

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-57720; File No. SR-FINRA-2008-013)

April 25, 2008

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Amending NASD Rule 2220 (Options Communications with the Public)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 7, 2008, 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, II, and III below, which Items have been substantially 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 amend NASD Rule 2220 (Options Communications with the Public), to better address current needs for regulating options communications practices and promote consistency across the options communications rules of other self-regulatory organizations (“SROs”). Below is the text of the proposed rule change.

Proposed new language is underlined; proposed deletions are in brackets.

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2200. COMMUNICATIONS WITH CUSTOMERS AND THE PUBLIC

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<sup>1</sup> 15 U.S.C. 78s(b)(1).

<sup>2</sup> 17 CFR 240.19b-4.

2220. Options Communications [with the Public]

(a) Definitions

For purposes of this Rule and any interpretation thereof:

(1) "Options communications" consist of:

(A) "Advertisement." Any "Advertisement" as defined in Rule 2210(a)(1) concerning options.[shall include any material that reaches a mass audience through public media such as newspapers, periodicals, magazines, radio, television, telephone recording, motion picture, audio or video device, telecommunications device, billboards, signs or through written sales communications to customers or the public that are not required to be accompanied or preceded by one or more current options disclosure documents.]

[(2) "Educational material" shall include any explanatory material distributed or made generally available to customers or the public that is limited to information describing the general nature of the standardized options markets or one or more strategies.]

[(3)](B) "Sales literature." Any "Sales Literature" as defined in Rule 2210(a)(2) concerning options including worksheet templates.[shall include any written communication (not defined as an "advertisement" or as "educational material") distributed or made generally available to customers or the public that contains any analysis, performance report, projection or recommendation with respect to options, underlying securities or market conditions, any

standard forms of worksheets, or any seminar text which pertains to options and which is communicated to customers or the public at seminars, lectures or similar such events.]

(C) "Correspondence." Any "Correspondence" as defined in Rule 2211(a)(1) concerning options.

(D) "Institutional sales material." Any "Institutional Sales Material" as defined in Rule 2211(a)(2) concerning options.

(E) "Public appearance." Any participation in a seminar, forum (including an interactive electronic forum), radio, television or print media interview, or other public speaking activity, or the writing of a print media article, concerning options.

(F) "Independently prepared reprint." Any "Independently Prepared Reprint" as defined in Rule 2210(a)(6)(A) concerning options.

(2) "Existing retail customer" as is defined in Rule 2211(a)(4).

(3) "Standardized option" means any option contract issued, or subject to issuance, by The Options Clearing Corporation, that has standardized terms for the strike price, expiration date, and amount of the underlying security, and is traded on a national securities exchange registered pursuant to section 6(a) of the Act.

(4) "Options" as is defined in Rule 2860(a).

(5) "Options disclosure document" has the same meaning as the term "disclosure document" as defined in Rule 2860(b)(2)(T).

(b) Approval by [Compliance] Registered Options and Security Futures Principal and Recordkeeping

(1) Advertisements, Sales Literature, and Independently Prepared Reprints. All advertisements, sales literature (except completed worksheets), [and educational material] and independently prepared reprints issued by a member [or member organization pertaining to] concerning options shall be approved in advance by a [the Compliance] Registered Options and Security Futures Principal designated by the member's written supervisory procedures.[or designee.]

(2) Correspondence. Correspondence need not be approved by a Registered Options and Security Futures Principal prior to use, unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. All correspondence is subject to the supervision and review requirements of Rule 3010(d).

(3) Institutional Sales Material. Each member shall establish written procedures that are appropriate to its business, size, structure, and customers for the review by a Registered Options and Security Futures Principal of institutional sales material used by the member and its registered representatives as described in Rule 2211(b)(1)(B).

(4) Copies [thereof] of the options communications shall be retained by the member in accordance with SEC Rule 17a-4 of the Act. [, together with t]The names of the persons who prepared the options communications [material], the names of the persons who approved the options

communications [material] and,[in the case of sales literature,] the source of any recommendations contained therein, shall be retained by the member[or member organization] and be kept [at an easily accessible place for examination by the Association period of three years] in the form and for the time period required for options communications by SEC Rule 17a-4 of the Act.

