

SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-64884; File No. SR-FINRA-2011-033)

July 14, 2011

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Adopt FINRA Rule 0180 (Application of Rules to Security-Based Swaps)

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Exchange Act” or “Act”)¹ and Rule 19b-4 thereunder,² notice is hereby given that on July 8, 2011, 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 and II below, which Items have been substantially prepared by FINRA. FINRA has designated the proposed rule change as constituting a “non-controversial” rule change under paragraph (f)(6) of Rule 19b-4 under the Act,³ which renders the proposal effective upon receipt of this filing by the Commission. 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 FINRA Rule 0180 (Application of Rules to Security-Based Swaps). The proposed rule change would, with certain exceptions, temporarily limit the application of FINRA rules with respect to security-based swaps.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 17 CFR 240.19b-4(f)(6).

The text of the proposed rule change is available on FINRA's website 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

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"),⁴ Title VII of which established a comprehensive new regulatory framework for swaps and security-based swaps. The new legislation was intended among other things to enhance the authority of regulators to implement new rules designed to reduce risk, increase transparency, and promote market integrity with respect to such products. Generally, the Dodd-Frank Act provides that the Commodity Futures Trading Commission ("CFTC") will regulate "swaps" and the SEC will regulate "security-based

⁴ Pub. L. No. 111-203, 124 Stat. 1376 (2010).

swaps.”⁵ The Dodd-Frank Act contemplates certain self-regulatory organization responsibilities in this area as well.⁶

Title VII of the Dodd-Frank Act generally becomes effective on July 16, 2011 (360 days after the enactment of the Dodd-Frank Act, *i.e.* the “Effective Date”), unless a provision requires a rulemaking.⁷ The Commission has recently taken a number of actions in furtherance of Title VII, including the issuance of a release to provide guidance in connection with the effectiveness of Exchange Act provisions related to security-based swaps added by subtitle B of Title VII (which generally creates, and relates to, the regulatory regime for security-based swaps), and to provide temporary exemptions in connection with certain of those provisions.⁸ In addition, the Commission has recently acted to address a change to an existing definition in the Act resulting from the effectiveness of the Title VII amendments.⁹ Specifically, as of the July 16 Effective

⁵ The terms “swap” and “security-based swap” are defined in Sections 721 and 761 of the Dodd-Frank Act. The Commission and the CFTC jointly have proposed to further define these terms. See Securities Exchange Act Release No. 64372 (Apr. 29, 2011), 76 FR 29818 (May 23, 2011) (Further Definition of “Swap,” “Security-Based Swap,” and “Security-Based Swap Agreement”; Mixed Swaps; Security-Based Swap Agreement Recordkeeping); Securities Exchange Act Release No. 63452 (Dec. 7, 2010), 75 FR 80174 (Dec. 21, 2010) (Further Definition of “Swap Dealer,” “Security-Based Swap Dealer,” “Major Swap Participant,” “Major Security-Based Swap Participant” and “Eligible Contract Participant”).

⁶ See, e.g., Sections 712 and 763 of the Dodd-Frank Act.

⁷ The Dodd-Frank Act provides that if a Title VII provision requires a rulemaking, the provision will go into effect “not less than” 60 days after the publication of the related final rule or on July 16, 2011, whichever is later. See Sections 754 and 774 of the Dodd-Frank Act.

⁸ See, e.g., Securities Exchange Act Release No. 64678 (June 15, 2011), 76 FR 36287 (June 22, 2011) (Compliance Dates Release).

⁹ See Securities Exchange Act Release No. 64795 (July 1, 2011) (Order Granting Temporary Exemptions) (the “Exemptive Release”).

Date, the Act's definition of "security" will expressly encompass security-based swaps.¹⁰ In making this change, Congress intended for security-based swaps to be treated as securities under the Act and the underlying rules and regulations. Nonetheless, this expansion of the general scope of the Act raises certain complex issues of interpretation, including issues as to the application of those provisions to registered broker-dealers. Absent additional time to analyze those issues, and to consider whether to provide interpretive or operational guidance, these changes may lead to unnecessary market uncertainty.

FINRA notes that the Act's definition of "security" has similar implications for numerous provisions under FINRA rules.¹¹ FINRA notes that, pending the final implementation of new rules and guidance that would provide greater regulatory clarity in relation to security-based swap activities, it is in the public interest to propose a rule that would provide relief from certain FINRA requirements so as to help avoid undue market disruptions resulting from the change to the definition of "security" under the Act. In its Exemptive Release, the Commission determined that it is appropriate to provide market participants with additional time to consider the potential impact on their businesses and the interpretive questions raised, and to provide the Commission with any related requests for guidance or relief, along with the underlying analysis.

¹⁰ See Exchange Act Section 3(a)(10) (15 U.S.C. 78c(a)(10)), as revised by Section 761 of the Dodd-Frank Act.

¹¹ 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 members, 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).

