

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-56207; File No. SR-NASD-2007-044)

August 6, 2007

Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Notice of Filing of Proposed Rule Change to Expand the Class of Entities Permitted to Use the Delta Hedging Exemption from Equity Options Position Limits

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 June 29, 2007, the National Association of Securities Dealers, Inc. (“NASD”) (n/k/a Financial Industry Regulatory Authority, Inc.) filed with the Securities and Exchange Commission (“Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA.³ 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 proposes to amend Rule 2860 to expand the class of entities permitted to use the delta hedging exemption from equity options position limits. The text of the proposed rule change is available on FINRA’s Web site (www.finra.org), at FINRA, and at the Commission’s Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD’s Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007), 72 FR 42190 (August 1, 2007).

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

Background

Over the past several years, FINRA has increased in absolute terms the size of the options position and exercise limits as well as the size and scope of available exemptions for “hedged” positions.⁴ The exemptions for hedged positions generally required a one-to-one hedge, *i.e.*, one stock option contract must be hedged by the number of shares covered by the options contract, typically 100 shares. In practice, however, many firms do not hedge their options positions in this way. Rather, these firms engage in what is known as “delta hedging,” which varies the number of shares of stock used to hedge an options position based upon the relative sensitivity of the value of the option contract to a change in the price of the underlying stock.⁵ FINRA believes that delta hedging is widely accepted for net capital and risk management purposes.

⁴ See Securities Exchange Act Release Nos. 47307 (February 3, 2003), 68 FR 6977 (February 11, 2003) (SR-NASD-2002-134); 40932 (January 11, 1999), 64 FR 2930 (January 19, 1999) (SR-NASD-98-92); 40087 (June 12, 1998), 63 FR 33746 (June 19, 1998) (SR-NASD-98-23); and 39771 (March 19, 1998), 63 FR 14743 (March 26, 1998) (SR-NASD-98-15).

⁵ For example, an option with a delta of .5 will move \$0.50 for every \$1.00 move in the underlying stock.

In 2004, the Commission approved amendments to Rule 2860 that provide a delta hedging exemption from stock options position and exercise limits⁶ for positions held by affiliates of NASD members approved by the Commission as “OTC Derivatives Dealers.”⁷ At that time, the Commission reiterated its “support for recognizing options positions hedged on a delta neutral basis as properly exempted from position limits.”⁸

Broadening the Scope of FINRA’s Delta Hedging Exemption

In the proposed rule change, FINRA is expanding the delta hedging exemption beyond OTC Derivatives Dealers to include broker-dealers and certain other financial institutions (“Exemption”). Specifically, the proposed rule change would permit any member, or non-member affiliate permitted to rely on new proposed subparagraph (B) or (C) of Rule 2860(b)(3)(A)(vii)b.1. (described below⁹), to apply the delta model developed by the Options Clearing Corporation.

In addition, certain other broker-dealers and affiliated entities, described below, would be permitted to use a proprietary model(s) to calculate options position net deltas provided that the use of such models were in accordance with the entity’s internal risk management control

⁶ The proposed rule change does not expressly amend FINRA’s options exercise limits in Rule 2860(b)(4) because such exercise limits apply only to the extent Rule 2860(b)(3) imposes position limits. Thus, as delta neutral positions would be exempt from position limits under the proposed rule change, such positions also would be exempt from exercise limits. See NASD Notice to Members 94-46 (June 1994) at 2 (“... exercise limits correspond to position limits, such that investors in options classes on the same side of the market are allowed to exercise ... only the number of options contracts set forth as the applicable position limit for those options classes.”). Similarly, for positions held that are not delta neutral, only the option contract equivalent of the net delta of such positions would be subject to exercise limits.

⁷ See Securities Exchange Act Release No. 50748 (November 29, 2004), 69 FR 70485 (December 6, 2004) (SR-NASD-2004-153).

⁸ Id. at 70486.

⁹ See infra notes 11 and 12 and accompanying text.

systems. The options contract equivalent of the net delta¹⁰ of a hedged options position still would be subject to the position limits in Rule 2860 (subject to the availability of any other position limit exemptions).

For example, if a member is short 20,000 call contracts (each representing 100 shares of stock) with a delta of .5, the member would need to be long 1,000,000 shares of stock to hedge that position. Assume that the member was long 600,000 shares and had another permitted offset (e.g., a swap or futures contract) representing another 200,000 shares of stock. In that case, the net delta of that position would be 200,000 shares (1,000,000 – 600,000 long shares – 200,000 swap or future); and the number of contracts attributable to that position would be 2,000 contracts (200,000 shares / 100 shares per contract) on the short side of the market.

