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III. Discussion

Section 19(b) of the Act directs the Commission to approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to such organization. Section 17A(b)(3)(D) of the Act requires that the rules of a clearing agency provide for the equitable allocation of reasonable dues, fees, and other charges.³ The Commission believes that DTC's rule change is consistent with this Section because it will provide for the equitable allocation of reasonable dues, fees, and other charges among the users of DTC's services.

IV. 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 Section 17A of the Act and the rules and regulations thereunder. In approving the proposed rule change, the Commission considered the proposal's impact on efficiency, competition, and capital formation.

It is therefore ordered, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-2009-04) be and hereby is approved.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.⁴

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59616; File No. SR-FINRA-2009-008]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Proposed Changes to Forms U4 and U5

March 20, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 6, 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.

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

FINRA is proposing to amend the Uniform Application for Securities Industry Registration or Transfer ("Form U4") and the Uniform Termination Notice for Securities Industry Registration ("Form U5") as well as FINRA Rule 8312 (FINRA BrokerCheck Disclosure).

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

Representatives of broker-dealers and investment advisers must use Form U4 to become registered in the appropriate jurisdictions and/or with appropriate self-regulatory organizations ("SROs"). Broker-dealers and investment advisers must use Form U5 to terminate registration of an individual in the various SROs and jurisdictions. (Forms U4 and U5 are together referred to as the "Forms").

As discussed in greater detail below, the proposed rule change would:

- Revise questions on the Forms to enable FINRA and other regulators to identify more readily individuals and firms (collectively referred to as "persons") subject to statutory disqualification pursuant to Section 15(b)(4)(D) or (E) of the Exchange Act (referred to as "willful violations").³

³ A person is subject to statutory disqualification under Section 15(b)(4)(D) of the Exchange Act if the person has:

* * * willfully violated any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, [the Exchange Act], the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

³ 15 U.S.C. 78q-1(b)(3)(D).

⁴ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

- Revise questions on the Forms regarding disclosure of arbitrations or civil litigation to elicit reporting of allegations of sales practice violations made against a registered person in arbitration or litigation in which that person is not named as a party.
- Revise questions on the Forms regarding customer complaints, arbitrations or civil litigation to clarify the manner in which individuals and firms must report sales practice violations alleged against registered persons.
- Raise the monetary threshold for reporting of settlements of customer complaints, arbitrations or civil litigation on the Forms from \$10,000 to \$15,000, and make a conforming change to reflect this revised monetary threshold in the description of "Historic Complaints" in FINRA Rule 8312.
- Revise the definition of "Date of Termination" in Form U5, and enable firms to amend the "Date of Termination" and "Reason for Termination" sections of the Form U5, subject to certain conditions and notifications.
- Make certain technical and conforming changes to the Forms intended to clarify the information being elicited by regulators and to facilitate accurate reporting by firms on the Forms.

Proposed Revisions Regarding Willful Violations

The proposed rule change would revise the Forms to enable FINRA and other regulators⁴ to identify more

readily persons subject to statutory disqualification as a result of willful violations.⁵ The current Forms elicit information that assists regulators in identifying persons subject to statutory disqualification based on findings by, or sanctions imposed by, the SEC, the Commodity Futures Trading Commission ("CFTC"), or an SRO as defined in the Forms,⁶ but the relevant questions do not specifically inquire as to willful violations and do not capture all of the enumerated types of willful violations. For example, Questions 14C and 14E on the Form U4 and the corresponding Regulatory Action disclosure reporting page ("DRP") elicit information regarding regulatory or disciplinary action taken by the SEC, the CFTC, or an SRO, but currently do not elicit information on whether a violation was willful and do not specifically address SRO findings of willful violations of the securities laws or the Commodity Exchange Act. Similarly, Question 7D on Form U5 asks whether the individual was involved in a disciplinary action by a domestic or foreign governmental body or SRO; however, neither the question nor the corresponding Form U5 Regulatory Action DRP elicits details on whether the action involved a willful violation. Accordingly, as described below, the proposed rule change would modify these Forms to enable FINRA and other regulators to query the CRD system to identify persons who are subject to disqualification as a result of a willful violation.

With respect to the Form U4, FINRA proposes to add questions to existing Questions 14C and 14E. Question 14C inquires about SEC and CFTC regulatory actions. The proposed rule change would add new Questions 14C(6), (7) and (8) to elicit from persons whether the SEC or the CFTC ever:

⁵ In connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. and the formation of FINRA, FINRA adopted a revised definition of disqualification to conform to the definition of statutory disqualification under Section 3(a)(39) of the Exchange Act. Consequently, FINRA's revised definition of disqualification incorporates certain additional categories of disqualification, including willful violations. FINRA has filed a proposed rule change to establish procedures applicable to persons subject to the additional categories of disqualification. See Securities Exchange Act Release No. 59208 (January 6, 2009), 74 FR 1738 (January 13, 2009) (Notice of Filing of SR-FINRA-2008-045).

⁶ The Forms define SRO to include any national securities or commodities exchange, as well as any national securities association or any registered clearing agency. Accordingly, the proposed rule change would delete as redundant certain specific references to commodities exchanges in individual questions that already inquire as to SRO actions.

(6) *found* you to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or *found* you to have been unable to comply with any provision of such Act, rule or regulation?

(7) *found* you to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board?

