

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-61189; File No. SR-FINRA-2009-089)

December 17, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed FINRA Rule 6490 (Processing of Company-Related Actions), to Clarify the Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and to Implement Fees for Such Services

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 December 7, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. 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 is proposing to adopt proposed FINRA Rule 6490 (Processing of Company-Related Actions), to clarify the scope of FINRA's regulatory authority and discretionary power when processing documents related to announcements for company-related actions for non-exchange listed equity and debt securities and to implement fees for such services.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA, on the Commission's Web site at <http://www.sec.gov>, and at the Commission's Public Reference Room.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

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

FINRA is proposing to: (1) adopt FINRA Rule 6490 (Processing of Company-Related Actions) to clarify the scope of FINRA's regulatory authority and discretionary power when processing documents related to announcements for company-related actions for non-exchange listed equity and debt securities; and (2) implement fees for such services.

FINRA's Current Role in the OTC Market

FINRA performs several critical functions with respect to the over-the-counter (OTC) market, including the operation of the OTC Bulletin Board (OTCBB), which provides a mechanism for FINRA members to quote certain SEC-registered OTC equity securities, and the OTC Reporting Facility (ORF), which provides a mechanism for FINRA members to trade report, for both regulatory and dissemination purposes, transactions in OTC equity securities.

In addition to these functions, FINRA performs other more limited functions relating to the processing of non-exchange listed issuer company actions in the OTC market. Specifically, in furtherance of FINRA's obligations to foster cooperation and coordination of the clearing, settling and processing of transactions in equity and debt securities of issuers with a class of

publicly traded, non-exchange listed securities, FINRA reviews and processes documents related to announcements for company-related actions pursuant to Rule 10b-17 (Untimely Announcements of Record Dates) of the Act (“SEA Rule 10b-17”).

OTC issuers provide notice to FINRA to affect a full range of company-related actions pursuant to SEA Rule 10b-17, including dividends or other distributions in cash or kind, stock splits or reverse stock splits, or rights or other subscriptions offerings (“SEA Rule 10b-17 Actions”). In addition, FINRA processes documents related to other company actions, including the issuance or change to a trading symbol or company name, mergers, acquisition, dissolutions or other company control transactions, bankruptcy or liquidations (“Other Company-Related Actions”; and together with SEA Rule 10b-17 Actions, collectively referred to hereinafter as “Company-Related Actions”). FINRA also maintains the symbols database for issuers. FINRA, in turn, provides notice to the marketplace of such events and adjusts issuers’ stock prices, if necessary. These functions are important to trading and settlement in the OTC marketplace and help promote investor protection and market integrity.

In performing these issuer-related functions, FINRA’s role has been primarily ministerial in nature, due in large part to its limited jurisdictional reach. FINRA does not impose listing standards for securities and maintains no formal relationship with, or direct jurisdiction over, issuers. FINRA’s authority to perform these functions flows primarily from two sources: SEA Rule 10b-17 and FINRA’s Uniform Practice Code (NASD Rule 11000 Series) (“UPC”). SEA Rule 10b-17 requires issuers with a class of publicly traded, non-exchange listed, securities to provide notice to FINRA generally 10-days before the record date involved in the following corporate actions: dividends or other distributions in cash or kind, stock splits or reverse stock splits, or rights or other subscriptions offerings. The UPC sets forth a basic framework of rules

between broker-dealers for the settlement of non-exchange listed securities quoted and/or traded in the OTC market.

The SEC has expressed concern that certain parties may be attempting to use the facilities of FINRA, including the noted ministerial functions described above and requests to announce Company-Related Actions, to further fraudulent activities.³ While it is understood that FINRA does not operate a “listing market” and has no privity with OTC issuers, FINRA’s OTC operations involve a wide range of touch points with OTC issuers and require FINRA to carry out a variety of labor-intensive tasks (e.g., OTC issuers interact directly with FINRA operations staff to announce a full range of Company-Related Actions). As such, there is concern that FINRA’s Company-Related Action processing services may potentially be utilized by parties to further microcap fraud on the part of the OTC issuers and penny stock promoters.

