September 7, 2010.

Endnotes

- Contrary exercise advices also are referred to as expiring exercise declarations (EEDs) in The Options Clearing Corporation rules.
- 2 See Securities Exchange Act Release No. 62711 (August 12, 2010), 75 FR 51124 (August 19, 2010) (Notice of Filing and Immediate Effectiveness of File No. SR-FINRA-2010-041).
- 3 Under the Ex-by-Ex procedures an option will be automatically exercised if the option contract is in-the-money by a requisite amount.
- 4 This change conforms with the rules of the options exchanges, which were modified to correspond to the two-minute difference in trading time created by the change in the close of trading time from 4:02 p.m. to 4 p.m. ET. See Securities Exchange Act Release Nos. 53519 (March 20, 2006), 71 FR 15229 (March 27, 2009) (SR-AMEX-2006-26); 53249 (February 7, 2006), 71 FR 8035 (February 15, 2006) (SR-PCX-2005-138); 53407 (March 3, 2006), 71 FR 12764 (March 13, 2006) (SR-PHLX-2006-12); 53439 (March 7, 2006), 71 FR 13643 (March 16, 2006) (SR-ISE-2006-11); and 53438 (March 7, 2006), 71 FR 13641 (March 16, 2006) (SR-CBOE-2006-19).

© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission. *Regulatory Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Attachment A

Text of Amended Rule

Proposed new language is underlined; proposed deletions are in brackets.

2300. Special Products

2360. Options

- (a) No Change.
- (b) Requirements
 - (1) through (22) No Change.
 - (23) Tendering Procedures for Exercise of Options
 - (A) Exercise of Options Contracts
 - (i) No Change.
 - [(ii) Final exercise decisions of options holders to either exercise or not to exercise an expiring standardized equity option must be indicated to an options exchange that is a national securities exchange (national options exchange) that lists and trades the option, either directly to such national options exchange or via a member of such national options exchange if it is not a member of such exchange, by the respective member no later than 5:30 p.m. Eastern time ("ET") on the business day immediately prior to the expiration date. For customer accounts, members may not accept exercise instructions after 5:30 p.m. ET but have until 6:30 p.m. ET to submit a Contrary Exercise Advice (as defined below). For non-customer accounts, members may not accept exercise instructions after 5:30 p.m. ET but have until 6:30 p.m. ET to submit a Contrary Exercise Advice if such member employs an electronic submission procedure with time stamp for the submission of exercise instructions by option holders. Members are required to submit a Contrary Exercise Advice by 5:30 p.m. ET for non-customer accounts if such members do not employ an electronic submission procedure with time stamp for the submission of exercise instructions by option holders. Each member shall establish fixed

procedures to ensure secure time stamps in connection with their electronic systems employed for the recording of submissions to exercise or not exercise expiring options. For purposes of this Rule 2360(b)(23)(A), the terms "customer account" and non-customer account" shall have the meanings as defined in The Options Clearing Corporation By-laws.]

[(iii)](ii) Special procedures apply to the exercise of standardized equity options on the last business day before their expiration ("expiring options"). Unless waived by The Options Clearing Corporation, expiring standardized equity options are subject to the Exercise-by-Exception ("Ex-by-Ex") procedure under The Options Clearing Corporation Rule 805. This Rule provides that, unless contrary instructions are given, standardized equity option contracts that are in-the-money by specified amounts shall be automatically exercised. In addition to The Options Clearing Corporation rules, the following FINRA requirements apply with respect to expiring standardized equity options. Option holders desiring to exercise or not exercise expiring standardized equity options must either:

a. take no action and allow exercise determinations to be made in accordance with The Options Clearing Corporation's Ex-by-Ex procedure where applicable; or

b. submit a "Contrary Exercise Advice" by the deadline specified [in paragraph (ii) above] below.

(iii) Exercise cut-off time. Option holders have until 5:30 p.m. Eastern Time ("ET") on the business day immediately prior to the expiration date to make a final exercise decision to exercise or not exercise an expiring option. Members may not accept exercise instructions for customers or non-customers accounts after 5:30 p.m. ET.

(iv) Submission of Contrary Exercise Advice. A Contrary Exercise Advice is a form approved by the national options exchanges, FINRA or The Options Clearing Corporation for use by a member to submit a final exercise decision committing an options holder to either: (1) not

exercise an option position which would automatically be exercised pursuant to The Options Clearing Corporation's Ex-by-Ex procedure; or (2) to exercise a standardized equity option position which would not automatically be exercised pursuant to The Options Clearing Corporation's Ex-by-Ex procedure. A Contrary Exercise Advice may be canceled by filing an "Advice Cancel" or resubmitted at any time up to the submission cut-off times specified herein[in subparagraph (ii)]. For customer accounts, members have until 7:30 p.m. ET to submit a Contrary Exercise Advice. For non-customer accounts, members have until 7:30 p.m. ET to submit a Contrary Exercise Advice if such member employs an electronic submission procedure with time stamp for the submission of exercise instructions by option holders. Members are required to manually submit a Contrary Exercise Advice by 5:30 p.m. ET for non-customer accounts if such members do not employ an electronic submission procedure with time stamp for the submission of exercise instructions by option holders. Each member shall establish fixed procedures to ensure secure time stamps in connection with their electronic systems employed for the recording of submissions to exercise or not exercise expiring options. For purposes of this Rule 2360(b)(23)(A), the terms "customer account" and "non-customer account" shall have the meanings as defined in The Options Clearing Corporation By-laws. Contrary Exercise Advices and/or Advice Cancels may be submitted by any member to:

[1]a. a place designated for that purpose by any national options exchange of which it is a member and where the standardized equity option is listed;

[2]b. a place designated for that purpose by any national options exchange that lists and trades the standardized equity option via a member of such exchange if the member is not a member of such exchange;

[3]c. any national options exchange of which it is a member and where the standardized equity option is listed via The Options Clearing Corporation in a form prescribed by The Options Clearing Corporation; or

[4]<u>d</u>. any national options exchange where the standardized equity option is listed via The Options Clearing Corporation in a form prescribed by The Options Clearing Corporation, provided the member is a member of The Options Clearing Corporation.