(8) *found* you to have failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board?

The proposed rule change would add identical questions to Question 14E of the Form U4 (to be numbered as Questions 14E(5), (6) and (7)) in the context of findings by any SRO.⁷ FINRA is not proposing any new questions addressing willful violations on the Form U4 Regulatory Action DRP, which will continue to elicit specific information regarding the status of the events reported in response to Questions 14C and 14E.⁸

With respect to the proposed new Questions 14C(6), (7) and (8), and 14E(5), (6) and (7) on the Form U4, firms will need to determine promptly whether any of their registered persons have been subject to an action that requires reporting. Firms then will be required to amend Forms U4 to respond to these new questions the first time they file a Form U4 amendment after the effective date of the proposed rule change, but no later than 120 days following the effective date of the proposed rule change. If a firm has determined that the registered person must answer "yes" to any part of

⁷ See Exhibit 3a. The Commission notes that there are references throughout this notice to exhibits. However, there are *no* exhibits attached to this notice. The exhibits are part of the proposed rule change.

⁸ See Exhibit 3b. FINRA is proposing to add a question to the Form U4 Regulatory Action DRP to elicit additional information about regulatory actions reported in Question 14D(2)(b) of Form U4 (actions that result in a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct).

A person is subject to statutory disqualification under Section 15(b)(4)(E) of the Exchange Act if the person has:

* * * willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, [the Exchange Act], the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board, or has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision. For the purposes of this subparagraph (E), no person shall be deemed to have failed reasonably to supervise any other person, if:

(i) There have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and

(ii) Such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with.

15 U.S.C. 78o(b)(4)(D) and (E).

⁴ In addition to FINRA, regulators that use the Forms include other SROs and securities regulators of states and other jurisdictions.

Questions 14C(6), (7) or (8), or Questions 14E(5), (6) or (7), the amendment filings must include completed DRP(s) covering the proceedings or action reported.⁹

FINRA appreciates that adding new disclosure questions to Form U4 will require firms to amend (or refile) such forms for their registered persons, and that this requirement may place an administrative burden on firms. Accordingly, FINRA is providing firms with up to 120 days from the effective date of the proposed rule change to amend their registered persons' Forms U4 to answer the new Questions 14C(6), (7) and (8) and 14E(5), (6) and (7), rather than the 30 days provided under Article V, Section 2 of the FINRA By-Laws for the filing of such amendments. FINRA emphasizes that complete and accurate reporting on Forms U4 is the joint responsibility of the registered person and the firm.

With respect to the Form U5, FINRA proposes to leave unchanged Question 7D (Regulatory Action Disclosure),¹⁰ and to add a new question, Question 12C, to the Form U5 Regulatory Action DRP. After implementation, firms that answer "yes" to Question 7D on Form U5 will be required to provide more detailed information about the regulatory action in Question 12C on the DRP. For regulatory actions in which the SEC, CFTC or an SRO is the regulator involved, Question 12C will require firms to answer questions eliciting whether the action involves a willful violation. These questions correspond to those questions proposed to be added to the Form U4.¹¹ A firm will not be required to amend Forms U5 to answer Question 12C on the DRP and/or add information to a Form U5 Regulatory Action DRP that was filed previously unless it is updating a

regulatory action that it reported as pending on the current DRP.

Proposed Revisions To Elicit Reporting of Allegations of Sales Practice Violations Against Registered Persons Made in Arbitrations or Litigation in Which the Registered Person Is Not a Named Party

The proposed rule change would revise the Forms to require the reporting of allegations of sales practice violations made against registered persons in a civil lawsuit or arbitration in which the registered person is not a named party. Under the current reporting structure, a firm is not required to report on a registered person's Form U4 that a customer has alleged a sales practice violation against such person in the body of a lawsuit or arbitration claim, unless the registered person also has been named as a defendant/respondent. A firm also is not required to report on Form BD (Uniform Application for Broker-Dealer Registration) that it has been named as a respondent in a consumer-initiated arbitration or to report that a sales practices violation was alleged against one of its registered persons under these circumstances. As a result, this form of "customer complaint" against a registered person or firm is currently unreported via the Forms and, therefore, unavailable to regulators or prospective broker-dealer employers of the registered person via CRD or to the public through BrokerCheck.

Specifically, current Question 14I(1) on Form U4 requires an applicant for registration to answer "yes" only if he or she has ever been named as a respondent or defendant in an investment-related, consumer-initiated arbitration or civil litigation that alleged that he or she was involved in one or more sales practice violations¹² and which: (1) Is still pending; (2) resulted in an arbitration award or civil judgment against the person, regardless of amount; or (3) was settled for an amount of \$10,000 or more.¹³ Question 7E(1) on Form U5 is similarly worded.

Regulators have interpreted Question 14I(1) on Form U4 and Question 7E(1) on Form U5 to mean that, even if a registered person is identified in the body of an arbitration claim or lawsuit

as the person responsible for the alleged sales practice violation(s), the event is not required to be reported on the person's Form U4 or U5 because he or she was not specifically named as a respondent/defendant in the arbitration or civil litigation.¹⁴ In other words, a "yes" answer to Question 14I(1) on Form U4 and Question 7E(1) on Form U5 is currently required only when the customer has sued a registered person or filed an arbitration claim naming the registered person as a respondent.

