

it to offer SPR subscriptions on a daily basis.

This proposed change to the SPR service will require an update to the DTC Fee Schedule to reflect the new subscription type. Specifically, DTC proposes to charge \$9,450 per year for the first recipient of the SPR for a security issue and \$6,785 for each additional recipient of the SPR for that security. In addition, DTC proposes to charge \$2,785 per year for each additional CUSIP in the same family (*i.e.*, securities whose CUSIP numbers have the same first six characters) of securities, one of which is the subject of an existing Daily Report annual subscription. A one year minimum Daily Report subscription would be required to qualify for this new subscription category.

In addition, DTC proposes to offer a new "Commercial Paper Family Report" that would indicate DTC's participants' closing positions in commercial paper securities as of a specific date. The fee for this report would be \$22 per report for each additional CUSIP in the same family, which, similar to the proposed Daily Report subscription explained above, refers to securities with the same base CUSIP number (*i.e.*, securities whose CUSIP numbers have the same first six characters), of securities, one of which is the subject of an existing Daily Report annual subscription.

DTC is also updating its SPR Fee Schedule with certain technical changes that are detailed in Exhibit 5 to DTC's filing and that can be viewed online at [http://www.dtcc.com/legal/rule\\_filings/dtc/2011.php](http://www.dtcc.com/legal/rule_filings/dtc/2011.php).

DTC states that the proposed rule change is consistent with the requirements of Section 17A of the Act<sup>5</sup> and the rules and regulations thereunder applicable to DTC because it is designed to facilitate the distribution of security position information to issuers and trustees in connection with their regulatory reporting obligations and, as such, promotes the protection of investors and the public interest. In addition and more specifically, DTC believes that the proposed rule filing is consistent with Rule 17Ad-8 under the Act<sup>6</sup> in that the proposed fees are designed to recover the reasonable costs of providing the securities position listing. DTC based its pricing for the provision of the securities position listing using the underlying costs of providing the service versus the projected volumes.

#### *B. Self-Regulatory Organization's Statement on Burden on Competition*

DTC does not believe that the proposed rule change will have any impact or impose any burden on competition.

#### *C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others*

DTC has not solicited or received written comments relating to the proposed rule change. DTC will notify the Commission of any written comments it receives.

### **III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action**

Within 45 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 ninety 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 or disapprove the 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 No. SR-DTC-2011-07 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 No. SR-DTC-2011-07. 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 such filings also will be available for inspection and copying at DTC's principal office and DTC's Web site at [http://www.dtcc.com/legal/rule\\_filings/dtc/2011.php](http://www.dtcc.com/legal/rule_filings/dtc/2011.php). 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 No. SR-DTC-2011-07 and should be submitted on or before October 5, 2011.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.<sup>7</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

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## **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-65281; File No. SR-FINRA-2011-031]

### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change To Amend FINRA Rule 9251 to Explicitly Protect From Discovery Those Documents That Federal Law Prohibits FINRA From Disclosing**

September 7, 2011.

#### **I. Introduction**

On July 8, 2011, the Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the *Securities Exchange Act of 1934* ("Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change to

<sup>7</sup> 17 CFR 200.30-3(a)(12).

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

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

<sup>5</sup> 15 U.S.C. 78q-1.

<sup>6</sup> *Supra* note 2.

amend FINRA Rule 9251 to explicitly protect from discovery those documents that federal law prohibits FINRA from disclosing. The proposed rule change was published for comment in the **Federal Register** on July 26, 2011.<sup>3</sup> The Commission received two comment letters on the proposed rule change.<sup>4</sup> This order approves the proposed rule change.

## II. Description of the Proposal

FINRA Rule 9251 delineates the types of documents that FINRA's Department of Enforcement ("Enforcement") and Department of Market Regulation ("Market Regulation") must produce to respondents during the discovery phase of a disciplinary proceeding. The rule also explicitly shields certain types of documents from production. For example, the rule provides that Enforcement and Market Regulation may withhold documents that are protected by attorney-client privilege or constitute attorney work product.<sup>5</sup> The rule also allows documents to be withheld where a hearing officer determines that they are irrelevant to the proceeding or for other good cause.<sup>6</sup> The rule does not, however, explicitly shield from discovery documents that federal law prohibits FINRA from disclosing.

