

introducing the potential to game the system due to wider spreads between bid and offer prices, resulting in allowing someone to take advantage of those inadvertently caught in a fail situation.

In response to these concerns, FICC noted that FICC's delivery allocation process, a process that matches buy obligations to sell obligations and is applicable to all members, is necessary to ensure that the clearing corporation remains flat. Accordingly, FICC contends, the fails charge would not have any unique impact on the commenter's firm. With regards to the concern that the fails charge may result in firms shifting their business away from FICC in order to avoid a fails charge, FICC agrees that applying the fails charge as proposed by the rule would result in adverse consequences if the rest of the industry does not adopt it. However, FICC argues, FICC would cease applying the charge if the Credit and Market Risk Management Committee of FICC's Board of Directors determines that industry events or practices warrant such a revocation. Finally, FICC rejected the commenters' assertions regarding the proposed rule change's effect on market liquidity and providing new opportunities for firms to "game" the system as "highly speculative." Even if these adverse effects developed, FICC argues that it would be able to respond by eliminating the fails charge or taking other appropriate action.

#### IV. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest.<sup>6</sup> The Commission believes the rule change is consistent with Act because the fails-to-deliver charge should discourage firms from creating and maintaining persistent fails-to-deliver in treasury securities, which if permitted to subsist, may adversely affect FICC's ability to safeguard securities or funds in FICC's

control or for which it is responsible and to promptly and accurately clear and settle securities transactions. In the event that the rule change does not have the intended effect or produces other undesirable consequences, FICC has the ability to eliminate the rule or take other appropriate action to address any ensuing problems.<sup>7</sup>

Accordingly, for the reasons stated above the Commission believes that the rule change is consistent with FICC's obligation under Section 17A of the Act.

#### V. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.<sup>8</sup>

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-FICC-2008-03) be and hereby is approved.

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. 34-59805; File No. SR-FINRA-2009-027]

#### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Make Non-Substantive, Technical Changes to FINRA Trade Reporting Rules Upon Implementation of SR-FINRA-2008-011

April 21, 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 April 16, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a

<sup>7</sup> Elimination or modification of the fails-to-deliver charge would require FICC to file a proposed rule change pursuant to Section 19(b) of the Act.

<sup>8</sup> In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>9</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.

National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under Section 19(b)(3)(A) of the Act<sup>3</sup> and paragraph (f)(6) thereunder,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to (1) replace references to "MMID" or "OEID" in Rules 6282, 7130, 7230A, 7230B and 7330 that will be obsolete upon the implementation of proposed rule change SR-FINRA-2008-011; and (2) update rule cross-references in Rules 6380B and 7230B, as amended pursuant to SR-FINRA-2008-011.<sup>5</sup>

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

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

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

On November 5, 2008, the SEC approved amendments to FINRA trade

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

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

<sup>5</sup> See Securities Exchange Act Release No. 58903 (November 5, 2008), 73 FR 67905 (November 17, 2008) (order approving SR-FINRA-2008-011); and Securities Exchange Act Release No. 58903A (November 13, 2008), 73 FR 69700 (November 19, 2008) (correction to order approving SR-FINRA-2008-011). SR-FINRA-2008-011 will be implemented on August 3, 2009. See FINRA Regulatory Notice 09-08 (January 2009).

<sup>6</sup> 15 U.S.C. 78q(b)(3)(F).

reporting rules applicable to over-the-counter ("OTC") equity transactions<sup>6</sup> to (1) replace the current market maker-based trade reporting structure with an "executing party" structure; and (2) require members with the trade reporting obligation under FINRA rules that are acting in a riskless principal or agency capacity on behalf of one or more other member firms to submit non-tape report(s) to FINRA, as necessary, to identify such other member firm(s) as a party to the trade.

This proposed rule change would make technical, non-substantive changes to certain FINRA rules upon the implementation of SR-FINRA-2008-011. Specifically, FINRA is proposing to delete the references to "MMID" and "OEID" in Rules 6282(c) and (d), 7130(b), 7230A(d), 7230B(d) and 7330(d). When the market maker-based trade reporting structure is replaced with the executing party structure, references to "MMID" (which corresponds to the "market maker" side) and "OEID" (which corresponds to the "order entry" side) will be obsolete, and they will be deleted from the revised system technical specifications for the FINRA Facilities. As such, FINRA is proposing to amend the rules to refer to the Reporting Member (denoted as the "Executing Party" or "EPID") and the Non-Reporting Member or Party, as applicable (denoted as the "Contra Party" or "CPID").

In this regard, FINRA also is proposing to amend Rule 6282 to (1) replace references in paragraphs (c) and (d) to "Non-Reporting Member" with "Non-Reporting Member (or other contra party)," where applicable, to clarify that the contra party to a trade may not always be a FINRA member, and (2) replace references in paragraph (c) to "Reporting FINRA Member" with "Reporting Member" to maintain consistency in the terminology used in the rule.<sup>7</sup>

In addition, on December 22, 2008, FINRA filed proposed rule change SR-FINRA-2008-066 to reflect the closing of the FINRA/NSX TRF. As part of that proposed rule change, FINRA proposed

<sup>6</sup> OTC equity transactions include transactions in NMS stocks effected otherwise than on an exchange, which are reported through the Alternative Display Facility ("ADF") or a Trade Reporting Facility ("TRF"), and transactions in OTC Equity Securities, as defined in Rule 6420, which are reported through the OTC Reporting Facility ("ORF"). The ADF, TRFs and ORF are collectively referred to herein as the "FINRA Facilities."