Similarly, if the customer has sued or filed an arbitration claim against the firm only and not the registered person, the registered person is not required to answer "yes" to these questions, even if the customer has identified a registered person in the body of the lawsuit or arbitration as the person responsible for the alleged sales practice violation(s).¹⁵ If, however, a customer files a written complaint with a firm alleging that a registered person is responsible for the same sales practice violation(s), the firm and the registered person are responsible for reporting that customer complaint on the person's Form U4 (Question 14I(3)) or Form U5 (Question 7E(3)), provided the complaint meets the threshold reporting requirements.

Settlements of customer disputes are similarly treated. If a customer complaint against a registered person is settled (either by the person or the person's firm) for \$10,000 or more,¹⁶ the event is reported on the registered person's Form U4 or U5 under Questions 14I(2) or 7E(2), respectively. However, if the firm settles an arbitration or civil lawsuit for \$10,000 or more,¹⁷ and the person described in the complaint or claim as the person responsible for the alleged sales practice violation(s) is not a named respondent/defendant, the matter is not reported on any of the Forms and is thus unavailable to the public through BrokerCheck, and is also unavailable to regulators or prospective broker-dealer employers of the person through the CRD system.

The inconsistent treatment regarding the reporting of alleged sales practice

⁹ Under the proposal, the CRD system will process Form U4 filings as follows: answers to current Questions 14C(1) through (5) and Questions 14E(1) through (4) will be transferred without change to proposed new Questions 14C and 14E, respectively. In addition, all registered persons will have "null" values in the newly added Questions 14C(6), (7), and (8), and 14E(5), (6), and (7). In other words, answers to these new questions will be blank (*i.e.*, not populated with either a "yes" or "no" answer). Firms must affirmatively answer these newly added questions (Questions 14C(6), (7), and (8) and 14E(5), (6), and (7)) by clicking the appropriate "yes" or "no" radio buttons the first time they file a Form U4 amendment after the effective date of the proposed rule change, but no later than 120 days following the effective date of the proposed rule change. If a firm does not affirmatively answer the new questions for registered persons, the filing of any amendments to the Form will fail the CRD-system completeness check.

¹⁰ See Exhibit 3c.

¹¹ See Exhibit 3d.

¹² The "Explanation of Terms" in Form U4 defines "sales practice violations" to include "any conduct directed at or involving a customer which would constitute a violation of any rules for which a person could be disciplined by any self-regulatory organization * * * See Exhibit 3a.

¹³ This proposed rule change proposes to raise from \$10,000 to \$15,000 the monetary threshold for reporting of settlements of customer complaints, arbitrations or litigations on the Forms, as discussed in more detail *infra*.

¹⁴ See Question 4 under the 14I(1) set of questions on Forms U4/U5 Interpretive Guidance, which is available on FINRA's Web site at <http://www.finra.org/RegulatorySystems/CRD/FilingGuidance/p005243>.

¹⁵ Moreover, in addition to not being reportable on Forms U4 or U5, such a matter is not reportable on Form BD because Form BD does not require the reporting of any customer-initiated complaints, arbitrations or civil litigations. FINRA notes, however, that certain summary information about arbitration awards rendered in claims brought by customers against firms may be obtained through BrokerCheck.

¹⁶ See *supra* note 12.

¹⁷ *Id.*

violations is difficult to reconcile on principle; whether or not the person responsible for the alleged sales practice violation is a named respondent or defendant, a sales practice violation has been alleged. Moreover, this reporting inconsistency raises practical concerns because naming a firm as the sole respondent in an arbitration claim is becoming more prevalent in circumstances where the allegations involve sales practice violation(s) against a registered person.

To address this inconsistent treatment, the proposed rule change would amend Question 14I on Form U4 and Question 7E on Form U5 to require the reporting of alleged sales practice violations made by a customer against persons identified in the body of a civil litigation complaint or an arbitration claim, even when those persons are not named as parties. Specifically, the proposed rule change would add Questions 14I(4) and (5) to Form U4 and Questions 7E(4) and (5) to Form U5. These questions would in most respects reflect the language of the corresponding questions regarding alleged sales practice violations of persons identified in consumer complaints (i.e., Questions 14I(2) and (3) in Form U4 and Questions 7E(2) and (3) in Form U5).¹⁸ The proposed new questions would apply only to arbitration claims or civil litigation filed on or after the effective date of the proposed rule change; applicants and firms would not be required to answer Questions 14I(4) or (5) on Form U4 or Questions 7E(4) or (5) on Form U5 with respect to arbitration claims or civil litigation filed before the effective date of the proposed rule change.

