OMB APPROVAL	
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Estimated average burden hours per response	38

Page 1 of 200

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
Form 19b-4

File No. SR - 2009 - 040
Amendment No.

Proposed Rule Change by Financial Industry Regulatory Authority

Pursuant to Rule 19b-4 under the Securities Exchange Act of 1934

Initial	Amendment	Withdrawal	Section 19(b)(2)	Section 19(b)(3)(A)	Section 19(b)(3)(B)
☑	☐	☐	☑	☐	☐

Pilot ☐

Extension of Time Period for Commission Action ☐

Date Expires

Rule

- ☐ 19b-4(f)(1)
- ☐ 19b-4(f)(2)
- ☐ 19b-4(f)(3)
- ☐ 19b-4(f)(4)
- ☐ 19b-4(f)(5)
- ☐ 19b-4(f)(6)

Exhibit 2 Sent As Paper Document ☐

Exhibit 3 Sent As Paper Document ☐

Description

Provide a brief description of the proposed rule change (limit 250 characters).

Proposed Rule Change to Adopt FINRA Rule 2380 to Limit the Leverage Ratio Offered by Broker-Dealers for Certain Forex Transactions

Contact Information

Provide the name, telephone number and e-mail address of the person on the staff of the self-regulatory organization prepared to respond to questions and comments on the proposed rule change.

First Name: Matthew Last Name: Vitek
Title: Counsel
E-mail: matthew.vitek@finra.org
Telephone: (202) 728-8156 Fax: (202) 728-8264

Signature

Pursuant to the requirements of the Securities Exchange Act of 1934,

has duly caused this filing to be signed on its behalf by the undersigned thereunto duly authorized officer.

Date 06/04/2009

By Gary L. Goldsholle (Name)

Vice President and Associate General Counsel (Title)

NOTE: Clicking the button at right will digitally sign and lock this form. A digital signature is as legally binding as a physical signature, and once signed, this form cannot be changed.

Gary Goldsholle,

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

For complete Form 19b-4 instructions please refer to the EFFS website.

Form 19b-4 Information

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The self-regulatory organization must provide all required information, presented in a clear and comprehensible manner, to enable the public to provide meaningful comment on the proposal and for the Commission to determine whether the proposal is consistent with the Act and applicable rules and regulations under the Act.

Exhibit 1 - Notice of Proposed Rule Change

Add Remove View

The Notice section of this Form 19b-4 must comply with the guidelines for publication in the Federal Register as well as any requirements for electronic filing as published by the Commission (if applicable). The Office of the Federal Register (OFR) offers guidance on Federal Register publication requirements in the Federal Register Document Drafting Handbook, October 1998 Revision. For example, all references to the federal securities laws must include the corresponding cite to the United States Code in a footnote. All references to SEC rules must include the corresponding cite to the Code of Federal Regulations in a footnote. All references to Securities Exchange Act Releases must include the release number, release date, Federal Register cite, Federal Register date, and corresponding file number (e.g., SR-[SRO]-xx-xx). A material failure to comply with these guidelines will result in the proposed rule change being deemed not properly filed. See also Rule 0-3 under the Act (17 CFR 240.0-3)

Exhibit 2 - Notices, Written Comments, Transcripts, Other Communications

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Exhibit Sent As Paper Document ☐

Copies of notices, written comments, transcripts, other communications. If such documents cannot be filed electronically in accordance with Instruction F, they shall be filed in accordance with Instruction G.

Exhibit 3 - Form, Report, or Questionnaire

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Exhibit Sent As Paper Document ☐

Copies of any form, report, or questionnaire that the self-regulatory organization proposes to use to help implement or operate the proposed rule change, or that is referred to by the proposed rule change.

Exhibit 4 - Marked Copies

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The full text shall be marked, in any convenient manner, to indicate additions to and deletions from the immediately preceding filing. The purpose of Exhibit 4 is to permit the staff to identify immediately the changes made from the text of the rule with which it has been working.

Exhibit 5 - Proposed Rule Text

Add Remove View

The self-regulatory organization may choose to attach as Exhibit 5 proposed changes to rule text in place of providing it in Item I and which may otherwise be more easily readable if provided separately from Form 19b-4. Exhibit 5 shall be considered part of the proposed rule change.

Partial Amendment

Add Remove View

If the self-regulatory organization is amending only part of the text of a lengthy proposed rule change, it may, with the Commission's permission, file only those portions of the text of the proposed rule change in which changes are being made if the filing (i.e. partial amendment) is clearly understandable on its face. Such partial amendment shall be clearly identified and marked to show deletions and additions.

1. Text of Proposed Rule Change

(a) Pursuant to the provisions of Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),[1] Financial Industry Regulatory Authority, Inc. ("FINRA") is filing with the Securities and Exchange Commission ("SEC" or "Commission") a proposed rule change 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 1.5 to 1; and (2) withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 1.5 to 1.

Below is the text of the proposed rule change. Proposed new language is underlined.

* * * * *

2300. SPECIAL PRODUCTS

* * * * *

2380. Leverage Limitation for Retail Forex

(a) Leverage Ratio Limitation

No member shall permit a customer to initiate any forex position with a leverage ratio greater than 1.5 to 1. In addition, 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 1.5 to 1.

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[1] 15 U.S.C. 78s(b)(1).

(b) Definitions

(1) The term "forex" means a foreign currency spot, forward, future option or any other agreement, contract, or transaction in foreign currency that is:

(A) offered or entered into on a leveraged basis, or financed by the offeror, the counterparty, or a person acting in concert with the offeror or counterparty on a similar basis;

(B) offered to or entered into with persons that are not eligible contract participants as defined in Section 1a(12) of the Commodity Exchange Act; and

(C) not executed on or subject to the rules of a contract market registered pursuant to Section 5 of the Commodity Exchange Act, a derivatives transaction execution facility registered pursuant to Section 5a of the Commodity Exchange Act, a national securities exchange registered pursuant to Section 6(a) of the Securities Exchange Act of 1934, or a foreign board of trade.

(2) The term "leverage ratio" is the fraction represented by the numerator which is the notional value of a forex transaction, and the denominator, which is the amount of good faith deposit or account equity required by the customer for a forex position.

• • • Supplementary Material: ----------

.01 Leverage Ratio Example. In order to meet the leverage ratio limitations of Rule 2380(a), a customer must deposit at least 2/3 of the notional value of the forex contract.

For example, a customer entering into a forex contract representing $750,000 of a foreign currency must deposit $500,000 to achieve a leverage ratio of 1.5 to 1.

* * * * *

(b) Not applicable.