[(iv)] (v) In those instances when The Options Clearing Corporation has waived the Ex-by-Ex procedure for an options class, members must either:

a. submit to any of the places listed in subparagraphs [(iii)b.1. through 4.] (iv)a. through d. above, a Contrary Exercise Advice, within the time limits specified in subparagraph [(ii)](iv) above if the holder intends to exercise the standardized equity option, or

b. take no action and allow the standardized equity option to expire without being exercised.

The applicable underlying security price in such instances will be as described in The Options Clearing Corporation Rule 805(1), which is normally the last sale price in the primary market for the underlying security. In cases where the Ex-by-Ex procedure has been waived for an options class, The Options Clearing Corporation rules require that members wanting to exercise such options must submit an affirmative Exercise Notice to The Options Clearing Corporation, whether or not a Contrary Exercise Advice has been filed.

[(v)](vi) Members that maintain proprietary or public customer positions in expiring standardized equity options shall take necessary steps to ensure that final exercise decisions are properly indicated to the relevant national options exchange with respect to such positions. Members that have accepted the responsibility to indicate final exercise decisions on behalf of another member also shall take necessary steps to ensure that such decisions are properly indicated to the relevant national options exchange. Members may establish a processing cut-off time prior to FINRA's exercise cut-off time at which they will no longer accept final exercise decisions in expiring standardized equity options from customers.

[(vi)](vii) Members may effect or amend exercise decisions for standardized equity options after the exercise cut-off time (but prior to expiration) under the following circumstances:

a. in order to remedy mistakes or errors made in good faith;

b. to take appropriate action as the result of a failure to reconcile unmatched option transactions; or

c. where extraordinary circumstances restricted a customer's or member's ability to inform the respective member of such decisions (or a member's ability to receive such decisions) by the cut-off time.

The burden of establishing an exception for a proprietary or customer account of a member rests solely on the member seeking to rely on such exception.

[(vii)] (viii) In the event a national options exchange or The Options Clearing Corporation provides advance notice on or before 5:30 p.m. ET on the business day immediately prior to the last business day before the expiration date indicating that a modified time for the close of trading in standardized equity options on such last business day before expiration will occur, then the deadline for an option holder to make a final decision to exercise or not exercise an expiring option shall be 1 hour [28] 30 minutes following the time announced for the close of trading on that day instead of the 5:30 p.m. ET deadline found in paragraph [(ii)](iii) above. However, members have until 7:30 p.m. ET to [may] deliver a Contrary Exercise Advice or Advice Cancel to the places specified in paragraphs [(iii)b.1. through 4.](iv)a. through d. above [within 2 hours 28 minutes following the time announced for the close of trading in standardized equity options on that day instead of the 6:30 p.m. ET deadline found in paragraph (ii) above] for customer accounts and non-customer accounts where such member firm employs an electronic submission procedure with time stamp for the submission of exercise instructions. For non-customer accounts, members that do not employ an electronic procedure with time stamp for the submission of exercise instructions are required to manually deliver a Contrary Exercise Advice or Advice Cancel within 1 hour and

[28] <u>30</u> minutes following the time announced for the close of trading on that day instead of the 5:30 p.m. ET deadline found in paragraph [(ii)] (iv) above.

[(viii)](ix) The filing of a final exercise decision, exercise instruction, exercise advice, Contrary Exercise Advice or Advice Cancel required by subparagraph (A) hereof does not serve as a substitute to the effective notice required to be submitted to The Options Clearing Corporation for the exercise or non-exercise of expiring standardized equity options.

[(ix)](x) Submitting or preparing an exercise instruction after the exercise cut-off time in any expiring standardized equity option on the basis of material information released after the exercise cut-off time is activity inconsistent with just and equitable principles of trade.

[(x)](xi) The exercise cut-off requirements contained in this subparagraph (A) do not apply to any currency option or standardized index option products listed on a national options exchange.

(B) through (D) No Change.

(24) No Change.

(c) No Change.

* * * * *

Regulatory Notice

Regulatory Notice

10-37

Arbitrator Selection

Increase in Number of Arbitrators Available for Review When Parties Choose Arbitration Panels

Effective Date: September 27, 2010

Executive Summary

Effective September 27, 2010, FINRA will increase the number of proposed arbitrators available for review when parties choose arbitration panels from lists generated randomly by the Neutral List Selection System (NLSS).¹ The amendments to the Customer and Industry Codes of Arbitration Procedure (Codes) will apply to lists generated on or after the effective date. The text of the amendments is set forth in Attachment A.

