TD AMERITRADE thinkorswim

July 27, 2009

Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Release No. 34-60172; File Number SR-FINRA-2009-40

Dear Ms. Murphy:

TD AMERITRADE, Inc.[1] ("TD Ameritrade") and thinkorswim, Inc. ("thinkorswim," and, collectively with TD Ameritrade, "the Firms") appreciate the opportunity to comment on the above-referenced proposal (the "Rule") from FINRA 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 Firms strongly oppose adoption of the Rule as proposed and believes that, if enacted, it would only serve to harm retail investors as it would effectively eliminate their ability to engage in forex as a part of their investment strategy in a securities account or in a separate forex only account with a dually-registered FINRA broker-dealer ("BD") and National Futures Association ("NFA") Introducing Broker ("IB"). The Firms believe that the underlying motive by FINRA appears to attempt to force FINRA member firms, whose customers trade retail forex, to secure Commodity Futures Trading Commission ("CFTC") registration and association with the NFA creating an onerous regulatory structure which may have the unintended consequence of creating regulatory loopholes rather than creating a more transparent structure for the retail investor.

The effect of the proposed Rule will be to prevent dually registered FINRA and NFA member firms from conducting retail forex business. The Rule imposes a leverage limit that is arbitrary and far more restrictive than the leverage permitted for: (i) forex trading offered through futures commission merchants ("FCMs") registered with the CFTC and members of the NFA; and (ii) the trading of alternative products available in the marketplace, providing a strong economic disincentive for customers to trade this product through a broker-dealer. As a result, customers

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[1] TD Ameritrade is a wholly-owned broker-dealer subsidiary of TD AMERITRADE Holding Corporation ("TD Ameritrade Holding"). TD Ameritrade Holding has a 34-year history of providing financial services to self-directed investors. TD Ameritrade Holding's wholly owned broker-dealer subsidiary, TD Ameritrade serves an investor base comprised of over 5.0 million funded client accounts with approximately $265 billion in assets. On June 11th, 2009, TD AMERITRADE Holding Corporation (NASDAQ: AMTD), the parent of TD Ameritrade acquired thinkorswim Group, Inc., the parent of thinkorswim. thinkorswim, founded in 1999 and headquartered in Chicago, is a registered broker-dealer based in Chicago, Illinois that conducts an online brokerage operation, including securities, futures and forex.

will migrate to CFTC/NFA only regulated firms. Firms that offer retail forex through broker-dealers, which includes firms that are dually registered as broker-dealers and FCMs/IBs, are disadvantaged relative to firms that offer forex through entities that are not broker-dealers. The Firms believe that FINRA has adopted a regulatory scheme with sufficient investor protection, which is set forth in Regulatory Notice 08-66. Finally, as explained in more detail below, the proposed Rule fails to provide added customer protection.

I. The Rule does not improve investor protection. Instead, it inconveniences customers.

Over the last several years, an increase in transparency has lead retail consumers to become have a more global view in their investment portfolio. When a U.S. customer purchases foreign securities as part of his/her portfolio, that portion will invariably be subject to foreign currency risk. To help hedge that risk, a customer is increasingly turning to forex, as it represents one of the only transparent methods for a retail investor to hedge foreign currency risk. Today, margin leverage in a brokerage account is on par with that of a futures account. As such, customers are increasingly utilizing forex activities in their brokerage account as a direct hedge to the security in question.

The Rule will substantially increase the capital commitment required to trade retail forex through broker-dealers. The customer's cost of trading retail forex at a broker-dealer will be much higher than the cost of trading retail forex a non-FINRA member firm. Customers will naturally move their accounts to firms that are not FINRA broker-dealers. However, the broker-dealers currently offering retail forex will not be willing to give up the revenue from retail forex trading. They will reorganize to be able to continue to offer forex trading on a cost effective basis for their customers. Firms that are acting as counterparties to forex transactions will move their forex business to non-FINRA member firms – IBs, FCMs or unregulated entities. Although firms that refer or introduce forex transactions are not required to be registered in any capacity under current NFA rules, a referring or introducing firm that is a registered broker-dealer must have compliance policies and procedures reasonably designed to comply with applicable rules and regulations – there is no such requirement for an unregulated entity. This potential increase in unregulated entities offering forex to customers will not increase investor protection.

FINRA's Regulatory Notice 08-66 expressed concern about counterparty risk in the forex marketplace. This risk will increase as a result of this Rule because more entities that are neither FCMs nor broker-dealers will offer forex. Unlike unregulated entities, both FCMs and broker-dealers have capital requirements to support their businesses.

The Rule also inconveniences customers. Instead of the convenience of having securities brokerage and forex trading accounts at one firm, customers will have to have accounts at multiple firms. This is likely to make it more difficult and costly for customers to move money from securities to forex accounts and vice versa. Because forex is commonly used as a hedge for international securities positions, splitting the securities positions from their hedge into different firms will negatively impact customers.

Some customers may be forced out of the forex market. If, for some reason, a customer cannot open a futures account and does not want to open an account at an unregistered introducing firm, and there are no broker-dealers offering retail forex, a customer that has real currency risks to hedge may be unable to engage in forex transactions.

