

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-59274; File No. SR-FINRA-2009-001)

January 22, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to the Exemptive Criteria in FINRA Rule 7470

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 January 7, 2009, Financial Industry Regulatory Authority, Inc. (“FINRA”) (f/k/a National Association of Securities Dealers, Inc. (“NASD”)) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I and II below, which Items have been prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change pursuant to Section 19(b)(3)(A)(iii) of the Act,³ and Rule 19b-4(f)(6) thereunder,⁴ which renders the proposal effective upon receipt of this filing by the Commission. On January 16, 2009, FINRA submitted Amendment No. 1 to the proposed rule change. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

FINRA is proposing to amend FINRA Rule 7470 to revise the criteria necessary to qualify for an exemption from the order recording and data transmission requirements in the Order Audit Trail System (“OATS”) Rules for manual orders.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(3)(A)(iii).

⁴ 17 CFR 240.19b-4(f)(6).

The text of the proposed rule change is available on FINRA's Web site at www.finra.org, at the principal office of FINRA and at the Commission's public reading room.

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

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

1. Purpose

On September 28, 2005, the SEC approved amendments to the OATS Rules that, among other things, permitted FINRA to grant exemptive relief from the OATS reporting requirements for manual orders.⁵ The exemptive authority was broadened in 2006 to give FINRA the authority to exempt members from the OATS recording requirements, in addition to the reporting requirements.⁶ At a minimum, members must meet the following criteria to be eligible to request an exemption from the OATS recording and reporting requirements for manual orders: (1) the member and current control affiliates and associated persons of the member have not been subject within the last five years to any final disciplinary action, and within the last ten

⁵ See Securities Exchange Act Release No. 52521 (September 28, 2005), 70 FR 57909 (October 4, 2005).

⁶ See Securities Exchange Act Release No. 53580 (March 30, 2006), 71 FR 17529 (April 6, 2006). In 2006, the exemptive provision was also relocated from NASD Rule 6955(d) to NASD Rule 6958. As of December 15, 2008, NASD Rule 6958 was renumbered as FINRA Rule 7470. See FINRA Regulatory Notice 08-57 (October 2008).

years to any disciplinary action involving fraud; (2) the member has annual revenues of less than \$2 million; (3) the member does not conduct any market making activities in Nasdaq Stock Market equity securities; (4) the member does not execute principal transactions with its customers (with limited exceptions for principal transactions executed pursuant to error corrections); and (5) the member does not conduct clearing or carrying activities for other firms.

In addition to the amendments to the exemptive provision in the OATS Rules in 2006, the SEC separately approved amendments to the OATS Rules to require members to record and report to OATS order information relating to OTC equity securities.⁷ The extension of the OATS requirements to OTC equity securities became effective on February 4, 2008.⁸

When the Commission approved the exemptive provision in the OATS Rules and the amendment extending FINRA's authority under that provision in 2006, the OATS Rules applied only to equity securities listed on the Nasdaq Stock Market. Consequently, at that time, one of the minimum criteria for a member to request an exemption from the OATS requirements, specifically the requirement that the member not conduct any market making activities, was limited to Nasdaq Stock Market equity securities. This requirement, similar to the other exemptive criteria such as the prohibition on principal transactions with customers and conducting clearing or carrying activities for other firms, reflects FINRA's conclusion that exemptive relief should only be available to members that conduct very limited types of trading activities.

⁷ See Securities Exchange Act Release No. 54585 (October 10, 2006), 71 FR 61112 (October 17, 2006).

⁸ See Securities Exchange Act Release No. 55440 (March 9, 2007), 72 FR 12852 (March 19, 2007).

When the OATS recording and reporting requirements were extended to OTC equity securities, the exemptive provision was not similarly extended to account for market-making activities in OTC equity securities. The proposed rule change would amend the minimum criteria to seek exemptive relief from the recording and reporting requirements of the OATS Rules for manual orders to require that a member not conduct any market making activities in OTC equity securities. The proposed rule change would make explicit that members that make a market in any security subject to the OATS Rules (Nasdaq Stock Market or OTC equity securities) are not eligible for exemptive relief under Rule 7470.⁹

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of filing, such that FINRA can implement the proposed rule change immediately.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁰ 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 original intent of limiting eligibility for an exemption and furthering the goals of the FINRA's OATS by codifying that members that

⁹ The proposed rule change would not affect exemptions granted or renewed before the effective date of the proposed rule change. Any member seeking an exemption (or the renewal of an existing exemption) after the effectiveness of the proposed rule change would be required to meet the eligibility criteria as amended by the proposed rule change.

¹⁰ 15 U.S.C. 78o-3(b)(6).

conduct market-making activities in any security subject to the OATS Rules are not eligible for exemptive relief under Rule 7470.

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

Written comments were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing proposed rule change does not:

(i) significantly affect the protection of investors or the public interest;

(ii) impose any significant burden on competition; and

(iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹¹ and Rule 19b-4(f)(6) thereunder.¹²

FINRA has asked the Commission to waive the operative delay to permit the proposed rule change to become operative prior to the 30th day after filing. FINRA has stated that it believes that it is important to correct and conform the OATS exemptive provisions as soon as

¹¹ 15 U.S.C. 78s(b)(3)(A).

¹² 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has fulfilled this requirement.

possible to eliminate any confusion as to the criteria to be eligible for exemptive relief under Rule 7470.

The Commission believes that waiving the 30 day operative delay is consistent with the protection of investors and the public interest.¹³ The Commission believes that the proposed rule should help ensure that the exemptive relief provided for in FINRA Rule 7470 continues to be available only to members that conduct very limited types of trading activities. The Commission, therefore, designates the proposal operative upon filing.

At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

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-2009-001 on the subject line.

Paper Comments:

¹³ For purposes only of waiving the 30 day operative delay, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549–1090.

All submissions should refer to File Number SR-FINRA-2009-001. 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 10:00 am and 3:00 pm. 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 No. SR-FINRA-2009-001 and should be submitted on or before [insert date 21 days from date of publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁴

Florence E. Harmon
Deputy Secretary

¹⁴ 17 CFR 200.30-3(a)(12).