Ouestions concerning this *Notice* should be directed to:

- Richard W. Berry, Senior Vice President and Director of Case Administration and Regional Office Services, Dispute Resolution, at (212) 858-4307 or richard.berry@finra.org; or
- ➤ Margo A. Hassan, Assistant Chief Counsel, Dispute Resolution, at (212) 858-4481 or margo.hassan@finra.org.

Background & Discussion

NLSS is a computer system that generates, on a random basis, lists of proposed arbitrators from FINRA's rosters of arbitrators (*i.e.*, public, non-public and chairperson rosters) for each arbitration case. The parties select their panel through a process of striking and ranking the arbitrators on the lists.

Currently, FINRA sends parties lists of available arbitrators, along with detailed biographical information. In a single arbitrator case, the parties receive a list of eight chairperson arbitrators.² In a three-arbitrator case, other than a dispute involving only FINRA firms, the parties receive three

August 2010

Notice Type

Rule Amendment

Suggested Routing

- ➤ Compliance
- ➤ Legal
- Registered Representatives
- Senior Management

Key Topics

- Arbitration
- ➤ Code of Arbitration Procedure
- Generating and Sending Lists
- Neutral List Selection System

Referenced Rules & Notices

- ➤ FINRA Rule 12403
- ➤ FINRA Rule 12404
- ➤ FINRA Rule 13403
- ➤ FINRA Rule 13404



lists—one public, one public chairperson and one non-public—each containing eight arbitrator names. In a three-arbitrator case involving only firms, the panel consists of non-public arbitrators, so the parties receive a list of 16 arbitrators from the non-public roster and a list of eight arbitrators from the non-public chairperson roster.

Each party is permitted to strike up to four of the eight names on each list and rank the remaining names in order of preference. FINRA appoints the panel from the names remaining on the parties' lists. When there are no names remaining on a list because all of them have been struck by the parties, or when no mutually acceptable arbitrator is able to serve, FINRA uses NLSS to "extend the list" by randomly selecting an additional arbitrator to complete the panel.³ Parties may only challenge an extended-list arbitrator for cause.

Parties in arbitration cases have expressed concerns about extended-list appointments because they are not able to strike arbitrators from these lists. To address these concerns, FINRA is amending the Codes to increase the number of arbitrators on the initial lists generated by NLSS from eight to 10 (or from 16 to 20, depending on the type of case), while retaining the current limitation on strikes.

The amendments provide parties with more control in the arbitrator selection process because of the increased likelihood that arbitrators from each initial list will remain on the list after the parties complete the striking and ranking process. Having additional arbitrator names on the list will also reduce the need for extended-list appointments if vacancies occur in a panel later in a case. FINRA believes the amendments will enhance the arbitration process.

Customer Disputes

FINRA Rule 12403 of the Customer Code of Arbitration Procedure is amended to expand the number of arbitrators on each list (public, public chairperson and non-public) generated through NLSS from eight arbitrators to 10 arbitrators, while keeping the number of available strikes at four per party.⁴ The new procedure will ensure that in most cases at least two proposed arbitrators will remain on each list of 10 potential arbitrators—thus significantly increasing the likelihood that the parties will get panelists they chose and ranked, as opposed to extended list appointments.

Firm and Associated Person Disputes

FINRA is also amending FINRA Rule 13403 of the Industry Code of Arbitration Procedure to expand the number of arbitrators on lists generated through NLSS. For disputes between firms, FINRA is expanding the number of arbitrators on the non-public chairperson list from eight arbitrators to 10 arbitrators and the number of arbitrators on the non-public list from 16 arbitrators to 20 arbitrators.

For disputes between associated persons or between or among firms and associated persons, FINRA is expanding the number of arbitrators on each list (public, public chairperson and non-public) from eight arbitrators to 10 arbitrators. FINRA is not expanding the number of allowable strikes for each party.⁵

Effective Date

Before implementing the amendments, FINRA needs to make programming changes to its case management computer system, MATRICS. Therefore, the amendments become effective on September 27, 2010, for lists generated on or after that date. The amendments apply to cases in which FINRA has not yet generated lists, and cases which require a new list on or after the effective date. In pending cases, however, FINRA will honor any joint request of the parties to wait until September 27, 2010, to generate lists.

Endnotes

- Exchange Act Release No. 62480 (July 9, 2010)
 75 Federal Register 41262 (July 15, 2010) (File No. SR-FINRA-2010-022).
- In a case involving only FINRA member firms, the parties receive a list of eight arbitrators from the non-public chairperson roster. In all other cases, the parties receive a list of eight arbitrators from the public chairperson roster.
- The Codes provide that each separately represented party may strike up to four of the arbitrators from each list for any reason. If, for example, a case involves a customer, a firm and an associated person, and each party is separately represented, all eight arbitrators on a list may be stricken. In such a case, FINRA uses NLSS to extend the list by generating additional arbitrator names.
- 4 Currently, FINRA Rule 12404 provides that each separately represented party may strike up to four of the arbitrators from each eight arbitrator list and that at least four names must remain on the list. FINRA is making a conforming change to FINRA Rule 12404 to reflect that at least six names must remain on each 10 arbitrator list.
- 5 Currently, FINRA Rule 13404 provides that each separately represented party may strike up to four of the arbitrators from each eight arbitrator list and eight arbitrators from each 16 arbitrator list. FINRA is making conforming changes to FINRA Rule 13404 to reflect that at least six names must remain on each list of 10 arbitrators and that at least 12 names must remain on a list of 20 arbitrators.

© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission. *Regulatory Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Attachment A

New language is underlined; deleted language is in brackets.

Code of Arbitration Procedure for Customer Disputes

And

Code of Arbitration Procedure for Industry Disputes

Customer Code

12403. Generating and Sending Lists to the Parties

(a) Generating Lists

- (1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of [eight] 10 public arbitrators from the FINRA chairperson roster.
- (2) If the panel consists of three arbitrators, the Neutral List Selection System will generate:
 - A list of [eight] 10 arbitrators from the FINRA non-public arbitrator roster;
 - A list of [eight] 10 arbitrators from the FINRA public arbitrator roster; and
 - A list of [eight] 10 public arbitrators from the FINRA chairperson roster.
 - (3) (4) No change.
- (b) No Change.

12404. Striking and Ranking Arbitrators

(a) Each separately represented party may strike up to four of the arbitrators from each list for any reason by crossing through the names of the arbitrators. At least [four] six names must remain on each list.

(b) – (c) No Change.

Industry Code

13403. Generating and Sending Lists to the Parties

For disputes involving statutory employment discrimination claims, see Rule 13802.

(a) Lists Generated in Disputes Between Members

- (1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of [eight] <u>10</u> non-public arbitrators from the FINRA non-public chairperson roster.
- (2) If the panel consists of three non-public arbitrators, the Neutral List Selection System will generate:
 - A list of [16] 20 arbitrators from the FINRA non-public roster; and
- A list of [eight] <u>10</u> non-public arbitrators from the FINRA non-public chairperson roster.
 - (3) (4) No change.

(b) Lists Generated in Disputes Between Associated Persons or Between or Among Members and Associated Persons

- (1) If the panel consists of one arbitrator, the Neutral List Selection System will generate a list of [eight] 10 public arbitrators from the FINRA public chairperson roster.
- (2) If the panel consists of three arbitrators, the Neutral List Selection System will generate:
 - A list of [eight] 10 arbitrators from the FINRA non-public arbitrator roster;
 - A list of [eight] 10 arbitrators from the FINRA public arbitrator roster; and
 - A list of [eight] 10 public arbitrators from the FINRA public chairperson roster.
 - (3) (4) No change.
 - (c) No change.

* * *

Regulatory Notice

13404. Striking and Ranking Arbitrators

- (a) Except for lists generated pursuant to Rule 13403(a)(2), each separately represented party may strike up to four of the arbitrators from each list for any reason by crossing through the names of the arbitrators. At least [four] <u>six</u> names must remain on each list.
- (b) For lists generated pursuant to Rule 13403(a)(2), each separately represented party may strike up to eight of the arbitrators from the non-public list and up to four of the arbitrators from the non-public chairperson list for any reason by crossing through the names of the arbitrators. At least [eight] 12 names must remain on the non-public list and at least [four] <u>six</u> names must remain on the non-public chairperson list.

(c) - (d) No change.

* * * * *

Regulatory Notice

10-38

Obligation of Issuers to Provide Notice of Company-Related Actions

SEC Approves New FINRA Rule Relating to the Processing of and Fees for Company-Related Actions for Non-Exchange-Listed Securities

Effective Date: September 27, 2010

Executive Summary

Effective September 27, 2010, new FINRA Rule 6490 (Processing of Company-Related Actions) codifies the requirements in SEA Rule 10b-17 for issuers of a class of publicly trading securities to provide timely notice to FINRA of certain corporate actions (e.g., dividend or other distribution of cash or securities, stock split or reverse split, rights or subscription offering). Issuers must also provide timely notification to FINRA of certain other specified corporate actions. The rule clarifies the scope of FINRA's regulatory authority and discretionary power when processing documents related to announcements for company-related actions for non-exchange-listed equity and debt securities, and implements fees for these services.¹ Issuers must complete the necessary forms and pay the applicable fees within the required time periods or they will be subject to late fees and delayed processing of documents to announce corporate actions.

The text of the new rule is set forth on FINRA's website at www.finra.org/rulefilings/2009-089.

Questions regarding this *Notice* should be directed to:

- ➤ FINRA Operations at (866) 776-0800; select option 1; or
- ➤ Kosha K. Dalal, Associate Vice President and Associate General Counsel, Office of General Counsel, at (202) 728-6903.

August 2010

Notice Type

> Rule Approval

Suggested Routing

- ➤ Compliance
- ➤ Legal
- Operations
- Senior Management
- Systems
- > Trading and Market Making

Key Topic(s)

- ➤ Fees
- Non-Exchange-Listed Securities
- ➤ Over-the-Counter Trading

Referenced Rules & Notices

- NASD Rule 11140
- ➤ FINRA Rule 6490
- ➤ SEA Rule 10b-17
- UPC Rules



Background

Historically, FINRA has performed certain limited functions relating to the processing of non-exchange-listed issuer company actions in the over-the-counter (OTC) securities market. Specifically, FINRA reviews and processes documents related to announcements for company-related actions pursuant to SEA Rule 10b-17 (Untimely Announcements of Record Dates),² and other company actions, including the issuance of or change to a trading symbol or company name, mergers, acquisition, dissolutions or other company control transactions, bankruptcy or liquidations. FINRA announces company-related actions pursuant to requests from issuers and their agents on its website in a document known as the "Daily List," establishes the ex-date for distributions and dividends and adjusts the trading price of the securities where applicable.³ These functions are important to trading and settlement in the OTC marketplace and help promote investor protection and market integrity.