(c) Association Approval Requirements and Review Procedures

(1) In addition to the approval required by paragraph (b) of this Rule, [every] all advertisements, [and all educational material] sales literature, and independently prepared reprints [of] issued by a member [or member organization pertaining to] concerning standardized options used prior to delivery of the applicable current options disclosure document or prospectus shall be submitted to the Advertising [/Investment Companies] Regulation Department of the Association [\*](the "Department") at least ten calendar days prior to use (or such shorter period as the [Association] Department may allow in particular instances) for approval and, if changed or expressly disapproved by the [Association] Department, shall be withheld from circulation until any changes specified by the [Association] Department have been made or, in the event of disapproval, until such options communication [ the advertisement or educational material] has been resubmitted for, and has received, [Association] Department approval.

(2)(A) Notwithstanding the foregoing provision, the Department, upon review of a member's options [advertisements,

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[\* This Department located at 1735 K Street, N.W., Washington, D.C. 20006.]

educational material and/or sales literature] communications, and after determining that the member [will again] has departed from the standards of this Rule, may require that such member file some or all options [advertisements, educational material and/or sales literature,] communications or the portions of such member's [material] communications that [is] are related to options [any specific types or classes of securities or services,] with the Department, at least ten calendar days prior to use.

(B) The Department shall notify the member in writing of the types of options communications [material] to be filed and the length of time such requirement is to be in effect. The requirement shall not exceed one year, however, and shall not take effect until 21 calendar days after service of the written notice, during which time the member may request a hearing under Rules 9551 and 9559.

(3) In addition to the foregoing requirements, every member's options [advertising and sales literature] communications shall be subject to a routine spot-check procedure. Upon written request from the [Association] Department, each member shall promptly submit the communications [material] requested. Members will not be required to submit communications [material] under this procedure that have[s] been previously submitted pursuant to one of the foregoing requirements.

(4) The requirements of this paragraph (c) shall not be applicable to:

(A) options communications [advertisements or educational material] submitted to another self-regulatory organization having comparable standards pertaining to such communications [advertisements or educational material, and];

(B) [advertisements] communications in which the only reference to options is contained in a listing of the services of [a] the member[organization.];

(C) the options disclosure document; and

(D) the prospectus.

[(5) Except as otherwise provided in subparagraphs (d)(2)(B) and (C), no written material respecting options may be disseminated to any person who has not previously or contemporaneously received one or more current options disclosure documents.]

(d) Standards Applicable to Communications[with the Public]

(1) [General Standards]Communications Regarding Standardized Options used Prior to Delivery of Options Disclosure Document

(A) Options communications regarding standardized options exempted under SEC Rule 238 under the Securities Act of 1933 used prior to options disclosure document delivery:

(i) must be limited to general descriptions of the options being discussed. The text may also contain a brief description of options, including a statement that identifies registered clearing agencies for options and a brief

description of the general attributes and method of operation of the exchanges on which such options are traded, including a discussion of how an option is priced;

(ii) must contain contact information for obtaining a copy of the options disclosure document;

(iii) must not contain recommendations or past or projected performance figures, including annualized rates of return, or names of specific securities;

(iv) may include any statement required by any state law or administrative authority;

(v) may include advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics, provided such material is not misleading; and

(B) Options communications regarding options not exempted under SEC Rule 238 under the Securities Act of 1933 used prior to delivery of a prospectus that meets the requirements of Section 10(a) of said Act must conform to SEC Rule 134 or 134a under said Act, as applicable.

## (2) General Standards

(A) No member [or member organization] or associated person of the member [associated with a member] shall use[tilize

any advertisement, educational material, sales literature,] any [or other] options communications [to any customer or member of the public concerning options] which:

[(A)](i) contains any untrue statement or omission of a material fact or is otherwise false or misleading;

[(B)](ii) contains promises of specific results, exaggerated or unwarranted claims, opinions for which there is no reasonable basis or forecasts of future events which are unwarranted or which are not clearly labeled as forecasts;

[(C)](iii) contains [hedge clauses or disclaimers which are not legible, which attempt to disclaim responsibility for the content of such literature or for opinions expressed therein, or which are otherwise inconsistent with such communication] cautionary statements or caveats that are not legible, are misleading, or are inconsistent with the content of the material;[ or]

[(D)](iv) would constitute a prospectus as that term is defined in the Securities Act of 1933, unless it meets the requirements of Section 10 of said Act[.];

(v) contains statements suggesting the certain availability of a secondary market for options;

[(2) Specific Standards (A)](vi) fails to reflect [T]the[special] risks attendant to options transactions and the

complexities of certain options investment strategies [shall be reflected in any advertisement, educational material or sales literature which discusses the uses or advantages of options.];

(vii) [Such communications shall] fails to include a warning to the effect that options are not suitable for all investors or contains suggestions to the contrary[. In the preparation of written communications respecting options, the following guidelines shall be observed:]; or

(viii) fails to include a statement that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of sales persons), comparison, recommendations, statistics, or other technical data, will be supplied upon request.