(c) Not applicable.

2. Procedures of the Self-Regulatory Organization

At its meeting on December 2, 2008, the FINRA Board of Governors authorized the filing of the rule change with the SEC. No other action by FINRA is necessary for the filing of the proposed rule change.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Regulatory Notice announcing Commission approval.

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

(a) Purpose

FINRA is proposing to limit the leverage ratio offered by broker-dealers for certain forex transactions to no more than 1.5 to 1. The proposed rule change addresses forex transactions in the lightly regulated, 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.[2] 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.[3] 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 1.5 to 1. Thus, at the time a customer initiates a forex position, the customer must deposit at least 2/3 of the notional value of the contract. Using the example in supplementary material .01, a customer entering into a forex contract representing $750,000 of a foreign currency must have an initial deposit of at least $500,000. 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 1.5 to 1." This provision is intended to prevent a customer from depositing funds at the initiation of the forex position and then immediately

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2 Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-378 (2001).

3 See CFTC Reauthorization Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008).

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.

The limitation on a customer's ability to withdraw funds that would cause the leverage ratio to exceed 1.5 to 1 differs from a maintenance margin requirement in that an adverse movement in a customer's forex contract will not necessitate the deposit of additional funds. The intra-day and day-to-day pricing changes of a forex contract may cause a customer to have a leverage ratio greater than 1.5 to 1. So long as a customer does not withdraw funds from those initially used to establish the position, a leverage ratio may exceed 1.5 to 1. FINRA considered imposing a maintenance margin requirement but determined that the level of initial deposit was sufficiently high that a maintenance margin requirement was not necessary.

The proposed rule change does not impact existing rules addressing the necessary customer funds to enter into and maintain a forex position. For example, Regulation T does not have margin requirements for forex and allows a customer to obtain nonpurpose credit in a good faith account to effect and carry transactions in forex.[4] However, it should be noted that any funds deposited in a margin account to maintain a forex position or any account equity derived from a forex position may not be used to purchase securities in that account.

Paragraph (b) of the proposed rule change establishes the key definitions. The term "forex" is defined to mean a foreign currency spot, forward, future, option or any

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4 12 CFR 220.6.

other agreement, contract, or transaction in foreign currency that: (1) is offered or entered into on a leveraged basis, or financed by the offeror, the counter party, or a person acting in concert with such person, (2) offered to or entered into with persons that are not eligible contract participants;[5] and (3) not executed on or subject to the rules of a contract market,[6] derivatives transaction execution facility,[7] national securities exchange,[8] or foreign board of trade.[9] FINRA is proposing an amended version of the definition of forex from what appeared in Regulatory Notice 09-06 by adding the terms "spot" and "forward" in order to clarify that the leverage limitation will apply to foreign currency transactions no matter how they are legally classified. FINRA's definition of forex is similar to the National Futures Association's ("NFA") definition of forex[10] and to amended Section 2(c)(2) of the Commodity Exchange Act which sets forth the scope of

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5 "Eligible Contract Participants" ("ECPs") include regulated entities such as financial institutions, insurance companies, investment companies and broker-dealers. Certain corporations and individuals qualify as ECPs by meeting the requirements under the statute. See 7 U.S.C. 1a(12).

6 "Contract markets" are markets that are designated by the CFTC that meet the criteria in Section 5 of the Commodity Exchange Act. See 7 U.S.C. 7.

7 "Derivatives transaction execution facilities" ("DTEFs") are CFTC-registered trading facilities that limit access primarily to institutional or otherwise eligible traders and/or limit the products traded. See 7 U.S.C. 7a.

8 A "national securities exchange" is a securities exchange that has registered with the SEC under Section 6 of the Exchange Act. See 15 U.S.C. 78f.

9 A "foreign board of trade" means any organized exchange or trading facility located outside of the United States.

10 NFA By-Law 1507(b).

of the Commodity Futures Trading Commission's ("CFTC") rulemaking jurisdiction.[11] The FINRA definition, however, does not contain an exclusion for certain spot and forward contracts found in the NFA and CFTC definitions, which were included due to CFTC jurisdictional limitations.[12]

Paragraph (b) also defines the term "leverage ratio" to mean the fraction represented by the numerator which is the notional value of a forex transaction, and the denominator, which is the amount of good faith deposit or account equity required from the customer for a forex position. For example, if the notional value of a forex contract is $250,000, and the customer deposits $200,000, the leverage ratio would be 1.25 to 1.

As noted in Item 2 of this filing, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Regulatory Notice announcing Commission approval.

(b) Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,[13] 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

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11 See CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(C)(i)(I)).

12 NFA By-Law 1507(b) and CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(C)(i)(II)).

13 15 U.S.C. 78o–3(b)(6).

interest. FINRA believes that the proposed rule change is consistent with the provisions of the Act noted above in that it will limit leverage ratios, requiring greater initial deposits that will substantially reduce the likelihood that any small adverse percentage change in the exchange rate of a foreign currency will cause an investor's funds to be wiped out. Moreover, limiting the leverage ratios is intended to reduce the risks of excessive speculation.

4. 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.

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

The proposed rule change was published for comment in FINRA Regulatory Notice 09-06 (January 2009). FINRA received 109 comments in response to the Regulatory Notice. A copy of the Regulatory Notice is attached as Exhibit 2a, the index to the comment letters is attached as Exhibit 2b and copies of the comment letters received in response to the Regulatory Notice are attached as Exhibit 2c.[14]

Of the 109 comment letters received, none were in favor of the proposed rule change and 108 were opposed; one comment letter did not express an opinion.

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[14] All references to commenters under this Item are to the commenters as listed in Exhibit 2b.

Ninety-seven of the comment letters were from individual investors who opposed FINRA's attempts to limit the amount of leverage available.[15] The central theme in these comment letters was that it was unfair to lower the leverage ratios available and that neither the government nor any regulator should inhibit an individual's freedom to invest and make money.[16] In short, they believe that they should be entitled to invest their money at whatever leverage ratio they see fit. Several of these commenters[17] argued that the proposed rule change would kill the off-exchange retail forex business or force traders to trade in foreign, less regulated markets.[18] Many of the individual investors believed

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15 Abhay, Aird, Akhras, Ali, Andrews, Arthur, Avery, Chris, Cohn, Colman, Crowley, Dallmann, Daniels, David, Day, Decker, Delfino, Doozan, Evergreen, Figlewski, Findley, Fortner, Gallagher, Gallagher 2, Getline, Goff, GoodBoy, Gray, gslatham, Gurkan, Hoepker, Howell, Hurley, Issacs, Jackal, Jackson, Jacobs, James, Jim, Johnston, Jones, Kerr, Lambert, Langin, Lannon, Lebold, Leousis, Levy, Marsh, Marshall, Muir, National Information, Nadjakov, Negus, Newhouse, Nichols, Nick, nv46, O'Moore, Otlo, Overfield, Parker, Pellot, Pena, Prime, Prindle, Quesenberry, Rajenthiran, Ramlakhan, Ramsey, Rawlins, Revolg, Rice, Richardson, L. Richardson, Rigney, Rocha, Romero, Sabo, Salatino, Shore, Sinclair, Sinclair 2, Thomlinson, Tischer, Uwins, Vern, Walker, Waratah, Weaver, Weisbloom, Wilkes, Williams, Young, Young 2, Zarlengo and Zepco.

