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

OCC rules currently prohibit members from depositing with OCC fully paid or excess margin securities that are carried for the account of a customer. This prohibition is intended to conform OCC's treatment of customer fully paid and excess margin securities to the requirements of Rule 15c3–3. The purpose of this proposed rule change is to allow members to deposit customer fully paid or excess margin securities to the extent that activity is consistent with Rule 15c3–3 and is permitted pursuant to no-action relief or interpretive guidance from the Commission or interpretive guidance from an SRO.

Currently, a Commission no-action letter and related interpretive guidance from the New York Stock Exchange permits fully paid or excess margin securities carried in a customer account to be deposited with OCC in two circumstances. First, if a customer makes a specific deposit of fully paid or excess margin securities with a member to secure its obligations as an option writer [5] then the member may in turn deposit the customer's securities with OCC.[6] Second, any fully paid or excess margin securities held by a member to secure a customer's obligations may be posted as margin with OCC to the extent of 140% of the difference between

the daily marking price deposits action: [7] and the original proceeds of the customer's transaction.[8] This proposed rule change would permit members to deposit customer fully paid or excess margin securities in these two circumstances as well as in any future circumstances identified by no-action relief or interpretive guidance from the Commission or interpretive guidance from an SRO.

OCC believes the proposed rule change is consistent with the requirements of Section 17A of the Act [9] and the rules and regulations thereunder because the proposed change will safeguard securities and funds related to the clearance and settlement of securities transactions for the protection of investors.

(B) Self-Regulatory Organization's Statement on Burden on Competition OCC does not believe that the proposed rule change would impose any burden on competition.

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

Written comments relating to the proposed rule change have not been solicited or received. OCC will notify the Commission of any written comments received by OCC.

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

Within thirty-five days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form (*http://www.sec.gov/rules/sro.shtml*); or
- Send an e-mail to *rule-comments@sec.gov.* Please include File Number SR–OCC–2009–18 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–OCC–2009–18. 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 Section, 100 F Street, NE., Washington, DC 20549–1090, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filings will also be available for inspection and copying at the principal office of the OCC and on OCC's Web site at *http://www.optionsclearing.com/components/docs/legal/rules_and_bylaws/sr_occ_09_18.pdf.*

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–OCC–2009–18 and should be submitted on or before December 28, 2009.

For the Commission by the Division of Trading and Markets, pursuant to delegated authority.[10]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29042 Filed 12–4–09; 8:45 am]

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[5] OCC Rule 610(e)–(f).

[6] New York Stock Exchange, *New York Stock Exchange Rule Interpretations Handbook* 505 (2004)(Interpretation 01 of Securities Exchange Act Rule 15c3–3(c) citing Chicago Board Options Exchange, Inc., SEC No-Action Letter (Feb. 19, 1975)).

[7] As required by OCC of its member.

[8] New York Stock Exchange, *New York Stock Exchange Rule Interpretations Handbook* 505 (2004)(Interpretation 020 of Securities Exchange Act Rule 15c3–3(c).

[9] 15 U.S.C. 78q–1.

[10] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–61080; File No. SR–FINRA–2009–068]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Granting Approval of Proposed Rule Change Relating to FINRA's Rules Governing Clearly Erroneous Executions

December 1, 2009.

I. Introduction

On October 19, 2009, Financial Industry Regulatory Authority, Inc. (''FINRA'') (f/k/a National Association of Securities Dealers, Inc. (''NASD'')) filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities

Exchange Act of 1934 (''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change to adopt NASD Rule 11890, IM–11890–1, and IM–11890–2 into a new consolidated rulebook (''Consolidated FINRA Rulebook'') as part of a new FINRA Rule 11890 Series governing clearly erroneous transactions. The proposed rule change was published for comment in the **Federal Register** on October 28, 2009.[3] The Commission received no comment letters on the proposal. This order grants approval to the proposed rule change.

II. Description of the Proposal

As part of the process of developing the Consolidated FINRA Rulebook, FINRA proposes that NASD Rule 11890, IM–11890–1, and IM–11890–2 be moved into the Consolidated FINRA Rulebook as part of a new FINRA Rule 11890 Series governing clearly erroneous transactions. FINRA also proposes amending these rules as part of a market-wide effort designed to provide transparency and finality with respect to clearly erroneous executions.[4] This effort seeks to achieve consistent results for participants across U.S. equities exchanges while maintaining a fair and orderly market, protecting investors, and protecting the public interest. Unlike the rules of the U.S. equities exchanges, FINRA's rules also address clearly erroneous executions in OTC Equity Securities.[5]

FINRA's new clearly erroneous rule series includes: (1) A general provision (Rule 11891) with accompanying Supplementary Material; (2) a rule governing clearly erroneous determinations for transactions in exchange-listed securities (Rule 11892) with accompanying Supplementary Material; (3) a rule governing clearly erroneous determinations for transactions in OTC Equity Securities (Rule 11893) with accompanying Supplementary Material; and (4) a rule governing review of FINRA staff determinations by the UPC Committee (Rule 11894).