II. The Rule treats FINRA member firms that offer retail forex disparately depending on their corporate structure and, in this respect, is anti-competitive.

The imposition of a leverage ratio limitation of 1.5 to 1 makes retail forex offered through broker-dealers uncompetitive. FCMs will be able to offer forex traders leverage of 100 to 1 or more. The margin requirements for alternative products, such as currency futures contracts are approximately 4%. As indicated above, customers will move their forex business to FCMs or unregulated entities to take advantage of this increased leverage.

Today, firms that are registered as broker-dealers and firms that are registered as FCMs or IBs are offering forex trading with similar leverage. However, firms that are broker-dealers without an affiliated FCM ("Integrated Firms") will be disadvantaged by the Rule. Integrated Firms will be subject to the Rule even though they will continue to be subject to regulation as FCMs or IBs. In order to continue offering retail forex, counterparties that are currently Integrated Firms will either have to separate their broker-dealer and FCM businesses or establish a separate entity (e.g., a Material Associated Person of a registered broker-dealer) that is not subject to either regulation by FINRA or the NFA to conduct retail forex trading activities. Firms that introduce or refer forex transactions will need to form unregulated affiliates to offer retail forex. Firms that have separate affiliated broker-dealers and FCMs will continue to be able to act as counterparties for retail forex transactions through their FCMs without restructuring. Those firms will be able to offer the same leverage to forex customers they are offering today. The Rule gives these firms a clear advantage over the Integrated Firms for no legitimate reason.

III. The leverage restriction of 1.5 to 1 for initiating a forex transaction is arbitrary.

FINRA has asserted, without support, that the currency market is speculative and volatile.[2] Contrary to such assertion, currency trading is generally less volatile than stock trading.[3] However, the initial margin requirement for securities trading is 50% and maintenance margin is 30%. Further, pattern day traders can trade securities with 4 to 1 leverage. The marketplace seems to be moving towards a margining system that does not impose bright line restrictions. For example, portfolio margining recognizes that margin should be based on the actual risk of

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[2] FINRA Regulatory Notice 09-06, at 3 (January 2009) (hereinafter "Notice 09-06").
[3] "Currency Trading," *at* http://articles.directorym.com/Currency_Trading-a448.html.

the positions and, therefore permits much greater leverage than conventional margining. Portfolio margining is based upon margin concepts that have existed in the futures industry for years. Futures margin ranges from 2% to 15% for initial margin, and there are generally lower requirements for maintenance margin.

In this regard, FINRA should consider following the lead of the NFA in its proposed amendments to Section 12 of the NFA's Financial Requirements and the Interpretative Notice regarding Forex Transactions. Prior to proposing such amendments and publishing them for comment at the CTFC, the NFA conducted an analysis of international money market margin rates to see how they compared to the security deposits for forex transactions for Forex Dealer Members ("FDMs) required by Section 12, an examination of the actual leverage amounts offered by individual FDMs and sent the proposed amendments to its FDMs prior to submitting them to the CFTC for consideration.[4] Similar, FINRA should be required to conduct a similar analysis to support its view that its proposed leverage ratios, with their corresponding increased costs to retail investors and FINRA members, are consistent with the provisions of the Securities Exchange Act of 1934.

The leverage restriction the Rule imposes on retail forex transactions is stricter than for any other financial instrument. Futhermore, the Rule does not even address maintenance margin. Instead, the Rule Proposal states that 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 account will not necessitate the deposit of additional funds…. FINRA considered imposing a maintenance requirement but determined that the level of initial deposit was sufficiently high that a maintenance margin requirement was not necessary."[5] If the value of a particular currency does fluctuate wildly, which should not be unexpected "given the speculative and volatile nature of retail forex activity,"[6] the Rule does not protect the position by imposing a maintenance margin requirement.

IV. The Rule does not take into account real time risk management systems.

The Background and Discussion section of the Proposal states that retail forex activities have historically been concentrated in the FCM world and that leverage ratios for retail forex by futures intermediaries were set to be comparable to the leverage ratios for currency futures trading on futures exchanges. As a result, retail forex contracts in the FCM arena commonly have leverage ratios of 100 to 1. The Proposal also states that in the retail forex market, there is no margin call mechanism or any way to give notice to investor to deposit additional funds to maintain his or her position. As a result, even small intra-day swings in currency rates have the

[4] Letter from Thomas W. Sexton, Vice President and General Counsel, National Futures Association to David A. Stawick, Office of the Secretariat, Commodity Futures Trading Commission (February 23, 2009).
[5] Securities Exchange Act Release No. 34-60172 (June 25, 2009), 74 Fed. Reg. 32022, 32023 (July 6, 2009) (hereinafter "Proposal").
[6] Notice 09-06, at 3.

potential to close out investors on either side of the market. The Proposal asserts that retail forex activity is speculative and volatile. By restricting the leverage ratio to 1.5 to 1, FINRA believes that it will reduce the risks of excessive speculation and 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.