16 Aird, Akhras, Avery, Day, Doozan, Findley, Gallagher, Gallagher 2, Getline, GoodBoy, gslatham, Jackson, Jacobs, James, Jones, Lannon, Marsh, National Information, Newhouse, nv46, O'Moore, Quesenberry, Ramsey, Revolg, Richardson, L. Richardson, Rigney, Sabo, Sinclair, Vern, Walker, Wilkes, Williams, Young and Zarlengo.

17 Abhay, Akhras, Andrews, Crowley, David, Figlewski, Fortner, Getline, GoodBoy, Gray, Gurkan, Hoepker, Lambert, Lebold, Leousis, Nick, nv46, Prindle, Ramlakhan, Rawlins, Rice, Romero, Sinclair 2, Thomlinson, Tischer, Waratah, Wilkes, Williams and Zepco.

18 Because many of these commenters are unfamiliar with FINRA and its jurisdiction, they mistakenly believe that the proposed rule change would eliminate their ability to trade forex at higher leverage levels. As the SEC is aware, FINRA's proposal would have no direct effect on the leverage ratios offered by non-broker-dealers, which currently represent the overwhelming

believed that the leverage limitations were unnecessary because they could manage their risk by trading in small amounts or by entering a stop-loss order.[19]

FINRA staff disagrees with these commenters and the laissez faire and caveat emptor approach. FINRA's mandate includes investor protection, and many of the comment letters, such as those from retirees and retail investors, are from individuals whose interests are traditionally helped by FINRA's regulatory program.[20] Taken to their logical conclusion, these commenters would likely oppose many of FINRA's existing rules (including a 25 % maintenance margin requirement, and the minimum equity of $25,000 for pattern day traders),[21] as well as the initial margin limitations in the Federal Reserve Board's Regulation T.[22] Plainly, these letters are inconsistent with the statutory and regulatory landscape established by Congress. Further, while a stop-loss order may help minimize the losses on any particular forex position, it does not address the fact that at high levels of leverage, such as 400 or 100 to 1, a very small movement in the exchange rate of a foreign currency pair trade will quickly trigger the stop-loss provision and close out the position with a loss. Similarly, the fact that a firm will close out a

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majority of participants in this industry. As of November 2008, the NFA had 26 Forex Dealer Members. See Lee Oliver, Retail FX in the U.S.: A Market in Transformation, Futures Industry Magazine, November/December 2008, at 35.

19 Abhay, Colman, Gurkan, Leousis, Sinclair 2, Weisbloom and Williams.

20 One investor noted that after finally saving up $114, he was able to start trading forex.

21 See NASD Rule 2520.

22 12 CFR 220.

customer position and not issue a margin call does not address the potential for losses resulting from such high leverage ratios.

In addition, these commenters believed that the proposal was targeted at the retail investor, while allowing larger institutional investors to have access to higher levels of leverage.[23] One commenter compared the proposed rule change to the "accredited investor" standard which he viewed as preventing the little guy from having access to the best deals.[24] Interestingly, some of those commenters who opposed the proposed rule change also acknowledged that existing levels of leverage were excessive and would not trade at these levels.[25]

Several broker-dealers submitted comment letters on the proposed rule change. Interactive Brokers, Knight, TD Ameritrade and thinkorswim believed that the investor protection benefits of the proposed rule change would not be attained as the proposal would merely divert customers' forex activities to non-FINRA members.[26] Knight urged FINRA to allow customers to trade forex at broker-dealers "on similar terms as accounts

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23 Abhay, Arthur, Chris, Goff, Gurkan, James, Jim, Kerr, Leousis, Nadjakov, Newhouse, Nichols, Prime, Prindle, Ramsey, Sinclair, Sinclair 2, Vern, Weisbloom, Williams and Young 2.

24 Avery.

25 Crowley (offered 40 to 1, yet trades at no more than 2 to 1); Dallmann (says you should not risk more than 2% of your account balance); Delfino (allow for a maximum leverage of 100 to 1); Lambert (understanding lowering the limit to 100 to 1); Parker (proposing maximum leverage of 5 to 1 or 4 to 1); Ramlakhan (the firm he trades with offers 40 to 1, but he uses no more than 16 to 1); Revolg (leverage no less than 20 to 1); Uwins (stating "400:1 is getting a little ridiculous" and favoring 100:1 or less); and Waratah (uses a true leverage of 5 to 1).

26 This view also was reflected in comment letters by FIA and FXC.

held at entities that are not regulated by FINRA." FINRA does not believe that the opportunity for customers to trade in a less-regulated environment or on more lenient terms is a compelling rationale to limit the application of the proposed rule change. Prior to soliciting comment on the proposed rule change in Regulatory Notice 09-06, FINRA reviewed the regulatory requirements of other regulators and concluded that the availability of such high levels of leverage was the crux of the problem faced by investors. FINRA acknowledges that different regulators may choose to pursue their regulatory mandate in separate ways; however, FINRA is not compelled to follow the standards adopted by other regulators.

FIA, FXC and thinkorswim urged FINRA to use the standards articulated in Regulatory Notice 08-66 (Retail Foreign Currency Exchange) and FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), and best practices adopted by the forex community in lieu of the proposed rule change. While FINRA believes that the protections afforded investors under Regulatory Notice 08-66 and FINRA Rule 2010 are meaningful, they do not, in FINRA's view, go far enough. FXC also questioned whether FINRA has the authority to control the terms of a non-securities transaction. FINRA does not read any provisions in the Act that prohibit it from proposing rules on broker-dealer conduct relating to non-securities. The standards for the rules of a national securities association in Section 15A of the Act include the "protect[ion] of investors" irrespective of whether such activity relates to securities. Ironically, FXC's premise that FINRA Rule 2010 and Regulatory Notice 08-66 are sufficient to protect investors contradicts its assertion that FINRA does not have authority to adopt rules relating to non-securities transactions.

