

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-62927; File No. SR-FINRA-2010-046)

September 17, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to Exemptions from the Trading Activity Fee

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 September 7, 2010, Financial Industry Regulatory Authority, Inc. (“FINRA”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, 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 to [sic] amend Section 1(b) of Schedule A to the FINRA By-Laws to remove the exemption from the trading activity fee (“TAF”) for transactions in exchange-listed options effected by a member when FINRA is not the designated options examining authority (“DOEA”) for that member.

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

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

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

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

The TAF is one of three member regulatory fees FINRA uses to fund its member regulation activities, which include examinations, financial monitoring, and FINRA's policymaking, rulemaking, and enforcement activities.<sup>3</sup> FINRA initially adopted the TAF in 2002 as a replacement for an earlier regulatory fee based on trades reported to Nasdaq's Automated Confirmation Transaction system then in place.<sup>4</sup> Because the TAF funds FINRA's member regulation functions, it is intended to apply to transactions in a way that corresponds with FINRA's regulatory responsibilities.<sup>5</sup> In general, the TAF is assessed for the sale of all

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<sup>3</sup> See FINRA By-Laws, Schedule A, § 1(b). In addition to the TAF, the other member regulatory fees are the Gross Income Assessment and the Personnel Assessment. See id. §§ 1(c), (d).

<sup>4</sup> See Securities Exchange Act Release No. 46416 (August 23, 2002), 67 FR 55901 (August 30, 2002) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change and Amendment No. 1 by the National Association of Securities Dealers, Inc. to Eliminate the Regulatory Fee and Institute a New Transaction-Based Trading Activity Fee); see also NASD Notice to Members 02-63 (September 2002); NASD Notice to Members 02-41 (July 2002). The TAF was originally approved on a pilot basis; the SEC approved the TAF on a permanent basis in 2003. See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003); see also NASD Notice to Members 03-30 (June 2003).

<sup>5</sup> See Securities Exchange Act Release No. 50485 (October 1, 2004), 69 FR 60445 (October 8, 2004).

exchange registered securities wherever executed (except debt securities that are not TRACE-eligible), over-the-counter equity securities, security futures, TRACE-Eligible Securities (provided that the transaction is a Reportable TRACE Transaction), and all municipal securities subject to the reporting requirements of the Municipal Securities Rulemaking Board.<sup>6</sup> The TAF rules also include numerous exemptions for certain types of transactions.<sup>7</sup> The proposed rule change would eliminate the exemption from the TAF for transactions in exchange-listed options when FINRA is not the DOEA for that member.<sup>8</sup>

In 2003, FINRA exempted from the TAF “[t]ransactions in exchange listed options effected by a member when FINRA is not the designated options examining authority for that member.”<sup>9</sup> The exemption was added to reflect the fact that FINRA’s regulatory responsibilities with respect to such activity were alleviated somewhat by its participation in a plan filed with the SEC under Rule 17d-2 of the Act<sup>10</sup> (“17d-2 Agreement”) in which regulatory responsibilities for certain FINRA members that conducted a public options business were assumed by other self regulatory organizations (“SROs”) that would act as the member’s DOEA.<sup>11</sup> At that time, of the approximately 450 member firms covered by the 17d-2 Agreement, FINRA assumed regulatory responsibilities (i.e., was the DOEA) for about 300 firms, and the remaining firms were divided among six other SROs. Thus, in view of the fact that another SRO performed certain regulatory

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<sup>6</sup> See FINRA By-Laws, Schedule A, § 1(b)(1).

<sup>7</sup> See FINRA By-Laws, Schedule A, § 1(b)(2).

<sup>8</sup> See FINRA By-Laws, Schedule A, § 1(b)(2)(K).

<sup>9</sup> FINRA By-Laws, Schedule A, § 1(b)(2)(K). See Securities Exchange Act Release No. 47946 (May 30, 2003), 68 FR 34021 (June 6, 2003).

<sup>10</sup> 17 CFR 240.17d-2.

<sup>11</sup> See Securities Exchange Act Release No. 46800 (November 8, 2002), 67 FR 69774 (November 19, 2002).

responsibilities with respect to the options activities of these members, FINRA decided to exempt transactions in exchange listed options by such firms from the TAF.<sup>12</sup>

The exemption was also based on the fact that certain other SROs were assessing or preparing to assess specific regulatory fees for acting as DOEA.<sup>13</sup> To the extent that other SROs assessed specific fees on firms to fund the SRO's DOEA responsibilities with respect to those firms, FINRA's TAF on options transactions appeared redundant.

