

19(b)(3)(A)(ii) of the Act.¹⁷ 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

- 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–NASDAQ–2011–022 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–NASDAQ–2011–022. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and

copying at the principal office of the Exchange. 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–NASDAQ–2011–022 and should be submitted on or before March 10, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁸

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–3582 Filed 2–16–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–63895; File No. SR–FINRA–2009–090]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to a Proposed Rule Change and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment No. 1, To Adopt FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders) in the Consolidated FINRA Rulebook

February 11, 2011.

I. Introduction

On December 12, 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 (“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 adopt FINRA Rule 5320 in FINRA's new consolidated rulebook (“Consolidated FINRA Rulebook”). The proposed rule change was published for comment in the **Federal Register** on December 22, 2009.³ The Commission received four comment letters on the proposed rule change⁴ and a letter from

FINRA responding to the comment letters.⁵ On January 24, 2011, FINRA filed Amendment No. 1 to the proposed rule change.⁶ This order approves the proposed rule change, as amended by Amendment No. 1.

II. Description of Proposed Rule Change and Summary of Comments

As part of the process of developing the Consolidated FINRA Rulebook,⁷ FINRA proposes to adopt NASD IM–2110–2 (Trading Ahead of Customer Limit Order) and NASD Rule 2111 (Trading Ahead of Customer Market Orders) with significant changes as new FINRA Rule 5320 (Prohibition Against Trading Ahead of Customer Orders). NASD IM–2110–2 generally prohibits a member from trading for its own account in an NMS stock, as defined in Rule 600(b)(47) of Regulation NMS,⁸ or

Elizabeth M. Murphy, Secretary, Commission, from Ann Vlcek, Managing Director and Associate General Counsel, SIFMA, dated January 28, 2010 (“SIFMA Letter”); and Letter to Elizabeth M. Murphy, Secretary, Commission, from Leonard J. Amoroso, General Counsel, Knight Capital Group, Inc. and Michael T. Corrao, Chief Compliance Officer, Knight Equity Markets, L.P., dated February 22, 2010 (“Knight Letter”).

⁵ See Letter to Elizabeth M. Murphy, Secretary, Commission, from Racquel Russell, Assistant General Counsel, Regulatory Policy and Oversight, FINRA, dated August 31, 2010 (“FINRA Letter”).

⁶ Amendment No. 1 modifies the proposal to remove the requirement that a member assign and use a unique market participant identifier (MPID) for its market-making desks where the member structures its order handling practices in NMS stocks to permit its market-making desks to trade at prices that would satisfy customer orders held at a separate unit. The amendment also addresses the applicability of interpretive guidance previously issued in connection with NASD IM–2110–2 and NASD Rule 2111 to new FINRA Rule 5320. FINRA stated that, consistent with its existing policy, where a provision of FINRA Rule 5320 is not substantively different from NASD IM–2110–2 or NASD Rule 2111, previously issued interpretations generally will continue to apply (unless rescinded or updated by FINRA). The Commission expects FINRA to update, as soon as practicable, its interpretive guidance to reflect new FINRA Rule 5320 and to rescind any previous interpretive guidance that is no longer applicable. The amendment also clarifies that, in the case of extended hours trading in foreign securities where currency fluctuations are possible, the price at which the proprietary transaction is executed, not the price of the proprietary order, is relevant in determining whether the customer order protection requirement has been triggered. Finally, Amendment No. 1 makes several non-substantive, technical changes to the rule text.

⁷ The current FINRA rulebook consists of: (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (“Incorporated NYSE Rules”). 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. 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).

⁸ Under Rule 600 of Regulation NMS, an NMS stock means any NMS security other than an

¹⁸ 17 CFR 200.30–3(a)(12).

¹⁵ U.S.C. 78s(b)(1).

² 17 CFR 240.19b–4.

³ See Securities Exchange Act Release No. 61168 (December 15, 2009); 74 FR 68084 (“Notice”).

