

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-60669; File No. SR-FINRA-2009-058)

September 14, 2009

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of 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)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“SEA” or “Act”)<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that 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”) 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 adopt a customer confirmation rule for purposes of the consolidated FINRA rulebook (“Consolidated FINRA Rulebook”).<sup>3</sup> In particular, FINRA proposes to adopt FINRA Rule 2232 (Customer Confirmations) and to delete NASD Rule 2230, NASD IM-2110-6 and Incorporated NYSE Rule 409(f).

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

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

<sup>3</sup> See infra note 4.

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 and at the Commission's Public Reference Room.

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

As part of the process of developing a new Consolidated FINRA Rulebook,<sup>4</sup> FINRA is proposing to adopt a new, consolidated customer confirmation rule. FINRA proposes to adopt FINRA Rule 2232 (Customer Confirmations) and to delete NASD Rule 2230, NASD IM-2110-6 and NYSE Rule 409(f).<sup>5</sup>

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<sup>4</sup> 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).

<sup>5</sup> For convenience, the Incorporated NYSE Rules are referred to as the "NYSE Rules."

(A) Background

NASD and NYSE Rules set forth certain basic requirements with respect to confirmations of transactions with customers.<sup>6</sup>

(1) NASD Rule 2230

NASD Rule 2230 provides that a member at or before the completion of each transaction<sup>7</sup> 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.

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<sup>6</sup> 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).

<sup>7</sup> SEA Rule 10b-10(d)(2) states that the term “completion of the transaction” has the meaning set forth in SEA 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.

When NASD Rule 2230 was adopted in 1939<sup>8</sup> its requirements essentially duplicated those set forth in SEA Rule 15c1-4 as originally adopted by the SEC. 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.<sup>9</sup> In 1977, the SEC rescinded Rule 15c1-4 and adopted SEA Rule 10b-10, indicating that it would apply “regardless of the manner in which a broker-dealer conducts its business or the marketplace where transactions are effected.”<sup>10</sup> Since then, the SEC has amended Rule 10b-10 several times.<sup>11</sup>

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<sup>8</sup> Rule 2230, formerly designated as Section 12 of the 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).

<sup>9</sup> See Securities Exchange Act Release No. 1330 (August 4, 1937).

<sup>10</sup> See Securities Exchange Act Release No. 13508 (May 5, 1977) (Securities Confirmations: Final Rule).

<sup>11</sup> 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 others, 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).

(2) NASD IM-2110-6

NASD IM-2110-6 requires that any member providing a customer confirmation pursuant to SEA Rule 10b-10 in connection with any transaction in callable common stock<sup>12</sup> 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.<sup>13</sup> FINRA also stated that the ability of 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

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<sup>12</sup> Callable common stock is stock that is subject to being called away from a shareholder, either by the issuer or by a third party.

<sup>13</sup> See Securities Exchange Act Release No. 42761 (May 5, 2000), 65 FR 30459 (May 11, 2000) (Approval Order). See also Notice to Members 00-33 (May 2000) (Callable Common Stock).

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 SEA Rule 10b-10.

(B) Proposal

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 SEA Rule 10b-10. FINRA believes that incorporating by reference the requirements of Rule 10b-10, as opposed to replicating the SEC rule's detailed requirements in FINRA's rule, would make the proposed rule clear and serve the interests of regulatory efficiency.
- 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,<sup>14</sup> not just callable common stock. FINRA believes that, from

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<sup>14</sup> Exchange Act Section 3(a)(11) defines the term "equity security" to include, among others, "any stock or similar security."

the standpoint of investor protection, this change is necessary to ensure that the rule covers, for instance, callable preferred stock.<sup>15</sup>

- The requirement in NYSE Rule 409(f) to disclose the settlement date of the transaction would be transferred to the new rule, 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 SEA Rule 10b-10, be deleted.

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.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of 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 will further the purposes of the Act because, as part of the FINRA rulebook consolidation process, the proposed rule

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<sup>15</sup> FINRA notes that SEA 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.

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

change would streamline and reorganize existing rules that govern basic customer confirmation requirements. Further, the proposed rule change would provide greater regulatory clarity with respect to a member's customer confirmation obligations.

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 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-2009-058 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-2009-058. 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 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 a.m. and 3 p.m. 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-2009-058 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).