

*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 inspection and copying 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 filing also will be available for inspection and copying at the principal office of CBOE. 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-CBOE-2009-012 and should be submitted on or before April 3, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>9</sup>

**Florence E. Harmon,**  
*Deputy Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59534; File No. SR-FINRA-2008-024]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 Thereto Relating to Amendments to the Discovery Guide To Update the Document Production Lists

March 6, 2009.

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 June 11, 2008, 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") and amended by Amendment No. 1 on January 21,

2009,<sup>3</sup> the proposed rule change as described in Items I, II, and III below, which Items substantially 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 proposes to amend the Discovery Guide to update the Document Production Lists. The text of the proposed rule change is available at FINRA, at its Web site (<http://www.finra.org>), 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

The proposed rule change adds clarifying and conforming language to the introduction in the Discovery Guide and updates the Document Production Lists. The text of the proposed rule change is contained in Exhibit 5 and is available on the FINRA Web site at [www.finra.org](http://www.finra.org).

###### Background

In January 1996, the Arbitration Policy Task Force chaired by former SEC chairman David Ruder issued a document entitled, "Securities Arbitration Reform: Report of the Arbitration Policy Task Force to the Board of Governors of NASD" (the "Report"). The Report made a number of broad recommendations to the Board of Governors to improve the securities arbitration process. One of the recommendations states that: "Automatic production of essential documents should be required for all parties, and arbitrators should play a much greater role in directing discovery

and resolving discovery disputes." After the work of the Task Force was completed, several groups were formed to work on discovery issues in response to this recommendation. Each group was composed of persons offering diverse perspectives, including counsel for investors and industry parties, and all made a substantial contribution to the process. The outcome of this process was the Discovery Guide, which the SEC approved after a public comment period,<sup>4</sup> and was made available for use in arbitration proceedings involving customer disputes upon the publication of NASD Notice to Members ("NTM") 99-90 (November 1999).

In March 2004, after more than four years of use, FINRA<sup>5</sup> determined to review the Discovery Guide and consider whether it should be updated. This review was undertaken by FINRA's National Arbitration and Mediation Committee ("NAMC"), a majority public committee of the FINRA Board made up of attorneys who represent investors, attorneys who represent brokerage firms, arbitrators, and mediators. In addition, FINRA staff met with frequent users of the arbitration forum representing both the public and the industry to listen to concerns regarding the Discovery Guide's document production lists, proposals for changes, and reactions to other constituents' proposals. Many of the provisions of the Discovery Guide were incorporated into a major revision of the portion of the Code of Arbitration Procedure for Customer Disputes ("Customer Code"), which was submitted to the SEC in 2003 and approved by the SEC in 2007.<sup>6</sup> The remaining provisions in the Discovery Guide consist primarily of lists of documents that are presumptively discoverable ("Document Production Lists").<sup>7</sup>

###### Summary of Significant Changes

The proposed rule change adds clarifying and conforming language to the introduction in the Discovery Guide and updates the Document Production Lists.

In the introductory language, FINRA proposes to add, "Where additional

<sup>4</sup> See Exchange Act Release No. 41833 (Sept. 2, 1999), 64 FR 49256 (Sept. 10, 1999).

<sup>5</sup> On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to FINRA in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007).

<sup>6</sup> Exchange Act Release No. 55158 (Jan. 24, 2007), 72 FR 4574 (Jan. 31, 2007) (File No. SR-NASD-2003-158).

<sup>7</sup> See Rule 12506.

<sup>9</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>3</sup> Amendment No. 1 to SR-FINRA-2008-024 replaced and superseded the original rule filing.

information is relevant in a particular case, it can be sought in accordance with the time frames provided in the 12500 series of rules.” This is intended to clarify that the Document Production Lists are not exhaustive, and that other documents may be requested. FINRA is also proposing to replace the reference to “churning” with the term “excessive trading” to conform the introduction to the language used in the Document Production Lists. FINRA also proposes to add a reference in the introduction to new List 12 relating to documents involving particular products or securities. Although FINRA is not proposing any changes to the paragraph on confidentiality, FINRA intends to call attention to an article in FINRA’s newsletter for arbitrators and mediators, the *Neutral Corner*, that provides additional background on the subject.<sup>8</sup>

Non-substantive, stylistic changes are proposed in some Document Production Lists; for example, the term “Associated Person” would be changed to lower case to conform to usage in the Customer Code.

Document Production Lists 1 and 2 apply to all types of disputes. The remainder of the Document Production Lists are categorized by the type of dispute, and within each type, they list first what the industry party must produce, and then what the customer must produce. The discussion below addresses each list by its current number. It should be noted, however, that some lists would be renumbered and/or renamed as part of the proposed rule change.

