

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 the Exchange. 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 publicly available. All submissions should refer to File Number SR-NASDAQ-2009-101 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61083; File No. SR-FINRA-2009-084]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 5330 (Adjustment of Orders) in the Consolidated FINRA Rulebook

December 1, 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 November 24, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a 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. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

<sup>11</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.

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

FINRA is proposing to adopt NASD Rule 3220 (Adjustment of Open Orders) as a FINRA rule in the consolidated FINRA rulebook with several changes and to renumber NASD Rule 3220 as FINRA Rule 5330 in the consolidated FINRA rulebook.

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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>3</sup> FINRA is proposing to adopt NASD Rule 3220 (Adjustment of Open Orders) into the Consolidated FINRA Rulebook with several changes, which are described below.

NASD Rule 3220 sets forth the requirements a member has regarding an open order held by the member when the order involves a security that is subject to a dividend, payment, or distribution.<sup>4</sup> Paragraph (a) of the rule

<sup>3</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>4</sup> For purposes of the rule, an "open order" is an order to buy or an open stop order to sell. These include, for example, "good 'til cancelled," "limit," and "stop limit" orders that remain in effect for a

sets forth how members are to adjust the terms of open orders, depending upon whether the dividend, payment, or distribution is in cash, stock, combined cash and stock, or determined by the stockholder. Under the rule, members are required to adjust open orders as follows:

- In the case of a cash dividend or distribution, the price of the open order is reduced by the dollar amount of the dividend or distribution and rounded down to the next lowest minimum quotation variation.
- In the case of a stock dividend or split, the price of the open order is reduced by rounding the dollar value of the dividend distribution or split to the next higher minimum quotation variation and subtracting that amount from the price of the order. The size of the order is increased by multiplying the size of the original order by the numerator of the ratio of the dividend or split, dividing the result by the denominator of the ratio of the dividend or split and then rounding the result to the next lower round lot.
- In the case of a dividend payable in either cash or securities at the option of the stockholder, the price of the open order is reduced by the dollar value of the cash or securities, whichever is greater, as determined by the formulas described above.

If the value of a distribution cannot be determined, paragraph (b) of the rule prohibits members from executing or permitting the execution of open orders without first reconfirming the order with the customer. Paragraph (c) requires members to cancel all open orders if a security is the subject of a reverse split. The rule also includes a list of order types to which it does not apply and a provision addressing the conversion of securities from fractional pricing to decimal pricing.

The proposed rule change includes substantive changes, as well as multiple wording and organizational changes, that conform much of the FINRA rule to the analogous Nasdaq and NYSE-Arca rules.<sup>5</sup> The proposed rule change also updates certain provisions of the rule that refer to trading in fractional amounts (as opposed to decimals).

First, the proposed rule change provides that, after adjusting an open order in the case of a stock dividend or

definite or indefinite period of time until executed, cancelled, or expired. See NASD Rule 3220(d).

<sup>5</sup> See Nasdaq Rule 4761; NYSE-Arca Rule 7.39.

Although the NYSE has a rule regarding the adjustment of orders (NYSE Rule 118), the Transitional Rulebook does not include the provision. Consequently, NASD Rule 3220 is the only FINRA rule addressing the adjustment of orders.

split, the order should be rounded down to the next lowest share, rather than the next lowest round lot. Although NYSE Rule 118 requires rounding down to the next lowest round lot, both Nasdaq Rule 4761 and NYSE–Arca Rule 7.39 require that, after being adjusted, orders be rounded down to the next lowest share. FINRA believes that rounding to the next lowest share, rather than the next lowest round lot, will result in an adjustment that more accurately reflects the customer's initial intent when placing the order.<sup>6</sup>

Second, the proposed rule change clarifies the treatment of open orders involving securities that are subject to a combined cash and stock dividend/split. Unlike Nasdaq Rule 4761 and NYSE–Arca Rule 7.39, NASD Rule 3220 does not directly address the adjustment requirements if a security is subject to a combined cash and stock dividend/split. The proposed rule change makes the provision consistent with the analogous Nasdaq and NYSE–Arca rules by specifying that, in these circumstances, members should calculate the cash portion of the adjustment using the existing formula in subparagraph (1) of the rule and should calculate the stock portion of the adjustment using the existing formula in subparagraph (2) of the rule.

Third, the proposed rule change applies the provision regarding reverse splits to all orders (both buy and sell) rather than just “open orders,” as that term is defined in the rule.<sup>7</sup> Thus, the proposed rule broadens the obligation of members to cancel orders involving securities subject to a reverse split and requires that all such orders be cancelled.

In addition to the conforming changes described above, FINRA is proposing one additional substantive change to the rule. NASD Rule 3220 provides that

<sup>6</sup> FINRA notes that, when Nasdaq amended its open order adjustment rule in 2002, Nasdaq stated that it believed that rounding adjusted orders to the next lowest share “will result in more accurate representation of buying and selling interest.” See Securities Exchange Act Release No. 45968 (May 20, 2002), 67 FR 36946 (May 28, 2002). Like NASD Rule 3220, NYSE Rule 118 requires that, after adjustment, orders be rounded down to the next lowest round lot. The proposed rule will continue to exclude any order “governed by the rules of a national securities exchange.” Consequently, an order subject to the rules of the NYSE will continue to be rounded as required under NYSE rules. Moreover, if a customer wants to avoid the potential of having an order rounded down in a manner that results in an odd lot, the customer could include any such instructions at the time it gives the member the order.

