

potential that a person, including members, could improperly interfere with or restrict the ability of the Commission or the Exchange to effectively carry out their regulatory oversight responsibilities under the Exchange Act. In addition, these limitations should protect against the instance whereby a member's interest in an exchange or an entity controlling the exchange becomes so large as to cast doubt on whether the exchange can fairly and objectively exercise its self-regulatory responsibilities with respect to that member.

### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>22</sup> that the proposed rule change (SR-BYX-2011-021) be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>23</sup>

**Kevin M. O'Neill**,  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65644; File No. SR-Phlx-2011-123]

### Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Order Granting Approval of Proposed Rule Change Relating to the Quarterly Trading Requirements Applicable to Registered Options Traders

October 27, 2011.

#### I. Introduction

On August 24, 2011, NASDAQ OMX PHLX LLC ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("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 change the quarterly trading requirements applicable to Registered Options Traders ("ROT's"). The proposed rule change was published for comment in the **Federal Register** on September 9, 2011.<sup>3</sup> The Commission received no comment letters on the proposal. This order approves the proposed rule change.

#### II. Description of the Proposal

The Exchange proposes to modify the quarterly trading requirements applicable to ROTs. ROTs can be either Streaming Quote Traders ("SQTs"), Remote SQTs ("RSQTs") or non-SQT ROTs. The quarterly trading requirements apply to two types of ROTs: SQTs and non-SQT ROTs.

Currently, Phlx Rule 1014 contains two quarterly trading requirements—in person and in assigned. First, Commentary .01 requires that in order for an ROT (other than an RSQT or a Remote Specialist) to receive specialist margin treatment for off-floor orders in any calendar quarter, the ROT must execute the greater of 1,000 contracts or 80% of his total contracts that quarter in person (not through the use of orders) and 75% of his total contracts that quarter in assigned options.

Second, the "in assigned" quarterly trading requirement in current Commentary .03 requires that, except for unusual circumstances, at least 50% of the trading activity in any quarter (measured in terms of contract volume) of an ROT (other than an RSQT) shall ordinarily be in classes of options to which he is assigned. Temporarily undertaking the obligations of paragraph (c) of Phlx Rule 1014 at the request of a member of the Exchange in non-assigned classes of options shall not be deemed trading in non-assigned option contracts.

The Exchange proposes to amend Commentary .01 to adopt a new quarterly requirement such that an ROT (other than an RSQT or a Remote Specialist) would be required to trade 1,000 contracts and 300 transactions on the Exchange each quarter. Transactions executed in the trading crowd where the contra-side is an ROT would not be included. The Exchange proposes that this requirement would be a pure trading requirement, not limited to assigned options and in person trading. Accordingly, the new trading requirement could be fulfilled with trades and contracts that are not in assigned options and not executed in person.

In addition, the Exchange proposes to amend the in person trading requirement in Commentary .01 in two ways. First, the Exchange proposes to exclude transactions executed in the trading crowd where the contra-side is an ROT from the existing in person trading requirement. Second, the Exchange proposes to permit non-SQT ROTs to use orders entered in person to meet the in person trading requirement. The Exchange represents that the only other way to participate in trades other

than through the use of orders is by quoting; while SQTs quote electronically by "streaming" quotations into the Exchange, non-SQT ROTs may only quote verbally in response to floor brokers representing orders in the trading crowd. The Exchange believes that the limitation on the use of orders with respect to non-SQT ROTs is obsolete, as, over time, following the movement toward a more electronic trading platform in options, it has become difficult for such ROTs to comply with the trading requirement without using orders. The Exchange represents that non-SQT ROTs can only comply with the in person quarterly trading requirement by participating in crowd trades, which they cannot control, in terms of frequency.

The Exchange believes that the proposed new trading requirement coupled with the proposed changes to the existing "in person" trading requirement should encourage a more regular presence and thus result in more active market making. In addition, Phlx states that excluding transactions where the contra-side is another ROT should encourage more regular and active market making.

#### III. Discussion

The Commission 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 exchange.<sup>4</sup> Specifically, the Commission finds that the proposal is consistent with Section 6(b)(5) of the Act,<sup>5</sup> which requires, among other things, that the rules of a national securities exchange be designed to promote just and equitable principles of trade, to prevent fraudulent and manipulative acts, 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 changes to the trading requirements applicable to ROTs should encourage more active market making and thereby promote the provision of liquidity to the market. In particular, by excluding in crowd ROT-to-ROT transactions from the quarterly trading requirements applicable to a ROT, the proposal should help to encourage the regular posting of liquidity. The Commission believes that these

<sup>4</sup> In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>5</sup> 15 U.S.C. 78f(b)(5).