⁴ See Letter to Elizabeth Murphy, Secretary, Commission, from Patrick Chi, Chief Compliance Officer, ITG, Inc., dated January 12, 2010 (“ITG Letter”); Letter to Elizabeth M. Murphy, Secretary, Commission, from R. Cromwell Coulson, Chief Executive Officer, Pink OTC Markets Inc., dated January 18, 2010 (“Pink OTC Letter”); Letter to

¹⁷ 15 U.S.C. 78s(b)(3)(a)(ii).

an OTC equity security, at a price that is equal to or better than an unexecuted customer limit order in that security, unless the member immediately, in the event it trades ahead, executes the customer limit order at the price at which it traded for its own account or better. Similarly, NASD Rule 2111 generally prohibits a member that accepts and holds a customer market order in a Nasdaq or exchange-listed security from trading for its own account at prices that would satisfy a customer market order, unless the firm immediately thereafter executes the customer market order up to the size and at the same price at which it traded for its own account or better. At present, NASD Rule 2111 does not apply to OTC equity securities.

While there is no Incorporated NYSE Rule counterpart to NASD IM-2110-2 and NASD Rule 2111 (collectively, "customer order protection rules"), NYSE Rule 92 imposes similar requirements on NYSE members in NYSE-listed securities. NYSE Rule 92 generally prohibits members or member organizations from knowingly entering proprietary orders ahead of, or along with, customer orders that are executable at the same price as the proprietary order.

As discussed below, FINRA proposes several changes to the requirements set forth in NASD IM-2110-2 and NASD Rule 2111 to create a standard that incorporates elements from existing FINRA and NYSE Rules. Commenters generally favored FINRA's effort to integrate the limit order protection rule and the market order protection rule into a single rule. However, as discussed below, some commenters raised concerns regarding the scope of the proposed rule and supported certain additional modifications.

A. Integration of NASD IM-2110-2 and NASD Rule 2111

FINRA proposes to integrate NASD IM-2110-2 and NASD Rule 2111 into a single rule, proposed FINRA Rule 5320, to govern members' treatment of customer orders and apply the new FINRA Rule to all equity securities uniformly, other than with respect to the no-knowledge interpretation as detailed below.⁹ In addition, FINRA

option. An NMS security means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in listed options. 17 CFR 242.600.

⁹ The Commission understands that prior interpretive guidance, such as Notices to Members, relating to FINRA's customer order protection rules would still apply to the extent that such

proposes to extend the application of NASD Rule 2111 to OTC equity securities.¹⁰ As noted above, NASD Rule 2111 currently applies only to Nasdaq or exchange-listed securities, while NASD IM-2110-2 applies to both NMS stocks and OTC equity securities.

Some commenters sought clarification about the application of the proposed rule to "not held" orders.¹¹ Generally, a "not held" order is an un-priced, discretionary order voluntarily categorized as such by the customer.¹² One commenter stated that it is not appropriate to apply the proposed rule to "not held" orders because they are neither a market nor a limit order and, by definition, provide a broker-dealer with flexibility through a grant of price and time discretion to exercise its professional judgment in handling the order.¹³

The Commission notes that FINRA stated, in its response, that because the customer has given the member price and time discretion, the proposed rule would not be applicable to the order, given that there is not a specific price parameter limitation to apply to the member's proprietary trading.¹⁴ FINRA noted that it previously has provided clarification regarding the application of the customer order protection rules to "not held" orders.¹⁵ FINRA stated that a broker-dealer with such an order must use its judgment as a broker in the execution of the order and, if such judgment is properly exercised, the broker is relieved of its normal responsibilities with respect to the time of execution and the price or prices of

interpretive guidance does not conflict with new FINRA Rule 5320.

¹⁰ The Commission notes that, since the filing of the proposed rule change, FINRA's definition of "OTC Equity Security" was revised to mean any equity security that is not an "NMS stock" as that term is defined in Rule 600(b)(47) of Regulation NMS; provided, however, that the term "OTC Equity Security" shall not include any Restricted Equity Security. See FINRA Rule 6420. This definitional change was intended to clarify members' trade reporting requirements for OTC equity securities and would not affect the applicability of FINRA Rule 5320. For information on this definitional change, see Securities Exchange Act Release No. 61979 (April 23, 2010), 75 FR 23316 (May 3, 2010) (SR-FINRA-2010-003).