FIA and Interactive Brokers stated that the proposed rule change is inconsistent with congressional intent in allowing a broker-dealer to engage in an off-exchange retail forex business. While Congress authorized a class of regulated entities to engage in an off-exchange retail forex business,[27] there is nothing in the legislation to suggest that Congress intended that each regulated entity would adopt a conforming regulatory regime. Indeed, when the CFMA was adopted, Congress was well-aware of the differing regulatory regimes in the eligible entities. Moreover, Congress actually contributed to the regulatory disparities in only increasing the minimum net capital required for FCMs.[28]

Interactive Brokers, Roberts & Ryan and TradeStation suggested that FINRA adopt an exclusion from the proposed rule change for FINRA members that are dually registered broker-dealer/FCMs like themselves. Both Interactive Brokers and TradeStation stated that dual registrants will be subject to oversight by the CFTC and/or NFA. FINRA believes Interactive Brokers and TradeStation are misreading the CEA and the scope of the NFA's rules. The CEA specifically states that the CFTC's jurisdiction over off-exchange retail forex applies only to FCMs that are not also a registered broker-dealer.[29] Similarly, NFA exempts from its Forex Dealer Members entities that are a member of a national securities association.[30] Thus, Interactive Brokers' and TradeStation's off-exchange retail forex business operate outside the ambit of the CFTC

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27 See supra note 5.

28 CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(B)).

29 CFTC Reauthorization Act of 2008, 1301 (to be codified at 7 U.S.C. 2(c)(2)(B)(i)(II)(cc)(AA)).

30 NFA By-Law 306.

and NFA rules tailored to forex. It is not sufficient for regulatory purposes that the CTFC and NFA can enforce their books and records and general anti-fraud provisions. Moreover, even if Interactive Brokers and TradeStation were to voluntarily submit to the NFA's jurisdiction for purpose of applying its off-exchange retail forex rules, FINRA would still have concerns about the level of leverage provided in what is a joint broker-dealer/FCM.

Interactive Brokers, thinkorswim and TradeStation also argued that the proposed rule change will disadvantage combined broker-dealer/FCMs. FINRA agrees that conducting an off-exchange retail forex business in a combined broker-dealer will subject the firm to a different regulatory regime than if the business were conducted in a separate FCM. Such differences exist today in the application of FINRA Rule 2010 and NASD Rule 2210 to joint broker-dealer/FCMs. FINRA also notes that joint broker-dealer/FCMs are in many other ways operating in a less regulated environment inasmuch as they operate outside of the CFTC and NFA rules on forex. However, the observation that either another regulatory scheme or practices occurring outside of any regulatory scheme allow business in retail forex at greater leverage levels is neither a compelling reason for FINRA to mandate a standard less than that deemed necessary by FINRA for investor protection nor does it demonstrate a deficiency for meeting the elements of approval of this proposed rule change under the Act.

Several commenters[31] suggested that disclosure about the risks of leverage, or the actual leverage, in a particular transaction would be an effective alternative to the

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[31] Dallmann, Hurley, Rocha and Young.

proposed rule change. FINRA disagrees that disclosure alone is an effective regulatory solution. We also note that Regulatory Notice 08-66 already requires disclosures of the risks of forex trading and the risks and terms of leveraged trading.[32] SIFMA suggested that FINRA adopt a definition of retail customer. FINRA disagrees and believes that the reference to the "eligible contract participant" standard is most appropriate for the proposed rule change as that is the terminology used in the federal legislation that permits a broker-dealer to engage in an off-exchange retail forex business. SIFMA and TD Ameritrade also requested that FINRA adopt a hedging exemption to allow customers to hedge foreign currency exposure from securities. FINRA does not support a hedging exemption as there are many other available alternatives (e.g., exchange traded futures and options, and other OTC products) that may be used to hedge foreign currency exposure. Furthermore, FINRA does not believe that the off-exchange retail forex markets are used for hedging and is concerned that burdens and complexities in establishing a hedging exemption will not be justified.

SIFMA also suggested that FINRA clarify whether Exchange Act Rule 15c3-3 is applicable to the deposit required to carry positions involving retail transactions in foreign exchange. FINRA will work with the SEC to publish an interpretation of Exchange Act Rule 15c3-3 that will address this question.

Finally, TD Ameritrade stated that the proposed rule change would cause broker-dealers to establish an FCM affiliate or to establish an introducing relationship with an NFA firm that offers off-exchange retail forex, and that the broker-dealer would therefore

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[32] See Regulatory Notice 08-66, page 4.

be unregulated with respect to its forex activity. FINRA disagrees and notes that Regulatory Notice 08-66 was very clear in reminding firms that broker-dealer forex activities, including referral and introducing activities, would be subject to FINRA Rule 2010.

6. Extension of Time Period for Commission Action

FINRA does not consent at this time to an extension of the time period for Commission action specified in Section 19(b)(2) of the Act.[33]

7. Basis for Summary Effectiveness Pursuant to Section 19(b)(3) or for Accelerated Effectiveness Pursuant to Section 19(b)(2)

Not applicable.

8. Proposed Rule Change Based on Rules of Another Self-Regulatory Organization or of the Commission

Not applicable.

9. Exhibits

Exhibit 1. Completed notice of proposed rule change for publication in the Federal Register.

Exhibit 2a. FINRA Regulatory Notice 09-06 (January 2009).

Exhibit 2b. Index to comments received in response to FINRA Regulatory Notice 09-06 (January 2009).

Exhibit 2c. Comments received in response to FINRA Regulatory Notice 09-06 (January 2009).

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[33] 15 U.S.C. 78s(b)(2).

EXHIBIT 1

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34- ; File No. SR-FINRA-2009-040)

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change to Adopt FINRA Rule 2380 to Limit the Leverage Ratio Offered by Broker-Dealers for Certain Forex Transactions

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 , Financial Industry Regulatory Authority, Inc. ("FINRA") 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 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 1.5 to 1; and (2) withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 1.5 to 1.

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.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

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 1.5 to 1. The proposed rule change addresses forex transactions in the lightly regulated, 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.[3] 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.[4] 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.

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3 Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-378 (2001).

4 See CFTC Reauthorization Act of 2008, Pub. L. No. 110-246, 122 Stat. 1651 (2008).

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 1.5 to 1. Thus, at the time a customer initiates a forex position, the customer must deposit at least 2/3 of the notional value of the contract. Using the example in supplementary material .01, a customer entering into a forex contract representing $750,000 of a foreign currency must have an initial deposit of at least $500,000. 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 1.5 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.