<sup>7</sup> This proposed change will conform the FINRA rule to the analogous provisions in the NYSE, Nasdaq, and NYSE–Arca rules. See Nasdaq Rule 4761(c)(6); NYSE–Arca Rule 7.39(b)(5); NYSE Rule 118.21.

some pending customer orders (*e.g.*, open sell orders and open stop orders to buy) are not adjusted if there is a stock split in the security, notwithstanding that a stock split could have a significant impact on the price of the security. This could be detrimental to a customer with a pending order in the security, as the order may become inconsistent with the customer's original intent and/or unexecutable. Therefore, the proposed rule change requires members to notify customers who have pending orders that are not otherwise required to be adjusted under the rule of any stock splits in the security.

Finally, the proposed rule change updates the language in the rule regarding trading in fractional amounts and deletes the portion of the rule addressing the conversion from fractional pricing to decimal pricing.

FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>8</sup> which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change will bring more uniformity to the treatment of open orders and will enhance customer protection with respect to pending orders involving securities that are the subject of a stock split or reverse split.

### B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

### C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

Written comments were neither solicited nor received.

## III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal**

**Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

## IV. Solicitation of Comments

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

### Electronic Comments

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR–FINRA–2009–084 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–2009–084. 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,<sup>9</sup> 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

<sup>9</sup> The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/>.

<sup>8</sup> 15 U.S.C. 78o–3(b)(6).

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-2009-084 and should be submitted on or before December 29, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61090; File No. SR-FINRA-2009-040]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change as Modified by Amendment No. 2 To Adopt FINRA Rule 2380 To Limit the Leverage Ratio Offered by Broker-Dealers for Certain Forex Transactions

December 1, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "Exchange Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on June 4, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a 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 substantially prepared by FINRA. The proposal was published for comment in the **Federal Register** on July 6, 2009.<sup>3</sup> The Commission received 12 comments on the proposal.<sup>4</sup> FINRA responded to the comment letters<sup>5</sup> and filed Amendment No. 1 to the proposed rule change on August 27, 2009. On November 12, 2009, FINRA filed Amendment No. 2 to the proposed rule

change.<sup>6</sup> The Commission is publishing this notice to solicit comments on the proposed rule change as modified by Amendment No. 2 from interested persons.

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

FINRA is proposing to adopt FINRA Rule 2380 to prohibit any member firm from permitting a customer to: (1) Initiate any forex position with a leverage ratio of greater than 4 to 1; and (2) withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 4 to 1. In addition, FINRA proposes to exempt from the proposed leverage limitation any security as defined in Section 3(a)(10) of the Securities Exchange Act of 1934.

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

FINRA is proposing to limit the leverage ratio offered by broker-dealers for certain forex transactions to no more than 4 to 1. Amendment No. 2 modifies the proposed leverage limitation from the original proposed rule change of 1.5 to 1 to 4 to 1, and makes conforming changes to Supplementary Material .01.<sup>7</sup> In addition, FINRA proposes in Amendment No. 2 to exempt from the leverage limitation any security as defined in Section 3(a)(10) of the Securities Exchange Act of 1934, by adding paragraph (b) to the proposed rule change. Finally, Amendment No. 2 to the proposed rule change

re-designates original paragraph (b) as paragraph (c) with no other modifications to the definitions contained in proposed paragraph (c).

FINRA is proposing to limit the leverage ratio offered by broker-dealers for certain forex transactions to no more than 4 to 1. The proposed rule change addresses forex transactions in the off-exchange spot contract market. This market has grown in recent years following the passage of the Commodity Futures Modernization Act of 2000 ("CFMA"), which permits certain enumerated entities, including broker-dealers, to act as counterparties to a retail forex contract.<sup>8</sup> While most of the growth in this area has been concentrated in the futures commission merchant ("FCM") channel, recent changes in legislation have brought greater interest to forex by broker-dealers.<sup>9</sup> The proposed rule change seeks to limit investor losses resulting from small changes in the exchange rate of a foreign currency and is intended to reduce the risks of excessive speculation.

Paragraph (a) of the proposed rule change states that no member shall permit a customer to initiate a forex position (as defined below) with a leverage ratio greater than 4 to 1. Thus, at the time a customer initiates a forex position, the customer must deposit at least 1/4 of the notional value of the contract. Using the example in supplementary material .01, a customer entering into a forex contract representing \$500,000 of a foreign currency must have an initial deposit of at least \$125,000. The proposed rule change differs from the leverage limits in the FCM channel, where depending on the foreign currency selected, a customer at 400 to 1 leverage would need only an initial deposit of \$1,875.

In addition, paragraph (a) also states that "no member shall permit a customer to withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 4 to 1." This provision is intended to prevent a customer from depositing funds at the initiation of the forex position and then immediately withdrawing them once the position is established. If a customer were permitted to withdraw the funds once a position is established, the leverage limitation could easily be circumvented as the same deposit could be used to establish multiple forex positions.

<sup>8</sup> Commodity Futures Modernization Act of 2000, Pub. L. 106-554, 114 Stat. 2763, 2763A-378 (2001).

<sup>9</sup> See CFTC Reauthorization Act of 2008, Pub. L. 110-246, 122 Stat. 1651 (2008).

<sup>10</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> Exchange Act Release No. 60172 (June 25, 2009), 74 FR 32022 (July 6, 2009).

<sup>4</sup> See *infra* note 21.

<sup>5</sup> Letter from Gary L. Goldsholle, Vice President and Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated August 27, 2009 ("FINRA Response").

<sup>6</sup> Amendment No. 2 replaced and superseded Amendment No. 1 in its entirety.

<sup>7</sup> See *supra* note 3.