

### 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-2011-044. 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 Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such 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 No. SR-BX-2011-044 and should be submitted on or before August 23, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>28</sup>

**Elizabeth M. Murphy,**

*Secretary.*

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### SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64969; File No. SR-FINRA-2009-028]

#### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment No. 1 to Proposed Rule Change To Adopt FINRA Rule 2231 (Customer Account Statements) in the Consolidated FINRA Rulebook

July 26, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act" or "SEA")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that on April 22, 2009, 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") the proposed rule change. The proposed rule change was published for comment in the **Federal Register** on May 21, 2009.<sup>3</sup> On July 12, 2011, FINRA filed Amendment No. 1 to the proposed rule change, which addresses the comments and proposes responsive amendments. Amendment No. 1 is described in Items I, II, and III below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on Amendment No. 1 to the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

FINRA is proposing this Amendment No. 1 to SR-FINRA-2009-028, a proposed rule change to adopt NASD Rule 2340 (Customer Account Statements) as FINRA Rule 2231 in the consolidated FINRA rulebook with moderate changes. The proposed rule change would delete Incorporated NYSE Rule 409 (Statements of Accounts of Customers), except for paragraph (f),<sup>4</sup>

<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-2009-028 responds to comments received on the original proposed rule change and proposes amendments to the original rule change pursuant to the comments. See Securities Exchange Act Release No. 59921 (May 14, 2009), 74 FR 23912 (May 21, 2009) ("Notice").

<sup>4</sup> The SEC approved the deletion of Incorporated NYSE Rule 409(f) in connection with the adoption of FINRA Rule 2232 (Customer Confirmations). See Securities Exchange Act Release No. 63150 (October 21, 2010); 75 FR 66173 (October 27, 2010) (Order Granting Accelerated Approval of Proposed Rule Change, as Modified by Amendment No. 1, To Adopt FINRA Rule 2232 (Customer Confirmations) in the Consolidated FINRA Rulebook and To Delete NASD Rule 2230, NASD IM-2110-6 and

and certain of its related interpretations. FINRA filed SR-FINRA-2009-028 with the Commission on April 22, 2009. On May 21, 2009, the Commission published the proposed rule change for comment in the **Federal Register**<sup>5</sup> and received 12 comment letters.<sup>6</sup> Based on the comments received, FINRA is filing this Amendment No. 1 to respond to the comments received and to propose amendments, where appropriate. FINRA requests that the Commission publish Amendment No. 1 in the **Federal Register** to allow interested parties the ability to comment on changes made to the proposal in light of comments.

The text of the proposed rule change is available on FINRA's Web site at <http://www.finra.org>, at the principal office of FINRA and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

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

Incorporated NYSE Rule 409(f). The rule change became effective on June 17, 2011. See *Regulatory Notice 10-62* (December 2010).

<sup>5</sup> See Securities Exchange Act Release No. 59921 (May 19, 2009), 75 FR 23912 (May 21, 2009) ("Proposing Release"). The comment period closed on June 11, 2009.

<sup>6</sup> Letter from *Gene Woodham, Chief Operating Officer, Sterne Agee Group, Inc.*, dated June 9, 2009 ("Sterne Agee Letter"); letter from *Tamara K. Salmon, Senior Associate Counsel, Investment Company Institute*, dated June 10, 2009 ("ICI Letter"); letter from *Jesse Hill, Director of Regulatory Services, Edward Jones*, dated June 10, 2009 ("Edward Jones Letter"); letter from *Dale E. Brown, President & CEO, Financial Services Institute, Inc.*, dated June 11, 2009 ("FSI Letter"); letter from *Sean C. Davy, Managing Director, Corporate Credit Markets Division, Securities Industry and Financial Markets Association (SIFMA), New York, New York*, dated June 11, 2009 ("SIFMA Letter"); letter from *David J. Pearlman, Chair, Regulatory Affairs Committee, College Savings Foundation*, dated June 11, 2009 ("College Savings Foundation Letter"); letter from *John S. Markle, Deputy General Counsel, Regulatory Operations, TD AMERITRADE Holding Corporation*, dated June 11, 2009 ("TD Ameritrade Letter"); letter from *Bari Havlik, Chief Compliance Officer, Senior Vice President, Charles Schwab & Co., Inc.*, dated June 11, 2009 ("Schwab Letter"); letter from *John Muschalek, Managing Director, Clearing Services Division, First Southwest Company*, dated June 11, 2009 ("First Southwest Company Letter"); letter from *Jonathan Feigelson, SVP, General Counsel, TIAA-CREF, New York, New York*, dated June 11, 2009 ("TIAA-CREF June Letter"); letter from *Sutherland Asbill & Brennan LLP on behalf of the Committee of Annuity Insurers*, dated June 11, 2009 ("Sutherland Asbill & Brennan Letter"); and letter from *Jonathan Feigelson, SVP, General Counsel, TIAA-CREF, New York, New York*, dated June 13, 2009 ("TIAA-CREF July Letter").