Discussion

Issuer Obligations Under New FINRA Rule 6490

FINRA Rule 6490 (Processing of Company-Related Actions) codifies the requirements in SEA Rule 10b-17 for issuers of a class of publicly trading securities to provide timely notice to FINRA of certain corporate actions (e.g., dividend or other distribution of cash or securities, stock split or reverse split, rights or subscription offering). Generally pursuant to SEA Rule 10b-17, issuers must notify FINRA at least 10 days prior to the record date for such corporate action. Issuers must also notify FINRA of certain other corporate actions (e.g., the issuance of or change of trading symbols, mergers, bankruptcy) no later than 10 days prior to the effective date of the company action. Issuers must complete the required forms and pay the applicable fees within such time periods or they will be subject to late fees and delayed processing of documents to announce corporate actions.

The new rule further permits FINRA to request other documents that may be necessary to verify information issuers provide on the forms. FINRA may, in its discretion, conduct detailed reviews of submissions, on a case-by-case basis. Moreover, the new rule authorizes FINRA to not process a request to announce a corporate action if FINRA determines that the request is deficient and not processing is necessary to protect investors and the public interest and to maintain fair and orderly markets.

SEA Rule 10b-17 Company-Related Actions

SEA Rule 10b-17, an anti-fraud rule of the federal securities laws, provides that issuers must notify FINRA no later than 10 days prior to the record date involved. In case of a rights subscription or other offering, if the 10-day advance notice is not practical, issuers must notify FINRA on or before the record date and in no event later than the effective date of the registration statement to which the offering relates. Generally, issuers must notify FINRA of the following actions:

- ➤ a dividend or other distribution in cash or in kind, except an ordinary interest payment on a debt security, but including a dividend or distribution of any security of the same or another issuer;
- a stock split or reverse split; or
- ➤ a rights or other subscription offering (collectively, referred to as "SEA Rule 10b-17 Actions"). For example, an issuer of non-exchange-listed publicly traded securities that is planning a stock split on shares of its common stock to holders of record on February 25 would be required under SEA Rule 10b-17 and FINRA Rule 6490 to provide written notice to FINRA no later than 10 days prior to the record date for the transaction, or by February 15.

Moreover, SEA Rule 10b-17 prescribes information that must be included in the notice, including, but not limited to:

- ➤ the title of the security;
- date of declaration;
- record date;
- payment or distribution date;
- for cash distributions, the amount to be paid per share;
- ➤ for distribution of securities, generally the amount of the security outstanding immediately prior to and immediately following the dividend or distribution and the rate of the dividend or distribution;
- details of any conditions that must be satisfied to enable the payment or distribution; and
- additional details relating to stock or reverse splits.

Issuers should review the text of SEA Rule 10b-17 to fully understand their obligations, which may be amended from time to time.

Other Company-Related Actions

Issuers with a class of publicly trading securities also undertake other corporate actions relating to such securities, including the issuance of or change to a trading symbol or company name, merger, acquisition, dissolution or other company control transaction, bankruptcy or liquidation ("Other Company-Related Actions"; and together with SEA Rule 10b-17 Actions, are collectively referred to as "Company-Related Actions").

In accordance with Rule 6490, FINRA may prescribe the necessary forms, supporting documentation and fees to process announcements for Company-Related Actions.

Submitting Notice of Company-Related Actions

An issuer or other duly authorized representative that is obligated to notify FINRA of a Company-Related Action must:

- 1. Complete, sign and submit the Company-Related Action Notification Form to FINRA Operations at least ten (10) days prior to the record date or effective date (as applicable) involved for the Company-Related Action. The form is available on FINRA's website at www.finra.org/upc/forms.
- 2. Ensure that the issuer's duly authorized transfer agent signs and submits a completed Transfer Agent Verification Form to FINRA Operations simultaneously.
- 3. Attach supporting documentation (e.g., copy of board resolutions authorizing the Company-Related Action, amendment to the charter of incorporation) as required by the Company-Related Action Notification Form.
- 4. Pay all applicable fees, including late fees, in the manner prescribed on the Company-Related Action Notification Form.
- 5. Submit the above package either electronically or via overnight mail to FINRA Operations at the addresses specified on the applicable Form.

FINRA Operations will assign a unique, identifying number to each request to process documentation for a Company-Related Action. Issuers or their duly authorized representatives must include the number on all future submissions, notices and correspondence from them to FINRA Operations relating to the action.

5

Applicable Fees

Rule 6490 requires issuers to pay the following fees to FINRA:

SEA RULE 10b-17 ACTION	FEE
Timely SEA Rule 10b-17 Notification	\$200
Late SEA Rule 10b-17 Notification (Notice submitted at least 5 calendar days prior to corporate action date)	\$1,000
Late SEA Rule 10b-17 Notification (Notice submitted at least 1 calendar day prior to corporate action date)	\$2,000
Late SEA Rule 10b-17 Notification (Notice submitted on or after corporate action date)	\$5,000
OTHER COMPANY-RELATED ACTION	FEE
Voluntary Symbol Request Change	\$500
Initial Symbol Set Up	No Charge
Symbol Deletion	No Charge
APPEALS	FEE
Action Determination Appeal Fee	\$4,000

Regulatory Notice

FINRA Operations Determination

Once an issuer or its duly authorized representative submits a Company-Related Action Notification Form, FINRA Operations will review the submission and may request additional information or documentation as may be necessary to verify the accuracy of the information. If the party that submits the form does not sufficiently respond within 90 calendar days of the date FINRA Operations requests additional information or documentation, the request will be deemed "lapsed" and will be closed.