(B) Subparagraphs (vii) and (viii) above shall not apply to institutional sales material as defined in paragraph (a) of this Rule.

(C)[(i)] Any statement in any options communications referring to the potential opportunities or advantages presented by options shall be balanced by a statement of the corresponding risks. The risk statement shall reflect the same degree of specificity as the statement of opportunities, and broad generalities [should] must be avoided[. Thus, a statement such as "with options, an investor has an opportunity to earn profits while limiting his risk of loss," should be balanced by a statement such as "of course, an options investor

may lose the entire amount committed to options in a relatively short period of time."].

[(ii) It shall not be suggested that options are suitable for all investors.]

[(iii) Statements suggesting the certain availability of a secondary market for options shall not be made.]

[(B) Advertisements pertaining to options shall conform to the following standards:]

[(i) Advertisements may only be used (and copies of the advertisements may be sent to persons who have not received one or more options disclosure documents) if the material meets the requirements of SEC Rule 134 under the Securities Act of 1933, as that Rule has been interpreted as applying to options. Under Rule 134, advertisements must be limited to general descriptions of the security being offered and of its issuer. Advertisements under this Rule shall state the name and address of the person from whom a current options disclosure document(s) may be obtained. Such advertisements may have the following characteristics:]

[a. The text of the advertisement may contain a brief description of such options, including a statement that the issuer of every such option is the Options Clearing Corporation. The text may also contain a

brief description of the general attributes and method of operation of the exchange or exchanges on which such options are traded and of the Options Clearing Corporation, including a discussion of how the price of an option is determined on the trading floor(s) of such exchange(s);]

[b. The advertisement may include any statement required by any state law or administrative authority;]

[c. Advertising designs and devices, including borders, scrolls, arrows, pointers, multiple and combined logos and unusual type faces and lettering as well as attention-getting headlines and photographs and other graphics may be used, provided such material is not misleading.]

[(ii) The use of recommendations or of past or projected performance figures, including annualized rates of return, is not permitted in any advertisement pertaining to options.]

[(C) Educational material, including advertisements, pertaining to options may be used if the material meets the requirements of SEC Rule 134A under the Securities Act of 1933. Those requirements are as follows:]

[(i) The potential risks related to options trading generally and to each strategy addressed are explained;]

[(ii) No past or projected performance figures, including annualized rates of return are used;]

[(iii) No recommendation to purchase or sell any option contract is made;]

[(iv) No specific security is identified other than:]

[a. a security which is exempt from registration under the Act, or an option on such exempt security;]

[b. an index option, including the component securities of the index; or]

[c. a foreign currency option; and]

[(v) The material contains the name and address of a person or persons from whom the appropriate current Options Disclosure Document(s), as defined in SEC Rule 9b-1 of the Act, may be obtained.]

[(D) Sales literature pertaining to options shall conform to the following standards:]

[(i) Sales literature shall state that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of sales persons), comparisons, recommendations, statistics or other technical data, will be supplied upon request.]

[(ii) Such communications may contain projected performance figures (including projected annualized rates of return), provided that:]

(3) Projections

Options communications may contain projected performance figures (including projected annualized rates of return) provided that:

(A) all such communications regarding standardized options are accompanied or preceded by the options disclosure document;

(B)[a.] no suggestion of certainty of future performance is made;

(C)[b.] parameters relating to such performance figures are clearly established (e.g., to indicate exercise price of option, purchase price of the underlying stock and its market price, option premium, anticipated dividends, etc.);

(D)[c.] all relevant costs, including commissions, fees, and interest charges ([if] as applicable[with regard to margin transactions]) are disclosed and reflected in the projections;

(E)[d.] such projections are plausible and are intended as a source of reference or a comparative device to be used in the development of a recommendation;

(F)[e.] all material assumptions made in such calculations are clearly identified (e.g., "assume option expires," "assume option unexercised," "assume option exercised," etc.);

(G)[f.] the risks involved in the proposed transactions are also disclosed; and

(H)[g.] in communications relating to annualized rates of return, that such returns are not based upon any less than a sixty-day experience; any formulas used in making calculations are clearly displayed; and a statement is included to the effect that the annualized returns cited might be achieved only if the parameters described can be duplicated and that there is no certainty of doing so.