The limitation on a customer's ability to withdraw funds that would cause the leverage ratio to exceed 1.5 to 1 differs from a maintenance margin requirement in that an adverse movement in a customer's forex contract will not necessitate the deposit of additional funds. The intra-day and day-to-day pricing changes of a forex contract may cause a customer to have a leverage ratio greater than 1.5 to 1. So long as a customer does not withdraw funds from those initially used to establish the position, a leverage ratio may exceed 1.5 to 1. FINRA considered imposing a maintenance margin

requirement but determined that the level of initial deposit was sufficiently high that a maintenance margin requirement was not necessary.

The proposed rule change does not impact existing rules addressing the necessary customer funds to enter into and maintain a forex position. For example, Regulation T does not have margin requirements for forex and allows a customer to obtain nonpurpose credit in a good faith account to effect and carry transactions in forex.[5] However, it should be noted that any funds deposited in a margin account to maintain a forex position or any account equity derived from a forex position may not be used to purchase securities in that account.

Paragraph (b) of the proposed rule change establishes the key definitions. The term "forex" is defined to mean a foreign currency spot, forward, future, option or any other agreement, contract, or transaction in foreign currency that: (1) is offered or entered into on a leveraged basis, or financed by the offeror, the counter party, or a person acting in concert with such person, (2) offered to or entered into with persons that are not eligible contract participants;[6] and (3) not executed on or subject to the rules of a contract market,[7] derivatives transaction execution facility,[8] national securities

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5 12 CFR 220.6.

6 "Eligible Contract Participants" ("ECPs") include regulated entities such as financial institutions, insurance companies, investment companies and broker-dealers. Certain corporations and individuals qualify as ECPs by meeting the requirements under the statute. See 7 U.S.C. 1a(12).

7 "Contract markets" are markets that are designated by the CFTC that meet the criteria in Section 5 of the Commodity Exchange Act. See 7 U.S.C. 7.

8 "Derivatives transaction execution facilities" ("DTEFs") are CFTC-registered trading facilities that limit access primarily to institutional or otherwise eligible traders and/or limit the products traded. See 7 U.S.C. 7a.

exchange,[9] or foreign board of trade.[10] FINRA is proposing an amended version of the definition of forex from what appeared in Regulatory Notice 09-06 by adding the terms "spot" and "forward" in order to clarify that the leverage limitation will apply to foreign currency transactions no matter how they are legally classified. FINRA's definition of forex is similar to the National Futures Association's ("NFA") definition of forex[11] and to amended Section 2(c)(2) of the Commodity Exchange Act which sets forth the scope of the Commodity Futures Trading Commission's ("CFTC") rulemaking jurisdiction.[12] The FINRA definition, however, does not contain an exclusion for certain spot and forward contracts found in the NFA and CFTC definitions, which were included due to CFTC jurisdictional limitations.[13]

Paragraph (b) also defines the term "leverage ratio" to mean the fraction represented by the numerator which is the notional value of a forex transaction, and the denominator, which is the amount of good faith deposit or account equity required from the customer for a forex position. For example, if the notional value of a forex contract is $250,000, and the customer deposits $200,000, the leverage ratio would be 1.25 to 1.

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9 A "national securities exchange" is a securities exchange that has registered with the SEC under Section 6 of the Exchange Act. See 15 U.S.C. 78f.

10 A "foreign board of trade" means any organized exchange or trading facility located outside of the United States.

11 NFA By-Law 1507(b).

12 See CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(C)(i)(I)).

13 NFA By-Law 1507(b) and CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(C)(i)(II)).

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be 30 days following publication of the Regulatory Notice announcing 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,[14] 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 consistent with the provisions of the Act noted above in that it will limit leverage ratios, requiring greater initial deposits that will substantially reduce the likelihood that any small adverse percentage change in the exchange rate of a foreign currency will cause an investor's funds to be wiped out. Moreover, limiting the leverage ratios is intended to reduce the risks of excessive speculation.

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

The proposed rule change was published for comment in FINRA Regulatory Notice 09-06 (January 2009). FINRA received 109 comments in response to the

[14] 15 U.S.C. 78o–3(b)(6).

Regulatory Notice. A copy of the Regulatory Notice is attached as Exhibit 2a, the index to the comment letters is attached as Exhibit 2b and copies of the comment letters received in response to the Regulatory Notice are attached as Exhibit 2c.[15]

Of the 109 comment letters received, none were in favor of the proposed rule change and 108 were opposed; one comment letter did not express an opinion.

Ninety-seven of the comment letters were from individual investors who opposed FINRA's attempts to limit the amount of leverage available.[16] The central theme in these comment letters was that it was unfair to lower the leverage ratios available and that neither the government nor any regulator should inhibit an individual's freedom to invest and make money.[17] In short, they believe that they should be entitled to invest their money at whatever leverage ratio they see fit. Several of these commenters[18] argued that

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15 All references to commenters under this Item are to the commenters as listed in Exhibit 2b.

16 Abhay, Aird, Akhras, Ali, Andrews, Arthur, Avery, Chris, Cohn, Colman, Crowley, Dallmann, Daniels, David, Day, Decker, Delfino, Doozan, Evergreen, Figlewski, Findley, Fortner, Gallagher, Gallagher 2, Getline, Goff, GoodBoy, Gray, gslatham, Gurkan, Hoepker, Howell, Hurley, Issacs, Jackal, Jackson, Jacobs, James, Jim, Johnston, Jones, Kerr, Lambert, Langin, Lannon, Lebold, Leousis, Levy, Marsh, Marshall, Muir, National Information, Nadjakov, Negus, Newhouse, Nichols, Nick, nv46, O'Moore, Otlo, Overfield, Parker, Pellot, Pena, Prime, Prindle, Quesenberry, Rajenthiran, Ramlakhan, Ramsey, Rawlins, Revolg, Rice, Richardson, L. Richardson, Rigney, Rocha, Romero, Sabo, Salatino, Shore, Sinclair, Sinclair 2, Thomlinson, Tischer, Uwins, Vern, Walker, Waratah, Weaver, Weisbloom, Wilkes, Williams, Young, Young 2, Zarlengo and Zepco.

17 Aird, Akhras, Avery, Day, Doozan, Findley, Gallagher, Gallagher 2, Getline, GoodBoy, gslatham, Jackson, Jacobs, James, Jones, Lannon, Marsh, National Information, Newhouse, nv46, O'Moore, Quesenberry, Ramsey, Revolg, Richardson, L. Richardson, Rigney, Sabo, Sinclair, Vern, Walker, Wilkes, Williams, Young and Zarlengo.