#### List 1—Documents To Be Produced in All Customer Cases by Firm/Associated Person(s)

List 1 includes documents to be produced in all customer cases by firm/associated person(s).

FINRA proposes to delete the footnote in the heading for List 1. This information is covered in the Customer Code’s subpoena and discovery rules (Rules 12505 through 12514).

List 1, Item 1 requires firms and associated persons to produce all agreements with the customer, including account opening documents, cash, margin, and option agreements, trading authorizations, powers of attorney, or discretionary authorization agreements, and new account forms. FINRA proposes to amend Item 1 to

require production of the account record information for the customer. The account record contains important information about the customer, such as the customer’s annual income, net worth, and account objectives, and it indicates whether the record has been signed by the associated person responsible for the account and approved or accepted by a principal of the firm.

FINRA proposes to delete List 1, Items 2 and 3 in their entirety. In many instances, the customer has retained account statements and/or confirmations, and requiring production of these documents in every case adds unnecessary delay and cost to the discovery process. If necessary, the customer may request these documents separately under proposed List 1, Item 2.

FINRA proposes to move current List 1, Item 5 into proposed new List 1, Item 2. Item 5 requires production of all correspondence between the customer and firm/associated person(s) relating to the transaction(s) at issue. Proposed Item 2 clarifies that the required documents are those that were sent to the customer or received by the firm and relate to the accounts or transactions at issue. A new sentence explains that monthly statements and confirmation slips need not be produced unless separately requested.

FINRA proposes to adopt new List 1, Item 3 to require the production of documents pertaining to the customer’s employment status, financial status, annual income, net worth, investment objectives, and risk tolerance. These documents would show what the firm/associated person(s) recorded about the customer’s financial status and investment objectives/risk tolerance.

List 1, Item 4 requires the production of all “holding (posting) pages” for the customer’s account(s) at issue or, if not available, any electronic equivalent. Holding pages are handwritten records of transactions made and kept by associated persons. FINRA proposes to delete Item 4 in its entirety, because holding pages generally are no longer in use, and transaction information in an electronic form would be available to the customer on account statements and/or confirmations.

FINRA proposes to adopt new Item 4 to require the production of documents evidencing any investment or trading strategies utilized or recommended in a customer’s account, including options programs, and any supervisory review of such strategies. New Item 4 would ensure that a customer has access to evidence of trading strategies utilized or recommended by the firm/associated

person(s) that may not have been publicly disseminated by the firm/associated person(s). The proposal would also provide the customer with documentation of any management supervision over the account.

As noted above, FINRA has proposed to move List 1, Item 5 into Item 2.

List 1, Item 6 requires the production of all notes by the firm/associated person(s) or on his/her behalf, including entries in any diary or calendar, relating to the customer’s account. FINRA proposes to modify the Item to clarify that notes of telephone calls or conversations must be produced and that required production is not limited to the items specified in the Item. The proposed amendment also provides that required production relates to the customer, in addition to those relating to his or her account(s) or transactions at issue. Because Item 6 requires production of all notes by the firm/associated person(s), the phrase “or on his/her behalf” would be deleted as unnecessary. This Item would be renumbered as Item 5.

Current List 1, Item 7 requires the production of all recordings and notes of telephone calls or conversations about the customer’s account(s) at issue that occurred between the associated person(s) and the customer, and/or between the firm and the associated person(s). FINRA proposes to delete Item 7 in its entirety. Notes of telephone calls or conversations would continue to be discoverable under proposed new Item 5, discussed above. FINRA proposes to eliminate mandatory production of recordings in every case because producing recordings is labor intensive, expensive, and unnecessary in cases where there is no dispute relating to conversations between the parties. Recordings would continue to be subject to discovery on a case by case basis, as the arbitrators deem to be appropriate under Rule 12507 of the Customer Code (Other Discovery Requests).

Current List 1, Item 8 requires production of all Forms RE-3, U4 and U5 including all amendments, all customer complaints identified in such forms, and all customer complaints of a similar nature against the associated person(s) handling the account(s) at issue. FINRA proposes to amend this item to clarify that Disclosure Reporting Pages must be produced. These pages, which are part of Forms U4 and U5, provide customer claimants with valuable, detailed information about prior customer complaints. With regard to customer complaints alleging conduct of a similar nature to that alleged in the Statement of Claim, the amendments

<sup>8</sup> The article would be discussed in the Regulatory Notice announcing approval of the amendments to the Discovery Guide. The article, *Arbitrators and Orders of Confidentiality*, The Neutral Corner, April 2004, is available at: <http://www.finra.org/ArbitrationMediation/Neutrals/Education/NeutralCorner/PO10040>.

would allow the firm/associated person(s) to redact portions of these documents to prevent disclosure of nonpublic personal information about other customers. Item 8 would be renumbered as Item 6.

