

supporting the “move all” function. The transaction fee will be adjusted annually to reflect DRS Profile transactional volume changes. The rule change will require transfer agents that wish to receive a transaction fee to have submitted their project plan by September 1, 2008. The transfer agents represented on the DRS Ad Hoc Committee have agreed that the remunerations from the transactional fee will be no more than \$25,000 per year per transfer agent. DTC will pay each eligible transfer agent with 2,000 or more Profile transactions monthly a set monthly amount of \$2,080, or \$24,960 annually. DTC will pay each eligible transfer agent with at least 200 transactions monthly but less than 2,000 transactions monthly a set monthly amount of \$800, or \$9,600 annually. DTC will not pay transfer agents with less than 200 transactions a month.

### C. DRS Limited Participant Eligibility Requirements

DTC will amend its DRS Limited Participant rules to require transfer agents to be able to process Profile instructions requesting the “move all” options and instructions including dual TIN or Social Security Numbers. To maintain eligibility as a DRS Limited Participant, all current DRS Limited Participants must provide “move all” and dual TIN or Social Security number processing capability by no later than December 31, 2008.

### III. Discussion

Section 17A(b)(3)(F) of the Act requires, among other things, that the rules of a clearing agency be designed to promote the prompt and accurate clearance and settlement of securities transactions, assure the safeguarding of securities and funds which are in the custody or control of the clearing agency or for which it is responsible, to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest.<sup>8</sup> The rule change is consistent with the provisions of the Act because it improves efficiency and reduces risks in DRS.

Accordingly, for the reasons stated above the Commission finds that the rule change, is consistent with DTC’s obligation under Section 17A of the Act to promote the prompt and accurate clearance and settlement of securities

transactions, to foster cooperation and coordination with persons engaged in the clearance and settlement of securities transactions, to remove impediments to and perfect the mechanism of a national system for the prompt and accurate clearance and settlement of securities transactions, and, in general, to protect investors and the public interest.

### IV. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular with the requirements of Section 17A of the Act and the rules and regulations thereunder.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (File No. SR-DTC-2008-07) be and hereby is approved.<sup>9</sup>

For the Commission by the Division of Trading and Practices, pursuant to delegated authority.<sup>10</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-27278 Filed 11-17-08; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58909; File No. SR-FINRA-2008-046]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of a Proposed Rule Change, as Modified by Amendment No. 1 Thereto, To Realign the Representation of Industry Members on the National Adjudicatory Council To Follow More Closely the Categories of Industry Representation on the FINRA Board

November 6, 2008.

On September 8, 2008, Financial Industry Regulatory Authority, Inc. (“FINRA,” f/k/a National Association of Securities Dealers, Inc. and NASD) 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 amend the By-Laws of FINRA’s regulatory subsidiary, FINRA Regulation, Inc. (“FINRA Regulation,”

<sup>9</sup> In approving the proposed rule change, the Commission considered the proposal’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

<sup>10</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.

f/k/a NASD Regulation, Inc.). On September 17, 2008, FINRA filed Amendment No. 1 to the proposed rule change. The proposed rule change was published in the **Federal Register** on September 30, 2008.<sup>3</sup> The Commission received one comment on the proposal.<sup>4</sup> This order approves the proposed rule change.

### I. Background and Description of the Proposal

#### A. Background

On July 30, 2007, NASD and the New York Stock Exchange, Inc. consolidated their member firm regulation operations into a combined organization, FINRA. As part of the consolidation, the Commission approved amendments to the NASD By-Laws to implement governance and related changes.<sup>5</sup> The approved changes included a FINRA Board governance structure that balanced public and industry representation and designated seven governor seats to represent member firms of various sizes based on the criteria of firm size.<sup>6</sup>

FINRA Regulation is a subsidiary of FINRA that operates according to the Plan of Allocation and Delegation of Functions by NASD to Subsidiaries, as amended, which NASD adopted first in 1996 when it formed NASD Regulation. FINRA Regulation’s By-Laws were not amended at the time of the

<sup>3</sup> Securities Exchange Act Release No. 58626 (September 23, 2008), 73 FR 56872 (“Notice”).