Definition and General Guidelines

The proposed rule defines the term ''clearly erroneous'' and specifies that ''the terms of a transaction are 'clearly erroneous' when there is an obvious error in any term, such as price, number of shares, or other unit of trading, or identification of the security.''[6]

Review of Transactions in Exchange-Listed Securities

Proposed Rule 11892 and its Supplementary Material set forth the standards FINRA uses to determine whether a transaction in an exchange-listed security is clearly erroneous. Specifically, for OTC transactions in exchange-listed securities that are reported to a FINRA system, such as a FINRA Trade Reporting Facility (''TRF'') or Alternative Display Facility (''ADF''), FINRA will generally follow the determination of a national securities exchange to break a trade (or multiple trades) when that national securities exchange has broken one or more trades at or near the price range in question at or near the time in question (in FINRA staff's sole discretion) such that FINRA breaking such trade(s) would be consistent with market integrity and investor protection. When multiple national securities exchanges have related trades, FINRA will leave a trade(s) unbroken when any of those national securities exchanges has left a trade(s) unbroken at or near the price range in question at or near the time in question (in FINRA staff's sole discretion) such that FINRA breaking such trade(s) would be inconsistent with market integrity and investor protection.

For OTC transactions in exchange-listed securities that are reported to a FINRA system, but for which there is no corresponding or related on-exchange trading activity, FINRA will generally make its own clearly erroneous determination.[7] However, to ensure that transactions in exchange-listed securities are treated consistently regardless of where the trade is executed (on an exchange or OTC), proposed Rule 11892 replicates the numerical thresholds adopted by the exchanges to determine whether a transaction is eligible for consideration as clearly erroneous. The proposed rule also establishes alternative reference prices to be used in unusual circumstances, additional factors that FINRA may consider when making a clearly erroneous determination, and numerical guidelines applicable to volatile market opens.[8]

Review of Transactions in OTC Equity Securities

Proposed Rule 11893, which governs transactions in OTC Equity Securities, is structured similarly to the provisions for transactions in exchange-listed securities under proposed Rule 11892, including numerical guidelines, the use of alternative reference prices in unusual circumstances, and additional factors FINRA officers may consider when making a clearly erroneous determination. However, as is the case under the existing rule, the proposed numerical guidelines for transactions in OTC Equity Securities are not the same as the guidelines used for exchange-listed securities.[9] The provisions in proposed Rule 11893 regarding alternative reference prices and additional factors are substantially similar to those set forth in Rule 11892 for exchange-listed securities. FINRA is also proposing to adopt Supplementary Material to Rule 11893 to emphasize FINRA's historical use of its clearly erroneous authority in very limited circumstances, in particular with respect to OTC Equity Securities.

Review Procedures

FINRA proposes removing language that currently allows a FINRA officer to modify one or more of the terms of a transaction under review. Under the proposed rules, the FINRA officer will only have the authority to break the trades. This proposed change is intended to conform with the rules of other exchanges and attempts to remove the subjectivity from the rule that is necessitated by an adjustment. An Executive Vice President of FINRA's Market Regulation Department or Transparency Services Department, or any officer designated by such Executive Vice President, may, on his or her own motion, review any transaction arising out of or reported through any FINRA facility.

With respect to determinations involving transactions in exchange-listed securities, absent extraordinary circumstances, the officer shall take action generally within 30 minutes after becoming aware of the transaction. When extraordinary circumstances exist, any such action of the officer must be taken no later than the start of trading on the day following the date of execution(s) under review. With respect

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 60851 (October 21, 2009), 74 FR 55606 (the ''Notice'').

[4] *See* Securities Exchange Act Release No. 60706 (September 22, 2009), 74 FR 49416 (September 28, 2009) (approving SR–NYSEArca-2009–36) (the ''Arca Order'').

[5] For purposes of the proposed rule change, the term ''OTC Equity Security'' has the same meaning as defined in FINRA Rule 6420, except that the term does not include any equity security that is traded on any national securities exchange.

[6] *See* proposed Rule 11891. The language in the rule is based on the definition in the recently approved Arca Order.

[7] The FINRA rules do not allow members to initiate reviews of transactions. All reviews conducted by FINRA are conducted on FINRA's own motion.

[8] Each of these provisions is modeled on similar provisions in the recently approved amendments to NYSE Arca Rule 7.10.

[9] *See* proposed Rule 11893(b)(1).

to determinations involving transactions in OTC Equity Securities, a FINRA officer must make a determination as soon as possible after becoming aware of the transaction, but in all cases by 3 p.m., Eastern Time, on the next trading day following the date of the transaction at issue.