¹¹ See ITG Letter and SIFMA Letter. SIFMA also sought clarification that FINRA Rule 5320 would not apply to securities that would not qualify as exchange-listed or OTC equity securities. FINRA, in response, clarified that FINRA Rule 5320 would apply to securities that meet the definition of "OTC Equity Security" as defined in FINRA Rule 6420, as well as securities that meet the definition of "NMS stock" as defined in Rule 600 of Regulation NMS. See FINRA Letter.

¹² See FINRA Letter.

¹³ See SIFMA Letter.

¹⁴ See FINRA Letter.

¹⁵ Id.

execution of such an order.¹⁶ FINRA noted, however, that a member must clearly document its customer authorization to "work the order" and must disclose to customers that members may trade at the same price or better than that received by the discretionary order.¹⁷ FINRA further remarked that, because the customer has granted the member the discretion to "work the order," the member has a clear responsibility to endeavor to obtain the best fill for the customer, considering all of the terms agreed to with the customer and the market conditions surrounding the order.¹⁸

B. Large Orders and Institutional Accounts

Currently, NASD IM-2110-2 and NASD Rule 2111 provide an exception to the customer order protection rules to permit members to negotiate terms and conditions on the acceptance of certain large-sized orders (orders of 10,000 shares or more and greater than \$100,000 in value) and orders from institutional accounts as defined in NASD Rule 3110(c) (collectively referred to as "Institutional/Large-Sized Orders"). Such terms and conditions permit a member to continue to trade along side or ahead of such customer orders if the customer agrees.

FINRA proposes to modify the steps necessary for a member to avail itself of the exception for Institutional/Large-Sized Orders. Specifically, under FINRA Rule 5320, a member would be permitted to trade a security on the same side of the market for its own account at a price that would satisfy a customer order, provided that the member provides clear and comprehensive written disclosure to each customer at account opening and annually thereafter that: (a) The member may trade proprietarily at prices that would satisfy the customer order, and (b) provides the customer with a meaningful opportunity to opt in to the protections of FINRA Rule 5320 with respect to all or any portion of its order(s).¹⁹ If a customer does not opt in

¹⁶ See FINRA Letter. See also Notice to Members 97-57 (September 1997) and Notice to Members 95-43 (June 1995).

¹⁷ See FINRA Letter. See also Notice to Members 97-57 (September 1997).

¹⁸ See FINRA Letter.

¹⁹ FINRA represents that, even when a customer has not opted in to the protections under FINRA Rule 5320, a member's conduct must continue to be consistent with the guidance provided in the Notice to Members 05-51 (August 2005). In Notice to Members 05-51, FINRA, among other things, reminded members that adherence to just and equitable principles of trade as mandated by NASD Rule 2010 "requires that members handle and execute any order received from a customer in a

with respect to all or any portion of its order(s), the member may reasonably conclude that such customer has consented to the member trading a security on the same side of the market for its own account at a price that would satisfy the customer's order.²⁰

In lieu of a member providing written disclosure to customers at account opening and annually thereafter, FINRA Rule 5320 would permit the member to provide clear and comprehensive oral disclosure to, and obtain consent from, a customer on an order-by-order basis, provided that the member documents who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order. In addition, where a customer has opted in to the protections of FINRA Rule 5320, a member may still obtain consent on an order-by-order basis to trade ahead of or along with an order from that customer, provided that the member documents who provided such consent and that such consent evidences the customer's understanding of the terms and conditions of the order.²¹

The Commission believes that the change to the exception for Institutional/Large-Sized Orders is appropriate. Specifically, the requirement that members provide comprehensive written disclosure to each customer at account opening and annually, or, alternatively, provide clear and comprehensive oral disclosure to, and get consent from, customers on an order-by-order basis, will help ensure that customers are sufficiently informed with respect to their rights to opt in to the protections of FINRA Rule 5320.