<sup>4</sup> The commenter stated that FINRA’s proposal seemed reasonable and that he generally favored it. However, he expressed concern about the elimination of the regional representation on the National Adjudicatory Council (“NAC”). See letter from Neal E. Nakagiri, Esq., NPB Financial Group, LLC, to Florence E. Harmon, Acting Secretary, Commission, dated October 20, 2008.

<sup>5</sup> See Securities Exchange Act Release No. 56145 (July 26, 2007), 72 FR 42169 (August 1, 2007), as amended by Securities Exchange Act Release No. 56145A (May 30, 2008), 73 FR 32377 (June 6, 2008) (File No. SR-NASD-2007-023).

<sup>6</sup> The FINRA Board consists of eleven Public Governors (who are appointed), ten Industry Governors (seven of whom are elected by industry members), the current Chief Executive Officer (“CEO”) of NYSE Regulation, and the current CEO of FINRA. The ten Industry Governors include: (a) Three elected Governors who are registered with member firms that employ 500 or more registered persons (Large Firm Governors); (b) one elected Governor who is registered with a member firm that employs at least 151 and no more than 499 registered persons (Mid-Size Firm Governor); (c) three elected Governors who are registered with member firms that employ at least one and no more than 150 registered persons (Small Firm Governors); (d) one appointed Governor who is associated with a floor member of the New York Stock Exchange; (e) one appointed Governor who is associated with an independent contractor financial planning member firm or an insurance company affiliate; and (f) one appointed Governor who is associated with an affiliate of an investment company. See FINRA By-Laws, Article VII (Board of Governors).

<sup>8</sup> 15 U.S.C. 78q(b)(3)(F).

consolidation, other than in a few sections where those By-Laws conflicted with the new FINRA By-Laws.

### B. Description of the Proposal

The proposed rule change would amend the FINRA Regulation By-Laws ("By-Laws") to: (1) Restructure the industry representation on the NAC to parallel the firm-size criteria for industry representation on the FINRA Board; (2) modify the nomination process for certain industry member seats on the NAC by using the FINRA Nominating Committee ("Nominating Committee") and by discontinuing the Regional Nominating Committees; and (3) adopt conforming changes to reflect the corporate name change and similar matters.<sup>7</sup>

#### 1. Changes to the NAC

The NAC reviews all disciplinary decisions issued by Hearing Panels and presides over disciplinary matters that have been appealed to or called for review by the NAC. The NAC also reviews statutory disqualification matters and considers appeals of membership proceedings and exemption requests.<sup>8</sup>

##### a. Composition

Under the current By-Laws, the NAC must consist of no fewer than 12 and no more than 14 members, and the number of non-industry members, including at least three public members, must equal or exceed the number of industry members.<sup>9</sup> Since 1999, each of five geographic regions, which had been established by the NASD Board of Governors, has been represented on the NAC. Consistent with Article V of the FINRA Regulation By-Laws, the current NAC consists of 14 members<sup>10</sup> and includes seven industry and seven non-industry members.<sup>11</sup> Five of the industry NAC members represent the five geographic regions, and the remaining two industry seats are "at-large" seats, which NASD historically used (and FINRA currently uses) to add

balance to the types of firms being represented on the NAC.<sup>12</sup>

FINRA proposes to eliminate the size range of the NAC (12–14 members) prescribed by the current By-Laws and instead provide that the NAC consist of 14 members. Additionally, FINRA proposes that the NAC be divided equally between industry and non-industry members, and thereby eliminate the possibility that the number of non-industry members exceed the number of industry members.

The proposed rule change also would eliminate regional representation on the NAC and instead provide for representation of the various firm sizes. Specifically, FINRA would replace the five region-based industry members of the NAC with two small firm, one mid-size firm, and two large firm industry representatives.

In summary, the restructured NAC would consist of 14 members, including seven industry members, two of whom would be "at large," and five of whom would be designated specifically as representatives of large firms, mid-size firms, and small firms, and seven non-industry members, three of whom are public.<sup>13</sup> The tenure of NAC members generally is three years and the terms of the members are staggered. The proposal would not disrupt the process of approximately one-third of the NAC members completing their service in a particular year and being replaced with newly appointed NAC members. The proposal would result in a Small Firm and a Large Firm NAC Member joining the NAC near the beginning of 2009; a Mid-Size Firm NAC Member joining in 2010; and a Small Firm and Large Firm NAC Member joining in 2011.<sup>14</sup>

##### b. Nomination and Election Process

Currently, non-industry members of the NAC and two "at-large" industry members are nominated to serve on the NAC by the Nominating Committee and

then appointed by the FINRA Regulation Board.<sup>15</sup> The five industry members of the NAC who are drawn from the five geographic regions are selected through Regional Nominating Committees (through either an uncontested or a contested nomination process), then nominated by the Nominating Committee, and finally appointed by the FINRA Regulation Board.

