

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-63150; File No. SR-FINRA-2009-058)

October 21, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change and Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, to Adopt FINRA Rule 2232 (Customer Confirmations) in the Consolidated FINRA Rulebook and to Delete NASD Rule 2230, NASD IM-2110-6 and Incorporated NYSE Rule 409(f)

I. Introduction

On August 24, 2009, the 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”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to adopt FINRA Rule 2232 (Customer Confirmations) in the consolidated FINRA rulebook and to delete NASD Rule 2230, NASD IM-2110-6 and Incorporated NYSE Rule 409(f). The proposed rule change was published for comment in the Federal Register on September 21, 2009.³ The Commission received three comments in response to the proposed rule change.⁴ On September 16, 2010, FINRA responded to the comments⁵ and filed Amendment No. 1 to the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 60669 (September 14, 2009), 74 FR 48107 (September 21, 2009) (“Notice”).

⁴ See letter from Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute (“ICI”), dated October 9, 2010 (“ICI Letter”); letter from Jonathan Feigelson, Senior Vice President, General Counsel, TIAA-CREF, dated October 13, 2009 (“TIAA-CREF Letter”); and letter from Clifford E. Kirsch and Susan S. Krawczyk, Sutherland Asbill & Brennan on behalf of the Committee of Annuity Insurers (“CAI”), dated October 13, 2009 (“CAI Letter”).

⁵ See letter from Adam H. Arkel, Assistant General Counsel, FINRA, dated September 16, 2010 (“FINRA’s Response”).

proposed rule change.⁶ The Commission is publishing this notice and order to solicit comments on Amendment No. 1 and to approve the proposed rule change, as modified by Amendment No. 1, on an accelerated basis.

II. Description of the Proposed Rule Change

As part of the process of developing a new Consolidated FINRA Rulebook,⁷ FINRA proposed to adopt a new, consolidated customer confirmation rule by adopting FINRA Rule 2232 (Customer Confirmations) and deleting NASD Rule 2230, NASD IM-2110-6 and NYSE Rule 409(f).⁸

(A) Background

NASD and NYSE rules set forth certain basic requirements with respect to confirmations of transactions with customers.⁹

⁶ See Amendment No. 1 dated September 16, 2010 (“Amendment No. 1”). The text of Amendment No. 1 is available on FINRA’s Web site at <http://www.finra.org/>, at the principal office of FINRA, and on the Commission’s Internet Web site (<http://sec.gov/rules/sro.shtml>).

⁷ The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (“Incorporated NYSE Rules”) (together, the NASD Rules and Incorporated NYSE Rules are referred to as the “Transitional Rulebook”). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (“Dual Members”). The FINRA Rules apply to all FINRA member firms, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see Information Notice, March 12, 2008 (Rulebook Consolidation Process).

⁸ For convenience, the Incorporated NYSE Rules are referred to as the “NYSE Rules.”

⁹ The proposed rule change addresses basic customer confirmation requirements. FINRA rules separately set forth confirmation requirements that are specific to certain types of financial products, such as the requirements set forth in FINRA Rule 2360 (adopted as part of FINRA’s set of consolidated rules addressing index warrants, options and security futures). See Securities Exchange Act Release No. 58932 (November 12, 2008), 73 FR 69696 (November 19, 2008) (Approval Order).

(1) NASD Rule 2230

NASD Rule 2230 provides that a member, at or before the completion of each transaction¹⁰ with a customer shall, give or send to the customer written notification (i.e., confirmation) disclosing: (a) whether the member is acting as a broker for the customer, as a dealer for its own account, as a broker for some other person, or as a broker for both the customer and some other person; and (b) in any case in which the member is acting as a broker for the customer or for both the customer and some other person, either the name of the person from whom the security was purchased or to whom it was sold for the customer and the date and time when the transaction took place or the fact that such information will be furnished upon the request of the customer, and the source and amount of any commission or other remuneration received or to be received by the member in connection with the transaction.