A “yes” answer to newly proposed Questions 14I(4) or 14I(5) in Form U4 or Questions 7E(4) or 7E(5) in Form U5 would indicate that the applicant or registered person, though not named as a respondent/defendant in a customer-initiated arbitration or civil lawsuit, was either named in or could be reasonably identified from the body of the arbitration claim or civil litigation as a registered person who was involved in one or more of the alleged sales practice violations. A firm would be required to report a “yes” answer only after it has made a good faith determination after a reasonable investigation that the alleged sales practice violation(s) involved the registered person.¹⁹

As a result of the proposed rule change, alleged sales practice violations made by a customer against persons identified in the body of a civil litigation complaint or arbitration claim (as described above) would be treated the same way that customer complaints are currently treated in the Uniform Forms.²⁰ For example, such matters would be required to be reported no later than 30 days after receipt by the firm. In addition, as is currently the practice with respect to customer complaints reported to the CRD system, registered persons would have an opportunity to provide context on the reported matter on Form U4; persons not currently registered with a FINRA member firm, but who were registered within the previous two years, would be afforded an opportunity to provide context on the reported matter through a Broker Comment.²¹ Such matters would be disclosed through BrokerCheck consistent with FINRA Rule 8312. To the extent such a matter becomes non-reportable (if, for example, the arbitration or litigation is dismissed and the dismissal is not part of a settlement, or it is settled for less than the monetary threshold designated on Form U4), it would, like other customer complaints that become non-reportable, be eligible for disclosure through BrokerCheck as a “Historic Complaint,” provided it meets certain criteria.²² FINRA will consider whether, as a result of the proposed rule change,

Claim or Complaint specifically mentions the individual by name and alleges the individual was involved in one or more sales practice violations or (2) the Statement of Claim or Complaint does not mention the individual by name but the firm has made a good faith determination that the sales practice violation(s) alleged involves one or more particular individuals.

²⁰ The proposed rule change would make corresponding changes to Customer Complaint/Arbitration/Civil Litigation DRPs to reflect the changes discussed above. See Exhibit 3b. These changes would include, e.g., eliciting specifically whether, in the case of an arbitration or litigation, the individual was named as a respondent or defendant. Furthermore, the DRPs would require the alleged damages and disposition for matters in which sales practice violations are alleged against an individual who was not named in an arbitration or litigation.

²¹ Individuals who currently are registered with FINRA, are associated with a member firm, and who wish to provide an update or context to information that is disclosed through BrokerCheck are required to file an amended Form U4. Individuals who are no longer registered with FINRA, but who have been FINRA-registered within the last two years (and thus about whom information is available through BrokerCheck pursuant to Rule 8312) may not provide an update or context to an event via the Form U4. Instead, such individuals may submit a Broker Comment to provide an update or context to information that is disclosed through BrokerCheck.

²² See FINRA Rule 8312(b)(7), and proposed conforming revisions discussed *infra* in this rule filing.

corresponding changes to the reporting requirements currently found in NASD Rule 3070 and Incorporated NYSE Rule 351 would be warranted.²³

Proposed Revisions To Clarify the Manner in Which Individuals and Firms Must Report Sales Practice Violations Alleged Against Registered Persons

The proposed rule change would make additional revisions to Questions 14I on Form U4 and 7E on Form U5 to further clarify the manner in which individuals and firms must report allegations of sales practice violations against registered persons made through arbitration or civil litigation or through consumer-initiated complaints.

Question 14I on Form U4 currently elicits information about allegations of sales practice violations for individuals who were named in arbitration or civil litigation (in Question 14I(1)) and for individuals who were the subject of consumer-initiated complaints (in Questions 14I(2) and (3)). Questions 14I(2) and (3) elicit information for consumer-initiated complaints “not otherwise reported under Question 14I(1).”²⁴ Similarly, Question 7E on Form U5 currently elicits information about allegations of sales practice violations for individuals who were named in arbitration or civil litigation (in Question 7E(1)) and for individuals who were the subject of consumer-initiated complaints “not otherwise reported under Question 7E(1)” (in Questions 7E(2) and (3)).²⁵ To clarify the methods of reporting allegations of sales practice violations, the rule proposal would eliminate as unnecessary the references to Question 14I(1) in Questions 14I(2) and (3) on Form U4 and the references to Question 7E(1) in Questions 7E(2) and (3).²⁶

²³ FINRA has proposed replacing NASD Rule 3070 and Incorporated NYSE Rule 351 with a single rule, proposed FINRA Rule 4530, in the Consolidated FINRA Rulebook. See *Regulatory Notice* 08–71 (November 2008).

²⁴ See Exhibit 3a.

²⁵ See Exhibit 3c.

²⁶ Question 14I(2) in Form U4 and Question 7E(2) in Form U5 would also add the words “written or oral” to describe an investment-related, consumer-initiated complaint, to reflect FINRA’s longstanding interpretation that, for purposes of this question, a consumer-initiated complaint can be in either written or oral format. In addition, the Customer Complaint/Arbitration/Civil Litigation DRPs would elicit whether a complaint is oral or written. The references in Question 14I(3) of Form U4 and Question 7E(2) of Form U5 to “written complaint” would remain unchanged.

¹⁸ For text of the proposed rule changes to Forms U4 and U5, see Exhibits 3a and 3c, respectively.

¹⁹ In this regard, the proposed rule change also would amend the Instructions to the Forms, noting that the revised questions should be answered “yes” if the individual was not named as a respondent/defendant but (1) the Statement of

Proposed Revisions To Raise the Monetary Threshold for Reporting Customer Complaints, Arbitrations or Litigation From \$10,000 to \$15,000 on the Forms and Conforming Change to FINRA Rule 8312

Currently, Question 14I(1)(c) on the Form U4 and Question 7E(1)(c) on the Form U5 require consumer-initiated arbitration or litigation to be reported only when they have been settled for \$10,000 or more. Similarly, Question 14I(2) on Form U4 and Question 7E(2) on Form U5 require customer complaints to be reported only when they have been settled for \$10,000 or more. Recognizing that the monetary threshold for settlements of customer complaints, arbitrations or litigation was set in 1998²⁷ and has never been adjusted for inflation, the proposed rule change would raise the existing settlement amount to \$15,000 to reflect more accurately the business criteria (including the cost of litigation) firms consider when deciding to settle claims. This change would be reflected in the Forms, including in Question 14I on Form U4 and Question 7E on Form U5 as discussed *supra*.