In conjunction with its proposed transition to representation on the NAC based on firm size, FINRA would simplify the NAC appointment process for industry representatives and follow more closely the procedures for electing industry members of the FINRA Board. FINRA proposes to eliminate the five Regional Nominating Committees and have the Nominating Committee perform their function. Instead of relying on Regional Nominating Committees to identify possible industry candidates and submit candidates to the Nominating Committee and the FINRA Regulation Board, FINRA proposes that the Nominating Committee would identify and solicit candidates for all NAC seats, including the five industry-member positions that are to be based on firm size.<sup>16</sup> FINRA states that the Nominating Committee would be free to consult with or receive recommendations for industry NAC members from other FINRA committees, such as the District Nominating Committees, before communicating its nominations to the FINRA Board.

Individuals who seek to serve on the NAC but who were not nominated ("Additional Candidates") would still be allowed to gather petitions in support of their candidacy and potentially compete in a contested election. The proposed rule change permits Additional Candidates to petition for consideration as Small, Mid-Size, or Large Firm NAC Members, based on the size of the firm with which they are registered. Additional Candidates would be able to qualify for a contested election by gathering petitions from three percent (or ten percent in the case of petitions in support of more than one person) of the firms in their size category.<sup>17</sup> In the event of a contested election, FINRA members would have an opportunity to vote for a NAC candidate based on firm size.<sup>18</sup>

<sup>7</sup> The proposed rule change would revise, delete, and/or renumber various provisions of the FINRA Regulation By-Laws. Renumbered sections are referred to herein as "proposed FINRA Regulation By-Laws." All other sections (that is, sections for which new numbering did not result from the proposed revisions) are referred to as "current FINRA Regulation By-Laws."

<sup>8</sup> See current FINRA Regulation By-Laws, Article V, Section 5.1 (Appointment and Authority).

<sup>9</sup> See current FINRA Regulation By-Laws, Article V, Section 5.2 (Number of Members and Qualifications).

<sup>10</sup> See Notice, *supra* note 3, 73 FR 56872, 56873, n.6.

<sup>11</sup> See Notice, *supra* note 3, 73 FR at 56873.

<sup>12</sup> *Id.*

<sup>13</sup> A public member of the NAC has no material business relationship with a broker or dealer or a self-regulatory organization registered under the Act.

<sup>14</sup> A Large Firm is any broker or dealer admitted to membership in FINRA which, at the time of determination, has 500 or more registered persons. A Mid-Size Firm is any broker or dealer admitted to membership in FINRA which, at the time of determination, has at least 151 and no more than 499 registered persons. A Small Firm is any broker or dealer admitted to membership in FINRA which, at the time of determination, has at least 1 and no more than 150 registered persons. See proposed FINRA Regulation By-Laws, Article I (Definitions) (defining Small Firm, Small Firm NAC Member, Large Firm, Large Firm NAC Member, Mid-Size Firm, and Mid-Size Firm NAC Member, respectively).

<sup>15</sup> See *supra* note 13.

<sup>16</sup> See proposed FINRA Regulation By-Laws, Article V, Section 5.3 (Appointments).

<sup>17</sup> See proposed FINRA Regulation By-Laws, Article V, Section 6.2 (Designation of Additional Candidates).

<sup>18</sup> See proposed FINRA Regulation By-Laws, Article VI, Section 6.3 (List of FINRA Members

Specifically, small, mid-size, or large firms would vote for NAC candidates only if the contested election was for a NAC seat designated for a firm of corresponding size.

