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October 18, 2011

Elizabeth M. Murphy, Secretary
Securities & Exchange Commission
100 F Street, NE
Washington, DC 20549

File 34-65164 Deleting the Text of NYSE Rule 92 and Adopting a New NYSE Rule 5320

Madam Secretary,

Thank you for the opportunity to comment on the New York Stock Exchange (NYSE) Proposed Rule Change Deleting the Text of NYSE Rule 92 and Adopting a New NYSE Rule 5320 that is substantially the same as Financial Industry Regulatory Authority (FINRA) Rule 5320 to Prohibit Trading Ahead of Customer Orders with Certain Exceptions. I have been an active investment professional for over 30 years, working in many different aspects of trading, from floor trader to buy-side trader, participating on numerous industry committees and in many industry organizations and have delivered testimony on market structure issues to The United States Senate Banking Committee Subcommittee on Securities, Insurance and Investment and to a roundtable of the Securities and Exchange Commission.

The current proposal to harmonize NYSE rule 92 with FINRA rule 5320 reduces the protections currently afforded client orders and makes the trading process much less transparent than is currently the case, therefore it is a material rule change that must be submitted under the full "notice and comment" rule making process prescribed by the Administrative Procedures Act (APA), not filed under the abbreviated for immediate effectiveness "housekeeping" rule change process.

Consolidating rules to "harmonize and streamline existing rules" to increase efficiency and reduce frictions in the market is no small undertaking and generally a goal that all regulators should strive for. Weeding out "obsolete or otherwise duplicative" rules is one sure way to accomplish this goal of increased efficiency, as long as all market participants believe/agree that the rules in question are obsolete or duplicative. Unfortunately not all stakeholders view the same rules as obsolete. Certain rules create obligations for some participants while offering protections for other stakeholders.

NYSE Rule 92 was one such rule, this rule obligated NYSE members to refrain from trading ahead of or alongside their client orders without first obtaining the client's permission on a trade by trade basis. Many clients (buy-siders) viewed this protection as fundamental; client orders were afforded precedence above member's (broker/dealers) interests by rule. It doesn't take well honed investigative abilities to figure out which group would consider such a rule obsolete.

Unfortunately the "harmonization" of NYSE rule 92 escaped the attention of much of the buy-side community. Perhaps the reason that this rule change escaped the exposure to diverse public comment that most rule changes are afforded by the APA was because when the topic was broached with the member firms representatives the buy-siders were told that this "wasn't a big deal" & it was really just putting in writing what was already the standard operating procedure of the member firms. Or perhaps the reason that this rule change received virtually no notice by buy-side stakeholders was because of the rule change was filed as a non-material housekeeping rule change under the ongoing plain brown consolidation/harmonization wrapper.

While the reason buy-side stakeholders were surprised by this rule change should be of grave concern for the NYSE and FINRA, the fact that this rule change received little attention is self evident. If the NYSE's or FINRA's desired result was to embrace the APA and foster an open and frank discussion amongst a diverse group of market participants, the results show that they failed miserably. Receiving five comment letters, one of which was filed by FINRA itself to discuss the other four, on a fourteen month long rule making that was extended 24 times during the fourteen months must tell any observer that this rule did not receive the proper notice. Receiving only four comment letters from outside stakeholders all of which were either from broker/dealers, an organization of broker/dealers or a trading venue should have told the NYSE & FINRA that a large stakeholder group (the buy-side) had not received the notice that this rule change was being contemplated.

FINRA's stated harmonization/consolidation process, articulated March 12, 2008, was:

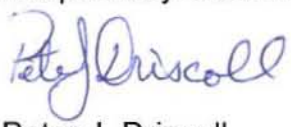
> "...to develop the Consolidated FINRA Rulebook, FINRA staff has been conducting a comprehensive review of all existing NASD and Incorporated NYSE Rules, guided by several analytical touchstones. First, the staff is identifying those NASD and Incorporated NYSE Rules that are obsolete or otherwise duplicative and should not be adopted as part of the Consolidated FINRA Rulebook.
>
> Second, the staff is analyzing the member conduct, member application and registration, and financial and operational rules that apply to Dual Members to identify significant differences between the NASD and Incorporated NYSE Rules and determine the extent to which the existing rules should inform the final consolidated FINRA Rules...."

So it is a mystery why FINRA filed to consolidate the NASDAQ Manning rules 2110 and 2111 (whose language make up a substantial portion of the surviving language in 5320) and not tackle harmonization of NYSE rule 92 at the same time. Filing this rule change in this fashion runs contra to FINRA's stated process.

Since virtually none of the language in NYSE rule 92 survived in the new NYSE/FINRA rule 5320 an observer must conclude that the rule was found to be obsolete or duplicative and thus non-material in nature. Nothing could be further from the truth. This NYSE rule change is material in several ways; just the wholesale change in the language of the rule should be enough to call this a material change. There is nothing more material than removing protections owed to client orders! Shifting the burden of the process to opt in/opt out of protection and allowing blanket disclosure to supplant order by order permissions are also a material change. The NYSE's filing of its "conforming" non-material substitution of FINRA 5320 for NYSE rule 92 appears to be an end run around the required rulemaking process.

I would ask the commission to recognize the material nature of SR-NYSE-2011-043/34-65164 and remand this rule making for further study and comment.

Respectfully Submitted,



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