C. No-Knowledge Exception

NASD IM-2110-2 and NASD Rule 2111 provide another exception to the

manner that does not disadvantage the customer or place the member's financial interests ahead of those of its customer." See also NASD Rule 2320 (Best Execution and Interpositioning).

²⁰ FINRA represents that customers always retain the right to withdraw consent at any time. Therefore, a member's reasonable conclusion that a customer has consented to the member trading along with such customer's order is subject to further instruction and modification from the customer.

²¹ While a firm relying on this exception or any other exception must be able to provide evidence of its eligibility for and compliance with the exception, FINRA states that it believes that, when obtaining consent on an order-by-order basis, a member must, at a minimum, document not only the terms and conditions of the order (e.g., the relative price and size of the allocated order/percentage split with the customer), but also the identity of the person at the customer who provided the consent. For example, the identity of the person must be noted in a manner that will enable subsequent contact with that person if a question as to the consent arises (i.e., first names only, initials, and nicknames will not suffice).

customer order protection rules. Specifically, if a firm implements and utilizes an effective system of internal controls, such as appropriate information barriers, that operate to prevent a non-market-making proprietary desk from obtaining knowledge of customer orders held at the firm's market-making desk, those "walled off" non-market-making proprietary desks are permitted to trade at prices that would satisfy the customer orders held by the market-making desk without any requirement that such proprietary executions trigger an obligation to fill pending customer orders at the same price.²² NYSE Rule 92 has a similar, but not identical, "no-knowledge" exception. NYSE Rule 92, by its terms, is limited to those circumstances where the firm knowingly trades ahead of its customer.²³

FINRA Rule 5320 would expand the current no-knowledge interpretation to include market-making desks, but not with respect to OTC equity securities.²⁴ To use the amended exception, a firm must structure its order handling practices in NMS stocks to wall off customer order flow from its market-making desks and disclose that fact to customers in writing. Such disclosure must include a description of the manner in which customer orders are handled and the circumstances under which the firm may trade proprietarily at its market-making desk at prices that would satisfy a customer order. Further, the disclosure is required at account opening and on an annual basis thereafter.

Three commenters argued that the proposed rule should extend the no-knowledge exception to market-making desks that trade OTC equity securities.²⁵ Two of these commenters stated that the adoption of different standards for exchange-listed and OTC equity securities is inconsistent with the stated

²² See *Notices to Members* 95-43 (June 1995), 03-74 (November 2003), and 06-03 (January 2006).

²³ Under NYSE Rule 92, a firm may trade ahead of a customer order as long as the person entering the proprietary order has no knowledge of the unexecuted customer order. Under NYSE Rule 92.10, a member or employee of a member or member organization is "presumed to have knowledge of a particular customer order unless the member organization has implemented a reasonable system of internal policies and procedures to prevent the misuse of information about customer orders by those responsible for entering proprietary orders."

²⁴ This proposed change would make FINRA Rule 5320 consistent with NYSE Rule 92, because the NYSE rule does not preclude members from walling off their market-making desks.

²⁵ See SIFMA Letter, Knight Letter, and Pink OTC Letter. Pink OTC stated that they agreed fully with the comments on the no-knowledge exception expressed by SIFMA.

intention to harmonize FINRA and NYSE rules.²⁶ Moreover, one commenter argued that having two sets of approaches to the no-knowledge exception would introduce unnecessary complexity, as well as compliance and programming inefficiencies.²⁷ This commenter further argued that the OTC equity markets have evolved in a similar manner to the market for NMS stocks and therefore warrant similar treatment.²⁸ The commenter noted that, as with exchange-listed securities, many firms may prefer to handle retail-sized customer orders in OTC equity securities on an automated basis, separate and apart from their proprietary trading desks, including market-making desks.²⁹