#### (4) Historical Performance

[(iii) Such]Options communications may feature records and statistics that portray the performance of past recommendations or of actual transactions, provided that:

(A) all such communications regarding standardized options are accompanied or preceded by the options disclosure document;

(B)[a.] any such portrayal is done in a balanced manner, and consists of records or statistics that are confined to a specific "universe" that can be fully isolated and circumscribed and that covers at least the most recent 12-month period;

(C)[b.] such communications include the date of each initial recommendation or transaction, the price of each such recommendation or transaction as of such date, and the date and price of each recommendation or transaction at the end of the period

or when liquidation was suggested or effected, whichever was earlier; provided that if the communications are limited to summarized or averaged records or statistics, in lieu of the complete record there may be included the number of items recommended or transacted, the number that advanced and the number that declined, together with an offer to provide the complete record upon request;

(D)[c.] [such communications disclose ]all relevant costs, including commissions, [and interest charges (if applicable with regard to margin transactions) and,] fees, and daily margin obligations (as applicable) are disclosed and reflected in the performance;

(E) whenever such communications contain annualized rates of return [are used], all material assumptions used in the process of annualization are disclosed;

(F)[d.] an indication is provided of the general market conditions during the period(s) covered, and any comparison made between such records and statistics and the overall market (e.g., comparison to an index) is valid;

(G)[e.] such communications state that the results presented should not and cannot be viewed as an indicator of future performance; and

(H)[f.] a Registered Options and Security Futures Principal determines that the records or statistics fairly present the status of

the recommendations or transactions reported upon and so initials the report.

(5) Options Programs

[(iv) In the case of] In communications regarding an options program (i.e., an investment plan employing the systematic use of one or more options strategies), the cumulative history or unproven nature of the program and its underlying assumptions shall be disclosed.

[(v) Standard forms of options worksheets utilized by member organizations, in addition to complying with the requirements applicable to sales literature, must be uniform within a member organization.]

[(vi) If a member organization has adopted a standard form of worksheet for a particular options strategy, nonstandard worksheets for that strategy may not be used.]

[(vii) Communications that portray performance of past recommendations or actual transactions and completed worksheets shall be kept at a place easily accessible to the sales office for the accounts or customers involved.]

(6) Violation of Other Rules

Any violation by a member or associated person of any rule or requirement of the SEC or any rule of the Securities Investor Protection Corporation applicable to member communications concerning options will be deemed a violation of this Rule 2220.

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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

FINRA and other SROs have sought to modernize their rules concerning options communications with the public. One of the goals of this rule modernization is to make the rules on options communications consistent with the general rules on communications with the public. To this end, FINRA proposes to: (1) use, to the extent appropriate, the same terminology and definitions as in its general communications rules; (2) make the requirements for principal review of correspondence concerning options the same as for correspondence generally; and (3) update the standards on the content of communications that precede the delivery of the options disclosure document ("ODD"). A discussion of the specific changes is provided below.

NASD Rule 2220(a) Definitions

The proposed rule change would amend the definitions in NASD Rule 2220(a) to adopt (and classify collectively as "options communications") definitions of

"advertisement," "sales literature," "independently prepared reprint," "correspondence," "institutional sales material," and "public appearance"<sup>3</sup> that are consistent with those terms as they are defined in FINRA's general advertising rules – NASD Rule 2210 (Communications with the Public) and NASD Rule 2211 (Institutional Sales Material and Correspondence).<sup>4</sup> With respect to the definition of "sales literature," the proposed rule change also would make clear that worksheet templates, which are commonly used in the marketing of options, are included within the definition of sales literature.<sup>5</sup> The proposed rule change also would adopt the definition of "existing retail customer" set forth in NASD Rule 2211.<sup>6</sup>

In addition, the proposed rule change would eliminate NASD Rule 2220's current definition of "educational material," which is a term unique to options communications. Communications that would previously have been considered "educational material" would now be classified as either "advertisements" or "sales literature." This approach also would allow FINRA members to continue to create educational material concerning options, while at the same time providing members with greater flexibility in designing

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<sup>3</sup> Options communications that qualify as public appearances (e.g., seminars, radio, forums) may also qualify as other forms of options communications (e.g., advertisements, sales literature). For example, the writing of a print media article would generally qualify as both an advertisement and a public appearance. Seminar scripts, handouts, slides, or other visual presentations would also generally be deemed to be sales literature.

