

annual accounting support fee shall not exceed the PCAOB's aggregate "recoverable budget expenses," which may include operating, capital and accrued items. Section 109(b) of the Act directs the PCAOB to establish a budget for each fiscal year in accordance with the PCAOB's internal procedures, subject to approval by the Securities and Exchange Commission (the "Commission").

On July 18, 2006, the Commission amended its Rules of Practice related to its Informal and Other Procedures to add a rule to facilitate the Commission's review and approval of PCAOB budgets and accounting support fees.¹ This budget rule provides, among other things, a timetable for the preparation and submission of the PCAOB budget and for Commission actions related to each budget, a description of the information that should be included in each budget submission, limits on the PCAOB's ability to incur expenses and obligations except as provided in the approved budget, procedures relating to supplemental budget requests, requirements for the PCAOB to furnish on a quarterly basis certain budget-related information, a list of definitions that apply to the rule and to general discussions of PCAOB budget matters, and the ability of the Commission to waive compliance with any provisions of the rule.

On December 17, 2008, the Commission approved the PCAOB's 2009 budget of \$157.6 million and 2009 annual accounting support fee of \$151.8 million.² Due to the development of certain unforeseen contingencies, on March 16, 2009 the PCAOB requested Commission approval to increase its 2009 annual accounting support fee by \$5.6 million, to \$157.4 million. The primary reason for the requested increase relates to proposed legislation in Congress that would increase the PCAOB's responsibilities over auditors of broker-dealers.

Specifically, the PCAOB's request would create an additional reserve for contingencies in addition to the five month working capital reserve provided for in the Commission's budget rule.³

Therefore, the requested amount of the increase to the annual accounting support fee would result in the PCAOB being noncompliant with certain provisions of the Commission's budget rule. The Commission's budget rule provides that the Commission, in its discretion, may waive compliance with any provision of the rule,⁴ and the PCAOB has requested a waiver. In approving the PCAOB's request to increase its 2009 annual accounting support fee, the Commission is hereby waiving paragraph (d)(3) of the budget rule with respect to the PCAOB's 2009 budget and annual accounting support fee.

Pursuant to the budget rule, and as the PCAOB indicates in its request, the incremental monies collected by the PCAOB are to be held by the PCAOB until the Commission, through the approval of a supplemental budget, later approves disbursement of such monies. The procedures for submitting a supplemental budget request are provided in the budget rule. Prior to submission of any such supplemental budget request or to the implementation of any legislation that expands the PCAOB's authority over the auditors of broker-dealers, the PCAOB shall consult with the Commission on a timely basis about the PCAOB's plans for additional resources, program changes, or information technology developments and enhancements contemplated.

The Commission has determined that the PCAOB's increased annual accounting support fee is consistent with Section 109 of the Act. Accordingly,

It is ordered, pursuant to Section 109 of the Act, that the PCAOB's increase to its annual accounting support fee for calendar year 2009 is approved.

By the Commission.
Elizabeth M. Murphy,
Secretary.
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budget or in a supplemental budget approved by the Commission."

⁴ See 17 CFR 202.11(i).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59754; File No. SR-FINRA-2009-018]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt IM-2830-1 ("Breakpoint" Sales) in the Consolidated FINRA Rulebook

April 13, 2009.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² notice is hereby given that on March 26, 2009, 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 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 NASD Interpretive Material 2830-1 ("IM-2830-1") ("Breakpoint" Sales) as a FINRA rule in the consolidated FINRA rulebook with minor changes. The proposed rule change would renumber NASD IM-2830-1 as FINRA Rule 2342 in the consolidated FINRA rulebook.

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.

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

¹ 17 CFR 202.11. See Release No. 33-8724 (July 18, 2006) [71 FR 41998 (July 24, 2006)].

² See Release No. 33-8989 (December 17, 2008) [73 FR 78861 (December 23, 2008)].

³ See 17 CFR 202.11(d)(3), which provides that, "In addition to amounts needed to fund disbursements during the budget year, a budget may reflect receipts in amounts needed to fund expected disbursements during a period not to exceed the first five months of the fiscal year immediately following the budget year (the working capital reserve), provided such amounts shall be disbursed only as specified in the following year's

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 rulebook ("Consolidated FINRA Rulebook"),³ FINRA is proposing to adopt NASD IM-2830-1 into the Consolidated FINRA Rulebook with minor changes discussed below. The proposed rule change would renumber NASD IM-2830-1 as FINRA Rule 2342. NASD IM-2830-1 prohibits sales of mutual fund shares in amounts below a "breakpoint" if such sales are made "so as to share in the higher sales charges." In the context of mutual fund sales, a "breakpoint" is that point at which the sales charge is reduced for quantity purchases of fund shares.