The proposed rule change authorizes the FINRA Secretary to collect information from candidates to determine that the nominee or Additional Candidate, as applicable, satisfies the definition of an Industry, Small Firm, Mid-Sized Firm, Large Firm, Non-Industry, or Public Member of the NAC.<sup>19</sup>

The proposed rule change also ensures that the winner of a contested election serves on the NAC. While all NAC members would continue to be recommended initially by the Nominating Committee and appointed by the FINRA Board,<sup>20</sup> the candidate who receives the most votes in any contested election for a Small, Mid-Size, or Large Firm NAC Member seat would be required under the FINRA Regulation By-Laws to be appointed to the NAC.<sup>21</sup> FINRA does not propose to change the NAC selection process if no Additional Candidates reach the threshold to qualify for a contested election; when there are no Additional Candidates, the industry NAC members selected by the Nominating Committee would not have a contested election and would be recommended for appointment to the NAC.<sup>22</sup>

Additionally, FINRA proposes to modify the provision that restricts NAC members and certain committees from communicating in an official capacity in support of a candidate in a contested election. The current provisions that permit individuals who are Directors or NAC or other committee members to communicate their views regarding a candidate in an individual capacity would remain the same. The

Eligible to Vote) and Article VI, Section 6.7 (Ballots).

<sup>19</sup> See proposed FINRA Regulation By-Laws, Article V, Section 5.4 (Nomination Process).

<sup>20</sup> The Exchange states that the seven non-industry members and two at-large industry members would continue to follow the nomination and Board appointment process currently employed for non-industry and at-large industry NAC members. See Notice, *supra* note 3, 73 FR at 56874, n. 14.

<sup>21</sup> See proposed FINRA Regulation By-Laws, Article V, Section 5.3 (Appointments) and 5.5 (Rejection of Nominating Committee Nominee).

<sup>22</sup> The proposed FINRA Regulation By-Laws would continue to allow the Nominating Committee to propose two or more candidates for a single open small, mid-size, or large firm NAC seat. See proposed FINRA Regulation By-Laws, Article VI, Section 6.5 (Notice of Contested Nomination). In such a case, there would be a contested election. The proposed rule change would clarify that only when the Nominating Committee nominates two or more candidates for the same open seat would the Nominating Committee trigger a contested election.

modification would specify the narrow circumstances under which the Nominating Committee may support its candidate by sending a maximum of two mailings in support of its nominee.<sup>23</sup> The proposal clarifies that this limited support is available during contested NAC elections by referring to support allowed “under these By-Laws,” which includes the support allowed under Article IV, Section 4.16.<sup>24</sup>

The proposed rule change would designate the Secretary of FINRA, instead of the FINRA Regulation Secretary, as the person who would: send notice to FINRA members announcing a contested NAC election; assist in preparing ballots; prepare a list of FINRA members eligible to vote; arrange for the location for counting of ballots by an independent agent; resolve ballots that were set aside, if necessary; extend a time period regarding elections for good cause; and perform similar duties.<sup>25</sup>

## 2. Other Changes

FINRA proposes to allow the NAC to continue to function while a vacancy is being filled. More specifically, the By-Laws would be changed to provide that a vacancy on the NAC lasting six months or less does not result in a violation of the compositional requirements of the NAC.

FINRA proposes to amend provisions of the By-Laws governing resignation, removal, appointment, and disqualification of NAC members and the NAC’s authority to act on FINRA’s behalf to designate the FINRA Board as the body authorized to oversee the NAC.<sup>26</sup> Under the proposal, the FINRA Board would have authority to remove all NAC members (for refusal, failure, neglect, or inability to discharge duties), accept their resignations, appoint them, and declare them disqualified.

The proposed rule change would eliminate the By-Laws provision that requires the Chair of the NAC to serve as a Director of the FINRA Regulation Board for a one-year term.

<sup>23</sup> See proposed FINRA Regulation By-Laws, Article IV, Section 4.16(b) (Communication of Views Regarding Contested Election or Nomination). Section 4.16(b) would also mirror the language of the FINRA By-Law provision that allows, in contested elections, the appropriate FINRA committee to communicate a responsive message in reply to an additional candidate’s communication. See FINRA By-Laws, Article VII, Section 11(b) (Communication of Views).

<sup>24</sup> See proposed FINRA Regulation By-Laws, Article VI, Section 6.6 (Administrative Support).

<sup>25</sup> See proposed FINRA Regulation By-Laws, Article VI, Sections 6.5, 6.7, 6.8, 6.10, 6.11, 6.13, and 6.14.