<sup>4</sup> See NASD Rule 2210(a)(1), (2), (5) & (6)(A); NASD Rule 2211(a)(1), and (2).

<sup>5</sup> The definition of "sales literature" in NASD Rule 2210(a)(2) includes many examples but does not include worksheets. In view of that fact that other SROs' definitions of "sales literature" include "worksheets," FINRA has expressly included "worksheet templates" in the definition of sales literature in proposed Rule 2220(a)(1)(B) to ensure consistency and avoid any ambiguity.

<sup>6</sup> See Rule NASD 2211(a)(4).

such materials.

The proposed rule change would also adopt the definition of “options” as defined in NASD Rule 2860(a) (Options), FINRA’s general rule governing members’ conduct when engaging in options activity. NASD Rule 2220 currently does not have a definition for the term “options.” Adopting NASD Rule 2860’s definition of that term would not only clarify the meaning of “options” as it is used in NASD Rule 2220, it would also promote consistency between the two rules.

Additionally, the proposed rule change would define the term “standardized option” for purposes of NASD Rule 2220 to mean any option contract issued, or subject to issuance, by The Options Clearing Corporation (“OCC”), that has standardized terms for the strike price, expiration date, and amount of the underlying security, and is traded on a national securities exchange registered pursuant to section 6(a) of the Securities Exchange Act of 1934 (“the Act”). FINRA is proposing this definition to help members understand the meaning of this term as it is used in proposed NASD Rule 2220(d)(1), which details the standards applicable to communications regarding standardized options exempted under SEC Rule 238 under the Securities Act of 1933 (“Securities Act”) that are used prior to delivery of the ODD, and to communications regarding options not exempted under SEC Rule 238 that are used prior to delivery of a prospectus that meets the requirements of Section 10(a) of the Securities Act.

Finally, the proposed rule change would define “options disclosure document” as having the same meaning as the definition of the term “disclosure document” defined in NASD Rule 2860.<sup>7</sup> FINRA believes that having a specific definition of “options

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<sup>7</sup> See NASD Rule 2860(b)(2)(T).

disclosure document” would assist members in correctly understanding and applying the proposed rule changes.

### NASD Rule 2220(b) Approval by Registered Options and Security Futures

#### Principal and Recordkeeping

The proposed rule change would remove the outdated term “educational material” in the requirement in NASD Rule 2220(b) to have an options principal approve prior to use certain options communications and would add “independently prepared reprints” to the types of options communications that require pre-use approval by an options principal. The proposed rule change would also exclude “completed worksheets” from those materials requiring approval of an options principal. Because the definition of “sales literature” includes “worksheet templates” this exclusion would clarify that only the templates, and not each subsequent worksheet with data, is required to be approved by an options principal.

In addition, the proposed rule change would include new requirements for principal review of correspondence in NASD Rule 2220(b) that are consistent with recently amended correspondence principal approval requirements in NASD Rule 2211.<sup>8</sup> As noted previously, because Rule NASD 2220 currently does not have a definition of correspondence, the proposed rule change would incorporate NASD Rule 2211’s definition of “correspondence,” which classifies correspondence as any written letter or electronic mail message distributed by a member to one or more of its existing retail customer and to fewer than 25 prospective retail customers within any 30 calendar-day

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<sup>8</sup> See Exchange Act Rel. No. 54217 (July 26, 2006), 71 F.R. 43831 (August 2, 2006) (SR-NASD-2006-011).

period.<sup>9</sup> Pursuant to the proposed rule change, correspondence would not need to be approved by a Registered Options and Security Futures Principal prior to use, unless such correspondence is distributed to 25 or more existing retail customers within any 30 calendar-day period and makes any financial or investment recommendation or otherwise promotes a product or service of the member. Also consistent with NASD Rule 2210, any written letters, emails, or instant messages to 25 or more prospective retail customers within any 30 calendar-day period would be deemed sales literature, which would have to be approved prior to use by a Registered Options and Security Futures Principal.<sup>10</sup> Finally, as with NASD Rule 2210, the proposed rule change would make clear that all correspondence concerning options is subject to NASD Rule 3010(d)'s supervision and review requirements.