“Permitted Pricing Models” for purposes of the Exemption would be pricing models used by: (1) a member or its affiliate subject to consolidated supervision by the Commission pursuant to Appendix E of Rule 15c3-1 under the Act;¹¹ (2) a financial holding company (“FHC”) or a company treated as an FHC under the Bank Holding Company Act of 1956, or its affiliate subject to consolidated holding company group supervision;¹² (3) an SEC registered OTC

¹⁰ “Net delta” would be defined in Rule 2860(b)(2)(GG) to mean “the number of shares that must be maintained (either long or short) to offset the risk that the value of an equity options position will change with incremental changes in the price of the security underlying the options position.”

“Options Contract Equivalent of the Net Delta” would be defined in proposed Rule 2860(b)(2)(LL) to mean the net delta divided by the number of shares underlying the options contract.

¹¹ Use of such pricing model would be required to be consistent with the requirements of Appendices E or G, as applicable, to Rules 15c3-1 and 15c3-4 under the Act in connection with the calculation of risk-based deductions from capital or capital allowances for market risk thereunder. See subparagraph (B) of proposed Rule 2860(b)(3)A)(vii)b.1.

¹² An FHC’s affiliate that is part of the FHC’s consolidated supervised holding company group would be eligible to use this part of the Exemption. An FHC’s (or an affiliate’s)

derivatives dealer;¹³ (4) a national bank under the National Bank Act;¹⁴ and, as previously noted, (5) a member, or non-member affiliate (as permitted by subparagraph (B) or (C) of proposed Rule 2860(b)(3)(A)(vii)b.1.), using a pricing model maintained and operated by the Options Clearing Corporation.

Irrespective of the features of any proprietary pricing model, only financial instruments relating to the security underlying an equity options position would be permitted to be included in any determination of an equity options position's net delta or whether the options position is delta neutral. For example, a short position in XYZ calls could be hedged with a long position in

use of a proprietary model would have to be consistent with either: (i) the requirements of the Board of Governors of the Federal Reserve System, as amended from time to time, in connection with the calculation of risk-based adjustments to capital for market risk under capital requirements of the Board of Governors of the Federal Reserve System; or (ii) the standards published by the Basel Committee on Banking Supervision, as amended from time to time and as implemented by such company's principal regulator, in connection with the calculation of risk-based deductions or adjustments to or allowances for the market risk capital requirements of such principal regulator applicable to such company – where “principal regulator” means a member of the Basel Committee on Banking Supervision that is the home country consolidated supervisor of such company. See subparagraph (C) of proposed Rule 2860(b)(3)(A)(vii)b.1.

It is important to note that the U.S. activities of entities subject to the Basel standards still are overseen by the Federal Reserve Board, and FINRA would be relying upon that oversight in extending exemptive relief to such entities.

¹³ This part of the Exemption would replace in its entirety current Rule 2860(b)(3)(a)vii.b. An OTC Derivative Dealer's use of a proprietary model would be required to be consistent with the requirements of Appendix F to Rule 15c3-1 and Rule 15c3-4 under the Act, as amended from time to time, in connection with the calculation of risk-based deductions from capital for market risk thereunder. Only an OTC Derivatives Dealer and no other affiliated entity (including a member) would be able to rely upon this particular part of the Exemption. See subparagraph (D) of proposed new Rule 2860(b)(3)(A)(vii)b.1.

¹⁴ The use of a proprietary model by a national bank would be required to be consistent with the requirements of the Office of the Comptroller of the Currency, as amended from time to time, in connection with the calculation of risk-based adjustments to capital for market risk under capital requirements of the Office of the Comptroller of the Currency. An affiliate of a national bank (including a FINRA member) would not be permitted to rely on this part of the Exemption. See subparagraph (E) of proposed Rule 2860(b)(3)(A)(vii)b.1.

XYZ warrants. However, a short position in XYZ calls would not be permitted to be hedged with any financial instrument relating to a security other than XYZ stock. In addition, firms would not be permitted to use the same equity or other financial instrument position in connection with more than one hedge exemption. Thus, a stock position used as part of a delta hedge would not be permitted also to serve as the basis for any other equity option hedge exemption.

Obligations of Members and Affiliates

A member that intends to employ, or whose non-member affiliate intends to employ, the Exemption would be required to provide a written certification to FINRA stating that the member and/or its affiliate will use a Permitted Pricing Model as described above and defined in the Rule, and that if an affiliate ceases to hedge stock options positions in accordance with such systems and models, it will provide immediate written notice to the member.

In addition, the options positions of a non-member relying on the Exemption would be required to be carried by a member with which it is affiliated.

Any options position that is not delta neutral would remain subject to position and exercise limits (subject, however, to the availability of other exemptions). While delta hedging generally is employed as part of an overall risk management program, firms do not necessarily hedge every position to be delta neutral, i.e., having a net delta of zero. In such cases, only the options contract equivalent of the net delta of any such options position would be subject to position limits.