The Rule does not seem to recognize that broker-dealers conduct risk management in real time. Not only do broker-dealers have real time risk management systems, broker-dealers commonly reserve the right to change margin requirements and liquidate margined securities without prior notice.[7] The broker-dealer's rights in the event of a margin deficiency are the same for a securities account as for a forex account. Moreover, in the Firms' experience retail forex customers are likely to be traders that keep apprised of their positions on an ongoing basis.

Additionally, as FINRA noted, forex is generally traded through electronic systems. The NFA has made clear in its publication "Forex Transactions: A Regulatory Guide," dated July 2009, that:

> An electronic trading system should be designed to allow the Member to set limits for each customer based on the amount of equity in the account or the currency, quantity, and type of order, and the Member should utilize these controls….
>
> If the trading platform automatically liquidates positions, the [forex dealer member] should set the liquidation levels high enough so that the positions will be closed out at prices that will prevent the account from going into a deficit position under all but the most extraordinary market conditions….
>
> An electronic trading platform that does not automatically liquidate positions should generate an immediate alert when an account is in danger of going into a deficit position.[8]

FINRA should consider mandating risk management guidelines that, in combination with a more lenient leverage ratio, would result in a better balance between its goal of limiting excessive speculation and frequent customer liquidations and maintaining a competitive marketplace. If a consequence of the Rule is that forex trading will simply migrate to different firms where customers have more competitive leveraging abilities, FINRA will have failed in accomplishing its goals of reducing speculation or liquidations or increasing customer protection.

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[7] Standard customer margin agreements generally give a broker-dealer the right, among others, to: (1) force the sale of securities or other assets in the customer's account; (2) sell securities or other assets in the customer's account without contacting the customer; and (3) increase its clearing firm's "house" maintenance margin requirements without providing notice to its customer.

[8] Forex Transactions, National Futures Association, at 92 (July 2009) (footnotes omitted), *at* http://www.nfa.futures.org/NFA-compliance/publication-library/forex-regulatory-guide.pdf.

V. FINRA should consider alternatives to its current proposal.

There are a number of less draconian measures FINRA could take that would increase customer protection, while permitting broker-dealers to continue offering forex trading to retail customers. FINRA could impose special capital requirements for broker-dealers that offer retail forex. Those capital requirements could mirror requirements imposed by the CFTC/NFA on FCMs that are forex counterparties. FINRA could adopt policies regarding risk management similar to the policies of the NFA and allow for customers to be given margins call electronically. FINRA also could adopt leverage restrictions, but such restrictions should be competitive with forex trading offering by FCMs and alternative products offered in the marketplace.

Finally, FINRA's Regulatory Notice 08-66 outlines the customer protection rules applicable to member firms that offer retail forex. Those rules include the requirement to comply with high standards of commercial honor and just and equitable principles of trade, regulation over communications with the public and treat forex accounts the same as commodity accounts with respect to the applicability of the customer reserve formula. Regulatory Notice 08-66 demonstrates that FINRA's existing regulatory regime provides forex traders with adequate protections and limits the need to resort to the unnecessary and anti-competitive measures contemplated by the Rule, which fail to take into account the sophisticated real-time risk management systems that most firms in this area of trading have operated for some time.

VI. The Commission should consider the impact to customer positions and brokerage operations.

The trading systems in existence currently can only maintain a single margin requirement for customer positions. Grandfathering positions will not be an option. Drastically altering the margin requirement overnight will have a dramatic effect on the customer accounts that are holding positions during the change over. Based on current customer positions 99% will be subject to immediate liquidation due to insufficient equity. This will negatively impact any customer that is holding forex positions with a FINRA member firm.

VII. The Commission should take seriously the near-unanimous comments FINRA received against the Proposal.

In evaluating the merits of this Proposal, the Commission should consider that 108 of the 109 comment letters that FINRA received were opposed to this proposed rule change and the remaining letter did not express an opinion. Ninety-seven of these letters were from individual investors, presumably the group the Rule change would ostensibly protect. The Commission should seriously consider their legitimate comments, as well as FINRA's characterization of such comments as a "laissez-faire" and "caveat emptor" approach. Contrary to FINRA's assertion, no one is suggesting here that there be a change to FINRA's existing 25% maintenance margin requirement, minimum equity requirement of $25,000 for pattern day traders or the initial margin limitations in the Federal Reserve Board's Regulation T. Instead, such commenters are asking the Commission to seriously consider a proposal that has far-reaching implications for both retail investors and the FINRA members that serve them.

If the Commission does, despite the paucity of any comment in favor of the Proposal, to approve the Proposal, the Firms respectfully request that the effective date of the proposed rule change be at least 120 days following Commission approval as noticed in the federal register. This extra time will permit member firms to take the appropriate steps to respond to and/or implement the proposed rule changes, while at the same time ensuring no adverse impact to the customers of member firms who engage in retail forex activities.

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TD Ameritrade and thinkorswim appreciate the opportunity to comment. Please contact Christopher Nagy at (402) 970-5656 or Peter D. Santori at (773) 244-6841 if you have any questions regarding our comments.

Respectfully submitted,

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Christopher Nagy Managing Director Order Routing Strategy TD AMERITRADE, Inc.	Peter D. Santori Senior Vice President and General Counsel thinkorswim Group Inc.