18 Abhay, Akhras, Andrews, Crowley, David, Figlewski, Fortner, Getline, GoodBoy, Gray, Gurkan, Hoepker, Lambert, Lebold, Leousis, Nick, nv46,

the proposed rule change would kill the off-exchange retail forex business or force traders to trade in foreign, less regulated markets.[19] Many of the individual investors believed that the leverage limitations were unnecessary because they could manage their risk by trading in small amounts or by entering a stop-loss order.[20]

FINRA staff disagrees with these commenters and the laissez faire and caveat emptor approach. FINRA's mandate includes investor protection, and many of the comment letters, such as those from retirees and retail investors, are from individuals whose interests are traditionally helped by FINRA's regulatory program.[21] Taken to their logical conclusion, these commenters would likely oppose many of FINRA's existing rules (including a 25 % maintenance margin requirement, and the minimum equity of $25,000 for pattern day traders),[22] as well as the initial margin limitations in the Federal Reserve Board's Regulation T.[23] Plainly, these letters are inconsistent with the statutory and regulatory landscape established by Congress. Further, while a stop-loss order may

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Prindle, Ramlakhan, Rawlins, Rice, Romero, Sinclair 2, Thomlinson, Tischer, Waratah, Wilkes, Williams and Zepco.

19 Because many of these commenters are unfamiliar with FINRA and its jurisdiction, they mistakenly believe that the proposed rule change would eliminate their ability to trade forex at higher leverage levels. As the SEC is aware, FINRA's proposal would have no direct effect on the leverage ratios offered by non-broker-dealers, which currently represent the overwhelming majority of participants in this industry. As of November 2008, the NFA had 26 Forex Dealer Members. See Lee Oliver, Retail FX in the U.S.: A Market in Transformation, Futures Industry Magazine, November/December 2008, at 35.

20 Abhay, Colman, Gurkan, Leousis, Sinclair 2, Weisbloom and Williams.

21 One investor noted that after finally saving up $114, he was able to start trading forex.

22 See NASD Rule 2520.

23 12 CFR 220.

help minimize the losses on any particular forex position, it does not address the fact that at high levels of leverage, such as 400 or 100 to 1, a very small movement in the exchange rate of a foreign currency pair trade will quickly trigger the stop-loss provision and close out the position with a loss. Similarly, the fact that a firm will close out a customer position and not issue a margin call does not address the potential for losses resulting from such high leverage ratios.

In addition, these commenters believed that the proposal was targeted at the retail investor, while allowing larger institutional investors to have access to higher levels of leverage.[24] One commenter compared the proposed rule change to the "accredited investor" standard which he viewed as preventing the little guy from having access to the best deals.[25] Interestingly, some of those commenters who opposed the proposed rule change also acknowledged that existing levels of leverage were excessive and would not trade at these levels.[26]

Several broker-dealers submitted comment letters on the proposed rule change. Interactive Brokers, Knight, TD Ameritrade and thinkorswim believed that the investor protection benefits of the proposed rule change would not be attained as the proposal

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[24] Abhay, Arthur, Chris, Goff, Gurkan, James, Jim, Kerr, Leousis, Nadjakov, Newhouse, Nichols, Prime, Prindle, Ramsey, Sinclair, Sinclair 2, Vern, Weisbloom, Williams and Young 2.

[25] Avery.

[26] Crowley (offered 40 to 1, yet trades at no more than 2 to 1); Dallmann (says you should not risk more than 2% of your account balance); Delfino (allow for a maximum leverage of 100 to 1); Lambert (understanding lowering the limit to 100 to 1); Parker (proposing maximum leverage of 5 to 1 or 4 to 1); Ramlakhan (the firm he trades with offers 40 to 1, but he uses no more than 16 to 1); Revolg (leverage no less than 20 to 1); Uwins (stating "400:1 is getting a little ridiculous" and favoring 100:1 or less); and Waratah (uses a true leverage of 5 to 1).

would merely divert customers' forex activities to non-FINRA members.[27] Knight urged FINRA to allow customers to trade forex at broker-dealers "on similar terms as accounts held at entities that are not regulated by FINRA." FINRA does not believe that the opportunity for customers to trade in a less-regulated environment or on more lenient terms is a compelling rationale to limit the application of the proposed rule change. Prior to soliciting comment on the proposed rule change in Regulatory Notice 09-06, FINRA reviewed the regulatory requirements of other regulators and concluded that the availability of such high levels of leverage was the crux of the problem faced by investors. FINRA acknowledges that different regulators may choose to pursue their regulatory mandate in separate ways; however, FINRA is not compelled to follow the standards adopted by other regulators.

FIA, FXC and thinkorswim urged FINRA to use the standards articulated in Regulatory Notice 08-66 (Retail Foreign Currency Exchange) and FINRA Rule 2010 (Standards of Commercial Honor and Principles of Trade), and best practices adopted by the forex community in lieu of the proposed rule change. While FINRA believes that the protections afforded investors under Regulatory Notice 08-66 and FINRA Rule 2010 are meaningful, they do not, in FINRA's view, go far enough. FXC also questioned whether FINRA has the authority to control the terms of a non-securities transaction. FINRA does not read any provisions in the Act that prohibit it from proposing rules on broker-dealer conduct relating to non-securities. The standards for the rules of a national securities association in Section 15A of the Act include the "protect[ion] of investors" irrespective of whether such activity relates to securities. Ironically, FXC's premise that

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[27] This view also was reflected in comment letters by FIA and FXC.

FINRA Rule 2010 and Regulatory Notice 08-66 are sufficient to protect investors contradicts its assertion that FINRA does not have authority to adopt rules relating to non-securities transactions.

FIA and Interactive Brokers stated that the proposed rule change is inconsistent with congressional intent in allowing a broker-dealer to engage in an off-exchange retail forex business. While Congress authorized a class of regulated entities to engage in an off-exchange retail forex business,[28] there is nothing in the legislation to suggest that Congress intended that each regulated entity would adopt a conforming regulatory regime. Indeed, when the CFMA was adopted, Congress was well-aware of the differing regulatory regimes in the eligible entities. Moreover, Congress actually contributed to the regulatory disparities in only increasing the minimum net capital required for FCMs.[29]

Interactive Brokers, Roberts & Ryan and TradeStation suggested that FINRA adopt an exclusion from the proposed rule change for FINRA members that are dually registered broker-dealer/FCMs like themselves. Both Interactive Brokers and TradeStation stated that dual registrants will be subject to oversight by the CFTC and/or NFA. FINRA believes Interactive Brokers and TradeStation are misreading the CEA and the scope of the NFA's rules. The CEA specifically states that the CFTC's jurisdiction over off-exchange retail forex applies only to FCMs that are not also a registered broker-dealer.[30] Similarly, NFA exempts from its Forex Dealer Members entities that are a

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28 See supra note 6.