During the course of the review, if FINRA Operations believes that one of five explicitly enumerated factors outlined in Rule 6490 may be triggered, it generally will conduct an in-depth review of the Company-Related Action and may seek additional information or documentation from the issuer or duly authorized representative as outlined above. Where a Company-Related Action is deemed deficient, FINRA Operations may determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to a Company-Related Action will not be processed. Factors that may be considered by the FINRA Operations in finding a request to process documentation related to a Company-Related Action deficient are *explicitly limited* to the following:

- 1. FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate or with proper authority;
- 2. the issuer is not current in its reporting obligations, if applicable, to the SEC or other regulatory authority;
- 3. FINRA has actual knowledge that parties related to the Company-Related Action are the subject of pending, adjudicated or settled regulatory action or investigation by a regulatory body, or civil or criminal action related to fraud or securities laws violations⁴;
- 4. a government authority or regulator has provided information to FINRA, or FINRA has actual knowledge, indicating that persons related to the Company-Related Action may be potentially involved in fraudulent activities related to the securities market and/or pose a threat to public investors; and/or
- 5. there is significant uncertainty in the settlement and clearance process for the security.

Appeal Process

If FINRA Operations determines that a request to process a Company-Related Action is deficient, FINRA will provide written notice to the requesting party. The written notice will state the specific factor(s) that caused the request to be deemed deficient. The issuer or its duly authorized representative may request an appeal of such determination by submitting a written request for an appeal to FINRA Operations within seven (7) calendar days after service of notice of the deficiency by FINRA. A three-member subcommittee composed of current and/or former industry members of FINRA's Uniform Practice Code Committee will review the appeal. The written request for an appeal must be accompanied by proof of payment of the non-refundable Action Determination Appeal Fee and must set forth with specificity any and all defenses to the determination by FINRA Operations that a request is deficient.

While the appeal is pending, FINRA will stay the processing of the Company-Related Action. The UPC subcommittee convenes once a month to consider all appeals received during the prior month and will render a determination within three (3) business days following the day the appeal is considered by the UPC subcommittee. The UPC subcommittee's determination will constitute final action by FINRA. If the issuer or its duly authorized agent fails to file a written request for an appeal within seven (7) calendar days after service of notice, FINRA Operations' determination shall constitute final action by FINRA.

Submissions by Third-Parties

Supplementary Material .02 (Requests by Third-Parties), permits FINRA, in its discretion, to announce a Company-Related Action when it is contacted by a third party, such as The Depository Trust & Clearing Corporation (DTCC), foreign exchanges or regulators, member firms or associated persons. In such instances, FINRA would request that the third-party contact the issuer in question regarding its obligations under SEA Rule 10b-17 or other rules and regulations, as applicable, and instruct the issuer to contact FINRA directly to provide notice and complete the requisite forms. However, FINRA Operations may in its discretion review and process a Company-Related Action based on information from a third-party when it believes the action is necessary for the protection of the market and investors and/or FINRA Operations has been unable to obtain notification of the Company-Related Action from the issuer. In all cases, FINRA notes that it must have actual substantiated knowledge of a Company-Related Action from a credible source before it can consider announcing such action.

Referral of Possible Non-Compliance with SEA Rule 10b-17 to SEC Staff

Non-compliance with SEA Rule 10b-17 has been an ongoing concern, and FINRA expects the new rule to reduce such non-compliance. An issuer that fails to notify FINRA of a proposed corporate action, as required by SEA Rule 10b-17, is potentially violating an anti-fraud rule of the federal securities laws. The possible sanctions for violating federal securities laws are significant. In addition, transfer agents that knowingly aid and abet such violations may also be subject to possible sanctions. Where FINRA Operations staff has actual knowledge, it will use its best efforts to provide a list of non-complying issuers to the SEC staff.

Development of Electronic Forms and Payment Processing System

FINRA is developing electronic forms and a payment processing system to process documents for Company-Related Actions more efficiently. Until the system is ready, FINRA requires parties to use paper forms and the payment methods listed on the UPC page on FINRA's website. FINRA expects to have the electronic system available by the first quarter of 2011 and will announce the effective date of the new system in a future *Regulatory Notice*.

FINRA encourages all interested parties to review its dedicated Web page for UPC matters which, among other things, provides detailed guidance on the necessary forms, required supporting documentation, methods to submit the required fees and a Frequently Asked Questions section.

Endnotes

- See Securities Exchange Act (SEA) Release No. 62434 (July 1, 2020; 75 FR 39603 (July 9, 2010); SR-FINRA-2009-089 (Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) to Clarify the Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and To Implement Fees for Such Services).
- 2 See Securities Exchange Act Rule 10b-17 (SEA Rule 10b-17).

- See NASD Rule 11000 Series (UPC rules). See also, NASD Rule 11140 relating to setting of ex-dates.
- 4 This includes instances where FINRA has actual knowledge that the SEC has issued an order pursuant to Section 12(k) of the Exchange Act temporarily suspending the issuer's securities or pursuant to Section 12(j) of the Exchange Act revoking registration of the issuer's securities.

© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission. *Regulatory Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Information Notice

FINRA Reminds Firms of Upcoming Changes to BrokerCheck

Executive Summary

In this *Notice*, FINRA reminds member firms of changes to BrokerCheck it will implement on August 23, 2010, and the steps firms and individuals may take with respect to these changes prior to implementation.

Questions about this *Notice* should be directed to Richard E. Pullano, Associate Vice President and Chief Counsel, Registration and Disclosure, at (240) 386-4821.

Background and Discussion

As announced in *Regulatory Notice 10-34*, on August 23, 2010, all historic customer complaints that became non-reportable after the implementation of the Central Registration Depository (CRD® or Web CRD®) (*i.e.*, on or after August 16, 1999) will be publicly available in BrokerCheck. Additionally, FINRA's current process for disputing the accuracy of (or updating) information disclosed through BrokerCheck will be enhanced and codified.

Historic Customer Complaints

Presently, FINRA Rule 8312 provides that Historic Complaints¹ be displayed in BrokerCheck only after certain conditions have been met.²

Effective August 23, 2010, FINRA will eliminate the conditions set forth in FINRA Rule 8312 that must be met before Historic Complaints will be displayed in BrokerCheck. Eliminating these conditions will result in the disclosure of all Historic Complaints via BrokerCheck that became non-reportable after the implementation of Web CRD.

August 3, 2010

Suggested Routing

- ➤ Compliance
- ➤ Legal
- Operations
- Registered Representatives
- Senior Management

Key Topic(s)

- BrokerCheck
- ➤ BrokerCheck Dispute Process
- Central Registration Depository
- ➤ Historic Complaints

Referenced Rules & Notices

- ➤ FINRA Rule 8312
- ➤ Regulatory Notice 10-34



To help firms ensure that Historic Complaints that will be displayed when this change is implemented are accurate and up-to-date, FINRA has introduced functionality to Web CRD to enable firms to more easily amend Historic Complaints. Specifically, firms now have the ability to amend Historic Complaints in the same manner that they amend any reportable disclosure event. In this regard, Web CRD now displays an individual's Historic Complaints along with the individual's current disclosure matters in the Forms U4 and U5 Disclosure Reporting Page (DRP) data entry screen. To amend a Historic Complaint, a firm need only click the appropriate edit link and enter the necessary changes.³

BrokerCheck Dispute Process

FINRA occasionally receives inquiries from persons subject to BrokerCheck who believe that information disclosed about them through BrokerCheck is inaccurate. When FINRA receives these inquiries, it typically reviews the alleged inaccuracy and, if appropriate, contacts the entity that reported the information to determine whether the information is accurate. Once FINRA obtains all of the available pertinent information, it determines whether the information is still accurate or whether it should modify or remove the information from BrokerCheck.

Effective August 23, 2010, FINRA will enhance and codify this process. The process will be available both for challenges alleging the information was incorrect when filed, and challenges asserting that the information has become incorrect or out-of-date due to events subsequent to filing.

To mitigate any potential delays that may occur upon the implementation of the enhanced dispute process, FINRA will accept disputes that firms or individuals submit prior to August 23, 2010. FINRA will process these disputes as they are received, but will not follow the specific procedures outlined for the dispute process in amended FINRA Rule 8312 until the August 23, 2010, implementation date. For example, FINRA will not add the dispute notation to an eligible party's BrokerCheck report as specified in paragraph (e)(2)(B) of the rule until August 23.

Information regarding the enhanced dispute process, including the BrokerCheck Dispute Form (which must be submitted to FINRA to initiate a dispute), is available at www.finra.org/BrokerCheck/DisputeProcess.

For more information on these BrokerCheck changes and the additional changes that will become effective on November 6, 2010,⁴ see *Regulatory Notice 10-34*.

2 Information Notice

Endnotes

- Historic Complaints are customer complaints that were reported on a uniform registration form that are more than two years old and that have not been settled or adjudicated; and customer complaints, arbitrations or litigations that have been settled for an amount less than the specified dollar amount (identified on the customer complaint question) and are therefore no longer reportable on a uniform registration form.
- 2 The conditions are as follows:
 - (1) a matter became a Historic Complaint on or after March 19, 2007;
 - (2) the most recent Historic Complaint or currently reported customer complaint, arbitration or litigation is less than 10 years old; and
 - (3) the person has a total of three or more currently disclosable regulatory actions, currently reported customer complaints, arbitrations or litigations, or Historic Complaints (subject to the limitation that they became Historic Complaints on or after March 19, 2007), or any combination thereof.

Unless all three conditions are met, a person's Historic Complaints are not disclosed through BrokerCheck. In addition, even if a person meets the criteria established for disclosing Historic Complaints, only those Historic Complaints that became Historic Complaints after March 19, 2007, are displayed through BrokerCheck.

- 3 FINRA will continue to review all changes made to Historic Complaints in such amendments to determine if further action is warranted.
- 4 The effective date for amendments pertaining to the expansion of the disclosure period for former associated persons from two years to 10 and the permanent public availability of certain information about former associated persons is November 6, 2010.

© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority, Inc. may not be used without permission. *Information Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.

Information Notice 3

Trade Reporting Notice

Weighted-Average Price/Special Pricing Formula Trade Modifier

Executive Summary

FINRA is issuing new guidance on the use of the weighted-average price/special pricing formula (.W) trade modifier for reporting certain types of OTC trades in NMS stocks to FINRA. Firms must make the systems changes necessary to properly modify trades in accordance with this guidance no later than October 18, 2010 (60 days from the date of this *Notice*).