The proposed rule change would also include new requirements for principal review of institutional sales material in NASD Rule 2220(b)(3) that are consistent with the principal review requirements for general institutional sales material in NASD Rule 2211. As noted previously, because NASD Rule 2220 does not have a definition of institutional sales material, the proposed rule change would incorporate NASD Rule 2211's definition of "institutional sales material," which classifies institutional sales material as any communication that is distributed or made available only to institutional customers.<sup>11</sup> Pursuant to the proposed rule change, each member would be required to

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<sup>9</sup> Previously, such material would have been examined to determine whether it should be considered an advertisement, sales literature, or educational material.

<sup>10</sup> See NASD Notice to Members 06-45 (August 2006). FINRA anticipates that other SROs will adopt similar standards to FINRA.

<sup>11</sup> Previously, such material would have been examined to determine whether it should be considered an advertisement, sales literature or educational material.

establish written procedures that are appropriate for its business size, structure, and customers for the review by a Registered Options and Security Futures Principal of institutional sales material used by the member and its registered representatives as described in NASD Rule 2211(b)(1)(B).<sup>12</sup>

The proposed rule change also would require that a member retain copies of the options communications in accordance with SEC Rule 17a-4. Additionally, a member would be required to retain the names of the persons who prepared the communications and the source of any recommendations contained in the communications and keep them in the form and for the time period required for options communications required in SEC Rule 17a-4.

NASD Rule 2220(c) FINRA Approval Requirements and Review Procedures

Currently, NASD Rule 2220(c)(1) requires members to submit all options advertisements and educational material to FINRA's Advertising Regulation Department (the "Department") for approval at least ten days prior to use (or such shorter period as FINRA may allow) but does not require members to submit sales literature. The effect has been that widely disseminated communications (i.e., advertisements and educational material) used prior to delivery of the ODD are filed for approval while more targeted communications (i.e., sales literature, as previously defined) that must be preceded or

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<sup>12</sup> NASD Rule 2211(b)(1)(B) requires such procedures to be in writing and be designed to reasonably supervise each registered representative. Where such procedures do not require review of all institutional sales material prior to use or distribution, they must include provision for the education and training of associated persons as to the firm's procedures governing institutional sales material, documentation of such education and training, and surveillance and follow-up to ensure that such procedures are implemented and adhered to. Evidence that these supervisory procedures have been implemented and carried out must be maintained and made available to FINRA upon request.

accompanied by the ODD are exempted from filing. FINRA intends to follow a similar approach in the proposed rule change. Communications concerning standardized options that are likely to be widely disseminated such as advertisements, sales literature (as newly defined), and independently prepared reprints would be subject to filing under the proposed rule change. In contrast, more targeted communications – generally correspondence – that will be used once the applicable ODD or prospectus has been delivered would continue to be exempt from the filing requirements. In addition, as discussed below, communications used prior to the delivery of the ODD or prospectus would be subject to the more stringent content standards in subparagraph (d)(1). The proposed rule change would also modify existing rule text to clarify that the filing must occur at least ten calendar days prior to use (or such shorter period as the Department may allow in particular instances).

The proposed rule change would delete NASD Rule 2220(c)(5), which prohibits the distribution of any written material, except as described in subparagraphs (d)(2)(B) and (C), respecting options to any person who had not previously or contemporaneously received one or more current options disclosure documents. This requirement would be subsumed into proposed NASD Rule 2220(d)(1) which would establish the standards for communications that may be used prior to delivery of the options disclosure document or prospectus.