Two commenters also objected to FINRA's proposal to require firms that rely on the no-knowledge exception to obtain a unique MPID for their market-making desks.³⁰ These commenters stated that an additional MPID would add unnecessary complexities to FINRA's Order Audit Trail System and other regulatory reporting requirements and could create further technological and operational burdens.³¹ One of these commenters noted that firms may need to make related changes to their clearing systems and that new MPIDs may require certifications with existing clients for which firms clear and for all destinations to which firms route.³² This commenter further remarked that there would not be a commensurate benefit in light of the costs of obtaining and maintaining MPIDs, because other equally effective ways for firms to establish internal control systems to monitor information barriers currently exist.³³ Both commenters suggested that FINRA consider giving firms the option to utilize a unique MPID for their market-making desks.³⁴

In its response to these comments, FINRA stated that it continues to believe that OTC equity securities should not be included within the no-knowledge exception, because the degree of automation in the OTC equity market is not commensurate with the market for NMS stocks. FINRA pointed out that, because trades in the OTC equity market are not as susceptible to automated routing for best execution, members should not be permitted to utilize the no-knowledge exception. Instead,

²⁶ See SIFMA Letter and Knight Letter.

²⁷ See SIFMA Letter.

²⁸ *Id.*

²⁹ *Id.*

³⁰ See SIFMA Letter and Knight Letter.

³¹ See SIFMA Letter and Knight Letter.

³² See SIFMA Letter.

³³ *Id.*

³⁴ See SIFMA Letter and Knight Letter.

FINRA believed that, for these securities, interacting with the market-making desk is a critical source of liquidity for customer orders. With regard to commenters' concerns about acquiring separate MPIDs for firms' market-making desks, FINRA, as noted above, proposed to remove the requirement in Amendment No. 1.³⁵

The Commission believes that the proposed change to the no-knowledge exception is appropriate. Although the OTC equity market may have become more automated in recent years, the Commission understands that the market for OTC equity securities is not as developed as the market for NMS stocks. The Commission concurs with FINRA that there is a continued benefit to retaining the current no-knowledge exception for OTC equity securities.³⁶ Further, the Commission notes that, while it would be more efficient from FINRA's perspective for the market-making unit of a firm to use a separate MPID, FINRA currently has the capability to surveil for violations of the customer order protection rules and will continue to use those mechanisms to surveil for violations of new FINRA Rule 5320, subject to necessary modifications to reflect the requirements of the new rule.³⁷ In addition, FINRA has noted its intention to examine alternative means of achieving the objective of the proposed MPID requirement.³⁸

D. Odd Lot and Bona Fide Error Exception

FINRA proposes applying the customer order protection requirements to all customer orders but would provide an exception for a firm's proprietary trade that: (1) Offsets a customer odd-lot order (*i.e.*, an order less than one round lot, which is typically 100 shares); or (2) corrects a bona fide error.³⁹ Currently, there is a blanket exclusion for odd lots from the customer order protection requirements. With respect to bona fide errors, member firms would be required to demonstrate and document the basis

upon which a transaction meets the bona fide error exception.

The Commission believes that FINRA's proposal with respect to odd-lot transactions and bona fide errors is appropriate. The Commission believes that the proposal is tailored to protect customer orders while allowing the market to operate efficiently. The Commission also believes that, by delineating exceptions for odd lots and bona fide errors, the proposal further clarifies market participants' obligations with respect to the protection of customer orders.

E. Trading Outside Normal Market Hours

FINRA proposes expanding the customer order protection requirements to apply at all times that a customer order is executable by a member. Currently, the customer order protection requirements apply only during normal market hours (9:30 a.m. to 4 p.m.) and after hours (4 p.m. to 6:30 p.m.).