Questions regarding this Notice may be directed to:

- ➤ The Legal Section, Market Regulation, at (240) 386-5126; or
- > FINRA Operations, at (866) 776-0800; or
- Office of General Counsel, at (202) 728-8071.

Discussion

Firms must use the weighted-average price/special pricing formula (.W) trade modifier on trade reports submitted to the Alternative Display Facility or a Trade Reporting Facility reflecting the following types of trades:

- Qualified contingent transactions, in accordance with the SEC's <u>Order Granting an Exemption for Qualified Contingent Trades from Rule 611(a) of Regulation NMS under the Securities Exchange Act of 1934 and Order Modifying the Exemption for Qualified Contingent Trades from Rule 611(a) of Regulation NMS under the Securities Exchange Act of 1934.</u>
- Certain transactions to correct bona fide errors in the execution of customer orders, in accordance with the SEC's <u>Order Exempting</u> <u>Certain Error Correction Transactions from Rule 611 of Regulation NMS</u>.
- Certain transactions that offer print protection to displayed customer orders when trades are reported at prices inferior to such orders, in accordance with the SEC's <u>Order Exempting Certain Print Protection</u> <u>Transactions from Rule 611 of Regulation NMS</u>.

August 19, 2010

Key Topic(s)

- ➤ Alternative Display Facility
- ➤ NMS Stocks
- ➤ Trade Reporting
- Trade Reporting Facilities
- Trading Halts

Referenced Rules & Notices

- ➤ FINRA Rule 6121
- ➤ FINRA Rule 6282
- ➤ FINRA Rule 6380A
- FINRA Rule 6380B
- ➤ Notice to Members 07-23
- ➤ Regulatory Notice 10-30
- ➤ SEC Regulation NMS
- ➤ Trade Reporting Notice 2/24/2009



FINRA rules require that firms use unique trade modifiers to indicate whether a transaction qualifies for an exception or exemption to Rule 611 of SEC Regulation NMS at the time of the trade.¹ Thus, firms must report the above transactions to FINRA with the appropriate trade modifiers in Trade Modifier Field 2 (Reason for SEC Rule 611 Exception or Exemption).²

FINRA believes these types of transactions also are consistent with the intended scope of the .W trade modifier, which is used to indicate that the price of a reported trade may bear no relation to the current market. Accordingly, firms also must use the .W in Trade Modifier Field 4 (SRO Required Detail) when reporting these transactions to FINRA, unless another Field 4 trade modifier applies.

Firms should regularly review their use of trade modifiers to ensure that they are accurately reporting trade information and applicable modifiers on all trade reports submitted to FINRA. Proper use of trade modifiers has become increasingly important because of the recently implemented single-stock trading pause pilot.³ Specifically, a firm that incorrectly modifies a trade in certain stocks can now trigger a trading pause, and trading in the stock may be unnecessarily halted, which is inconsistent with the intent and purpose of the trading pauses. Because the transactions noted above are not necessarily based on the current market price of the security when reported, FINRA believes that they are not appropriate triggers for a trading pause and should be marked with the .W trade modifier.

Firms must make the systems changes necessary to properly modify trades in accordance with this guidance as soon as possible, and no later than October 18, 2010 (60 days from the date of this *Notice*). In order to avoid the situation where a trading pause is inappropriately triggered in the near term, the FINRA/NASDAQ TRF and FINRA/NYSE TRF will automatically append the .W trade modifier for those trades where the firm has appended in Trade Modifier Field 2 the appropriate modifier for qualified contingent trade, error correction or print protection, and Trade Modifier Field 4 is blank. This automated solution will be ready on or before Tuesday, September 7, 2010. However, the input of modifiers is the obligation of the firm reporting the trade and, as noted above, firms must complete their systems changes by October 18, 2010.

Firms are reminded that the facts and circumstances of the particular trade dictate the appropriate modifier that must be reported in each field.⁴ Accordingly, the reporting firm must include in the trade report all of the information that is pertinent to a particular transaction. To determine what modifiers must be included in a particular transaction report, firms should analyze each Trade Modifier Field individually to determine what, if any, modifier is applicable for the transaction that is being reported.

Endnotes

- See Notice to Members (NTM) 07-23 (May 2007) and Trade Reporting Notice 2/24/09.
- The Trade Modifier Fields are described more fully in NTM 07-23 and Trade Reporting Notice 2/24/09. For example, although the trade modifier ".V" is generally used in Trade Modifier Field 2 for qualified contingent trades, the specific data entries used to report trades may vary depending upon the specific platform or system used. Firms must review and report in accordance with the applicable system specifications. ADF and TRF technical specifications can be found on the FINRA Web site at www.finra.org/Industry/Compliance/MarketTransparency/index.htm.
- 3 See FINRA Rule 6121 and Regulatory Notice 10-30 (June 2010).
- See NTM 07-23, Trade Reporting Notice 2/24/09 and Trade Reporting Frequently Asked Questions, FAQ 400.1 at www.finra.org/Industry/Regulation/Guidance/p038942#400.

© 2010 FINRA. All rights reserved. FINRA and other trademarks of the Financial Industry Regulatory Authority. Inc. may not be used without permission. *Trade Reporting Notices* attempt to present information to readers in a format that is easily understandable. However, please be aware that, in case of any misunderstanding, the rule language prevails.