Subsequent amendments to the 17d-2 Agreement have consolidated within FINRA sole regulatory responsibility for the public options activities of all of its members.<sup>14</sup> Consequently, FINRA assumes all regulatory responsibility for FINRA members under the 17d-2 Agreement.<sup>15</sup> Based on the foregoing, FINRA is proposing to delete the exemption from the TAF.<sup>16</sup>

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<sup>12</sup> Transactions in over-the-counter ("conventional") options are exempted from the TAF with respect to all FINRA members. See FINRA By-Laws, Schedule A, § 1(b)(2)(H).

<sup>13</sup> See, e.g., Securities Exchange Act Release No. 47577 (March 26, 2003), 68 FR 16109 (April 2, 2003) (SR-PCX-2003-03) (PCX rule filing establishing a DOEA fee).

<sup>14</sup> See Securities Exchange Act Release No. 57987 (June 18, 2008), 73 FR 36156 (June 25, 2008) (Notice of Filing and Order Approving and Declaring Effective an Amendment to the Plan for the Allocation of Regulatory Responsibilities Among the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, LLC, Financial Industry Regulatory Authority, Inc., The New York Stock Exchange, LLC, the NYSE Arca, Inc., The NASDAQ Stock Market LLC, and the Philadelphia Stock Exchange, Inc.).

<sup>15</sup> Following the consolidation of NASD and NYSE member regulation operations in 2007, FINRA announced that it serves as the DOEA for all FINRA member firms. See Regulatory Notice 08-37 (July 2008). FINRA had previously published a list of firms that had a DOEA other than FINRA and, consequently, were exempt from the TAF for transactions in exchange listed options. See NASD Notice to Members 05-03 (January 2005).

<sup>16</sup> At the time FINRA (then NASD) proposed the exemption in Amendment No. 4 to SR-NASD-2002-148, it noted that "NASD does not believe it is precluded from seeking further amendments to the TAF with respect to the reduction or elimination of the proposed exemption . . . in the event of a change of factors surrounding its sales practice and other regulatory responsibilities."

Deleting this exemption also will remove any ambiguities over whether FINRA should collect the TAF on sole-FINRA members or with respect to FINRA members that conduct only a proprietary options business. The existing language exempting transactions in exchange listed options from the TAF when FINRA is not the DOEA for the member does not properly align with those situations where FINRA has regulatory responsibility over the member firm. First, the DOEA designation is established only under the 17d-2 Agreement, which by its own terms applies only with respect to firms that are members of more than one SRO. Thus, while FINRA has regulatory responsibility for the options business of its sole members, FINRA is not technically the DOEA for such firms. Second, the 17d-2 Agreement addresses only a firm's public options business. As such, a firm that conducts only a proprietary options business, irrespective of whether such firm is a member of FINRA and another SRO, would not be covered by the 17d-2 Agreement, and FINRA would not technically be the DOEA. Although FINRA's regulatory responsibilities are more limited for a firm that does not conduct a public options business, FINRA still retains regulatory responsibilities over the firm's options activities.

The effective date of the proposed rule change will be the first day of the month following Commission approval. FINRA will announce the effective date of the proposed rule change in a Regulatory Notice to be published no later than 30 days following Commission approval.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(5) of the Act,<sup>17</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and

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<sup>17</sup> 15 U.S.C. 78q-3(b)(5).

other persons using any facility or system that FINRA operates or controls. FINRA believes that because it maintains regulatory responsibility over its members' transactions in exchange listed options, the exemption from the TAF for transactions in exchange listed options when FINRA is not the DOEA for that member is no longer necessary. Eliminating the exemption will also ensure that the TAF more accurately reflects the current allocation of regulatory responsibilities to FINRA of its members' transactions in exchange listed options.

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 45 days of the date of publication of this notice in the Federal Register or within such longer period up to 90 days (i) as the Commission may designate 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 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](mailto:rule-comments@sec.gov). Please include File Number SR-FINRA-2010-046 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-2010-046. 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 website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 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 publicly available. All submissions should refer to File Number SR-FINRA-2010-046 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

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

Florence E. Harmon  
Deputy Secretary

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<sup>18</sup> 17 CFR 200.30-3(a)(12).