One commenter objected to FINRA's proposal to extend customer order protection requirements beyond regular market hours.⁴⁰ The commenter pointed out that other rules relating to order handling, such as Regulation NMS, do not apply outside of regular trading hours and that there is no reason that those rules and the proposed FINRA rule should differ. According to the commenter, customers who send orders for extended-hours trading tend to be more sophisticated and therefore their orders should be handled like institutional orders, even if they are smaller in size or submitted by an individual investor.⁴¹ Finally, the commenter noted that the costs and burdens of applying customer order protection requirements during extended-hours trading may be particularly onerous for firms that execute transactions in foreign securities during that period in light of fluctuations in U.S. and non-U.S. currency exchange rates.⁴² The commenter stated that these currency fluctuations could inadvertently cause a member to trade ahead of customer orders.⁴³

In Amendment No. 1, FINRA clarified that, as is the case during regular trading hours, during extended trading hours, Rule 5320 would continue to require that members fill executable customer orders whenever the member executes a proprietary transaction at a price that would satisfy the customer's order (or at

a price that does not satisfy the customer limit order but does not provide the minimum level of price improvement). FINRA stated that the price at which the proprietary transaction is executed, not the price of the proprietary order, is the relevant factor in determining whether the customer order protection requirement has been triggered. Therefore, if a member receives an execution in a foreign security at a price (in U.S. dollars) that would satisfy a customer's order, the member must immediately thereafter execute the customer order up to the size and at the same or better price at which it traded for its own account.

The Commission believes that FINRA's proposal is appropriate and agrees that customer orders should be protected during after hours trading. Regardless of potential currency fluctuations in the price of foreign securities, customers should be able to receive an execution at the same or a better price as the member receives when it trades for its own account.

F. Other Comments

Two commenters commented on aspects of the current customer order protection rules that were not proposed to be amended by FINRA.⁴⁴ One commenter stated that customer orders generally should only qualify for price improvement if they use defined quotation price increments.⁴⁵ This commenter stated that, without such a rule, some customers could take unfair advantage of OTC market makers by submitting orders that are slightly higher than the market maker's quote in increments that cannot be displayed by interdealer quotation systems for OTC equity securities, which orders are then unfairly entitled to price improvement when a market maker "lifts" a published quote.⁴⁶ Further, the commenter stated that OTC market makers should not be required to provide price improvement for orders received while they are in the process of executing a trade for their own account and that market makers' publicly displayed proprietary quotes should have time priority over orders received after the proprietary quote is published.⁴⁷

The Commission notes that FINRA does not propose to revise in this filing its minimum price increments for OTC equity securities. Further, in response, FINRA stated that the Commission recently approved a FINRA proposed

³⁵ See *supra* note 4.

³⁶ See FINRA Letter.

³⁷ See e-mail from Racquel Russell, Assistant General Counsel, FINRA, to Nancy Burke-Sanow, Assistant Director, Commission, dated February 10, 2011.

³⁸ *Id.*

³⁹ For purposes of FINRA Rule 5320, FINRA represents that the definition of a "bona fide error" is commensurate with Regulation NMS's exemption for error correction transactions. See Securities Exchange Act Release No. 55884 (June 8, 2007), 72 FR 32926 (June 14, 2007) (Order Exempting Certain Error Correction Transactions from Rule 611 of Regulation NMS under the Securities Exchange Act of 1934).

⁴⁰ See SIFMA Letter.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See Pink OTC Letter and Knight Letter.

⁴⁵ See Pink OTC Letter.

⁴⁶ *Id.*

⁴⁷ See Pink OTC Letter.

rule change that generally establishes a minimum increment of \$0.01 for the display of orders in securities priced \$1.00 or greater and \$0.0001 for the display of orders in securities priced under \$1.00.⁴⁸ FINRA, therefore, does not believe that it is necessary to separately address price increments in the customer order protection context.⁴⁹

Regarding the commenter's second point, FINRA stated that, although FINRA Rules provide for an exception for member trading where the customer limit order is received after the member routed an intermarket sweep order ("ISO"), this exception is only available in connection with ISOs routed in compliance with Rule 600(b)(30)(ii) of Regulation NMS. FINRA believes, and the Commission agrees, that it is not appropriate to permit members to trade ahead of customer orders in the circumstances suggested by the commenter, other than in this narrow instance.