29 CFTC Reauthorization Act of 2008, 13101 (to be codified at 7 U.S.C. 2(c)(2)(B)).

30 CFTC Reauthorization Act of 2008, 1301 (to be codified at 7 U.S.C. 2(c)(2)(B)(i)(II)(cc)(AA)).

member of a national securities association.[31] Thus, Interactive Brokers' and TradeStation's off-exchange retail forex business operate outside the ambit of the CFTC and NFA rules tailored to forex. It is not sufficient for regulatory purposes that the CTFC and NFA can enforce their books and records and general anti-fraud provisions. Moreover, even if Interactive Brokers and TradeStation were to voluntarily submit to the NFA's jurisdiction for purpose of applying its off-exchange retail forex rules, FINRA would still have concerns about the level of leverage provided in what is a joint broker-dealer/FCM.

Interactive Brokers, thinkorswim and TradeStation also argued that the proposed rule change will disadvantage combined broker-dealer/FCMs. FINRA agrees that conducting an off-exchange retail forex business in a combined broker-dealer will subject the firm to a different regulatory regime than if the business were conducted in a separate FCM. Such differences exist today in the application of FINRA Rule 2010 and NASD Rule 2210 to joint broker-dealer/FCMs. FINRA also notes that joint broker-dealer/FCMs are in many other ways operating in a less regulated environment inasmuch as they operate outside of the CFTC and NFA rules on forex. However, the observation that either another regulatory scheme or practices occurring outside of any regulatory scheme allow business in retail forex at greater leverage levels is neither a compelling reason for FINRA to mandate a standard less than that deemed necessary by FINRA for investor protection nor does it demonstrate a deficiency for meeting the elements of approval of this proposed rule change under the Act.

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[31] NFA By-Law 306.

Several commenters[32] suggested that disclosure about the risks of leverage, or the actual leverage, in a particular transaction would be an effective alternative to the proposed rule change. FINRA disagrees that disclosure alone is an effective regulatory solution. We also note that Regulatory Notice 08-66 already requires disclosures of the risks of forex trading and the risks and terms of leveraged trading.[33] SIFMA suggested that FINRA adopt a definition of retail customer. FINRA disagrees and believes that the reference to the "eligible contract participant" standard is most appropriate for the proposed rule change as that is the terminology used in the federal legislation that permits a broker-dealer to engage in an off-exchange retail forex business. SIFMA and TD Ameritrade also requested that FINRA adopt a hedging exemption to allow customers to hedge foreign currency exposure from securities. FINRA does not support a hedging exemption as there are many other available alternatives (e.g., exchange traded futures and options, and other OTC products) that may be used to hedge foreign currency exposure. Furthermore, FINRA does not believe that the off-exchange retail forex markets are used for hedging and is concerned that burdens and complexities in establishing a hedging exemption will not be justified.

SIFMA also suggested that FINRA clarify whether Exchange Act Rule 15c3-3 is applicable to the deposit required to carry positions involving retail transactions in foreign exchange. FINRA will work with the SEC to publish an interpretation of Exchange Act Rule 15c3-3 that will address this question.

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32 Dallmann, Hurley, Rocha and Young.

33 See Regulatory Notice 08-66, page 4.

Finally, TD Ameritrade stated that the proposed rule change would cause broker-dealers to establish an FCM affiliate or to establish an introducing relationship with an NFA firm that offers off-exchange retail forex, and that the broker-dealer would therefore be unregulated with respect to its forex activity. FINRA disagrees and notes that Regulatory Notice 08-66 was very clear in reminding firms that broker-dealer forex activities, including referral and introducing activities, would be subject to FINRA Rule 2010.

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. Please include File Number SR-FINRA-2009-040 on the subject line.

Paper Comments:

- Send paper comments in triplicate to Florence E. Harmon, Deputy Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2009-040. 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-2009-040 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Florence E. Harmon

Deputy Secretary

[34] 17 CFR 200.30-3(a)(12).

EXHIBIT 2b

Alphabetical List of Written Comments

1. Email from Abhay (“Abhay”) (February 10, 2009)
2. Email from Calum Aird (“Aird”) (February 7, 2009)
3. Email from O. Akhras MD. (“Akhras”) (February 16, 2009)
4. Email from Ameka Ali (“Ali”) (February 10, 2009)
5. Email from Leonard J. Amoruso, Knight Capital Group, Inc. (“Knight”) (February 20, 2009)
6. Email from Mike Andrews (“Andrews”) (February 8, 2009)
7. Email from Luke Arthur (“Arthur”) (February 17, 2009)
8. Email from Clifford and Meleese Avery (“Avery”) (February 12, 2009)
9. Letter from David M. Battan, Interactive Brokers LLC (“Interactive Brokers”) (February 20, 2009)
10. Email from Steven Belden, Zepco Sales & Service, Inc. (“Zepco”) (February 10, 2009)
11. Letter from William Cahill, TradeStation Securities Inc. (“TradeStation”) (May 17, 2009)
12. Email from Chris (“Chris”) (February 14, 2009)
13. Email from Aaron I. Cohn (“Cohn”) (February 21, 2009)
14. Email from Aaron I. Cohn (“Cohn 2”) (February 21, 2009)
15. Letter from Aaron W. Colman (“Colman”) (February 10, 2009)
16. Email from James Crowley (“Crowley”) (January 29, 2009)
17. Email from Tim Dallmann (“Dallmann”) (February 10, 2009)
18. Email from John M. Damgard, Futures Industry Association (“FIA”) (February 20, 2009)
19. Email from Bill Daniels (“Daniels”) (February 15, 2009)
20. Email from David (“David”) (February 10, 2009)