In addition, the proposed rule change would amend the description of "Historic Complaints" in FINRA Rule 8312 to conform to the revised monetary threshold for reporting of settlements of customer complaints, arbitrations or litigation in the Forms. Currently, Historic Complaints refer to the information last reported on registration forms relating to customer complaints that are more than two years old and that have not been settled or adjudicated, and customer complaints, arbitrations or litigation settled for an amount less than \$10,000 and are no longer reported on a registration form. Under FINRA Rule 8312, FINRA will release Historic Complaints under BrokerCheck where: (1) Any such 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 ten years old; and (3) the person has a total of three or more currently disclosable regulatory actions, currently reported customer complaints, arbitrations or litigation, or Historic Complaints (subject to the limitation that they became a Historic Complaint on or after March 19, 2007), or any combination thereof.

In light of the proposed amendment to raise the monetary threshold for reporting customer complaints, arbitrations or litigation on the Forms from \$10,000 to \$15,000, the proposed rule change would make a conforming amendment to FINRA Rule 8312 such that Historic Complaints would include customer complaints, arbitrations or litigation that have been settled for less than \$10,000 prior to the effective date of the proposed rule change (subject to the limitation that they became a Historic Complaint on or after March 19, 2007), or settled for less than \$15,000 on or after the effective date of the proposed rule change. As a result, FINRA would continue to release through BrokerCheck those customer complaints, arbitrations or litigation settled for more than \$10,000 but less than \$15,000 prior to the effective date of the proposed rule change. Customer complaints, arbitrations or litigation settled for less than \$15,000 on or after the effective date of the proposed rule change would be considered Historic Complaints for purposes of BrokerCheck.

Proposed Revisions To Clarify the Definition of "Date of Termination" in Form U5 and To Allow Firms To Amend the "Date of Termination" and "Reason for Termination"

FINRA proposes clarifying revisions to the definition of "date terminated" in Form U5. The current definition provides that the date terminated means the "effective date of the termination of the registration or, in cases where registration has not yet been made effective, the date of the withdrawal of the application for registration." However, as stated in Article V, Section 3(a) of the FINRA By-Laws, the authority to declare the effective date of termination for purposes of FINRA registration resides with FINRA.²⁸ As a result, the proposed amendments to Form U5 would clarify that the date to be provided by a firm in the "Date of Termination" field is the "date that the firm terminated the individual's association with the firm in a capacity for which registration is required." The proposed amendments further would clarify that, in the case of full terminations, the "Date of Termination" provided by the firm will continue to be used by FINRA and other SROs and jurisdictions to determine whether an individual is required to requalify by

examination or obtain an appropriate waiver upon reassociating with a firm.²⁹

With respect to the "effective date" of terminations, the proposed amendments to the Form U5 would clarify that the SRO/jurisdiction determines the effective date of termination of registration. In general, for purposes of retention of jurisdiction by FINRA,³⁰ FINRA considers the effective date of termination to be the date that the Form U5 is received by CRD (generally the date of filing of the Form U5 with CRD).³¹

Currently, firms are explicitly precluded from changing the "Date of Termination" and "Reason for Termination" sections of Form U5 absent a court order or an arbitration award that meets certain criteria. Since 2000, firms have had the ability to add a Registration Comment (essentially, a note on the terminated person's CRD record) to report an error in connection with the filing of either the reason for, or date of, termination. The Registration Comment explains the reason for the change, but does not amend the original reason for, or date of, termination.

After reviewing the Registration Comments reported by firms since 2000, FINRA believes that it would be beneficial for firms and regulators to permit firms to amend the date of, or reason for, termination because (1) the majority of requests to change a date of, or reason for, termination are a result of clerical errors made by a firm; and (2) the inaccurate information originally

²⁹ FINRA also proposes to clarify that, for partial terminations, a firm is only required to provide a "Date of Termination" when submitting post-dated termination requests during the renewal period (i.e., to effect a termination of registration at year-end). For all other partial terminations, the "Date of Termination" will be an optional field for firms to complete.

³⁰ Article 5, Section 4 of the FINRA By-Laws provides that FINRA generally retains initial jurisdiction over a person whose association with a member has been terminated for purposes of a complaint under FINRA's rules based upon conduct that commenced prior to termination for a period of two years after the effective date of termination of registration.

³¹ FINRA notes that Article 5, Section 3(a) states that termination of registration shall not take effect so long as any complaint or action under FINRA's rules is pending against a member and to which complaint or action such associated person is also a respondent or so long as any complaint or action is pending against such person individually under FINRA's rules. See also *In re Donald M. Bickerstaff*, 52 S.E.C. 232, 233 (April 17, 1995) (noting that, absent a pending complaint or an examination in process, termination of registration became effective upon receipt of the Form U5 termination notice). FINRA further notes that in the case of post-dated requests for full termination during the renewal period, for purposes of retention of jurisdiction by FINRA, the effective date of termination generally will be the (post-dated) date of termination provided by the firm and not the date that CRD received the form.

