

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

Re: Release No. 34-61090; File Number SR-FINRA-2009-40

Dear Ms. Murphy:

TD AMERITRADE, Inc.<sup>1</sup> (“TD Ameritrade”) and thinkorswim, Inc. (“thinkorswim,” and, collectively with TD Ameritrade, “the Firms”) appreciate the opportunity to comment on the above-referenced amended 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 4 to 1; and (2) withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 4 to 1. The Firms previously commented that they strongly oppose adoption of the Rule and the Firms continue to believe that the amended proposal, if enacted, 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 FINRA member firm.

The Firms believe that FINRA’s proposal is arbitrary in that it is based on the unsupported finding that the current allowable leverage has resulted in “excessive speculation.” As noted in the Firms’ prior comment letter, clients generally use forex to hedge foreign currency risk related to their equity and options holdings. Limiting member firms from offering leverage beyond 4 to 1 will simply drive investors from trading forex at FINRA member firms to firms registered with the CFTC/NFA. As a result, this proposal will only inconvenience investors by dislocating trading to CFTC/NFA firms not otherwise registered with FINRA. It follows that FINRA member firms that offer forex trading will be significantly impacted as they lose business to non-FINRA member firms. Despite FINRA’s dismissive statement that these claims are meant to advance dually registered firms’ “pecuniary interest,” what really is at stake are member firms ability to offer forex to investors, and not worry that their entire forex business will move to non-FINRA member firms. The Firms believe the Securities and Exchange

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<sup>1</sup> 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 5.2 million funded client accounts with approximately \$302 billion in assets. On June 11, 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.

Ms. Elizabeth Murphy  
December 29, 2009

Commission (“Commission”) should not approve FINRA’s proposed rule as FINRA has not shown the Rule is in the public interest. Moreover, given the resulting impact on competition between FINRA member and non-member firms, the Commission should not approve the Rule because FINRA has not shown the Rule is necessary in light of the significant burden on competition that will occur.

If the Commission decides to approve the Rule, the Firms believe that to avoid the significant burden on competition that will occur, the Commission should require FINRA to add an exception from the Rule for member firms that also are subject to CFTC/NFA oversight. That is, the FINRA proposal should recognize the robust CFTC/NFA regulatory oversight of forex trading and, as a result, such firms would have the ability to operate under CFTC/NFA rules and not the Rule. The Rule should include an exception for FINRA/NFA member firms that: (1) are regulated in their forex activities by NFA; and (2) do not conduct forex business in the regulated SIPC account, but rather in the futures/forex account. We understand that contingent on FINRA creating an exception in the Rule for jointly registered FINRA/NFA members, the NFA Executive Committee and the NFA Board have agreed to amend NFA rules so that it will supervise the forex activities of these jointly registered entities for forex trades that are not conducted in the SIPC account and are conducted under NFA rules. The Firms submit that such an exception would clearly be in the public interest as it would ensure retail forex is subject to regulatory oversight, allow investors to use forex to hedge their transactions, and would significantly reduce the competitive harm that the Rule would create.

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TD Ameritrade and thinkorswim appreciate the opportunity to comment. Please contact me at 443.539.2128 if you have any questions regarding our comments.

Respectfully Submitted,



John S. Markle  
Deputy General Counsel