Current List 1, Item 9 requires production of all sections of the firm's Compliance Manual(s) related to the claims alleged in the Statement of Claim, including any separate or supplemental manuals governing the duties and responsibilities of the associated person(s) and supervisors, any bulletins (or similar notices) issued by the compliance department, and the table of contents and index to each Manual. FINRA proposes to amend this Item to replace "Compliance Manual(s)" with "manuals and any updates thereto" and "compliance department" with "firm." The proposal would clarify that manuals must be produced regardless of whether the firm characterizes them as "Compliance Manuals," and bulletins must be produced from any department issuing them. FINRA is also proposing to require the production of updates to the firm's manuals for the time period related to the claims at issue. Updates are material to establishing the firm's procedures in place during a specified time frame. Item 9 would be renumbered as Item 7.

Current List 1, Item 10 requires the production of all analyses and reconciliations of the customer's account(s) during the time period and/or relating to the transaction(s) at issue. FINRA proposes to amend this Item to clarify that production is limited to analyses and reconciliations prepared during the time period at issue, and includes analyses and reconciliations prepared as part of a review of the customer's account(s) or transaction(s) at issue. These documents are valuable because they contain firm findings concerning reviews of customer accounts. Item 10 would be renumbered as Item 8.

Current List 1, Item 11 requires the production of all records of the firm/associated person(s) relating to the customer's account(s) at issue, such as internal reviews and exception and activity reports, which reference the customer's account(s) at issue. FINRA proposes to amend Item 11 to provide guidance concerning the types of documents that may have been created by a firm in the course of its usual surveillance and compliance activities. The proposed Item would require the production of all exception reports, supervisory activity reviews, activity concentration reports, active account runs and similar documents produced

to review for activity in customer accounts in which customer's account or the transaction(s) at issue are referenced or listed. Item 11 would be renumbered as Item 9.

Current List 1, Item 12 requires the production of records of disciplinary action taken against the associated person(s) by any regulator or employer for all sales practices or conduct similar to the conduct alleged to be at issue. Item 12 would be renumbered as Item 10.

FINRA proposes to adopt new List 1, Item 11 to require production of all documents related to the case at issue that are received by the Respondent by subpoena or document request directed to third parties. The subpoena rule, Rule 12512(e) of the Customer Code, requires production of subpoenaed documents. FINRA proposes to cross-reference that rule in the Discovery Guide. Documents received by request would be added to List 1 to ensure that all parties have access to evidence obtained from non-parties.

#### List 2—Documents and Information To Be Produced in All Customer Cases by Customer

List 2 includes documents and information to be produced by the customer in all customer cases.

Current List 2, Item 1 requires the production of all customer and customer-owned business (including partnership or corporate) federal income tax returns, limited to pages 1 and 2 of Form 1040, Schedules B, D, and E, or the equivalent for any other type of return, for the three years prior to the first transaction at issue in the Statement of Claim through the date the Statement of Claim was filed. FINRA proposes to require the production of complete copies of tax returns for the five years prior to the first transaction at issue in the arbitration, through the year in which the statement of claim is filed. The expanded production would provide parties with a broader understanding of a customer's financial status during the relevant period. The amendments would provide that the income tax returns being provided must be identical to those that were filed with the Internal Revenue Service.

Current List 2, Item 2 requires the production of financial statements or similar statements of the customer's assets, liabilities, and/or net worth for the period(s) covering the three years prior to the first transaction at issue in the Statement of Claim through the date the Statement of Claim was filed. To provide parties with a broader understanding of a customer's financial status during the relevant period,

FINRA proposes to amend this Item to expand the covered period to five years.

Current List 2, Item 3 requires the production of copies of all documents the customer received from the firm/associated person(s) and from any entities in which the customer invested through the firm/associated person(s), including monthly statements, opening account forms, confirmations, prospectuses, annual and periodic reports, and correspondence. FINRA proposes to amend Item 3 to eliminate mandatory production of account statements and confirmations if the customer stipulates to having received them. The amendments would require the customer to produce any statements or confirmations with handwritten notations on them or which are in any way non-identical to those sent by the firm. The amendments would decrease a customer's discovery costs while preserving the requirement to produce documents that may have probative value. FINRA also proposes to add research reports to Item 3. Research reports may provide evidence concerning the basis for a customer's investment decisions.

Current List 2, Item 4 requires the production of account statements and confirmations for accounts maintained at securities firms other than the respondent firm for the three years prior to the first transaction at issue in the Statement of Claim through the date the Statement of Claim was filed. FINRA proposes to amend Item 4 to require the customer to identify each securities firm where the customer has maintained an account and to produce account statements for the five year period prior to the first transaction at issue in the arbitration, through the completion of discovery. The proposal would permit the customer to provide written authorization allowing the respondent firm/associated person to obtain account statements directly from the securities firms in lieu of providing copies of the statements. The proposal would ensure that other parties to the matter have a more complete understanding of the customer's investing history. FINRA proposes to eliminate confirmations from Item 4 because most of the information detailed in confirmations is also contained in account statements.