The application of the standard in NASD IM-2830-1 depends on the facts and circumstances of particular transactions to determine whether a member executed a transaction for the purpose of earning a higher sales charge. In 1998, NASD IM-2830-1 was amended to address the use of modern portfolio investment strategies that utilize many different mutual funds with varying investment objectives.⁴ The amendments specify more precisely those facts and circumstances that FINRA will consider when examining whether trades that miss breakpoints, but are made pursuant to bona fide asset allocation programs, may have violated NASD IM-2830-1. In making such determinations, the rule provides that FINRA will consider, among other things, whether a member has retained records that demonstrate that the trade was executed in accordance with a bona fide asset allocation program that the member offers to its customers which is designed to meet their diversification needs and investment goals; and under which the member discloses to its customers that they may not qualify for

³ 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 FINRA *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

⁴ See Securities Exchange Act Release No. 40659 (Nov. 10, 1998), 63 FR 64136 (Nov. 18, 1998) (Order Approving Proposed Rule Change Relating to Mutual Fund Breakpoint Sales).

breakpoint reductions that are otherwise available.

Breakpoint issues have been of concern to the regulatory community. On December 23, 2002, FINRA issued *Special Notice to Members 02-85*, which reminded firms of their obligation to apply correctly breakpoint discounts to front-end sales load mutual fund transactions.⁵ In 2003, the staffs of FINRA, the SEC, and the NYSE conducted examinations of broker-dealers to assess their ability to deliver breakpoint discounts and memorialized the findings of those examinations in a joint report.⁶ Concurrently, FINRA staff and industry members formed a joint task force to consider issues regarding breakpoints. The joint task force issued a report in July 2003 containing recommendations for the industry to facilitate the accurate delivery of breakpoint discounts.⁷

FINRA proposes to adopt NASD IM-2830-1 as FINRA Rule 2342 as it believes this rule continues to be an important tool in regulating members' sales of mutual fund shares to ensure that they are not sold in dollar amounts just below breakpoints so as to share in higher sales charges. FINRA proposes to eliminate references to "just and equitable principles of trade" and make other minor changes to the text to reflect that it would be a stand-alone rule, rather than Interpretive Material, and to eliminate certain redundant text that is inconsistent with a rules-based format.

As noted above, 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,⁸ 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

⁵ NASD *Special Notice to Members 02-85*, NASD Requires Immediate Member Firm Action Regarding Mutual Fund Purchases and Breakpoint Schedules (December 2002).

⁶ See Joint SEC/NASD/NYSE Report of Examinations of Broker/Dealers Regarding Discounts on Front-End Sales Charges on Mutual Funds (March 2003), available at <http://www.finra.org/Industry/Issues/Breakpoints/P006438>.

⁷ See Report of the Joint NASD/Industry Task Force on Breakpoints (July 2003), available at <http://www.finra.org/Industry/Issues/Breakpoints/P006422>.

⁸ 15 U.S.C. 78o-3(b)(6).

proposed rule change would continue to provide FINRA with an important tool in regulating members' sales of mutual fund shares, consistent with the goals of protecting investors and the public interest.

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. Please include File Number SR-FINRA-2009-018 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-2009-018. 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-2009-018 and should be submitted on or before May 11, 2009.

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

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59755; File Nos. SR-NYSE-2009-18 and SR-NYSEAltr-2009-15]

Self-Regulatory Organizations; New York Stock Exchange LLC and NYSE Alternext US LLC (n/k/a NYSE Amex LLC); Order Granting Approval of Proposed Rule Changes Amending Rule 123C to Provide the Exchanges with the Ability to Temporarily Suspend Certain Requirements Relating to the Closing of Securities on the Exchange

April 13, 2009.

I. Introduction

On February 19, 2009, the New York Stock Exchange LLC ("NYSE") filed with the Securities and Exchange Commission ("Commission"), pursuant

to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹ and Rule 19b-4 thereunder,² a proposed rule change to amend NYSE Rule 123C to provide the Exchange with the ability to temporarily suspend certain NYSE requirements relating to the closing of securities at the Exchange. On February 20, 2009, NYSE Alternext US LLC (n/k/a NYSE Amex LLC) ("NYSE Amex" and, with NYSE, each an "Exchange" and collectively, the "Exchanges") filed with the Commission, pursuant to Section 19(b)(1) of the Act³ and Rule 19b-4 thereunder,⁴ a substantively identical proposed rule change to amend NYSE Amex Equities Rule 123C. The proposed rule changes were published for comment in the **Federal Register** on March 10, 2009.⁵ The Commission received no comments regarding the proposals. This order approves the proposed rule changes, as amended.