The rule contains procedural safeguards to protect against inappropriate withholding of documents by Enforcement and Market Regulation. Specifically, the rule provides that the hearing officer may require Enforcement or Market Regulation to submit to the hearing officer either a list of withheld documents or any document withheld so that the hearing officer may privately review it to determine the appropriate status of a withheld document.<sup>7</sup> Upon review, the hearing officer may order Enforcement or Market Regulation to make the list or document withheld available to other parties.<sup>8</sup> Moreover, the rule prohibits Enforcement or Market Regulation from withholding a document, or part thereof, that contains material exculpatory evidence.<sup>9</sup>

FINRA's proposal would amend FINRA Rule 9251 to explicitly protect

from discovery documents that are prohibited from disclosure pursuant to federal law. Currently, when Enforcement and Market Regulation possess a document that federal law prohibits them from disclosing, they must affirmatively seek a hearing officer determination that they can withhold it on the grounds of lack of relevancy or for other good cause.<sup>10</sup> The proposed rule change will eliminate the need for such a hearing officer determination by adding a new provision that expressly provides that Market Regulation or Enforcement shall withhold a document from production if disclosure is prohibited by federal law.

Certain of the rule's procedural safeguards discussed above would apply to documents withheld pursuant to this new provision. As discussed above, a hearing officer may review any documents withheld pursuant to this new provision, and may order Enforcement or Market Regulation to make the list of withheld documents or the documents withheld available to other parties. However, the proposed rule change precludes a hearing officer from requiring Enforcement or Market Regulation to make the list of documents withheld or any document withheld available to other parties if federal law prohibits disclosure of the document or the document's existence. Moreover, the rule's prohibition on withholding documents, or parts thereof, that contain exculpatory evidence does not apply to documents prohibited from disclosure by federal law.

FINRA stated that the proposed rule change will be effective 30 days following publication of the *Regulatory Notice* announcing Commission approval.

## III. Summary of Comment Letters

Both commenters questioned the fairness of the proposed rule change, and noted concerns about the opportunities afforded to those charged in a FINRA disciplinary proceeding.<sup>11</sup> In particular, one commenter stated that if the present system results in "testing" the federal laws that may prevent disclosure of certain documents, then the current system should continue as is.<sup>12</sup> The commenter was particularly concerned about the ability of Market Regulation or Enforcement to withhold documents that contain exculpatory evidence.<sup>13</sup> While the commenter appreciated FINRA's desire to

streamline the disciplinary process, the commenter believed that given the stakes involved, "every opportunity and effort" should be afforded to those charged in a disciplinary proceeding.<sup>14</sup>

## IV. Discussion and Commission's Findings

The Commission has carefully reviewed the proposed rule change and the comments received, and finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities association.<sup>15</sup> In particular, the Commission finds that the proposed rule change is consistent with 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. The Commission also believes that the proposal is consistent with Section 15A(b)(8) of the Act,<sup>17</sup> which requires that the rules of the association provide a fair procedure for the disciplining of members and associated persons.

More specifically, the Commission believes that clarifying that Market Regulation and Enforcement shall withhold documents prohibited from disclosure by federal law both promotes a fair and efficient disciplinary process and helps ensure compliance with federal law by avoiding the need for unnecessary "good cause" motions regarding documents that federal law prohibits FINRA from producing during a disciplinary proceeding.

The Commission also believes that the proposed rule change is subject to adequate procedural safeguards to protect against inappropriate use by FINRA and that address the commenters' concerns. Specifically, a hearing officer may review and determine whether a document was appropriately withheld by Market Regulation or Enforcement as prohibited from disclosure by federal law. If the hearing officer determines that the document is not prohibited from disclosure by federal law, the hearing officer may order the document be made available to the other parties.

While the Commission appreciates the commenter's concern about FINRA withholding exculpatory evidence, the

<sup>14</sup> *Id.*

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

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

<sup>17</sup> 15 U.S.C. 78o-3(b)(8).

<sup>3</sup> See *Securities Exchange Act* Release No. 64934 (July 20, 2011), 76 FR 44645 (July 26, 2011) ("Notice").

<sup>4</sup> See letter from Neal E. Nakagiri, President, Chief Executive Officer and Chief Compliance Officer, NPB Financial Group, LLC, dated July 27, 2011 ("NPB Letter"); letter from Joyce Dillard, dated August 16, 2011.

<sup>5</sup> FINRA Rule 9251(b)(1)(A).

<sup>6</sup> FINRA Rule 9251(b)(1)(D).

<sup>7</sup> See FINRA Rule 9251(c).

<sup>8</sup> *Id.*

<sup>9</sup> FINRA Rule 9251(b)(2).

<sup>10</sup> See FINRA Rule 9251(b)(1)(D).

<sup>11</sup> See *supra*, note 4.

<sup>12</sup> NPB Letter.

<sup>13</sup> *Id.*

proposed rule would not change current practice, as FINRA currently cannot legally disclose a document—even if the document contains exculpatory evidence—if federal law prohibits disclosure of the document in that instance. Moreover, the Commission believes that as part of determining whether FINRA appropriately withheld a document, the hearing officer would need to review the applicable federal law to assess whether the document at issue is, in fact, prohibited from disclosure.