Current List 2, Item 5 requires the production of all agreements, forms, information, or documents relating to the account(s) at issue signed by or provided by the customer to the firm/associated person(s). FINRA proposes to expand the scope of this Item by requiring production of documents relating to accounts or transactions at the firm regardless of whether the

documents were signed by the customer.

Current List 2, Item 6 requires the production of all account analyses and reconciliations prepared by or for the customer relating to the account(s) at issue. FINRA proposes to clarify this Item by changing “the account(s) at issue” to “the accounts at the respondent firm or transactions with the respondent firm during the time period at issue.”

Current List 2, Item 7 requires the production of all notes, including entries in diaries or calendars, relating to the account(s) at issue. FINRA proposes to amend Item 7 to provide clarity by changing “the account(s) at issue” to “the accounts at the respondent firm or transactions at issue with the respondent firm.”

Current List 2, Item 8 requires the production of all recordings and notes of telephone calls or conversations about the customer’s account(s) at issue that occurred between the associated person(s) and the customer (and any person purporting to act on behalf of the customer). FINRA proposes to clarify Item 8 by specifying that the required recordings and notes relate to the customer’s accounts or transactions.

Current List 2, Item 9 requires the production of all correspondence between the customer (and any person acting on behalf of the customer) and the firm/associated person(s) relating to the account(s) at issue. FINRA proposes to amend this Item to broaden the scope of the production by deleting the reference to firm/associated person(s). The customer may have corresponded with persons/entities unrelated to the firm concerning the transactions at issue. The amendment would also clarify that the required correspondence relates to the accounts or transactions.

Current List 2, Item 10 requires the production of previously prepared written statements by persons with knowledge of the facts and circumstances related to the account(s) at issue, including those by accountants, tax advisors, financial planners, other associated person(s), and any other third party. FINRA proposes to amend this Item to clarify that the required written statements relate to the accounts or transactions at issue.

Current List 2, Item 11 requires the production of all prior complaints by or on behalf of the customer involving securities matters and the firm’s/ associated person’s response(s). FINRA proposes to delete this item as unnecessary because the respondent firm/associated person would be in possession of any responsive documents

and production by the customer would be duplicative.

Current List 2, Item 12 requires the production of Complaints/Statements of Claim and Answers filed in all civil actions involving securities matters and securities arbitration proceedings in which the customer has been a party, and all final decisions and Awards entered in these matters. FINRA proposes to amend Item 12 to: (1) Add “Identify and” before “produce;” (2) include any non-confidential settlements entered in these matters; and (3) extend the time period through the completion of discovery. The proposed change would add that, although an agreement is not presumptively discoverable, a party to a confidential settlement agreement, that by its terms does not preclude identification of the existence of the settlement agreement, must identify the underlying documents of the confidential settlement agreement. The proposed change also would state that such a settlement agreement could be obtained with an order from the panel. By adding the requirement to identify the stated documents, the proposal would ensure that parties are aware of other securities actions even if a customer is not in possession of documents relating to the actions. The amendments would require the customer to produce non-confidential settlements, because the subject matter may be relevant to the pending case. Item 12 would be renumbered as Item 11.

Current List 2, Item 13 requires the production of all documents showing action taken by the customer to limit losses in the transaction(s) at issue. FINRA proposes to delete this item from the Discovery Guide because the firm/ associated person is in possession of any documents that would be responsive to this item and production by the customer would be duplicative.

FINRA proposes to adopt new Item 12 to require the customer to identify loans that he or she applied for or guaranteed for the five years prior to the first transaction at issue in the arbitration through the date the Statement of Claim was filed. The customer also would be required to produce copies of related loan applications, or provide a written authorization allowing the respondent firm/associated person to obtain loan applications directly from each lender. This information may provide evidence relating to the customer’s financial status, including, for example, information on net worth, assets, and liabilities.

FINRA proposes to move the content of Lists 8 (Misrepresentations/

Omissions), 10 (Negligence/Breach of Fiduciary Duty) and 14 (Unsuitability) to List 2 because the Items contained in these lists would provide valuable information to parties in all customer cases. Proposed List 2, Items 13 through 16, would require the production of:

- Documents showing the customer’s ownership in or control over any business entity, including general and limited partnerships and closely held corporations.
- Written documents relied upon by the customer in making the investment decision(s) at issue.
- Copy of the customer’s resume.
- Documents showing the customer’s complete educational and employment background or, in the alternative, a description of the customer’s educational and employment background if not set forth in a resume produced under item 15.