Proposal

FINRA is proposing to adopt new FINRA Rule 6490 (Processing of Company-Related Actions) that would clarify the scope of FINRA’s regulatory authority and discretionary power when reviewing and processing documents related to requests for Company-Related Actions. In addition, FINRA is also proposing to implement fees for such services to more equitably allocate

³ See, for example, SEC Order of Suspension of Trading In the Matter of Andros Isle, Corporation, et al. [sic], dated March 13, 2008 (File No. 500-1), wherein the SEC suspended trading pursuant to SEA Section 12(k), in the securities of approximately 26 Pink Sheet securities stating “[c]ertain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.” See also, SEC v. Irwin Boock, Stanton B.J. DeFreitas, Nicolette D. Loisel, Roger L. Shoss, and Jason C. Wong, Birte Boock, and 1621566 Ontario, Inc., Civil Action No. 09 CV 8261 (S.D.N.Y.) (DLC), Litigation Release No. 21243 / October 8, 2009 (SEC Charges Five With Dozens of Fraudulent Corporate Hijackings and Unregistered Offerings of Securities and Names Two Relief Defendants).

costs related to the processing of Company-Related Actions. The proposed rule would codify the authority of FINRA's Department of Operations (Department) to conduct in-depth reviews of Company-Related Actions and allow the staff discretion not to process such actions that are incomplete or when certain indicators of potential fraud exist.

Specifically, the proposed rule would establish procedures for the submission, review, and determination of Company-Related Actions. The proposed rule would permit the Department to prescribe the forms, supporting documentation and procedures necessary to conduct more in-depth reviews of OTC issuer Company-Related Actions. Specifically, the proposed rule would provide that an issuer or other duly authorized representative of the issuer ("Requesting Party") must submit a request for FINRA to review and process documentation related to an SEA Rule 10b-17 Action or Other Company-Related Action within the time frames specified by either SEA Rule 10b-17⁴ or, for Other Company-Related Actions no later than ten (10) calendar days prior to the effective date of the company action. All such requests must be accompanied by proof of payment of a non-refundable fee specified in the proposed fee table. In addition, the proposed rule would provide that initial symbol set up requests may also be submitted by members or associated persons of members in order to comply with regulatory reporting requirements.

⁴ SEA Rule 10b-17 provides that notice must be given to FINRA no later than 10 days prior to the record date involved or, in case of a rights subscription or other offering, if such 10 days advance notice is not practical, on or before the record date and in no event later than the effective date of the registration statement to which the offering relates. For example, an issuer of non-exchange listed publicly traded securities that is planning a stock split on shares of its common stock to holders of record on February 25 would be required under SEA Rule 10b-17 to provide written notice to FINRA no later than 10 days prior to the record date for such transaction, or by February 15.

However, in recognition of the lack of privity FINRA has with OTC issuers, FINRA is proposing to adopt Supplementary Material .02 (Requests by Third-Parties), which would permit FINRA, in its discretion, to announce a Company-Related Action when it is contacted by a third party, such as The Depository Trust & Clearing Corporation (DTCC), foreign exchanges or regulators, members or associated persons. FINRA would request that the third-party contact the issuer in question regarding its obligations under SEA Rule 10b-17 or other rules and regulations, as applicable, and instruct the issuer to contact FINRA directly to provide notice and complete the requisite forms. However, FINRA may in its discretion review and process a Company-Related Action based on information from a third-party when it believes such action is necessary for the protection of the market and investors and/or FINRA has been unable to obtain notification of the Company-Related Action from the issuer.

The proposed rule would permit the Department to request additional information or documentation as may be necessary for the Department to verify the accuracy of the information submitted by the Requesting Party. If the Requesting Party does not sufficiently respond within 90 calendar days of the date the Department requests additional information or documentation, the request will be deemed “lapsed” and will be closed.

The proposed rule would also provide that where a Company-Related Action is deemed deficient, the Department may determine that it is necessary for the protection of investors, the public interest and to maintain fair and orderly markets, that documentation related to a Company-Related Action will not be processed.

Factors that may be considered by the Department in finding a request to process documentation deficient are explicitly limited to the following: (1) FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete,

accurate or with proper authority; (2) the issuer is not current in its reporting obligations, if applicable, to the SEC or other regulatory authority; (3) FINRA has actual knowledge that parties related to the Company-Related Action are the subject of pending, adjudicated or settled regulatory action or investigation by a regulatory body, or civil or criminal action related to fraud or securities laws violations⁵; (4) a government authority or regulator has provided information to FINRA, or FINRA has actual knowledge, indicating that persons related to the Company-Related Action may be potentially involved in fraudulent activities related to the securities market and/or pose a threat to public investors; and/or (5) there is significant uncertainty in the settlement and clearance process for the security.