#### NASD Rule 2220(d) Standards Applicable to Communications

The proposed rule change would make several amendments to the standards applicable to options communications contained in NASD Rule 2220(d). First, new NASD Rule 2220(d)(1) would clarify and update the standards limiting the content of

communications regarding standardized options, as that term is defined and discussed earlier in the proposed rule change. Specifically, proposed new NASD Rule 2220(d)(1)(A) would provide that communications regarding standardized options exempted under SEC Rule 238 under the Securities Act that are used prior to delivery of the ODD must be limited to general descriptions of the options being discussed. This could include a brief description of options, including a statement that identifies registered clearing agencies for options and a brief description of the general attributes and method of operation of the exchanges on which such options are traded, including a discussion of how an option is priced. Additionally, such options communications would be required to include contact information for obtaining a copy of the ODD, but could not contain recommendations or past or projected performance figures, including annualized rates of return, or names of specific securities. These options communications could also include any statement required by any state law and administrative authority as well as any advertising designs and devices, provided such material is not misleading.

Second, proposed new NASD Rule 2220(d)(1)(B) would provide that options communications regarding options not exempted under SEC Rule 238 that are used prior to delivery of a prospectus that meets the requirements of the Securities Act Section 10(a) must conform to SEC Rule 134 or 134a under the Securities Act, as applicable.

Third, the proposed rule change would broaden NASD Rule 2220(d)(2), which prohibits hedge clauses or disclaimers that are not legible, attempt to disclaim responsibility, or are otherwise inconsistent, by deleting references to disclaimers and the outdated term "hedge clauses" and instead generally prohibiting the use of illegible, misleading, or inconsistent cautionary statements or caveats.

Fourth, the proposed rule change would require all options communications, with the exception of institutional sales material, to include a statement that supporting documentation for any claims (including any claims made on behalf of options programs or the options expertise of sales persons), comparison, recommendations, statistics, or other technical data, will be supplied upon request. Currently, NASD Rule 2220(d)(2)(D) only requires sales literature to include this statement.

Fifth, the proposed rule change would except institutional sales materials from being required to include the existing required disclosure that options are not suitable for all investors. This disclaimer appears unnecessary in institutional sales material because, for purposes of this provision, institutions are viewed to be sufficiently sophisticated to be aware that options are not suitable for all investors.

Sixth, proposed changes to NASD Rules 2220(d)(3) and (d)(4) would permit projected and historical performance figures in any options communications. Currently, only communications defined as sales literature may contain this information.<sup>13</sup> The proposed rule change also would require all such communications regarding standardized options to be preceded or accompanied by the ODD. In addition, all relevant costs would be required to be disclosed and reflected in the projections.

Seventh, the proposed rule change would amend Rule NASD 2220(d)(6) to provide that any violation by a member or associated person of any rule or requirement of the SEC or any rule of the Securities Investor Protection Corporation applicable to member communications regarding options will be deemed a violation of NASD Rule

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<sup>13</sup> See Rule NASD 2220(d)(2)(D)(ii).

2220. This approach is consistent with NASD Rule 2210.<sup>14</sup>

General Technical Amendments to NASD Rule 2220

The proposed rule change also would delete and update outdated rule language identified by the Options Self Regulatory Council and the subcommittee assigned to update the SROs' options communications rules. In particular, the proposed rule change would replace references throughout NASD Rule 2220 to "material" with the term "communications." The proposed rule change would also replace references to "Registered Options Principal" with "Registered Options and Security Futures Principal."

FINRA believes that the proposed rule change will better address the needs for regulating current options communications practices and promote consistency across SROs. After these proposed changes are filed with the SEC, FINRA and other SROs will begin work on updating the Guidelines for Options Communications.<sup>15</sup>

As noted in Item 2 of this filing, FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 60 days following Commission approval. The effective date will be 90 days following publication of the Regulatory Notice announcing Commission approval.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of

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<sup>14</sup> See Rule 2210(e).

<sup>15</sup> The Guidelines for Options Communications is an industry-wide publication prepared by FINRA and the options exchanges. The Guidelines explain the SROs' options communications rules and interpretations, address frequently asked questions and common problems, and provide a framework for informative and effective communications with the public.

Section 15A(b)(6) of the Act,<sup>16</sup> 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 promotes just and equitable principles of trade and protects investors and the public interest by providing the investing public with options communications rules that are designed to provide appropriate safeguards and greater clarity by promoting harmonization between FINRA's and other SROs' options communications rules.

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

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<sup>16</sup> 15 U.S.C. 78o-3(b)(6).

(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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2008-013 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-FINRA-2008-013. 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 Number SR-FINRA-2008-013 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.<sup>17</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>17</sup> 17 CFR 200.30-3(a)(12).