In addition, FINRA proposes to add to Item 13 the requirement that a claimant Trustee would be required to identify accounts over which he or she has trading authority. A Trustee’s trading activity for other accounts may provide relevant evidence of his or her sophistication as an investor.

FINRA proposes to adopt new List 2, Item 17 to require the production of all documents related to the case at issue that are received by the customer by subpoena or document request directed to third parties at any time during the case. Rule 12512(e) of the Customer Code requires production of subpoenaed documents. FINRA proposes to cross-reference the rule in the Discovery Guide. Documents received by request would be added to ensure that all parties have access to evidence obtained from non-parties.

#### List 3—Churning (Firm/Associated Person)

Current List 3 applies to documents required to be produced by firms/ associated persons in cases involving claims based on churning. As part of its plain English initiative, FINRA proposes to change the title of List 3 from Churning, which is defined as excessive activity in a customer’s account, to Claims of Excessive Trading.

Current List 3, Item 1 requires the production of all commission runs relating to the customer’s account(s) at issue or, in the alternative, a consolidated commission report relating to the account(s). Current List 3, Item 2 requires the production of all documents reflecting compensation of any kind, including commissions, from all sources generated by the associated person(s) assigned to the customer’s account(s) for the two months

preceding, through the two months following, the transaction(s) at issue, or up to 12 months, whichever is longer. The firm is permitted to redact all information identifying customers who are not parties to the action except for the last four digits of the non-party customer account number for each transaction. Proposed new Item 1 combines Items 1 and 2. New Item 1 would expand the scope of discovery concerning the associated person's(s') compensation and provides specificity about the documents that must be produced. New Item 1 would require production of the record of all compensation (monetary and non-monetary), including a listing of the securities traded, dates traded, solicited or unsolicited nature, and the gross and net commission from each trade, for all years in which the conduct alleged in the Statement of Claim occurred. The firm would be permitted to redact nonpublic personal information concerning customers who are not parties to the claim, but could not redact or delete any other information. The expanded time frame would ensure that the associated person's compensation is produced for the entire period that he or she serviced the account. If the firm asserts that the client controlled the trading in the account, the firm would have to produce sufficient information to distinguish the associated person's(s') accounts, and would be required to identify whether the associated person had related accounts that traded at the firm during the period in question. Activity in the associated person's(s') account is relevant because it may provide a basis for transactions that took place in a customer's account.

FINRA proposes to adopt new List 3, Item 2 to require production of a memorandum of each order or instruction given for all transactions at issue in the Statement of Claim. Order memoranda may contain valuable notations made at the time an order was received. Proposed Item 2 would also require documentation showing the associated person's(s') compensation for each transaction. If a wrap fee or similar arrangement applied to the account, the firm would be required to produce a record showing compensation earned by period. Documentation of compensation on an order by order basis provides parties with a clear understanding of how much the associated person was paid for the trading at issue.

Current List 3, Item 3 requires production of documents describing the basis upon which the associated person(s) was compensated during the years in which the transaction(s) or occurrence(s) in question occurred,

including any bonus or incentive program, and compensation and commission schedules. The proposed amendments would clarify the Item by requiring production of a record of all agreements pertaining to the relationship between the associated person and the firm, summarizing the associated person's compensation arrangement or plan with the firm, including commission and concession schedules, bonus or incentive plans, and schedules showing compensation. If compensation was based on factors other than remuneration per trade, the amendments would require a record of the method by which compensation was determined.

#### List 4—Churning (Customer)

FINRA proposes to delete current List 4 (Churning—Customer) which does not identify any documents or information that the customer must produce.

#### List 5—Failure To Supervise (Firm/Associated Person(s))

Current List 5, requires firms/associated persons to produce documents in cases involving claims of failure to supervise.

Current List 5, Item 1 requires the production of all commission runs and other reports showing compensation of any kind relating to the customer's account(s) at issue. The proposed amendments would clarify the Item by requiring production of commission runs and other reports showing compensation of any kind relating to the customer's account(s) or transactions at issue. The Item would be renumbered as List 4, Item 1.

Current List 5, Item 2 requires the production of all exception reports and supervisory activity reviews relating to the associated person(s) and/or the customer's account(s) generated not earlier than one year before or not later than one year after the transaction(s) at issue, and all other documents reflecting supervision of the associated person(s) and the customer's account(s). FINRA proposes to amend Item 2 to clarify that activity concentration reports and active account runs must be produced. List 5, Item 2 would be renumbered as List 4, Item 2.

Current List 5, Item 3 requires production of the portions of internal audit reports at the branch in which the customer maintained his/her account(s) that focused on the associated person(s) or the transaction(s) at issue, and were generated not earlier than one year before or not later than one year after the transaction(s) at issue and discussed alleged improper behavior in the branch against other individuals similar to the

improper conduct alleged in the Statement of Claim. FINRA is not proposing any substantive changes to this Item. The proposed amendments would simplify the language and sentence structure in accordance with FINRA's plain English initiative. List 5, Item 3 would be renumbered as List 4, Item 3.