<sup>26</sup> See current FINRA Regulation By-Laws, Article V, Sections 5.1 (Appointment and Authority), and proposed Sections 5.7–5.9.

The proposed rule change would modify the By-Laws’ definition of “Industry Member” by limiting the look-back test that measures whether a NAC or committee member is considered “industry.” Currently, a person who has served as an officer, director, or employee of a broker or dealer, within the past three years is considered to be “industry.” The proposal would shorten that period to one year.

The proposal also would add the term “independent director” to the portion of the definition of “Industry Member” that excludes outside directors of a broker or dealer. According to FINRA, “independent director” is synonymous with outside director, but would be added to the exclusionary clause of the definition to harmonize the FINRA Regulation By-Laws with the FINRA By-Laws’ use of the term “independent director” when defining an Industry Governor. In addition, the definitions of “Public Director” and “Public Member,” which refer to NAC or committee members, would be modified to clarify that, for example, a Public Director’s service on FINRA Regulation’s Board or a Public Member’s service on the NAC does not disqualify that person from satisfying the definition of Public Director or Public Member.<sup>27</sup>

Finally, the proposed rule change would make certain non-substantive changes to several articles of the FINRA Regulation By-Laws as follows:

- “The NASD” or “NASD” is to be replaced with “FINRA” or “the Corporation;”
- “NASD Regulation” is to be changed to “FINRA Regulation;”
- “The Rules of the Association” is to be replaced with “the Rules of the Corporation;” and
- “National Nominating Committee” is to be replaced with “Nominating Committee.”

## II. Discussion and Commission’s Findings

After careful review, including consideration of the comment letter received<sup>28</sup> and FINRA’s response thereto,<sup>29</sup> 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

<sup>27</sup> See proposed FINRA Regulation By-Laws, Article I(hh) and (ii).

<sup>28</sup> See *supra* note 4.

<sup>29</sup> See letter from Carla Carloni, Associate Vice President, FINRA, to Florence E. Harmon, Acting Secretary, Commission, dated October 22, 2008, at 1 (“FINRA Response Letter”).

association.<sup>30</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(4) of the Act,<sup>31</sup> which requires that FINRA rules are designed to assure a fair representation of FINRA's members in the administration of its affairs. Additionally, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,<sup>32</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.

#### A. Changes to the NAC

##### 1. Composition

FINRA proposes that the restructured NAC consist of 14 members, including seven industry members, two of whom will be "at large" and five of whom will be designated specifically as representatives of large firms, mid-size firms, and small firms, and seven non-industry members, three of whom are public.<sup>33</sup> As noted above, the Commission received one letter regarding this proposal.<sup>34</sup> The commenter expressed support for the proposal, although he noted a concern that NAC members no longer would be required to come from different geographic regions of the country. In response, FINRA stated that it will "remain sensitive" to the commenter's concern.<sup>35</sup> FINRA also pointed out that, under the proposed nomination process, which is discussed further below, the District Nominating Committees, which currently select the five industry members on the NAC that come from the five geographic regions, are permitted to recommend candidates to the Nominating Committee.

The Commission finds that the proposed composition of the NAC satisfies the fair representation requirement of Section 15A(b)(4) of the Act because five of the 14 NAC members will be industry members, elected by member firms of similar size.<sup>36</sup> The proposed rule change aligns the representation of industry members

on the NAC to follow more closely the industry representation of the FINRA Board. Previously, the Commission found that the composition of the FINRA Board satisfies the fair representation requirement of Section 15A(b)(4) of the Act.<sup>37</sup>

##### 2. Nomination and Election

FINRA proposes that the Nominating Committee identify and solicit candidates for all NAC seats, including the five industry-member positions that are based on firm size. The Nominating Committee would be free to consult with and receive recommendations for industry NAC members from other FINRA committees, including the District Nominating Committees, before submitting nominees to the FINRA Board.

Under the proposed rule change, Additional Candidates would be: (a) Permitted to petition for consideration as Small, Mid-Size, or Large Firm NAC Members, based on the size of the firm with which they are registered; and (b) able to qualify for a contested election by gathering petitions from three percent of the firms in their size category. In the event of a contested election, FINRA members would have an opportunity to vote for a NAC candidate based on firm size.<sup>38</sup> Specifically, small, mid-size, or large firms would vote for NAC candidates only if the contested election was for a NAC seat designated for a firm of corresponding size.