II. Description of the Proposal

A. NYSE's October 2, 2008 Amendments to Rule 48

On October 2, 2008, NYSE filed for immediate effectiveness to amend NYSE Rule 48 to provide NYSE with the ability to suspend certain rules at the close when extremely high market volatility could negatively affect the ability to ensure a fair and orderly close.⁶ NYSE amended Rule 48 on a temporary basis in order to respond swiftly to market conditions at that time. The Rule 48 amendments are scheduled to end on April 30, 2009.⁷

On December 1, 2008, NYSE Amex (then known as NYSE Alternext US LLC) relocated its equities trading to facilities located at NYSE's main trading floor at 11 Wall Street, New York, New York (the "Equities Relocation"). NYSE Amex's equity trading systems and the facilities at 11 Wall Street are operated by NYSE on behalf of NYSE Amex. In connection with the Equities Relocation, NYSE Amex adopted NYSE Rules 1-1004, subject to such changes as

necessary to apply the rules to NYSE Amex, to govern trading on the NYSE Alternext Trading System beginning on December 1, 2008.⁸ In particular, among the rules adopted in substantively identical form were the rules at issue in this proposal—most notably, NYSE Rules 48, 52, and 123C.

The temporary provisions of Rule 48 provide that a qualified Exchange officer could declare an extreme market volatility condition before the scheduled close of trading in cases where the Exchange noted volatility during the day's trading session and evidence of significant order imbalances at the close.⁹ A declaration of extreme market volatility at the close under Rule 48 permits each Exchange to temporarily suspend Rule 52 (Hours of Operation) to allow the DMM to solicit and enter into Exchange systems additional orders in order to offset any imbalance in a security at the close.¹⁰ Rule 48 requires that any additional interest be represented manually on the Floor by an Exchange Floor broker.¹¹ A declaration of extreme market volatility at the close also permits each Exchange to temporarily suspend NYSE Rules 123C(1) and (2) (Market on the Close Policy and Expiration Policy) in order to allow cancellation or reduction of market-at-the-close ("MOC") and limit-at-the-close ("LOC") orders after 3:50 p.m. if such orders are the result of a legitimate error and would cause significant price dislocation at the close, among other requirements.¹² Each Exchange is required to make a reasonable effort to consult with Commission staff before declaring an extreme market volatility condition and granting a suspension of NYSE rules or procedures.¹³

The Exchanges now propose to adopt the amendments to Rule 48 on a permanent basis by deleting these provisions from Rule 48 and moving them to Rule 123C. As part of the amendments to Rule 123C, the Exchanges further propose modifying the terms of the temporary suspensions by permitting the Exchange to invoke such relief on a security-by-security basis without first declaring a Floor-wide extreme market volatility condition and codifying certain

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ 15 U.S.C. 78s(b)(1).

⁴ 17 CFR 240.19b-4.

⁵ See Securities Exchange Act Release Nos. 59489 (March 3, 2009), 74 FR 10330 (SR-NYSE-2009-18) and 59488 (March 3, 2009), 74 FR 10334 (SR-NYSEAltr-2009-15) (each a "Notice" and collectively, the "Notices").

⁶ See Securities Exchange Act Release No. 58743 (October 7, 2008), 73 FR 60742 (October 14, 2008) (SR-NYSE-2008-102) (referred to herein as "NYSE's October 2, 2008 filing").

⁷ Rule 48.10. See also Securities Exchange Act Release Nos. 59168 (December 29, 2008), 74 FR 483 (January 6, 2009) (SR-NYSE-2008-139) and 59666 (March 31, 2009), 74 FR 15792 (April 7, 2009) (SR-NYSE-2009-35).

⁸ See Securities Exchange Act Release Nos. 58705 (October 1, 2008), 73 FR 58995 (October 8, 2008) (SR-Amex-2008-63) and 59022 (November 26, 2008), 73 FR 73683 (December 3, 2008) (SR-NYSEALTR-2008-10).

⁹ Rule 48(c)(1)(A).

¹⁰ Rule 48(b)(2)(A).

¹¹ Rule 48(b)(2)(A)(ii).

¹² Rule 48(b)(2)(B).

¹³ Rule 48(c)(2).

⁹ 17 CFR 200.30-3(a)(12).