<sup>7</sup> FINRA also is proposing technical amendments to correct the cross-references in paragraphs (c) and (d) of Rule 6282 that incorrectly refer to numbered subparagraphs of (e) and (f), respectively; these cross-references should refer to numbered subparagraphs of (c) and (d), respectively.

to renumber the rules relating to the FINRA/NYSE TRF, and Rules 6380C and 7230C became Rules 6380B and 7230B, respectively.<sup>8</sup> In this filing, FINRA is proposing to update the cross-references in Rules 6380B(d)(4) and 7230B(c), as amended pursuant to SR-FINRA-2008-011, to reflect the renumbering of the pertinent rules.

FINRA has filed the proposed rule change for immediate effectiveness. The proposed rule change will be operative on August 3, 2009, the date on which SR-FINRA-2008-011 will be implemented.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>9</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 the proposed rule change will provide greater clarity to members and the public regarding FINRA's trade reporting rules.

### 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

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

<sup>8</sup> See Securities Exchange Act Release No. 59175 (December 30, 2008), 74 FR 840 (January 8, 2009) (notice of filing and immediate effectiveness of SR-FINRA-2008-066). SR-FINRA-2008-066 was filed for immediate effectiveness with an operative date of January 1, 2009.

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

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

<sup>11</sup> 17 CFR 240.19b-4(f)(6).

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

## IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2009-027 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-2009-027. 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-2009-027 and should be submitted on or before May 19, 2009.

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

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59807; File No. SR-NASDAQ-2009-036]

### Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Order Routing

April 21, 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 April 17, 2009, The NASDAQ Stock Market LLC (“NASDAQ”) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by NASDAQ. NASDAQ has designated the proposed rule change as constituting a non-controversial rule change under Rule 19b-4(f)(6) under the Act,<sup>3</sup> which renders the proposal 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

NASDAQ proposes to modify Rule 4758, Order Routing, to provide market participants with the option of entering orders that do not check the Nasdaq Market Center book prior to routing. NASDAQ proposes to implement the change with respect to Rule 4758(a)(1)(A)(i) on or about May 1, 2009, and will announce the exact date of implementation in a NASDAQ Equity Trader Alert. NASDAQ proposes to implement the change with respect to Rules 4758(a)(1)(A)(ii) and (iii) on a date in May or June 2009, to be announced in a NASDAQ Equity Trader Alert.

The text of the proposed rule change is below. Proposed new language is italicized and proposed deletions are in brackets.

#### 4758. Order Routing

(a) Order Routing Process.

(1) The Order Routing Process shall be available to Participants from 7:00 a.m. until 8:00 p.m. Eastern Time, and shall route orders as described below: All routing of orders shall comply with Rule 611 of Regulation NMS under the Exchange Act.

(A) The System provides three routing options. Of these three, DOT is only available for orders ultimately sought to be directed to either the New York Stock Exchange (“NYSE”) or [the American Stock Exchange (“AMEX”)] NYSE Amex. The System will consider the quotations only of accessible markets. The three System routing options are:

(i) DOT (“DOT”)—under this option, after checking the System for available shares *if so instructed by the entering firm*, orders are sent to other available market centers for potential execution, per entering firm’s instructions, before being sent to the destination exchange, so long as the price at such market centers would not violate the Order Protection Rule. Any un-executed portion will thereafter be sent to the NYSE or [AMEX] NYSE Amex, as appropriate, at the order’s original limit order price. This option may only be used for orders with time-in-force parameters of either SDAY, SIOC, MDAY, MIOC, GTMC or market-on-open/close. Notwithstanding the foregoing, orders designated for participation in the NYSE or [AMEX] NYSE Amex opening or closing processes will not check the System for available shares prior to routing.

(ii) Reactive Electronic Only (“STGY”)—under this option, after checking the System for available shares *if so instructed by the entering firm*, orders are sent to other available market centers for potential execution, per entering firm’s instructions. When checking the book, the System will seek to execute at the price it would send the order to a destination market center. If shares remain un-executed after routing, they are posted on the book. Once on the book, should the order subsequently be locked or crossed by another accessible market center, the System shall route the order to the locking or crossing market center. With the exception of the Minimum Quantity order type, all time-in-force parameters and order types may be used in conjunction with this routing option.

(iii) Electronic Only Scan (“SCAN”)—under this option, after checking the

System for available shares *if so instructed by the entering firm*, orders are sent to other available market centers for potential execution, per entering firm’s instructions, in compliance with Rule 611 under Regulation NMS. When checking the book, the System will seek to execute at the price it would send the order to a destination market center. If shares remain un-executed after routing, they are posted on the book. Once on the book, should the order subsequently be locked or crossed by another market center, the System will not route the order to the locking or crossing market center. With the exception of the Minimum Quantity order type, all time-in-force parameters and order types may be used in conjunction with this routing option.

*Orders that do not check the System for available shares prior to routing may not be sent to a facility of an exchange that is an affiliate of Nasdaq, except for orders that are sent to the NASDAQ OMX BX Equities Market.*

(B) No change.

(b) No change.

\* \* \* \* \*

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

In its filing with the Commission, NASDAQ 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. NASDAQ has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

In SR-NASDAQ-2008-079,<sup>4</sup> NASDAQ amended Rule 4758 to provide that if an order is routed to the New York Stock Exchange (“NYSE”) or NYSE Amex and is designated as eligible for posting to the NYSE or NYSE Amex book, the order must check the NASDAQ book prior to routing. Routing of orders eligible to post at NYSE or NYSE Amex is conducted pursuant to NASDAQ’s DOT routing strategy, as described in Rule

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

<sup>13</sup> 15 U.S.C. 78s(b)(1).

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

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

<sup>4</sup> Securities Exchange Act Release No. 58721 (October 2, 2008), 73 FR 59696 (October 9, 2008) (SR-NASDAQ-2008-079).