The proposed rule change authorizes the FINRA Secretary to collect information from candidates to determine that the nominee or Additional Candidate, as applicable, satisfies the definition of an Industry, Small Firm, Mid-Sized Firm, Large Firm, Non-Industry, or Public Member of the NAC.<sup>39</sup> The proposed rule change also ensures that the winner of a contested election would serve on the NAC. While all NAC members would continue to be recommended initially by the Nominating Committee and appointed by the FINRA Board,<sup>40</sup> the candidate who receives the most votes in any contested election for a Small, Mid-Size, or Large Firm NAC Member

seat would be required under the FINRA Regulation By-Laws to be appointed to the NAC.<sup>41</sup> FINRA does not propose to change the NAC selection process if no Additional Candidates reach the threshold to qualify for a contested election. When there are no additional candidates, the industry NAC members selected by the Nominating Committee would not have a contested election and would be recommended for appointment to the NAC.<sup>42</sup>

The Commission finds that the proposed petition process, coupled with the proposed By-Law provisions on the NAC's composition, also are consistent with the fair representation requirement of Section 15A(b)(4) of the Act. As noted above, the Commission previously approved a proposed rule change relating to the composition of the FINRA Board that similarly provided firms with the right to petition for and vote on FINRA Board candidates industry members, according to firm size.<sup>43</sup> The Commission also notes that FINRA's proposal to permit Additional Candidates to qualify for a contested election by gathering petitions from three percent of the firms in their size category (or ten percent in the case of petitions in support of more than one person) is lower than the ten percent threshold that has been in place under the By-Laws to qualify a FINRA member as an Additional Candidate for a regional NAC seat.<sup>44</sup>

In addition, FINRA proposes to: (a) The narrow circumstances under which the Nominating Committee may support its candidate by sending a maximum of two mailings in support of its nominee; and (b) assign to the Secretary of FINRA the duties of sending notice to FINRA members announcing a contested NAC election, assisting in preparing ballots; preparing a list of FINRA members eligible to vote, arranging for the location for counting of ballots by an independent agent; resolving ballots that were set aside, as necessary,

<sup>41</sup> See proposed FINRA Regulation By-Laws, Article V, Section 5.3 (Appointments) and 5.5 (Rejection of Nominating Committee Nominee).

<sup>42</sup> The proposed FINRA Regulation By-Laws would continue to allow the Nominating Committee to propose two or more candidates for a single open small, mid-size, or large firm NAC seat. See proposed FINRA Regulation By-Laws, Article VI, Section 6.5 (Notice of Contested Nomination). In such a case, there would be a contested election. The proposed rule change would clarify that only when the Nominating Committee nominates two or more candidates for the same open seat would the Nominating Committee trigger a contested election.

<sup>43</sup> See *supra* note 37.

<sup>44</sup> Compare current FINRA Regulation By-Laws, Article VI, Section 6.15 (Requirement for Petition Supporting Additional Candidate) with proposed FINRA Regulation By-Laws, Article VI, Section 6.2 (Designation of Additional Candidates).

<sup>30</sup> In approving this proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>31</sup> 15 U.S.C. 78o-3(b)(4).

<sup>32</sup> 15 U.S.C. 78o-3(b)(6).

<sup>33</sup> A public member of the NAC has no material business relationship with a broker or dealer or a self-regulatory organization registered under the Act.

<sup>34</sup> See *supra* note 4.

<sup>35</sup> See FINRA Response Letter, *supra* note 29.

<sup>36</sup> See *infra* note 43 and accompanying text.

<sup>37</sup> See Securities Exchange Act Release No. 56145, *supra* note 5, 72 FR at 42182.

<sup>38</sup> See proposed FINRA Regulation By-Laws, Article VI, Section 6.3 (List of FINRA Members Eligible to Vote) and Article VI, Section 6.7 (Ballots).

<sup>39</sup> See proposed FINRA Regulation By-Laws, Article V, Section 5.4 (Nomination Process).

<sup>40</sup> The seven non-industry members and two at-large industry members would continue to follow the nomination and Board appointment process currently employed for non-industry and at-large industry NAC members.

extending a time period regarding elections for good cause, and similar duties. The Commission finds that these proposals are consistent with Section 15A(b)(6) of the Act,<sup>45</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.