Impact on “Aggregation” Guidance

FINRA recently issued guidance on when certain options accounts may be “disaggregated.”¹⁵ The proposed rule change would impact this guidance in the following way: Generally, an entity that relies on the proposed rule change would be required to ensure that a Permitted Pricing Model is applied to all positions in or relating to the security underlying the relevant options position that are owned or controlled by the entity, or its affiliates. However, the net delta of an options position held by an entity entitled to rely on this Exemption, or by a separate and distinct trading unit of such entity, would be permitted to be calculated without regard to positions in or relating to the security underlying the option held by an affiliated entity or by another trading unit within the same entity, provided that: (1) the entity demonstrates to FINRA’s satisfaction that no control relationship, as defined in Notice to Members 07-03, exists between such affiliates or trading units; and (2) the entity has provided FINRA written notice in advance that it intends to be considered separate and distinct from any affiliate, or, as applicable, which trading units within the entity are to be considered separate and distinct from each other for purposes of this Exemption.¹⁶

Position Reporting

Today, under paragraph (b)(5) of Rule 2860, a broker-dealer must report any options position in which the member has an interest, and each customer, non-member broker or non-member dealer account, which has established an aggregate position of 200 or more options contracts (whether long or short) of the put class and the call class on the same side of the

¹⁵ See NASD Notice to Members 07-03 (January 2007).

¹⁶ See proposed subparagraph (A)(vii)b.2 of Rule 2860(b)(3). FINRA has set forth, in Notice to Members 07-03, the conditions under which it will deem no control relationship to exist between affiliates and between separate and distinct trading units within the same entity.

market. Under the proposed rule change, FINRA would retain these reporting thresholds even with respect to options positions of any member or designated aggregation unit that are delta neutral. In addition, however, each member, or designated aggregation unit pursuant to proposed subparagraph (b)(3)(A)(vii)b.2., also shall report the options equivalent of the net delta of a position if such position represents 200 or more contracts (whether long or short) on the same side of the market covering the same underlying stock that are effected by the member.

Referring to the example above, a member who is short 20,000 call contracts with a delta of .5 and long 600,000 shares of stock and long 200,000 shares through a SWAP or futures contract, would report (a) its options position as short 20,000 contracts and (b) its options equivalent of the net delta as short 2,000 contracts.

FINRA and other self-regulatory organizations are working on modifying the Large Options Position Reporting system and/or the Options Clearing Corporation reports to allow a member to indicate that an equity options position is being delta hedged.

Reliance on Federal Oversight

FINRA notes that when it provided exemptive relief for OTC Derivatives Dealers in 2004, NASD indicated that it believed that the rigor of the Commission's OTC Derivatives Dealer approval process and the ongoing oversight by the Commission staff provided an appropriate basis for exempting delta neutral positions in options held by such entities from position and exercise limits.¹⁷ The proposed rule change's extension of exemptive relief to additional users of proprietary models similarly relies upon the rigorous approval processes and ongoing oversight of a federal financial regulator.

¹⁷ See Securities Exchange Act Release No. 50539 (October 19, 2004), 69 FR 61884, 61885 (October 21, 2004) (SR-NASD-2004-153).

In an effort to leverage the existing federal oversight in this area, FINRA has developed procedures to monitor members' compliance with the proposed delta hedging position limit rules. Specifically, FINRA would employ a narrowly circumscribed program around the employment of delta hedging by eligible broker-dealers. FINRA would examine to the extent of: (1) reviewing that the eligible broker-dealers have policies and procedures to determine their net positions in ascertaining any option holdings in respect of position limits including the reduction from any such net positions any positions subject to delta hedging or allowable equity option hedges; and (2) determining that the eligible broker-dealers represent that they have made any reduction from such net option positions pursuant to and in accordance with a model, or the processes that develop a model, for delta hedging that have been approved by an applicable federal regulator. It is important to note that FINRA is not under any obligation to test: (1) the integrity of a model, its processes or methodology; or (2) the employment of such models by eligible broker-dealers as to any data inputs, calculations or any other utilization of the model.

FINRA will announce the effective date of the proposed rule change in a Notice to Members to be published no later than 60 days following Commission approval. The effective date will be no later than 30 days following publication of the Notice to Members 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,¹⁸ which requires, among other things, that FINRA rules 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 it is

¹⁸ 15 U.S.C. 78q-3(b)(6).

appropriate, subject to certain conditions, to exempt options positions of entities subject to an extensive regulatory framework of a federal financial regulator from position limits and require that only the option contract equivalent of the net delta of a stock options position be subject to position limits.

B. Self-Regulatory Organization's Statement on Burden on Competition

FINRA does not believe that the proposed rule change would 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

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-NASD-2007-044 on the subject line.

Paper Comments:

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

All submissions should refer to File Number SR-NASD-2007-044. 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, 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 Number SR-NASD-2007-044 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁹

Florence E. Harmon
Deputy Secretary

¹⁹ 17 CFR 200.30-3(a)(12).