Another commenter stated that the proposed rule regarding limit orders priced below \$1.00 should be modified.⁵⁰ Under the current rule and the proposed rule, for purposes of determining the minimum price improvement standards for customer limit orders in OTC equity securities priced below \$1.00 where there is no published current inside spread, members may calculate a current inside spread by contacting and obtaining priced quotations from at least two unaffiliated dealers and using the highest bid and lowest offer obtained in calculating the current inside spread.⁵¹ The commenter stated that market makers should be able to include their own quotes in calculating minimum price improvement standards.⁵²

The Commission notes that FINRA does not propose changes to its current treatment of limit orders priced below \$1.00 as part of the instant proposed rule change. Further, FINRA stated, and the Commission agrees, that allowing market makers to include their own quotes in calculating minimum price improvement standards would undermine the safeguard of obtaining independent, unaffiliated quotes.

III. Commission's Findings

After careful review of the proposed rule change as well as the comment letters and the FINRA Letter submitted

with respect to the proposal, the Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.⁵³ In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,⁵⁴ which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.

The Commission believes that the proposed rule change is designed to establish a single standard to protect customer orders from member firms trading ahead of those orders. By consolidating the current NASD and NYSE order protection rules, the Commission believes that the proposed rule change would reduce the complexity of the customer order protection rules for those firms subject to both sets of rules. Furthermore, the Commission believes that the proposed rule will help assure the protection for customer orders without imposing undue regulatory costs on industry participants.

IV. Accelerated Approval

The Commission finds good cause, pursuant to Section 19(b)(2) of the Exchange Act,⁵⁵ for approving the proposed rule change, as modified by Amendment No. 1, prior to the 30th day after publication of Amendment No. 1 in the **Federal Register**. The changes proposed in Amendment No. 1 respond to specific concerns raised by commenters and do not raise any new or novel issues. As noted above, the changes proposed by Amendment No. 1 remove the proposed separate MPID requirement for market-making desks where the member structures its order handling practices in NMS stocks to permit its market-making desks to trade at prices that would satisfy customer orders held at a separate unit; addresses the applicability of interpretive guidance previously issued in connection with NASD IM-2110-2 and NASD Rule 2111 to new FINRA Rule 5320; clarifies the applicability of the

rule in the case of extended hours trading in foreign securities where currency fluctuations are possible; and makes several non-substantive, technical changes to the rule text.

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

V. 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 Exchange 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-2009-090 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-2009-090. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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

⁴⁸ See FINRA Letter citing Securities Exchange Act Release No. 62359 (June 22, 2010), 75 FR 37488 (June 29, 2010) (SR-FINRA-2009-054).

⁴⁹ See FINRA Letter.

⁵⁰ See Knight Letter.

⁵¹ See NASD IM-2110-2 and FINRA Rule 5320, Supplementary Material .06.

⁵² See Knight Letter.

⁵³ In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

⁵⁴ 15 U.S.C. 78o-3(b)(6).

⁵⁵ 15 U.S.C. 78s(b)(2).

available publicly. All submissions should refer to File Number SR-FINRA-2009-090 and should be submitted on or before March 10, 2011.

VI. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,⁵⁶ that the proposed rule change (SR-FINRA-2009-090), as modified by Amendment No. 1, be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁷

Elizabeth M. Murphy,
Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-63892; File No. SR-NASDAQ-2011-021]

Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Revise an Optional Depth Data Enterprise License Fee for Broker-Dealer Distribution of Depth-of-Book Data

February 11, 2011.

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 February 1, 2011, The NASDAQ Stock Market LLC (“NASDAQ”) filed with the Securities and Exchange Commission (the “Commission”) the proposed rule change as described in Items I, II, and III below, which Items have been prepared by NASDAQ. 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

NASDAQ proposes to revise an optional Depth Data Enterprise License Fee for broker-dealer distribution of depth-of-book data to non-professional users with which the firm has a brokerage relationship.

The text of the proposed rule change is below. Proposed new language is

italicized; proposed deletions are in [brackets].³

* * * * *

7023. NASDAQ TotalView

(a) TotalView Entitlement.