### 3. Other Changes

FINRA proposes to allow NAC to continue to function for a period of 6 months or less while a vacancy is being filled.

FINRA proposes to broaden the FINRA Board's oversight authority over the NAC.<sup>46</sup> The proposed rule change grants the FINRA Board authority to remove all NAC members (for refusal, failure, neglect, or inability to discharge duties), accept their resignations, appoint them, and declare them disqualified. FINRA believes that this change will benefit the appellate portion of the disciplinary process.<sup>47</sup>

The proposed rule change eliminates the reference to the Chair of the NAC serving as a Director of the FINRA Regulation Board for a one-year term. FINRA explains that this provision is obsolete because the NAC Chair is no longer an automatic member of the FINRA Regulation Board.

FINRA proposes to narrow the pool of people qualified to be an "Industry Member," requiring that a person who has served as an officer, director, or employee of a broker or dealer, within the past year (instead of three years) is considered to be "industry." The proposed change is consistent with the definitions of "Industry Governor" and "Industry committee member" in the FINRA By-Laws.<sup>48</sup>

The proposal also adds the term "independent director" to the portion of the definition of "Industry Member" that excludes outside directors of a broker or dealer. FINRA states that the goal of this proposal is to harmonize use of the term "independent director" when defining an Industry Governor in the FINRA Regulation By-Laws and the FINRA By-Laws.

In addition, FINRA would modify the qualifications for "Public Director" and "Public Member." Currently, only someone with no material business

relationship with a broker, dealer, or the NASD, NASD Regulation, or a market for which NASD provides regulation is eligible for those positions.

Alternatively, FINRA proposes to require that Public Directors and Public Members have no material business relationship with a broker, dealer, or a self regulatory organization registered under the Act ("SRO"), provided that service as a public director of an SRO or as a public member on an SRO committee is not disqualifying.

Finally, FINRA proposes to make the following non-substantive replacements in the FINRA Regulation By-Laws:

- Substitute "the NASD" or "NASD" with "FINRA" or "the Corporation;"
- Substitute "NASD Regulation" with "FINRA Regulation;"
- Substitute "the Rules of the Association" with "the Rules of the Corporation;" and
- Substitute "National Nominating Committee" with "Nominating Committee."

The Commission finds that these proposed changes are consistent with Section 15A(b)(6) of the Act,<sup>49</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.

### III. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>50</sup> that the proposed rule change (SR-FINRA-2008-046) be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>51</sup>

**Florence E. Harmon,**

*Acting Secretary.*

[FR Doc. E8-27249 Filed 11-17-08; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58929; File No. SR-Phlx-2008-75]

### Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the NASDAQ OMX PHLX, Inc. Relating to the Definition of "Market for the Underlying Security"

November 12, 2008.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")<sup>1</sup>, and Rule 19b-4<sup>2</sup> thereunder, notice is hereby given that on November 3, 2008, the NASDAQ OMX PHLX, Inc. ("Phlx" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. 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, pursuant to Section 19(b)(1) of the Act<sup>3</sup> and Rule 19b-4 thereunder,<sup>4</sup> proposes to amend Exchange Rule 1017, Openings in Options, to replace references to the "primary market" in respect of an underlying security with references to the "market for the underlying security."

The text of the proposed rule change is available on the Exchange's Web site at [http://www.phlx.com/regulatory/reg\\_rulefilings.aspx](http://www.phlx.com/regulatory/reg_rulefilings.aspx).

#### 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 Exchange 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. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

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

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

<sup>3</sup> 15 U.S.C. 78s(b)(1).

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

<sup>45</sup> 15 U.S.C. 78o-3(b)(6).

<sup>46</sup> The authority of the FINRA Board to establish disciplinary procedures, impose sanctions, and review disciplinary decisions of the NAC are discussed in the Notice. See Notice, *supra* note 3, 73 FR at 56875.

<sup>47</sup> See *id.*

<sup>48</sup> See FINRA By-Laws, Article I(t).

<sup>49</sup> 15 U.S.C. 78o-3(b)(6).

<sup>50</sup> 15 U.S.C. 78s(b)(2).

<sup>51</sup> 17 CFR 200.30-3(a)(12).