If a FINRA officer declares any transaction null and void, FINRA will notify each party involved in the transaction as soon as practicable, and any party aggrieved by the action may appeal such action in accordance with Rule 11894, unless the officer making the determination also determines that the number of the affected transactions is such that immediate finality is necessary to maintain a fair and orderly market and to protect investors and the public interest.

FINRA is also proposing to codify in Rule 11894 the provisions governing the appeal to the UPC Committee of a FINRA officer's determination to declare an execution clearly erroneous.[10] IM–11890–2, which concerns review by panels of the UPC Committee, will be incorporated into the text of the new rule. Under the rule, an appeal must be made in writing and must be received by FINRA within thirty minutes after the person making the appeal is given the notification of the determination being appealed. With respect to appeals regarding exchange-listed securities, determinations by the UPC Committee will be rendered as soon as practicable, but generally, on the same trading day as the execution(s) under review. On requests for appeal received after 3:00 p.m., Eastern Time, a determination will be rendered as soon as practicable, but in no case later than the trading day following the date of the execution(s) under review. With respect to appeals regarding OTC Equity Securities, determinations by the UPC Committee will be rendered as soon as practicable, but in no case later than two trading days following the date of the execution(s) under review.

III. Discussion and Commission Findings

The Commission finds that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.[11] In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,[12] in that it is designed, among other things, to prevent fraudulent and manipulative acts and practices; to promote just and equitable principles of trade; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and, in general, to protect investors and the public interest.

The Commission considers that, under ordinary circumstances, trades that are executed between parties should be honored. On rare occasions, the price of the executed trade indicates that an obvious error may exist, suggesting that it is unrealistic to expect that the parties to the trade had come to a meeting of the minds regarding the terms of the transaction and therefore that a clearly erroneous transaction may have taken place. In the Commission's view, the determination of whether a clearly erroneous trade has occurred should be based on specific and objective criteria and subject to specific and objective procedures.

The Commission believes that the proposed rule change sets forth a specific methodology for reviewing potentially erroneous trades in exchange-listed securities and should increase transparency and certainty for participants with respect to such trades. The Commission also believes that the proposed rule change is designed to increase the likelihood that that clearly erroneous execution rules will be consistently applied across markets, while also helping to facilitate the fair and orderly operation of the markets and protection of investors and the public interest. Specifically, with respect to OTC transactions in exchange-listed securities that are reported to a FINRA system, FINRA will generally follow the determination of a national securities exchange to break a trade (or multiple trades) when that national securities exchange has broken one or more trades at or near the price range in question at or near the time in question (in FINRA staff's sole discretion) such that FINRA breaking such trade(s) would be consistent with market integrity and investor protection.[13] With respect to OTC transactions in exchange-listed securities for which there is no corresponding or related on-exchange trading activity, Rule 11892 replicates the numerical thresholds used by the exchanges to determine whether a transaction is eligible for consideration as clearly erroneous. In addition, similar to the rules of the exchanges, the proposed rule also provides for the use of alternative reference prices in unusual circumstances, additional factors that FINRA may consider when making a clearly erroneous determination and numerical guidelines applicable to volatile market opens.

With respect to OTC Equity Securities, proposed Rule 11893 sets forth a specific methodology for reviewing potentially erroneous trades in OTC Equity Securities and should increase transparency and certainty for participants with respect to such trades. Proposed Rule 11893 is structured similarly to the provisions for transactions in exchange-listed securities under proposed Rule 11892, including numerical guidelines, the use of alternative reference prices in unusual circumstances, and additional factors FINRA officers may consider when making a clearly erroneous determination. However, the proposed numerical guidelines for transactions in OTC Equity Securities and the proposed timeframes for review and appeal of transactions involving OTC Equity Securities vary from the guidelines used for exchange-listed securities. The Commission believes that it is reasonable for FINRA to adopt different numerical guidelines and timeframes for these securities due to the differences in the OTC equity and exchange-listed markets, including the lack of compulsory information flows in the OTC equity market that are a result of the listing process and the fact that aberrant trading in the OTC market may be due to issues other than systems problems or extraordinary events.

V. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[14] that the proposed rule change (SR–FINRA–2009–068), be, and it hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[15]

Florence E. Harmon,

Deputy Secretary.

[FR Doc. E9–29043 Filed 12–4–09; 8:45 am]

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[10] A FINRA officer's determination not to break a trade is not appealable.

[11] In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. *See* 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78o–3(b)(6).

[13] *See* proposed Rule 11892, Supplementary Material .01.

[14] 15 U.S.C. 78s(b)(2).

[15] 17 CFR 200.30–3(a)(12).