For the reasons stated above, the Commission finds that the rule change is consistent with the Act and the rules and regulations thereunder.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>18</sup> that the proposed rule change (SR-FINRA-2011-031) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Elizabeth M. Murphy,**

*Secretary.*

[FR Doc. 2011-23377 Filed 9-13-11; 8:45 am]

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65283; File No. SR-NYSEAmex-2011-67]

### Self-Regulatory Organizations; NYSE Amex LLC; Notice of Filing of Proposed Rule Change Relating to Fees for Trading Securities Listed on the Nasdaq Stock Market LLC Pursuant to Unlisted Trading Privileges

September 7, 2011.

Pursuant to Section 19(b)(1)<sup>1</sup> of the *Securities Exchange Act of 1934* (the “Act”)<sup>2</sup> and Rule 19b-4 thereunder,<sup>3</sup> notice is hereby given that, on September 1, 2011, NYSE Amex LLC (“NYSE Amex” or the “Exchange”) 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 the self-regulatory organization. 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

The Exchange proposes to amend its 2011 Price List (“Price List”) for certain fees relating to trading pursuant to unlisted trading privileges (“UTP”) of securities listed on the Nasdaq Stock Market LLC (“Nasdaq”). The proposed amendment to the Exchange’s Price List for equities is attached hereto as Exhibit 5. The text of the proposed rule change is available at the Exchange, on the Exchange’s Web site at [www.nyse.com](http://www.nyse.com), on the Commission’s Web site at <http://www.sec.gov>, 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, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

###### 1. Purpose

The Exchange proposes to amend its Price List for certain fees relating to trading Nasdaq securities pursuant to UTP. The amended pricing will become operative on September 1, 2011.

Currently, market participants, Supplemental Liquidity Providers (“SLPs”) and Designated Market Makers (“DMMs”) are charged a fee of \$0.0027 per share for orders in Nasdaq securities with a share price of \$1 or more traded pursuant to UTP that take liquidity. Under the proposal, there will be a fee of \$0.0004 per share for orders that take liquidity.

Currently, market participants and DMMs are charged a fee of \$0.0029 per share for orders in Nasdaq securities with a share price of \$1 or more that route to other markets when reduced fee volume requirements are not met. Under the proposal, there would be a fee of \$0.0025 per share for such orders.

Market participants, other than DMMs and SLPs, that provide liquidity in

Nasdaq securities with a share price of \$1 or more traded pursuant to UTP are currently paid a rebate of \$0.0030 per share. Under the proposal, such market participants will be paid a rebate of \$0.0010 per share.

Currently, for orders in Nasdaq securities with a share price of \$1 or more traded pursuant to UTP that provide liquidity, DMMs, as well as SLPs that meet their quoting requirements pursuant to Rule 107B are paid a rebate of \$0.0031 per share, and SLPs that do not meet their quoting requirements are paid a rebate of \$0.0030 per share for orders that provide liquidity. Under the proposal, the rebate will be \$0.0011 per share for orders that provide liquidity for SLPs that meet their quoting requirements while SLPs that provide liquidity but do not meet their quoting requirements will be paid a rebate of \$0.0010 per share. The rebate will be \$0.0020 per share for orders that provide liquidity for DMMs.

Currently, market participants and SLPs are paid a rebate of \$0.0036 per share for executions of displayed liquidity in Nasdaq securities with a share price of \$1 or more when they are adding liquidity in orders that originally display a minimum of 2,000 shares with a trading price of at least \$5.00 per share, as long as the order is not cancelled in an amount that would reduce the original displayed amount below 2,000 shares. Under the proposal, such market participants and SLPs will be paid a rebate of \$0.0020 per share.

Currently, DMMs receive a rebate of \$0.0036 per share in Nasdaq securities with a share price of \$1 or more traded pursuant to UTP for executions of the displayed portions of s-Quotes that provide liquidity and display 2,000 shares or more at the time of execution with a trading price of at least \$5.00 per share. Under the proposal, DMMs will be paid a rebate of \$0.0020 per share.

In a rule filing submitted on March 29, 2011,<sup>4</sup> the Exchange adopted a new tier with a reduced “take” fee of \$0.0019 per share (compared with \$0.0027 then in effect) and a reduced routing fee of \$0.0019 per share (compared with \$0.0029 then in effect) for market participants and DMMs that meet certain average daily executed volume requirements in either shares or a combination of shares and contracts traded on the NYSE Amex options market. Under the proposal, this tier and the related routing fee will be

<sup>18</sup> 15 U.S.C. 78s(b)(2).

<sup>19</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78a.

<sup>3</sup> 17 CFR 240.19b-4.

<sup>4</sup> See Securities Exchange Act Release No. 64195 (April 5, 2011), 75 FR 20428 (April 12, 2011) (SR-NYSEAmex-2011-21).