

#### 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-BX-2010-022 on the subject line.

##### *Paper Comments*

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

All submissions should refer to File Number SR-BX-2010-022. 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,<sup>15</sup> 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 Web site viewing and printing in the Commission's Public Reference Room, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. 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-BX-2010-022 and should be submitted on or before April 27, 2010.

<sup>15</sup> The text of the proposed rule change is available on the Commission's Web site at <http://www.sec.gov/rules/sro.shtml>.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

**Florence E. Harmon,**

*Deputy Secretary.*

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#### **SECURITIES AND EXCHANGE COMMISSION**

**[Release No. 34-61808; File No. SR-FINRA-2010-005]**

#### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed Rule Change To Repeal Incorporated NYSE Rule 405(4) (Common Sales Accounts)**

March 31, 2010.

On January 21, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Exchange Act" or "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> a proposed rule change. The proposed rule change was published for comment in the **Federal Register** on February 25, 2010.<sup>3</sup> The Commission received no comments on the proposed rule change.

#### **I. Description of the Proposal**

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>4</sup> FINRA proposed to repeal NYSE Rule 405(4) (Common Sales Accounts).<sup>5</sup>

NYSE Rule 405(4) (Common Sales Accounts) required proper supervision of registered representatives handling common sales accounts. The rule provided that a member might facilitate the isolated liquidation of securities valued at \$1,000 or less registered in the name of an individual who does not

<sup>16</sup> 17 CFR 200.30-3(a)(12).

<sup>15</sup> 5 U.S.C. 78s(b)(1).

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

<sup>3</sup> See Exchange Act Release No. 61543 (February 18, 2010); 75 FR 8770 (February 25, 2010).

<sup>4</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from the New York Stock Exchange ("Incorporated NYSE Rules") (together, the NASD Rules and Incorporated NYSE Rules are referred to as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE ("Dual Members"). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see *Information Notice*, March 12, 2008 (Rulebook Consolidation Process).

<sup>5</sup> For convenience, the Incorporated NYSE Rules are referred to as the "NYSE Rules."

have an account, and which are not part of any distribution, through a common sales account set up for the specific purpose of handling such sales. The rule further provided that such sales might be effected on behalf of the customer without requiring the member to send a periodic customer account statement to the individual as otherwise generally required, provided the following conditions were satisfied: (1) The customer was identified as the individual in whose name the securities are registered; (2) the securities were received by the member, at or prior to the time of the entry of the order, in the exact amount to be sold in good delivery form; (3) a confirmation was sent to the customer; (4) all proceeds of such sales were paid out on or immediately following settlement date; and (5) a record was made in the common sales account that includes certain customer-specific information.

FINRA believed that the rule as written might raise potential investor protection concerns. The term "isolated" was not defined.<sup>6</sup> Further, NYSE Rule 405(4) permitted a member to effect sales of securities for customers without expressly requiring prior customer consent and without the need to send periodic account statements to the customer. For these reasons, FINRA proposed to eliminate NYSE Rule 405(4) and not adopt its content into the Consolidated FINRA Rulebook.<sup>7</sup>

<sup>6</sup> NYSE Rule 405(4) was adopted by the NYSE in the late 1960s. In 1977, the NYSE proposed amendments to Rule 405(4) to define the term "isolated" to mean "not exceeding five \$2,000 transactions during any twelve-month period unless otherwise approved by the NYSE," and to allow unsolicited purchases as well as sales of securities. In late 1977, the SEC instituted proceedings to determine whether to disapprove the proposed rule change and identified the potential grounds for disapproval. See Securities Exchange Act Release No. 14143 (November 7, 1977) (Order Instituting Proceedings to Determine Whether Proposed Changes to Rule 405 Should be Disapproved; File No. SR-NYSE-76-34). The SEC expressed concern that "execution of such transactions, and in particular of purchases [as proposed], in the common purchase and sale account may permit opportunities for fraudulent and manipulative acts or practices[.]" In February 1978, the NYSE withdrew the filing. See Securities Exchange Act Release No. 14630 (April 3, 1978) (Order Approving Withdrawal of NYSE's Proposed Changes to Rule 405; File No. SR-NYSE-76-34).

<sup>7</sup> FINRA notes that in the event a member may seek permission not to send customer account statements under certain limited circumstances, proposed FINRA Rule 2231, which relates to customer account statements, would authorize FINRA to exempt members from the provisions of such rule, including the requirement to deliver periodic account statements, pursuant to the Rule 9600 Series. See Securities Exchange Act Release No. 59921 (May 14, 2009); 74 FR 23912 (May 21, 2009) (Notice of Filing; File No. SR-FINRA-2009-028).

## II. Discussion

After careful review, 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 association.<sup>8</sup> In particular, the Commission finds that the proposed rule change is consistent with Section 15A(b)(6) of the Act,<sup>9</sup> 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 by eliminating a rule that contains terms that are not clearly defined and raises potential investor protection concerns.

## III. Conclusion

For the foregoing reasons, the Commission finds that the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities association.