²⁷ See, e.g., Securities Exchange Act Release No. 39562 (January 20, 1998), 63 FR 3942 (January 27, 1998); *Special NASD Notice to Members* 98-27, "Interim Forms U-4 and U-5 Go Into Effect; Interim Form BD Also Approved" (March 1998).

²⁸ Similarly, other SROs and jurisdictions generally determine the effective date of termination of registration for their purposes.

reported currently remains on a person's CRD record unless the person is able to obtain an arbitration award or a court order directing that the original entry be expunged or changed.

As a result, the proposed rule change would permit a firm to amend the "Date of Termination" and "Reason for Termination" fields in a Form U5 it previously submitted, but would require the firm to provide a reason for each amendment. To monitor such amendments, including those reporting terminations for cause, FINRA would notify other regulators and the broker-dealer with which the person is currently associated (if the person is associated with another firm) when a date of termination or reason for termination has been amended. As proposed, the original date of termination or reason for termination would remain in the CRD system in form filing history. Importantly, any changes to the "Date of Termination" filed by firms would not affect the manner in which FINRA determines whether an individual is required to requalify by examination or obtain an appropriate waiver upon reassociating with another firm or whether FINRA has retained jurisdiction over the individual. Rather, FINRA would continue to determine such periods based on the original "Date of Termination" provided by the firm and/or the date that the original filing was processed by CRD, respectively, as further described above.³²

Proposed Technical and Conforming Changes to the Forms

The proposed rule change would make various technical and conforming changes to the Forms. These changes are generally intended to clarify the information elicited by regulators and to facilitate reporting by firms and regulators. The proposed rule change would convert certain "free text" fields to discrete fields on the DRPs of Forms U4 and U5. These revisions to the DRPs generally would not change the information currently elicited, but would change the presentation of the

DRPs.³³ For example, the DRPs would enable filers to provide more specific information utilizing pre-established picklists for the following types of information:

- Product type;
- Sanction/disposition; and
- Status of the sanction (*i.e.*, whether the sanction remains in effect at the time of filing).

FINRA anticipates this format would elicit additional details from respondents at the initial filing stage. This format change would have attendant benefits. For example, a completeness check would prevent a firm from submitting a filing without having provided information in response to the allegations and disposition detail questions which, in turn, should reduce the need for additional communications between FINRA staff and firms that occur when DRP filings are incomplete, and generally should make the filing process more efficient.

The proposed rule change also would add to Section 7 of Form U5 (Disclosure Questions) an optional "Disclosure Certification Checkbox" that would enable firms to affirmatively represent that all required disclosure for a terminated person has been reported and the record is current at the time of termination. Checking the checkbox would allow the firm to bypass the process of re-reviewing a person's entire disclosure history for purposes of filing Form U5 in situations in which disclosure is up to date at the time of the person's termination.

The proposed change would make additional technical changes to the Forms. For example, it would incorporate the definition of "found" from the Form U4 Instructions into the Form U5 instructions. In addition, it would provide more detailed instructions regarding the reporting of an internal review (conducted by the firm) to clarify that employment-related disputes between a registered person and the firm should not be reported in Question 7B. It would also clarify how an individual may file comments to an Internal Review DRP (via "Part II" of that DRP) to emphasize that the individual's signature is required (in Section 8 of that DRP).

FINRA will announce the effective date of the proposed rule change in a

Regulatory Notice. FINRA anticipates including the proposed changes in a software release to the CRD system in the second quarter of 2009.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,³⁴ 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 is designed to accomplish these ends by making changes to the Forms that will address regulatory concerns and to ease, clarify or facilitate industry reporting requirements. The proposed rule change, among other things, would enable FINRA and other regulators to identify more readily those persons subject to a statutory disqualification based on willful violations. It also would require firms to report allegations of sales practice violations made in arbitration claims and civil lawsuits against registered persons who are not named as parties in those proceedings, thereby eliminating existing inconsistencies regarding the reporting of alleged sales practice violations by registered persons.

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

In April 2008, FINRA staff published *Regulatory Notice* 08-20 requesting comment on certain of the proposed changes to the Forms.³⁵ A copy of the *Regulatory Notice* is attached as Exhibit 2a. The comment period ended on May 27, 2008. FINRA received 36 comments

³² With respect to the requalification period, FINRA is not proposing to allow an amended date of termination to systematically reset the two-year window in CRD. Instead, should an individual be notified that he or she is required to requalify by examination as a result of an erroneous date of termination that was subsequently amended by a firm, the individual would be required to submit a request for a waiver, and FINRA would consider the amended date of termination in connection with its review of the request. FINRA does not expect this situation to occur often; moreover, FINRA would expect to review such requests in an expeditious manner.

³³ As discussed *supra*, proposed Form U5 Regulatory Action DRP would add Question 12C that corresponds to proposed Form U4 Questions 14C(6-8) and 14E(5-7). The Forms U4 and U5 Regulatory Action DRPs would be expanded to ask details with respect to fines and penalties, including whether the money has been paid, is subject to a payment plan, or has been waived.

³⁴ 15 U.S.C. 78o-3(b)(6).