Following a determination by the Department that a request to process a Company-Related Action is deficient, the Department must provide written notice to the Requesting Party. Such written notice shall state the specific factor(s) that caused the request to be deemed deficient. A Requesting Party may appeal such determination to a three-member subcommittee comprised of current or former industry members of FINRA's Uniform Practice Code Committee in writing within seven (7) calendar days after service of the notice. The written request for an appeal must be accompanied by proof of payment of the non-refundable Action Determination Appeal Fee and must set forth with specificity any and all defenses to the Department's determination that a request was deficient. An appeal to the subcommittee will operate to stay the processing of the Company-Related Action (i.e., the requested Company-Related Action shall not be processed during the period that the Requesting Party requests an

⁵ This would include instances where FINRA has actual knowledge that the SEC has issued an order pursuant to Section 12(k) of the Exchange Act temporarily suspending the issuer's securities or pursuant to Section 12(j) of the Exchange Act revoking registration of the issuer's securities.

appeal or while any such appeal is pending). The subcommittee will convene once each calendar month to consider all appeals received during the prior month and will render a determination within three (3) business days following the day the appeal is considered by the subcommittee. The subcommittee's determination will constitute final action by FINRA. If the Requesting Party fails to file a written request for an appeal within seven (7) calendar days after service of notice, the Department's determination shall constitute final action by FINRA.

In addition, FINRA is proposing to establish fees for Requesting Parties submitting documentation to announce a Company-Related Action. The proposed fees would include late fees for Requesting Parties that fail to provide timely notice of Company-Related Actions. FINRA believes that late fees will encourage OTC issuers to meet the various deadlines, including those associated with SEA Rule 10b-17, which is critical to enable FINRA to process such requests in a timely fashion in order to provide adequate notice to market participants. In addition, the proposed fees will also prove beneficial in that they will offset some of the significant costs that FINRA is currently bearing for the benefit of OTC issuers that are not otherwise paying to support the OTC symbol database and OTC issuer Company-Related Action processing.

Specifically, FINRA is proposing to charge the following non-refundable fees for the review and processing of documentation related to SEA Rule 10b-17 Actions and Other Company-Related Actions:

<u>SEA Rule 10b-17 Action</u>	<u>Fee</u>
Timely SEA Rule 10b-17 Notification	\$200
Late SEA Rule 10b-17 Notification Submitted at least 5 calendar days prior	\$1,000

to Corporate Action Date	
Late SEA Rule 10b-17 Notification Submitted at least 1 calendar day prior to Corporate Action Date	\$2,000
Late SEA Rule 10b-17 Notification Submitted on or after Corporate Action Date	\$5,000
<u>Other Company-Related Action</u>	<u>Fee</u>
Voluntary Symbol Request Change	\$500
Initial Symbol Set Up	No Charge
Symbol Deletion	No Charge
<u>Appeals</u>	<u>Fee</u>
Action Determination Appeal Fee	\$4,000

However, in recognition of the critical nature of SEA Rule 10b-17 information to the marketplace, FINRA is proposing to adopt Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations), which would permit FINRA to process documentation for Company-Related Actions, absent a determination that the action is deficient, even if the fee is not paid. All unpaid SEA Rule 10b-17 Action fees associated with a specific OTC issuer would be accumulated and FINRA would not process Voluntary Symbol Request Changes until all unpaid accumulated fees are paid. FINRA believes that this accumulation authority would create incentives for issuers that are not otherwise subject to FINRA’s direct jurisdiction, to comply with the requirements of this rule without compromising FINRA’s investor protection mission. Acceptance and processing of “late” Company-Related Action requests and related fees by FINRA, will not act to relieve an issuer of potential violations of SEA Rule 10b-17 or other federal, state or SRO rules.

In addition, in connection with mandatory symbol set ups or changes, FINRA generally assigns issuers random symbols. As a result, FINRA will not charge a voluntary symbol request change fee in connection with a mandatory symbol change that results from an SEA Rule 10b-17 Action (i.e., a mandatory symbol change required because of a CUSIP number change or otherwise in direct connection with an SEA Rule 10b-17 Action will not require the payment of the Voluntary Symbol Request Change fee). However, the request (and granting, subject to symbol availability) of a specific symbol in connection with an SEA Rule 10b-17 Action will result in such a fee being assessed in addition to the requisite SEA Rule 10b-17 Action fee.

FINRA will announce the effective date of the proposed rule change in a Regulatory Notice. The effective date will be no later than 90 days following 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,⁶ 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, and Section 15A(b)(5) of the Act,⁷ which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls. FINRA believes that the proposed rule will codify FINRA's authority and discretion to review and process documents related to requests for Company-Related Actions in the OTC securities and, along with the proposed new

⁶ 15 U.S.C. 78o-3(b)(6).

⁷ 15 U.S.C. 78o-3(b)(5).

fees for such services, act to ensure there is more complete, accurate and timely information concerning Company-Related Actions.

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

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 Exchange 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-2009-089 on the subject line.

Paper Comments:

- 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-2009-089. 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,⁸ 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 the 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

⁸ The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/>.

that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2009-089 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁹

Florence E. Harmon
Deputy Secretary

⁹ 17 CFR 200.30-3(a)(12).