When NASD Rule 2230 was adopted in 1939¹¹ its requirements essentially duplicated those set forth in Exchange Act Rule 15c1-4 as originally adopted by the Commission. The primary difference between the two rules was that the scope of Rule 15c1-4 was restricted to over-the-counter transactions while the NASD rule by its terms extended to all member transactions with customers.¹² In 1977, the Commission rescinded Rule 15c1-4 and adopted Exchange Act Rule 10b-10, indicating that it would apply “regardless of the manner in which a

¹⁰ Exchange Act Rule 10b-10(d)(2) states that the term “completion of the transaction” has the meaning set forth in Exchange Act Rule 15c1-1. The Rule 15c1-1 definition of “completion of the transaction” depends on whether the customer is purchasing or selling the security, the time when payment is made and the status of the custody/delivery of the security.

¹¹ NASD Rule 2230, formerly designated as Section 12 of the NASD Rules of Fair Practice, was adopted as part of FINRA’s original rulebook. See Certificate of Incorporation and By-Laws, Rules of Fair Practice and Code of Procedure for Handling Trade Practice Complaints of National Association of Securities Dealers, Inc. (August 8, 1939).

¹² See Securities Exchange Act Release No. 1330 (August 4, 1937).

broker-dealer conducts its business or the marketplace where transactions are effected.”¹³ Since then, the Commission has amended Rule 10b-10 several times.¹⁴

(2) NASD IM-2110-6

NASD IM-2110-6 requires that any member providing a customer confirmation pursuant to Exchange Act Rule 10b-10 in connection with any transaction in callable common stock¹⁵ must disclose on the confirmation that the security is callable common stock and that a customer may contact the member for more information concerning the security.

When IM-2110-6 was adopted in 2000, FINRA noted that an investor purchasing callable common stock is subject to unique risks not typically associated with ownership of common stock, even when such stock is called away at a premium.¹⁶ FINRA also stated that the ability of

¹³ See Securities Exchange Act Release No. 13508 (May 5, 1977) (Securities Confirmations: Final Rule).

¹⁴ See, e.g., Securities Exchange Act Release No. 19687 (April 18, 1983), 48 FR 17583 (April 25, 1983) (Securities Confirmations: Final Rule Amendments) (requiring, among things, disclosure to investors of certain yield and call feature information in connection with transactions in debt securities); Securities Exchange Act Release No. 34962 (November 10, 1994), 59 FR 59612 (November 17, 1994) (Confirmation of Transactions: Final Rule Amendments) (generally requiring, among other things, disclosure if a debt security is not rated by a nationally recognized statistical rating organization, disclosure if a broker-dealer is not a member of the Securities Investor Protection Corporation, and disclosure with respect to the availability of information with respect to transactions in collateralized debt securities); Securities Exchange Act Release No. 46471 (September 6, 2002), 67 FR 58302 (September 13, 2002) (Confirmation Requirements for Transactions of Security Futures Products Effected in Futures Accounts: Final Rule Amendments) (adopting, among others, requirements regarding transactions in securities futures products); Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005) (Regulation NMS: Final Rules and Amendments) (making conforming amendments to Rule 10b-10 in connection with the adoption of Regulation NMS).

¹⁵ Callable common stock is stock that is subject to being called away from a shareholder, either by the issuer or by a third party.

¹⁶ See Securities Exchange Act Release No. 42761 (May 5, 2000), 65 FR 30459 (May 11, 2000) (Approval Order). See also NASD Notice to Members 00-33 (May 2000) (Callable Common Stock).

an issuer's common stock to be called away from a shareholder generally is a material fact to an investor. Accordingly, in adopting the IM, FINRA stated that high standards of commercial honor and just and equitable principles of trade would require members to provide the disclosures as set forth in the IM. FINRA further emphasized that the disclosure of the call feature on the confirmation in no way relieves a member of its obligation to consider the callable nature of the security when complying with any applicable suitability obligations.

(3) NYSE Rule 409(f)

NYSE Rule 409(f) requires that confirmation of all transactions in securities admitted to dealings on the NYSE – whether over-the-counter or on an exchange – sent by members or member organizations to their customers, must clearly set forth with a suitable legend the settlement date of each transaction. The rule provides that this requirement also applies to confirmations or reports from an organization to a correspondent, but does not apply to reports made by floor brokers to the member organization from which the orders were received. The rule further contains a general cross-reference instructing members to refer to Exchange Act Rule 10b-10.