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act,<sup>10</sup> that the proposed rule change (SR-FINRA-2010-010) be and hereby is approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>11</sup>

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

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-61818; File No. SR-NYSEAmex-2010-18]

### Self-Regulatory Organizations; NYSE Amex LLC; Order Granting Accelerated Approval of the Proposed Rule Change Relating to the Designation of a “Professional Customer”

March 31, 2010.

## I. Introduction

On February 25, 2010, the NYSE Amex LLC (“NYSE Amex” or the “Exchange”) filed with the Securities and Exchange Commission

(“Commission”) a proposed rule change 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> to designate any Customer<sup>3</sup> that places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s) as a “Professional Customer.” The proposed rule change was published for comment in the **Federal Register** on March 9, 2010.<sup>4</sup> The Commission did not receive any comments on the proposed rule change. This order approves the proposal on an accelerated basis.

## II. Description of NYSE Amex’s Proposal

NYSE Amex proposes to adopt a new term, “Professional Customer,” which would be defined in NYSE Amex Rule 900.2NY(18A) as a person or entity that (i) is not a broker or dealer in securities, and (ii) places more than 390 orders in listed options per day on average during a calendar month for its own beneficial account(s). Under the proposal, a Professional Customer would be treated in the same manner as a broker or dealer in securities for purposes of certain execution rules of the Exchange. Specifically, the orders of a Professional Customer generally would be treated in the same manner as a broker-dealer in securities for the purposes of NYSE Amex Rules 900.3NY(j) (Facilitation Order), 904G(f) (FLEX Trading Procedures and Principles—Crossing Limitations), 934NY (Crossing), 934.1NY (Facilitation Cross Transactions), 934.2NY (At-Risk Cross Transactions), 934.3NY (Solicitation), 963NY (Priority and Order Allocation Procedures—Open Outcry), 963.1NY (Complex Order Transactions), 964NY (Display, Priority and Order Allocation—Trading Systems), 964.2NY(b)(1)(iii) (Participation Entitlement of Specialists and e-Specialists), 964.2NY(b)(3)(B) (Allocation of Participation Entitlement Amongst Specialist Pool), 980NY(b) (Electronic Complex Order Trading), Rule 995NY(b) (Prohibited Conduct—Limit Orders) and the Exchange’s schedule of fees.

Under the proposal, a Professional Customer would participate in NYSE Amex’s allocation process on equal terms with broker-dealers—*i.e.*,

Professional Customers would not receive priority over broker-dealers in the allocation of orders on the Exchange. The Exchange states that the proposal would not otherwise affect non-broker-dealer individuals or entities under NYSE Amex rules. All Customer orders, including non-broker-dealer orders included in the definition of “Professional Customers,” would continue to be treated equally for purposes of the Exchange’s rules concerning away market protection.

The proposal requires ATP holders to indicate whether Customer orders are “Professional Customer” orders.<sup>5</sup> To comply with this requirement, ATP holders would be required to review their customers’ activity on at least a quarterly basis to determine whether orders that are not for the account of a broker or dealer should be represented as Customer orders or Professional Customer orders.<sup>6</sup> The Exchange states that it intends to file a separate proposed rule change to adopt fees for professional orders.<sup>7</sup>

## III. Commission Findings and Order Granting Approval of the Proposed Rule Change

After careful consideration of the proposed rule change, the Commission finds that the proposed rule change is consistent with the Act. Specifically, the Commission finds that the proposed rule change is consistent with Section

<sup>5</sup> The Exchange intends to require firms to identify Professional Customer orders submitted electronically to the system by identifying them with the number “8” in the customer type field—a mandatory field required for order entry. Manual orders submitted outside the electronic system would be marked with an origin code of “PC.” These Professional Customer identifiers would also flow through Exchange systems into audit trail and trade reporting data. See Notice, *supra* note 4 at 10852.

<sup>6</sup> Orders for any customer that had an average of more than 390 orders per day during any month of a calendar quarter must be represented as Professional Customer orders for the next calendar quarter. ATP Holders would be required to conduct a quarterly review and make any appropriate changes to the way in which they are representing orders within five business days after the end of each calendar quarter. While members only would be required to review their accounts on a quarterly basis, if during a quarter the Exchange identifies a customer for which orders are being represented as Customer orders but that has averaged more than 390 orders per day during a month, the Exchange would notify the ATP Holder and the ATP Holder would be required to change the manner in which it is representing the customer’s orders within five business days. The Exchange confirmed that references to “five days” in footnote 10 of the Notice should be read as “five business days.” E-mail from Matthew Vaughn, Counsel, NYSE Euronext to Ronesha Butler, Special Counsel, Division of Trading and Markets, dated March 31, 2010.

<sup>7</sup> See Notice, *supra* note 4 at 10852.

<sup>8</sup> In approving the proposed rule change, the Commission has considered the rule change’s impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

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

<sup>10</sup> 15 U.S.C. 78s(b)(2).

<sup>11</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> Under NYSE Amex rules, “Customer” is defined as “an individual or organization that is not a Broker/Dealer.” See NYSE Amex Rule 900.2NY(18).

<sup>4</sup> See Securities Exchange Act Release No. 61629 (March 2, 2010), 75 FR 10851 (March 9, 2010) (“Notice”).