The TotalView entitlement allows a subscriber to see all individual NASDAQ Market Center participant orders and quotes displayed in the system as well as the aggregate size of such orders and quotes at each price level in the execution functionality of the NASDAQ Market Center, including the NQDS feed.

(1)

(A)–(D) No change.

(E) *For a pilot period ending April 30, 2011, as an alternative to (a)(1)(A), (B), and (C), a broker-dealer distributor may purchase an enterprise license at a rate of \$325,000 for non-professional subscribers. The enterprise license entitles a distributor to provide NQDS (as set forth in Rule 7017), TotalView and OpenView to an unlimited number of non-professional subscribers with whom the firm has a brokerage relationship. The enterprise license shall not apply to relevant Level 1 fees. The enterprise license shall not apply to Depth Distributor Fees.*

(2) 30-Day Free-Trial Offer. NASDAQ shall offer all new individual subscribers and potential new individual subscribers a 30-day waiver of the user fees for TotalView. This waiver shall not include the incremental fees assessed for the NQDS-only service, which are \$30 for professional users and \$9 for non-professional users per month. This fee waiver period shall be applied on a rolling basis, determined by the date on which a new individual subscriber or potential individual subscriber is first entitled by a distributor to receive access to TotalView. A distributor may only provide this waiver to a specific individual subscriber once.

For the period of the offer, the TotalView fee of \$40 per professional user and \$5 per non-professional user per month shall be waived.

(b) No change.

(c) No change.

(d) No change.

* * * * *

II. Self-Regulatory Organization’s Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NASDAQ 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. NASDAQ 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 the Statutory Basis for, the Proposed Rule Change

1. Purpose

Current Proposal. Effective February 1, 2011, NASDAQ will begin offering a voluntary Enterprise License for non-professional usage of the National Quotation Dissemination Service or NQDS (Rule 7017) and TotalView and OpenView (Rule 7023) (collectively, “NASDAQ Depth Data”). The Depth Enterprise License will be identical to the program offered previously under SR-NASDAQ-2010-125 in that it will cost \$325,000 per month and offer the same market data entitlement.⁴ The Depth Data Enterprise License is available only to broker-dealers registered under the Securities Exchange Act of 1934, and it covers all non professional usage fees to customers with whom the firm has a brokerage relationship with an allowance to distribute data to external professional subscribers with which the firm has a brokerage relationship. This Depth Data Enterprise License Fee includes non-professional usage fees, but does not include distributor fees. The Depth Enterprise License is a pilot program that will automatically sunset on April 30, 2011.

Background. NASDAQ disseminates market data feeds in two capacities. First, NASDAQ disseminates consolidated or “core” data in its capacity as Securities Information Processor (“SIP”) for the national market system plan governing securities listed on NASDAQ as a national securities exchange (“NASDAQ UTP Plan”).⁵ Second, NASDAQ separately disseminates proprietary or “non-core” data in its capacity as a registered national securities exchange. Non-core data is any data generated by the NASDAQ Market Center Execution System that is voluntarily disseminated by NASDAQ separate and apart from the consolidated data.⁶ NASDAQ has numerous proprietary data products, such as NASDAQ TotalView, NASDAQ Last Sale, and NASDAQ Basic.

NASDAQ continues to seek broader distribution of non-core data and to reduce the cost of providing non-core data to larger numbers of investors. In the past, NASDAQ has accomplished

⁴ See Securities Exchange Act Release No. 63084 (Oct. 13, 2010); 75 FR 64379 (Oct. 19, 2010) (SR-NASDAQ-2010-125). See also Securities Exchange Act Release No. 62908 (Sept. 14, 2010); 75 FR 57321 (Sept. 20, 2010) (SR-NASDAQ-2010-111).

⁵ See Securities Exchange Act Release No. 59039 (Dec. 2, 2008) at p. 41.

⁶ *Id.*

⁵⁶ 15 U.S.C. 78s(b)(2).

⁵⁷ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rules of The NASDAQ Stock Market LLC found at <http://nasdaq.cchwallstreet.com>.