(B) Proposal

As discussed in the Notice, the proposed rule change would delete current NASD Rule 2230 from the FINRA rulebook and replace it with proposed FINRA Rule 2232, which would streamline and combine basic customer confirmation requirements in the NASD and NYSE Rules. Specifically:

- Proposed FINRA Rule 2232 would provide that confirmations must be given or sent to customers in conformity with the requirements of Exchange Act Rule 10b-10.

FINRA believes that incorporating by reference the requirements of Rule 10b-10, as

- The proposed rule change would delete NASD IM-2110-6 from the FINRA rulebook and transfer its requirements to proposed FINRA Rule 2232. Proposed FINRA Rule 2232 would expand the coverage of those requirements to make clear that the requirement to disclose that the security is callable (and that further information is available from the member) applies to *any* callable equity security,¹⁷ not just callable common stock. As stated in the Notice, FINRA believes that, from the standpoint of investor protection, this change is necessary to ensure that the rule covers, for instance, callable preferred stock.¹⁸
- The proposed rule would include the requirement in NYSE Rule 409(f) to disclose the settlement date of the transaction, with two changes. First, consistent with FINRA’s investor protection mission, the requirement to disclose the settlement date of the transaction would include all transactions in securities, not just NYSE-listed securities. Second, because the proposed rule would address customer confirmations, the elements of the NYSE rule addressing member-to-member communications would, consistent with the parameters of Exchange Act Rule 10b-10, be deleted.

¹⁷ Exchange Act Section 3(a)(11) defines the term “equity security” to include, among others, “any stock or similar security.”

¹⁸ As noted by FINRA in the Notice, Exchange Act Rule 10b-10(a)(4) requires that, in the case of any transaction in a debt security subject to redemption before maturity, the confirmation must include a statement to the effect that the debt security may be redeemed in whole or in part before maturity, that such a redemption could affect the yield represented and that additional information is available upon request.

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval. The implementation date will be no later than 240 days following Commission approval.

III. Summary of Comment Letters and FINRA's Response

The Commission received three comments on the proposed rule change,¹⁹ all of which objected to the settlement disclosure requirement of the proposed rule, particularly with respect to mutual fund and variable annuity transactions. Among the reasons cited for the objections were differences in calculating settlement dates for mutual fund purchases through a broker-dealer versus those purchased through a mutual fund's underwriter.²⁰ Another commenter was of the view that variable annuity transactions were not a "good fit" because they do not settle like other securities transactions.²¹ One commenter also objected to the potential costs associated with reprogramming and testing automated confirmation systems to include settlement date information.²² This commenter also made a number of procedural objections.²³ One commenter urged FINRA to revise the proposed rule to relieve broker-dealers from having to disclose the settlement date when that date is the same as the trade date, or considering the settlement date requirement to be satisfied if the trade date on the confirmation is the same as the

¹⁹ See supra note 4.

²⁰ See ICI Letter.

²¹ See CAI Letter. This commenter further indicated that variable annuity transactions require the purchase or surrender of an insurance policy and as such, could not settle the way that other securities transactions settle.

²² See TIAA-CREF Letter. In particular, this commenter stated that requiring the inclusion of the settlement date in customer confirmations would cost about \$11 to 15 million dollars.

²³ See TIAA-CREF Letter. In addition, this commenter objected to FINRA not opening the proposal to comment by FINRA members and generally expressed its view that the proposal was inconsistent with the requirements of Exchange Act Rule 19b-4.

settlement date.²⁴ Another commenter indicated that there should be a two-year implementation timetable if the rule change is adopted as proposed.²⁵

In its response, FINRA clarified that it intended the settlement date provisions to apply only to transactions in traditional equity securities, whether traded on an exchange or over-the-counter where, according to FINRA, the disclosure of settlement date serves the purposes of investor protection.²⁶ FINRA filed Amendment No. 1 to clarify this intent by limiting the settlement date provisions of the proposed rule to transactions in: (1) any NMS stock as defined in Rule 600 of Regulation NMS;²⁷ and (2) any equity security subject to the reporting requirements of the FINRA Rule 6600 series, other than direct participation programs as defined in FINRA Rule 6642. FINRA stated that it also made other minor changes to the proposed rule in the interest of clarity.