21. Email from Max Day (“Day”) (February 15, 2009)

22. Email from Mike Decker (“Decker”) (February 10, 2009)

23. Email from Daniel Delfino (“Delfino”) (February 17, 2009)

24. Email from Jonathan Doozan (“Doozan”) (February 11, 2009)

25. Email from Ray Figlewski (“Figlewski”) (February 11, 2009)

26. Email from Michael T. Findley (“Findley”) (February 7, 2009)

27. Email from Don Fortner (“Fortner”) (February 12, 2009)

28. Email from Steve Gallagher (“Gallagher”) (February 11, 2009)

29. Email from Steve Gallagher (“Gallagher 2”) (February 11, 2009)

30. Email from Meryl Getline (“Getline”) (February 10, 2009)

31. Email from Max K. Goff (“Goff”) (February 10, 2009)

32. Email from GoodBoy (“GoodBoy”) (May 30, 2009)

33. Email from Stephen Gray (“Gray”) (February 13, 2009)

34. Email from gslatham (“gslatham”) (February 10, 2009)

35. Email from Gurkan (“Gurkan”) (February 10, 2009)

36. Email from Cary Hoepker (“Hoepker”) (February 10, 2009)

37. Email from David Howell (“Howell”) (February 9, 2009)

38. Email from Eric Hurley (“Hurley”) (February 10, 2009)

39. Email from Arlene Isaacs (“Isaacs”) (February 10, 2009)

40. Email from Brenda Izzo, MG Securities, LLC (“MG Securities”) (February 20, 2009)

41. Email from Jackal 44 (“Jackal”) (February 7, 2009)

42. Email from Mary M. Jackson (“Jackson”) (February 14, 2009)

43. Email from Norman Jacobs (“Jacobs”) (February 11, 2009)

44. Email from Steven James (“James”) (February 20, 2009)

45. Email from Jim (“Jim”) (February 14, 2009)

46. Email from Chenoa Johnston (“Johnston”) (February 19, 2009)

47. Email from Charles Jones (“Jones”) (February 10, 2009)

48. Email from Alan D. Kerr (“Kerr”) (February 7, 2009)

49. Email from Robert L. Lambert (“Lambert”) (February 16, 2009)

50. Email from Jeff Langin (“Langin”) (February 10, 2009)

51. Email from Bob Lannon (“Lannon”) (February 10, 2009)

52. Email from Ken Lebold (“Lebold”) (February 19, 2009)

53. Email from Elias Leousis (“Leousis”) (February 10, 2009)

54. Email from Josh Levy (“Levy”) (May 12, 2009)

55. Email from Terry Lyon, National Information Solutions Cooperative (“National Information”) (February 19, 2009)

56. Email from Richard Mahoney, Foreign Exchange Committee (“FXC”) (February 20, 2009)

57. Email from Peter Marsh (“Marsh”) (February 18, 2009)

58. Email from Russell N. Marshall (“Marshall”) (February 11, 2009)

59. Email from Daniel McIsaac, Securities Industry and Financial Markets Association (“SIFMA”) (February 20, 2009)

60. Email from Chris Muir (“Muir”) (February 11, 2009)

61. Email from Emil Nadjakov (“Nadjakov”) (February 16, 2009)

62. Email from Christopher Nagy, TD Ameritrade Holding Corp. (“TD Ameritrade”) (February 19, 2009)

63. Email from John Negus (“Negus”) (February 10, 2009)

64. Email from Keith Newhouse (“Newhouse”) (February 14, 2009)

65. Email from Rad Nichols (“Nichols”) (February 20, 2009)

66. Email from Nick (“Nick”) (February 11, 2009)

67. Email from nv46 (“nv46”) (February 12, 2009)

68. Email from Thomas O’Moore (“O’Moore”) (February 10, 2009)

69. Email from Paul Otlo (“Otlo”) (February 10, 2009)

70. Email from Randy Overfield (“Overfield”) (February 11, 2009)

71. Email from Lynn R. Parker (“Parker”) (February 11, 2009)

72. Email from Francesca Pellot (“Pellot”) (February 10, 2009)

73. Email from Oscar Pena (“Pena”) (February 10, 2009)

74. Email from Tom Prime (“Prime”) (February 5, 2009)

75. Email from Donald E. Prindle (“Prindle”) (February 10, 2009)

76. Email from Rob Quesenberry (“Quesenberry”) (February 20, 2009)

77. Email from Tharma Rajenthiran (“Rajenthiran”) (February 18, 2009)

78. Email from Ravi Ramlakhan (“Ramlakhan”) (February 18, 2009)

79. Email from Mike Ramsey (“Ramsey”) (February 10, 2009)

80. Email from Dean Rawlins (“Rawlins”) (January 28, 2009)

81. Email from Hpesoj Revolg (“Revolg”) (February 5, 2009)

82. Email from Russell Rice (“Rice”) (February 19, 2009)

83. Email from Alisha Richardson (“Richardson”) (February 10, 2009)

84. Email from Lonnie Richardson (“L. Richardson”) (February 8, 2009)

85. Email from Ed Rigney (“Rigney”) (February 10, 2009)

86. Letter from Daniel W. Roberts, Roberts & Ryan Investments Inc. (“Roberts & Ryan”) (February 18, 2009)

87. Email from Daniel W. Roberts, Roberts & Ryan Investments Inc. (“Roberts & Ryan 2”) (March 2, 2009)

88. Email from Sergio Rocha (“Rocha”) (January 28, 2009)

89. Email from Marc Romero (“Romero”) (February 14, 2009)

90. Email from Dave Sabo (“Sabo”) (February 5, 2009)

91. Email from Blake Salatino (“Salatino”) (February 12, 2009)

92. Email from Jonathan Shore (“Shore”) (May 12, 2009)

93. Email from Michael Sinclair (“Sinclair”) (February 10, 2009)

94. Email from Michael Sinclair (“Sinclair 2”) (February 10, 2009)

95. Letter from Tom Sosnoff, thinkorswim, Inc. (“thinkorswim”) (February 19, 2009)

96. Email from Michael Thomlinson (“Thomlinson”) (February 18, 2009)

97. Email from Andrew Tischer (“Tischer”) (February 20, 2009)

98. Email from Darrick J. Uwins (“Uwins”) (February 7, 2009)

99. Email from Vern (“Vern”) (February 10, 2009)

100. Email from Larry Walker (“Walker”) (February 10, 2009)

101. Email from Norman Waratah (“Waratah”) (February 11, 2009)

102. Email from William E. Weaver (“Weaver”) (February 12, 2009)

103. Email from Robert Weisbloom (“Weisbloom”) (February 10, 2009)

104. Email from Charles Wilkes (“Wilkes”) (February 10, 2009)

105. Email from Derrik Williams (“Williams”) (February 10, 2009)

106. Email from John F. Williams, Evergreen I, LLC (“Evergreen”) (February 19, 2009)

107. Email from Steve Young (“Young”) (February 6, 2009)

108. Email from Steve Young (“Young 2”) (February 7, 2009)

109. Email from Marco Zarlengo (“Zarlengo”) (February 14, 2009)