In its Exemptive Release, the Commission noted that the relief it is granting is targeted and does not include, for instance, relief from the Act's antifraud and anti-manipulation provisions. FINRA notes that proposed new FINRA Rule 0180 is similarly targeted. Specifically, proposed FINRA Rule 0180(a) provides that FINRA rules shall not apply to members' activities and positions with respect to security-based swaps, except for: FINRA Rule 2010 (standards of commercial honor and principles of trade); FINRA Rule 2020 (use of manipulative, deceptive or other fraudulent devices); FINRA Rule 3310 (anti-money laundering program); and FINRA Rule 4240 (margin requirements for credit default swaps). Paragraph (b) of the proposed rule provides that the following rules apply to members' activities and positions with respect to security-based swaps only to the extent they would have applied as of July 15, 2011: NASD Rule 3110 (books and records) and all successor FINRA Rules to such NASD Rule;¹² the FINRA Rule 4500 Series (books, records and reports); and the FINRA Rule 4100 Series (financial condition). Paragraph (c) provides that the following rules apply as necessary to effectuate members' compliance with paragraphs (a) and (b) of the rule: the FINRA Rule 0100 Series (general standards); the NASD Rule 1000 Series (membership, registration and qualification requirements) and all successor FINRA Rules to such NASD Rule Series; the FINRA Rule 1000 and 1100 Series (member application); NASD Rules 3010 (supervision) and 3012 (supervisory control system) and IM-3010-1 (standards for reasonable review) and all successor FINRA Rules to such NASD Rules and Interpretive Material; FINRA Rule 3130 (annual certification of compliance and supervisory processes); the FINRA Rule 8000 Series (investigations and sanctions); and the FINRA Rule 9000 Series (code of procedure). Paragraph

¹² The SEC recently approved the adoption of certain consolidated FINRA rules governing books and records, which will become effective on December 5, 2011. See Regulatory Notice 11-19 (April 2011).

(d) of the proposed rule provides that the rule will expire on January 17, 2012. Lastly, proposed FINRA Rule 0180.01 provides that, for purposes of the rule, “security-based swap” shall be as defined pursuant to Exchange Act Section 3(a)(68)¹³ and the rules and guidance of the SEC or its staff.

FINRA notes that, though the proposed rule change suspends on a temporary basis certain member conduct rules that may otherwise apply to members’ activities and positions with respect to security-based swaps, conduct of a serious nature that would call into question the principles underlying such rules may be addressed by FINRA under FINRA Rules 2010 and 2020.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, such that FINRA can implement the proposed rule change immediately. The implementation date of the proposed rule change will be July 8, 2011. The proposed rule change will expire by its terms on January 17, 2012. FINRA will amend the expiration date of the proposed rule in subsequent filings as necessary such that the expiration date will be coterminous with the termination of relevant provisions of the SEC’s Exemptive Release, as defined herein.

2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹⁴ which requires, among other things, that FINRA rules must be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable

¹³ 15 U.S.C. 78c(a)(68).

¹⁴ 15 U.S.C. 78q-3(b)(6).

principles of trade, and, in general, to protect investors and the public interest. FINRA believes that the proposed rule change would further the purposes of the Act because, consistent with the goals set forth by the Commission when it issued the Exemptive Release, the proposed rule change will help to avoid undue market disruption resulting from the change to the definition of “security” under the Act.

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

Because the foregoing proposed rule change does not: (i) significantly affect the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹⁵ and Rule 19b-4(f)(6) thereunder.¹⁶

A proposed rule change filed under Rule 19b-4(f)(6)¹⁷ normally does not become operative prior to 30 days after the date of the filing. However, pursuant to Rule 19b-

¹⁵ 15 U.S.C. 78s(b)(3)(A).

¹⁶ 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires a self-regulatory organization to provide the Commission with written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. FINRA has fulfilled this requirement.

¹⁷ 17 CFR 240.19b-4(f)(6).

4(f)(6)(iii),¹⁸ the Commission may designate a shorter time if such action is consistent with the protection of investors and the public interest.

FINRA has requested that the Commission waive the 30-day operative delay so that the proposal may become operative upon filing. The Commission hereby grants that request. The proposed rule is consistent with the goals set forth by the Commission when it issued the Exemptive Release and will help avoid undue market interruption resulting from the change to the definition of “security” under the Act. Therefore, the Commission believes it is consistent with the protection of investors and the public interest to waive the 30-day delay and designates the proposal as operative upon filing.¹⁹

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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:

¹⁸ 17 CFR 240.19b-4(f)(6)(iii).

¹⁹ For purposes only of waiving the operative delay for this proposal, the Commission has considered the proposed rule’s impact on efficiency, competition and capital formation. See 15 U.S.C. 78c(f).

- 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-2011-033 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-2011-033. 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 website (<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 website 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 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-2011-033 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.²⁰

Cathy H. Ahn
Deputy Secretary

²⁰ 17 CFR 200.30-3(a)(12).