FINRA also noted that with respect to considering the implementation costs of a proposed rule filing, in a self-regulatory organization rulemaking, the appropriate standard, as stated in Section 15A(b)(9) of the Exchange Act, is that the rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.²⁸ Moreover, FINRA tailors its proposed rule changes as narrowly as possible to achieve the intended and necessary regulatory benefit. As stated in Item 4 of the proposed rule change, 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. FINRA also noted

²⁴ See ICI Letter.

²⁵ See TIAA-CREF Letter.

²⁶ See FINRA's Response.

²⁷ See 17 CFR 242.600.

²⁸ This statement was confirmed in a telephone conversation with Adam Arkel of FINRA on October 19, 2010.

that, as required under Section 19(b)(1) of the Exchange Act,²⁹ it submitted to the Commission a concise general statement of the basis and purpose of the proposed rule.³⁰

IV. Discussion and Commission Finding

After carefully considering the proposal, as amended by Amendment No. 1, the comments, and FINRA's Response, the Commission finds that the proposed rule change is consistent with the requirements of the Exchange Act, and the rules and regulations thereunder that are applicable to national securities associations.³¹ In particular, the Commission believes the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Exchange Act,³² which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and in general, to protect investors and the public interest. The proposed rule change is consistent with FINRA's obligations under the Exchange Act to protect investors and the public interest because the proposed rule streamlines the rules governing broker-dealers' confirmation requirements by cross-referencing Exchange Act Rule 10b-10 while maintaining the additional disclosure requirements of NASD IM-2110-6 (i.e., relating to callable securities) and extending the additional NYSE Rule 409(f) requirements (i.e., relating to settlement date) to a broader range of equity securities.

The Commission believes that FINRA has adequately addressed the concerns raised by commenters with respect to the application of the settlement date provisions to mutual fund and variable annuity transactions. In particular, Amendment No. 1 limits the settlement date

²⁹ 15 U.S.C. 78s(b)(1).

³⁰ See supra note 28.

³¹ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 17c(f).

³² 15 U.S.C. 78o-3(b)(6).

disclosure requirement to Regulation NMS stock and over-the-counter equity securities subject to the FINRA Rule 6600 series. We also believe that the proposed rule is consistent with the public interest and the protection of investors because information regarding the callable status of a security is generally a material fact for investors. Indeed, callable securities can subject investors to additional reinvestment risk because investors may have less attractive alternatives for reinvesting the proceeds if the issuer calls the security earlier than the investor's intended sell date, even when the security is called away at a premium. In addition, the disclosure of settlement date on a confirmation is important for investors because many of the rights and benefits associated with the beneficial ownership of a security do not confer until settlement date.³³ Finally, we note that the Exchange Act does not require a cost/benefit analysis with respect to proposed self-regulatory organization rules that are filed with, and approved by, the Commission.

³³ For example, an investor may not be eligible for dividend payments if the ex-dividend date falls between the transaction date and the settlement date.

V. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,³⁴ for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after publication of Amendment No. 1 in the Federal Register. The changes proposed in Amendment No.1 respond to specific concerns raised by commenters. In particular, Amendment No. 1 will limit the application of the settlement date provisions to transactions in Regulation NMS securities and to over-the-counter equity securities subject the reporting requirements of the FINRA Rule 6600 series, other than direct participation programs as defined in FINRA Rule 6642.

Accordingly, the Commission finds that good cause exists to approve the proposal, as modified by Amendment No.1, on an accelerated basis.

VI. 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-2009-058 on the subject line.

Paper Comments:

³⁴ 15 U.S.C. 78s(b)(2).

- 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-2009-058. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings 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-FINRA-2009-058 and should be submitted on or before [insert 21 days from publication in the Federal Register].

VII. Conclusion

IT IS THEREFORE ORDERED, pursuant to section 19(b)(2) of the Exchange Act,³⁵ that the proposed rule change (SR-FINRA-2009-058), as modified by Amendment No. 1, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.³⁶

Florence E. Harmon
Deputy Secretary

³⁵ 15 U.S.C. 78s(b)(2).

³⁶ 17 CFR 200.30-3(a)(12).