Current List 5, Item 4 requires production of the portions of examination reports or similar reports following an examination or an inspection conducted by a state or federal agency or a self-regulatory organization that focused on the associated person(s) or the customer's account(s) or transaction(s) at issue or that discussed alleged improper behavior in the branch against other individuals similar to the improper conduct alleged in the Statement of Claim. The Item would be moved to proposed new Item 6 and the word "improper" would be deleted, as redundant, from the phrase "improper conduct alleged in the Statement of Claim."

FINRA proposes to adopt new List 4, Item 4 to require the production of any writings reflecting conversations between the associated person assigned to the customer's account during the time period at issue and members of the firm's compliance department. FINRA believes that such writings may provide evidence concerning firm supervisory activities relating to the associated person.

FINRA proposes to adopt new List 4, Item 5 to require the production of copies of any inquiries, charges or findings by any regulator (state, federal or self-regulatory organization) and the responses thereto by the firm/associated person for alleged improper behavior by the associated person similar to that alleged in the Statement of Claim. This Item is intended to complement proposed Item 6 by expanding the scope of documents produced that relate to supervision of the associated person.

Proposed new List 4, Item 6 is discussed under current List 5, Item 4, above.

FINRA proposes to adopt new List 4, Item 7 to require the production of any notes or memoranda evidencing supervisory or managerial review of the customer's account or trades for the period at issue. These documents would provide important evidence in a case alleging failure to supervise.

FINRA proposes to adopt new List 4, Item 8 to require the production of all correspondence between the customer and firm/associated person relating to the customer's account(s) or transaction(s) at issue bearing

indications of managerial or supervisory review of such correspondence. This Item is intended to complement proposed List 1, Items 2 (correspondence between the customer and firm/associated person relating to the transactions) and 5 (notes by the firm/associated person relating to the customer's account) by requiring production of documents indicating supervisory review of customer correspondence with the firm.

**List 6—Failure To Supervise (Customer)**

FINRA proposes to delete List 6 (Failure To Supervise—Customer) which does not identify any documents or information that the customer must produce.

**List 7—Misrepresentations/Omissions (Firm/Associated Person(s))**

Current List 7 requires firms/associated person(s) to produce documents in cases involving claims of misrepresentations or omissions. List 7 requires the production of all materials prepared or used by the firm/associated person(s) relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes indicating the associated person(s) reviewed or read such documents. As an alternative, the firm/associated person(s) is permitted to produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon request by a party, the firm/associated person(s) is required to provide any documents identified on the list. FINRA proposes to clarify this List by specifying that in addition to materials prepared or used by the firm/associated person(s), materials provided to the customer must be produced. The amendments would also require production of sales literature and performance or risk data. In addition, FINRA proposes to delete the alternative procedure provided in this Item. Because this two-step production causes delays in the discovery process. Disputes about the details contained on the lists often arise, resulting in parties requesting production of every item on the list. Current List 7 would be renumbered as proposed List 5.

**List 8—Misrepresentations/Omissions (Customer)**

Current List 8 requires customers to produce documents in cases involving allegations of misrepresentations or omissions. FINRA proposes to move Items 1 through 3 of current List 8 to

proposed List 2. This would expand required production of these documents to all customer cases.

FINRA proposes adopt new List 6 to require the customer to produce copies of all materials received or obtained from any source relating to the transactions or products at issue, and other prospective investments, including research reports, sales literature, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes. Production of these documents may provide evidence concerning representations made to the customer by the firm/associated person. Current List 8 would be renumbered as List 6.

**List 9—Negligence/Breach of Fiduciary Duty (Firm/Associated Person)**

Current List 9 requires production of copies of all materials prepared or used by the firm/associated person relating to the transactions or products at issue, including research reports, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes indicating that the associated person reviewed or read such documents. As an alternative, the firm/associated person is permitted to produce a list of such documents that contains sufficient detail for the claimant to identify each document listed. Upon further request by a party, the firm/associated person is required to provide any documents identified on the list. In addition, FINRA proposes to clarify this List by specifying that in addition to materials prepared or used by the firm/associated person, materials provided to the customer must be produced. The amendments would also specify that sales literature and performance or risk data must be produced. FINRA proposes to delete the alternative procedure provided in this Item because this two-step production causes delays in the discovery process. Disputes about the details contained on the lists often arise, resulting in parties requesting production of every item on the list. Current List 9 would be renumbered as List 7.