<sup>22</sup> 15 U.S.C. 78s(b)(2).

<sup>23</sup> 7 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>3</sup> Securities Exchange Act Release No. 65257 (September 2, 2011), 76 FR 55996.

proposed changes to the quarterly trading requirements should enhance the market making function performed by ROTs and thereby serve to maintain fair and orderly markets and generally promote the protection of investors and the public interest.

#### IV. Conclusion

*It Is Therefore Ordered*, pursuant to Section 19(b)(2) of the Act,<sup>6</sup> that the proposed rule change (SR-Phlx-2011-123) be, and it hereby is, approved.

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

**Kevin M. O'Neill,**

*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-65645; File No. SR-FINRA-2011-059]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt FINRA Rule 3230 (Telemarketing) in the FINRA Consolidated Rulebook

October 27, 2011.

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> notice is hereby given that on October 13, 2011, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been substantially prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) in the consolidated FINRA rulebook, subject to certain amendments. The proposed rule change would delete Incorporated NYSE Rule 440A (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01. Additionally, the proposed

rule change would adopt provisions that are substantially similar to the telemarketing rules of the Federal Trade Commission ("FTC").

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA, and at the Commission's Public Reference Room.

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

In its filing with the Commission, FINRA included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. FINRA has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

###### 1. Purpose

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>3</sup> FINRA is proposing to adopt NASD Rule 2212 (Telemarketing) as FINRA Rule 3230 (Telemarketing) with changes discussed below. The proposed rule change would delete Incorporated NYSE Rule 440A<sup>4</sup> (Telephone Solicitation) and Incorporated NYSE Rule Interpretation 440A/01 as they are, in main part, duplicative of NASD Rule 2212. However, as further described below, the proposed rule change would incorporate certain provisions of NYSE Rule 440A and its Interpretation into new FINRA Rule 3230. Further, the proposed rule change adds provisions that are substantially similar to FTC rules that prohibit deceptive and other abusive telemarketing acts or practices as described below.

<sup>3</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA 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).

<sup>4</sup> For convenience, the proposed rule change refers to Incorporated NYSE Rules as NYSE Rules.

NASD Rule 2212 and NYSE Rule 440A are similar rules that require members to maintain do-not-call lists, limit the hours of telephone solicitations, and prohibit members from using deceptive and abusive acts and practices in connection with telemarketing. The Commission directed FINRA and NYSE to enact these telemarketing rules in accordance with the Telemarketing Consumer Fraud and Abuse Prevention Act of 1994 ("Prevention Act").<sup>5</sup> The Prevention Act requires the Commission to promulgate or direct any national securities exchange or registered securities association to promulgate, rules substantially similar to the FTC rules to prohibit deceptive and other abusive telemarketing acts or practices.<sup>6</sup>

In 2003, the FTC and the Federal Communications Commission ("FCC") established requirements for sellers and telemarketers to participate in the national do-not-call registry.<sup>7</sup> Pursuant to the Prevention Act, the Commission requested that FINRA and NYSE amend their telemarketing rules to include a requirement that their members participate in the national do-not-call registry. In 2004, the Commission approved amendments to NASD Rule 2212 requiring member firms to participate in the national do-not-call registry.<sup>8</sup> The following year, the Commission approved amendments to NYSE Rule 440A, which were similar to the NASD rule amendments, but included additional provisions regarding the use of caller identification information, pre-recorded messages, telephone facsimiles, and computer advertisements.<sup>9</sup>

As mentioned above, the Prevention Act requires the Commission to promulgate, or direct any national securities exchange or registered securities association to promulgate, rules substantially similar to the FTC rules to prohibit deceptive and other abusive telemarketing acts or practices.<sup>10</sup> Earlier this year, Commission staff directed FINRA to conduct a review of its telemarketing rule and propose rule amendments that provide protections that are at least as strong as those provided by the FTC's

<sup>5</sup> 15 U.S.C. 6101-6108.

<sup>6</sup> 15 U.S.C. 6102.

<sup>7</sup> See 68 FR 4580 (January 29, 2003); 68 FR 44144 (July 25, 2003); CG Docket No. 02-278, FCC 03-153, (adopted June 26, 2003; released July 3, 2003).

<sup>8</sup> See Securities Exchange Act Release No. 49055 (January 12, 2004), 69 FR 2801 (January 20, 2004) (approval order).

<sup>9</sup> See Securities Exchange Act Release No. 52579 (October 7, 2005), 70 FR 60119 (October 14, 2005) (approval order).

<sup>10</sup> See *supra* note 6.

<sup>6</sup> 15 U.S.C. 78s(b)(2).

<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.