³⁵ *Regulatory Notice* 08-20 requested comment on revisions to the Forms regarding reporting of allegations of sales practice violations against registered persons made in litigations or arbitrations in which the registered person is not a named party; raising the monetary threshold for reporting of settlements of customer complaints, arbitrations and litigations; enabling firms to amend the date of and reason for termination on the Form U5; and certain of the technical and conforming changes. It did not request comment on the proposed rule change regarding willful violations, nor to the proposed conforming change to FINRA Rule 8312. See Exhibit 2a.

in response to the *Regulatory Notice*.³⁶ A list of the commenters in response to the *Regulatory Notice* is attached as Exhibit 2b, and copies of the comment letters received in response to the *Regulatory Notice* are attached as Exhibit 2c. Commenters generally supported the proposed changes to the Forms. A summary of the comments relevant to the issues addressed by the proposed rule change is provided below.

(a) Proposed Revisions To Elicit Reporting of Allegations of Sales Practice Violations Against Registered Persons Made in Arbitrations or Litigation in Which the Registered Person Is Not a Named Party

Thirty-four commenters commented on the proposal regarding eliciting reporting of allegations of sales practice violations against registered persons made in litigation or arbitrations in which the registered person is not named as a party.³⁷ The majority of commenters (26) supported or did not oppose this proposed change;³⁸ a minority (7) opposed it.³⁹ One commenter supported the part of the proposal that would require firms to report allegations made in an arbitration claim where a registered person is identified by name (in the Statement of Claim text) but did not support such reporting where the registered person is not identified by name.⁴⁰ Generally, commenters supporting the proposal stated that allegations of sales practice violations made in arbitration claims were no different than those made in written customer complaints, and therefore should be treated the same for reporting purposes.⁴¹ Many of the same commenters viewed the proposal as “closing a loophole,” and noted that

investors would benefit by having this type of information publicly available.⁴²

The commenters opposing the proposed changes generally raised concerns about fairness to registered persons regarding potential damage to their reputations from the reporting of unadjudicated allegations, and possible lack of a meaningful opportunity to respond to such allegations.⁴³ While FINRA appreciates the concerns raised regarding the potential harm to a registered person's reputation based on allegations of sales practice violations made in an arbitration claim, FINRA believes that such allegations, which are made in writing and filed in a formal proceeding, are not appreciably different than those made in written customer complaints, and may have even more substance. Accordingly, such allegations should be treated in the same manner that customer complaints are currently treated in the Uniform Forms.

Several commenters supported the proposed change, but expressed concerns about the burden on firms to identify the “subject of” the allegations and whether, and under what circumstances, registered persons would be afforded an opportunity to remove such matters from the CRD.⁴⁴ Several commenters expressed concerns about the ability of firms to discern whether reporting as to a particular person was required based on the allegations in a claim.⁴⁵ One commenter supported the reporting of such matters only after there was an adjudication or settlement in favor of the claimant, but opposed requiring the reporting of any such matter while it was pending.⁴⁶ The commenter also expressed concerns about a firm's ability to report the allegations within the 30-day reporting period.⁴⁷ Several commenters raised questions about other fact-specific scenarios, and requested that FINRA provide interpretive guidance to assist firms in determining reporting practices should the proposed questions be adopted.⁴⁸ In addition, one commenter recommended that, in conjunction with

the proposal, FINRA should consider adopting reasonable measures to promote responsible pleading.⁴⁹ Specifically, the commenter suggested that FINRA apprise customer claimants and their counsel of the significant consequences of making allegations against a registered person and consider requiring that claimants and their attorneys attest that, at the time an arbitration claim is filed, there is a good faith basis for the claims and allegations therein.

In response to these comments, FINRA has included instructions regarding reporting, and staff is prepared to develop additional guidance, if necessary, to assist firms in determining when reporting is required under the proposed questions. FINRA further notes that there is an existing process for requesting expungement relief under NASD Rule 2130. Moreover, while FINRA believes that the existing 30-day timeframe for reporting is sufficient, FINRA staff intends to work with firms that may need additional time because of extraordinary circumstances on a case-by-case basis. With respect to the comment that FINRA apprise customers and their representatives of the consequences of making allegations against a registered person, FINRA appreciates the commenters' concerns but must consider that suggestion in the context of the potential chilling effect such an action may have on the filing of legitimate customer claims.⁵⁰ Accordingly, FINRA believes that it would not be appropriate to implement the suggestion at this time.

(b) Proposed Revisions To Raise the Monetary Threshold for Reporting Customer Complaints, Arbitrations or Litigation From \$10,000 to \$15,000 on the Forms and Conforming Change to FINRA Rule 8312

Thirteen commenters responded to the proposal to raise the threshold for reporting of settlements. Nine of the commenters supported raising the threshold from \$10,000 to \$15,000 to account for increased business costs (legal and economic), and to align the threshold with the reporting requirements in NASD Rule 3070 (Reporting Requirements).⁵¹ Of the four commenters who did not support this proposal, three suggested raising the

³⁶ See Exhibits 2b and 2c.

³⁷ Aidikoff; ARM; Bakhtiari; Brecek & Young; Brown & Brown; Cantella; Caruso; FMSBonds; FSI; Greene/Woodforest; Gross/Pace; Harrison; Jacobson/Cornell; Lazaro/St. John's; Lipner/Baruch; MassMutual; MWA; NASAA; Nationwide; Nelson; NPB; NPH; Pension; PIABA; ProEquities; RND; Sadler; SIFMA; Steiner; Stephens; R. Long/Wachovia; P. Spitzer/Wachovia; Williams/Woodforest; WSA. The Commission notes that Cambridge also commented on this section.