**List 10—Negligence/Breach of Fiduciary Duty (Customer)**

The contents of current List 10 (Negligence/Breach of Fiduciary Duty (Customer)) are being moved to proposed List 2, as described above. FINRA proposes to revise List 10 to require the customer to produce copies of all materials received or obtained

from any source relating to the transactions or products at issue, and other prospective investments, including research reports, sales literature, performance or risk data, prospectuses, and other offering documents, including documents intended or identified as being “for internal use only,” and worksheets or notes. Current List 10 would be renumbered as List 8.

**List 11—Unauthorized Trading (Firm/Associated Person)**

Current List 11, Item 1 requires the production of order tickets for the customer's transaction(s) at issue. FINRA proposes to amend this Item to specify that for all allegedly unauthorized transactions at issue in the Statement of Claim, the firm/associated person is required to produce a memorandum of each order or instruction given as well as documentation showing the compensation, gross and net, to the associated person for each such transaction. The term “order ticket” would be replaced with the term “memorandum of each order” to reflect the current use of various order management systems by FINRA member firms. FINRA would require documentation of compensation for each transaction because such information may provide evidence of the Associated person's motivation for executing a particular trade.

FINRA does not propose to change current List 11, Items 2 and 3.

FINRA proposes to adopt new List 11, Item 4 to require the production of commission runs or other documents showing all trading by the associated person in the security at issue from ten trading days before until ten trading days after each transaction the customer alleges was unauthorized. The firm/associated person would be permitted to redact customer names but would be required to disclose the security traded, dates traded, whether trades were solicited or unsolicited and gross and net commission from each trade. These documents may reflect a pattern of trading behavior by the association persons. List 11 would be renumbered as List 9.

**List 12—Unauthorized Trading (Customer)**

FINRA does not propose to current change List 12, Items 1 and 2. List 12 would be renumbered as List 10.

**List 13—Unsuitability (Firm/Associated Person)**

Current List 13, Item 1 requires production of all materials prepared,

used, or reviewed by the firm/associated person related to the transactions or products at issue, including but not limited to research reports, prospectuses, other offering documents, including documents intended or identified as being "for internal use only," and worksheets or notes indicating the associated person reviewed or read such documents. As an alternative, the firm/associated person is permitted to produce a list of such documents. Upon further request by a party, the firm/associated person is required to provide any documents identified on the list. FINRA proposes to clarify this List by specifying that in addition to materials prepared or used by the firm/associated person, materials provided to the customer must also be produced. In addition, the proposal also specifies that sales literature and performance or risk data must be produced. FINRA proposes to delete the alternative procedure provided in this Item because this two-step production causes delays in the discovery process. Disputes about the details contained on the lists often arise, resulting in parties requesting production of every item on the list.

Current List 13, Item 2 requires the production of documents sufficient to describe the basis upon which the associated person was compensated during the years in which the transaction(s) or occurrence(s) in question occurred, including any bonus or incentive program and all compensation and commission schedules showing compensation received or to be received. FINRA proposes to amend Item 2 to specify that documents reflecting agreements between the firm and associated person relating to compensation (including those concerning fee-based accounts) must be produced for the relevant time period. The proposal would eliminate required production of schedules showing compensation received or to be received.

FINRA proposes to adopt new List 13, Item 3 to require the production of all documents between the firm/associated person and the customer relating to asset allocation, diversification, trading strategies and market conditions related to the customer's account(s). These documents may provide valuable insight into the reasons for particular trading decisions and are germane to an allegation of unsuitability. List 13 would be renumbered as List 11.

#### List 14—Unsuitability (Customer)

FINRA proposes to move current List 14 (Unsuitability-Customer), Items 1 through 4, to List 2, as discussed above.

This would expand required production of these documents to all customer cases.

FINRA proposes to adopt new List 12, Claims Involving Particular Products or Securities. The Items on this list are designed to provide the parties with information about transactions in the customer accounts of an associated person and the commission earned on those transactions. FINRA proposes to limit discovery to five securities/products selected by the customer to minimize delays in the discovery process.

New List 12, Item 1 would require the firm/associated person to produce a record concerning trading activity in the customer's account(s) for a maximum of five securities and/or products selected by the customer claimant. The following would be required for each of the securities selected:

- Last four digits of the non-party customer account number;
- Trade activity (*i.e.*, buy, sell);
- Number of shares, unit price, and dollar value of transaction;
- Date traded;
- Solicited or unsolicited; and
- Gross and net commission.

New List 12, Item 2 would provide that, in giving a response to Item 1, the firm may redact the names of persons other than the customer, but should provide sufficient information to identify the customer's account, the associated person's own accounts, and the type of account. The proposal would require the information to be provided for a period of time beginning six months before and ending six months after the transactions at issue in the customer's account. If the customer seeks production of information related to more than five products or securities, a separate request would have to be made; however, the information would not be deemed presumptively discoverable. In addition, the firm would be required to identify related accounts of the associated person that traded in these securities or products at the firm during the relevant time period.

