

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-60366; File No. SR-FINRA-2009-030)

July 22, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving a Proposed Rule Change to Amend Rules 6440 and 6540 to Require Members to Create a Contemporaneous Record of Certain Customer and Order Information

On May 22, 2009, the Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“Commission” or “SEC”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“SEA” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to amend Rules 6440 and 6540 to require members to create a contemporaneous record of certain customer and order information. The proposed rule change was published for comment in the Federal Register on June 17, 2009.³ The Commission received no comments on the proposal. This order approves the proposed rule change.

I. Description of the Proposed Rule Change

FINRA has proposed to amend Rules 6440 and 6540 to, among other things, require members to create a contemporaneous record of certain customer and order information demonstrating eligibility for the unsolicited customer order exception of SEA Rule 15c2-11 when the member is relying on such exception. SEA Rule 15c2-11 sets forth the information review and maintenance requirements for broker-dealers that

¹ 15 U.S.C. 78s(b)(1)

² 17 CFR 240.19b-4.

³ Securities Exchange Act Release No. 60085 (June 10, 2009), 74 FR 28741 (June 17, 2009).

publish quotations⁴ in a quotation medium⁵ for certain over-the-counter equity securities (e.g., those quoted on the OTC Bulletin Board and Pink Sheets).

Specifically, SEA Rule 15c2-11 prohibits a broker-dealer from publishing, or submitting for publication, a quotation for a covered OTC equity security unless it has obtained and reviewed current information about the issuer whose security is the subject of the quotation that the broker-dealer believes is accurate and obtained from a reliable source. There are several exceptions to SEA Rule 15c2-11, including paragraph (f)(2) of the Rule, which excepts quotations that represent a customer's unsolicited order or indication of interest (unsolicited customer order exception).

FINRA Rule 6440 sets forth the standards applicable to member firms for demonstrating compliance with SEA Rule 15c2-11. FINRA has indicated that it has found that member firms maintain varying levels of documentation for demonstrating eligibility for the unsolicited customer order exception and, in some cases, are unable to produce any proof that a quote in fact represented a customer's unsolicited order or indication of interest ("IOI").

While a member relying on this or any exception should be able to proffer evidence of its eligibility for and compliance with the exception, FINRA believes that providing specific recordkeeping requirements for demonstrating eligibility for the SEA

⁴ SEA Rule 15c2-11 defines "quotation" as any bid or offer at a specified price with respect to a security, or any indication of interest by a broker or dealer in receiving bids or offers from others for a security, or any indication by a broker or dealer that advertises its general interest in buying or selling a particular security.

⁵ "Quotation medium" means any "inter-dealer quotation system" or any publication or electronic communications network or other device that is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell. "Inter-dealer quotation system" means any system of general circulation to brokers or dealers that regularly disseminates the quotations of identified brokers or dealers.

Rule 15c2-11(f)(2) exception is appropriate and will promote more uniform record-keeping and compliance with this exception.

Specifically, FINRA has proposed that contemporaneous with the receipt of any unsolicited customer order or IOI, members would be required to record the following details: the identity of the associated person who receives the order or IOI directly from the customer, if applicable;⁶ the identity of the customer; the date and time the order or IOI was received; and the terms of the order or IOI that is the subject of the quotation (e.g., security name and symbol, size, side of the market, the duration (if specified) and, if priced, the price). To the extent a member is displaying a quote representing an unsolicited customer order or IOI that was received from another broker-dealer, the member is still required to create a contemporaneous record of the identity of the person from whom information regarding the unsolicited customer order or IOI was received, if applicable;⁷ the date and time the unsolicited customer order or IOI was received by the member displaying the quotation; and the terms of the order that is the subject of the quotation.⁸ The member displaying the quotation may rely on the information provided

⁶ FINRA stated that in cases where a member is displaying a quote representing an unsolicited customer order or IOI that was received electronically, it is understood that there may not be a “person” associated with the receipt or submission of such unsolicited customer order or IOI. Thus, with respect to the requirement that members record (1) the identity of the associated person who received the unsolicited customer order or IOI; or (2) the identity of the person from whom information regarding the unsolicited customer order or IOI was received where the order or IOI is received from another broker-dealer, members are only required to record such information if applicable.

⁷ See supra note 6.

⁸ FINRA stated that it is critical that the member receiving an order be advised of and understand the terms of the order that are relevant to the exception so that the receiving member may reasonably and accurately rely on the unsolicited customer order exception. For example, if the customer order is a “day” order, the receiving member must be advised of that fact so that it can withdraw the quote upon the expiration of the order. Similarly, to the extent that the terms of the order change or other significant information is received by the firm routing the order (e.g., a “good-till-cancelled” order is cancelled or there is a change in the terms of the order), the firm routing such order must promptly update the member displaying the quote as to the change in the terms of the order. To the extent the firm routing the order is not a member, the member should make periodic inquiry as to whether the terms of the order have changed. Members may not rely on the

by the routing firm if the member has a reasonable basis for believing that the information is valid.

In addition, FINRA proposed to amend Rule 6540 (Requirements Applicable to Market Makers). The proposed amendment would delete footnote #1 under Rule 6540. Footnote #1 sets forth a summary of exemptive relief granted by the SEC from the requirements of SEA Rule 15c2-11 (subject to certain conditions). FINRA noted that because the Commission has granted additional exemptive requests from the requirements of SEA Rule 15c2-11 that are not included in footnote #1, and believes the Commission may continue to grant such requests in the future, FINRA has proposed to delete footnote #1 in its entirety and specify in Rule 6540 that members must demonstrate compliance with, or qualify for an exception or exemption from, SEA Rule 15c2-11.⁹

II. Discussion and Findings

After careful review, the Commission finds that the proposed rule change is consistent with the requirements of the Act, and the rules and regulations thereunder that are applicable to a national securities association.¹⁰ In particular, the Commission believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act, in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to

unsolicited customer order exception where a displayed quote no longer accurately represents current unsolicited customer interest.

⁹ SEA Rule 15c2-11(h) sets forth the SEC's exemptive authority with respect to the requirements of SEA Rule 15c2-11 and provides that SEA Rule 15c2-11 shall not prohibit any publication or submission of any quotation if the SEC, upon written request or upon its own motion, exempts such quotation either unconditionally or on specified terms and conditions, as not constituting a fraudulent, manipulative or deceptive practice comprehended within the purpose of the rule.

¹⁰ In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest. The Commission believes that the proposed amendments to Rules 6440 and 6540 will protect the public interest by promoting more uniform record-keeping and compliance with SEA Rule 15c2-11.

III. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,¹¹ that the proposed rule change (File No. SR-FINRA-2009-030) be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹²

Florence E. Harmon
Deputy Secretary

¹¹ 15 U.S.C. 78s(b)(2).

¹² 17 CFR 200.30-3(a)(12).