³⁸ Aidikoff; Bakhtiari; Brecek & Young; Cantella; Caruso; Gross/Pace; Harrison; Jacobson/Cornell; Lazaro/St. John's; Lipner/Baruch; Mass Mutual; NASAA; Nationwide; NPB; NPH; Pension; PIABA; RND; Sadler; SIFMA; Stephens; Steiner; P. Spitzer/Wachovia; WSA.

³⁹ Brown & Brown; FMSBonds; FSI; MWA; Nelson; ProEquities; R. Long/Wachovia.

⁴⁰ ARM.

⁴¹ Aidikoff; Bakhtiari; Caruso; Gross/Pace; Harrison; Jacobson/Cornell; Lazaro/St. John's; Lipner/Baruch; Sadler; Steiner; Stephens.

⁴² Aidikoff; Bakhtiari; Caruso; Gross/Pace; Harrison; Jacobson/Cornell; Lazaro/St. John's; Lipner/Baruch; PIABA; Steiner.

⁴³ Brown & Brown; FSI; Greene/Woodforest; MWA; Nelson; ProEquities; R. Long/Wachovia; Williams/Woodforest.

⁴⁴ ARM; Brecek & Young; Mann; MassMutual; NPH; Pension; RND; SIFMA; R. Long/Wachovia; WSA.

⁴⁵ ARM; Brecek & Young; Cantella; RND; SIFMA; R. Long/Wachovia; WSA.

⁴⁶ ARM.

⁴⁷ ARM.

⁴⁸ ARM; Brecek & Young; Cantella; MassMutual; NPH; Pension; ProEquities; RND; SIFMA; R. Long/Wachovia; WSA.

⁴⁹ SIFMA.

⁵⁰ SIFMA.

⁵¹ Cambridge; FSI; Gross/Pace; Jacobson/Cornell; Lazaro/St. John's; NASAA; Nationwide; NPH; ProEquities.

threshold to a higher amount,⁵² and one suggested requiring the reporting of all settlements regardless of dollar amount.⁵³

FINRA believes that a dollar threshold within the questions is appropriate to address those instances where matters are settled for a nuisance value; at the same time, FINRA is not persuaded by the comments suggesting that an increase to greater than \$15,000 is warranted at this time.

(c) Proposed Revisions to Form U5 To Allow Firms To Amend the "Reason for Termination" and the "Date of Termination"

Eight commenters responded to the proposal to allow firms to amend the "Reason for Termination" and "Date of Termination."⁵⁴ Six commenters affirmatively supported this proposal on the basis that it would result in more accurate information being reported to regulators and recorded in the CRD system.⁵⁵ Of the two commenters that generally opposed this proposal, one opposed allowing firms to amend the Reason for Termination or Date of Termination except in cases of clerical error.⁵⁶ The other commenter supported allowing changes to the Date of Termination, but opposed allowing changes to the Reason for Termination based on a concern about the potential for abuse by firms.⁵⁷

FINRA believes that a firm should have the ability to correct inaccurate information that it filed on a Form U5 regarding terminations through an amendment to that original Form filing. FINRA also believes that limiting such changes to clerical errors is unnecessary in light of: (1) the attendant requirement that firms provide a reason for the Form U5 amendment; and (2) the monitoring of such amendments by FINRA and other regulators. FINRA believes that such monitoring, in particular, will protect against any potential misuse by firms.

(d) Proposed Technical and Conforming Changes to the Forms

No commenters opposed the proposed technical and conforming changes to the Forms, and four commenters affirmatively supported them.⁵⁸

III. Date of Effectiveness of the Proposed Rule Change and Timing of 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. Please include File Number SR-FINRA-2009-008 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-2009-008. 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, on official business days between the hours of 10 a.m. and 3 p.m. Copies

of the filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2009-008 and should be submitted on or before April 17, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁹

Florence E Harmon,

Deputy Secretary.

[FR Doc. E9-6830 Filed 3-26-09; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59611; File No. SR-PHLX-2009-22]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change by NASDAQ OMX PHLX, Inc. Relating to Administration of Certain Rules in Respect of Index Data Dissemination

March 20, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4² thereunder, notice is hereby given that on March 16, 2009, NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

The Exchange proposes to reflect in the administration of its rules the expected discontinuation by the NASDAQ OMX Futures Exchange, Inc. ("NFX") of index value distribution over NFX's Market Data Distribution Network ("MDDN"). Index values will continue to be distributed via another NASDAQ OMX data dissemination service, and the discontinuation of MDDN index value dissemination will not have any impact on the listing or trading of any instruments on the

⁵² ARM; R. Long/Wachovia; Williams/Woodforest.

⁵³ PIABA.

⁵⁴ ARM; FSI; Gross/Pace; Jacobson/Cornell; NASAA; Nationwide; PIABA; ProEquities.

⁵⁵ ARM; FSI; Gross/Pace; NASAA; Nationwide; ProEquities.

⁵⁶ Jacobson/Cornell.

⁵⁷ PIABA.

⁵⁸ FSI; Gross/Pace; NASAA; Nationwide.

⁵⁹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.