New List 12, Item 3 would provide that, if an insurance product that provides a death benefit is included in the Statement of Claim, the firm/associated person must produce all information concerning the customer's insurance holdings and any recommendations made to the customer regarding insurance products.

If the Statement of Claim includes an insurance product that provides a death benefit, New List 12, Item 4 would require the customer to produce all insurance information received from an insurance sales agent or broker.

New List 12, Item 5 would require the firm/associated person to produce a record of all agreements pertaining to the relationship between the associated person and the firm, summarizing the associated person's compensation arrangement or plan with the firm, including commission and concession schedules, bonus or incentive plans, schedules showing compensation received or to be received based upon volume, type of product, nature of trade, (*agency v. principal*) etc. and, to the extent that compensation is based on factors other than remuneration per trade, the method by which the compensation was determined.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>9</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. FINRA believes that these updates to the Discovery Guide will reduce the number and limit the scope of disputes involving document productions and other matters, thereby improving the arbitration process for the benefit of the public investors, broker-dealer firms, and associated persons who use the forum.

### 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 35 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 90 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:

<sup>9</sup> 15 U.S.C. 78o-3(b)(6).

(A) by order approve 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-2008-024 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Elizabeth M. Murphy, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549-1090.

All submissions should refer to File Number SR-FINRA-2008-024. 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 inspection and copying 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 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 available publicly. All submissions should refer to File Number SR-FINRA-2008-024 and

should be submitted on or before April 3, 2009.

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

**Florence E. Harmon,**

*Deputy Secretary.*

[FR Doc. E9-5389 Filed 3-12-09; 8:45 am]

**BILLING CODE 8011-01-P**

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-59525; File No. SR-NYSEArca-2009-16]

### Self-Regulatory Organizations; NYSE Arca, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Its Schedule of Fees and Charges Applicable to the Option Strategy Executions Pilot Program

March 6, 2009.

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 February 27, 2009, NYSE Arca, Inc. ("NYSE Arca" or "Exchange") filed with the Securities and Exchange Commission ("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 Exchange filed the proposal pursuant to Section 19(b)(3)(A) of the Act<sup>3</sup> and Rule 19b-4(f)(2) thereunder.<sup>4</sup> 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

NYSE Arca is proposing to amend its Schedule of Fees and Charges in order to extend the pilot program that applies to Option Strategy Executions ("Pilot Program") until March 1, 2010. The text of the proposed rule change is attached as Exhibit 5.<sup>5</sup> A copy of this filing is available on the Exchange's Web site at <http://www.nyse.com>, at the Exchange's principal office and at the Commission's Public Reference Room.

<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.

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

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

<sup>5</sup> The Commission notes that while provided in Exhibit 5 to the filing, the text of the proposed rule change is not attached to this notice but is available at NYSE Arca, the Commission's Public Reference Room, and at <http://www.nyse.com>.

#### 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. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization 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 purpose of this proposed rule change is to extend the Pilot Program that applies to Option Strategy Executions until March 1, 2010. The transactions included as part of the Pilot Program include reversals and conversions,<sup>6</sup> dividend spreads,<sup>7</sup> box spreads,<sup>8</sup> short stock interest spreads,<sup>9</sup> and merger spreads.<sup>10</sup> Because the referenced Options Strategy Transactions are generally executed by professionals whose profit margins are generally narrow, the Pilot Program caps the transaction fees associated with such executions at \$750 per strategy execution that are executed on the same trading day in the same option class. In addition, there is also a monthly cap of \$25,000 per initiating firm for all strategy executions. The Exchange believes that by keeping fees low, the Exchange is able to attract liquidity by

<sup>6</sup> Reversals and conversions are transactions that employ calls, puts and the underlying stock to lock in a nearly risk free profit. Reversals are established by combining a short stock position with a short put and a long call position that shares the same strike and expiration. Conversions employ long positions in the underlying stock that accompany long puts and short calls sharing the same strike and expiration.

<sup>7</sup> Dividend spreads are trades involving deep in the money options that exploit pricing differences arising around the time a stock goes ex-dividend.

<sup>8</sup> Box Spreads is a strategy that synthesizes long and short stock positions to create a profit. Specifically, a long call and short put at one strike is combined with a short call and long put at a different strike to create synthetic long and synthetic short stock positions, respectively.

<sup>9</sup> A short stock interest spread is a spread that uses two deep in the money put options of the same class followed by the exercise of the resulting long position in order to establish a short stock interest arbitrage position.

<sup>10</sup> A merger spread is a transaction executed pursuant to a strategy involving the simultaneous purchase and sale of options of the same class and expiration date, but with different strike prices followed by the exercise of the resulting long option position.