<sup>28</sup> 17 CFR 200.30-3(a)(12).

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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),<sup>7</sup> FINRA is proposing to adopt NASD Rule 2340 (Customer Account Statements) as FINRA Rule 2231 in the Consolidated FINRA Rulebook with moderate changes. The proposed rule change would delete: (1) Incorporated NYSE Rule 409 (Statements of Accounts of Customers), except for paragraph (f);<sup>8</sup> and (2) Incorporated NYSE Rule Interpretations 409(a) and 409(b), except for paragraphs 409(a)/01 and 409(a)/03, as such rule and its related interpretations are, in main part, duplicative of NASD Rule 2340. However, as further described herein, the proposed rule change would incorporate certain provisions of Incorporated NYSE Rule 409 and its interpretations into new FINRA Rule 2231.

Rule Filing History

On April 22, 2009, FINRA filed with the Commission SR-FINRA-2009-028, a proposed rule change to adopt FINRA Rule 2231 (Customer Account Statements) in the Consolidated FINRA Rulebook. The proposed rule change would require each general securities member to send account statements at least once each calendar month to each customer whose account had account activity during the period since the last statement was sent to the customer, subject to certain new exceptions proposed in this Amendment No. 1; and at least once every calendar quarter to each customer whose account had a security position or money balance during the period since the last

statement was sent to the customer. The proposed rule change would also continue the exception (subject to specified conditions) for customer accounts carried solely for the purpose of execution on a delivery versus payment/receive versus payment (DVP/RVP) basis.

On May 21, 2009, the SEC published the proposed rule change for comment in the **Federal Register**<sup>9</sup> and received 12 comment letters.<sup>10</sup> Based on the comments received, FINRA is filing this Amendment No. 1 to respond to the comments received and to propose amendments, where appropriate.

FINRA requests that the Commission publish Amendment No. 1 in the **Federal Register** to allow interested parties the ability to comment on changes made to the proposal in light of comments.

Proposed Changes in Amendment No. 1

In light of the comments, FINRA is proposing to exclude certain account activities from the proposed monthly account statement delivery requirement by adding new paragraph (c) to proposed FINRA Rule 2231. Proposed paragraph (c) of FINRA Rule 2231 would expressly exclude certain account activities from the monthly account statement delivery requirement. These activities would continue to require delivery of quarterly account statements, subject to new proposed Supplementary Material .01 (Compliance with SEA Rule 10b-10) that provides a general reminder that members remain subject to any conditions or requirements specified in any release, interpretation, "no-action" position or exemption issued by the SEC or its staff in the context of SEA Rule 10b-10 (Confirmation of Transactions) that a member may rely on for relief from certain delivery obligations of trade confirmations as specified in such rule (e.g., the manner and frequency of delivering periodic account statements in lieu of immediate trade confirmations) and FINRA Rule 2231 is not intended to alter any such conditions or requirements. FINRA also is proposing to amend proposed Supplementary Material .02 (Transmission of Customer Account Statements to Other Persons or Entities)<sup>11</sup> to: (1) Clarify that members are not required to obtain prior written consent to send duplicate account

statements or other communications for accounts of associated persons of another member to such other member in complying with NASD Rule 3050 and Incorporated NYSE Rule 407;<sup>12</sup> (2) clarify (consistent with any SEC release, interpretation, "no-action" position or exemption issued by the SEC or its staff in the context of SEA Rule 10b-10 that have established the policy that customers should continue to receive periodic account statements when not receiving immediate trade confirmations under SEA Rule 10b-10) that members must continue to deliver customer account statements to customers as provided in the proposed rule even when directed by the customer in writing to send duplicates to a third party;<sup>13</sup> and (3) delete the term "confirmation," from the proposed rule text as delivery requirements for confirmations are governed by SEA Rule 10b-10 and FINRA Rule 2232.<sup>14</sup>

Comments to the Proposed Rule Change

The commenters express general support for the proposed rule change, but have concerns with certain aspects of the proposed rule. Most commenters believe the proposal is too broad. Specifically, most of the comments focus on the following two issues: (1) The proposal to change the delivery requirement for customer account statements from quarterly to monthly; and (2) the proposal's potential conflict with SEA Rule 10b-10 and related guidance. Commenters also raised concerns regarding the general utility of customer account statements, potential environmental impact, availability of alternatives, need for written customer consent to transmit customer account statements to third parties, clarification of provisions requiring display of the identity of clearing firms and other issues. In addition, several commenters requested sufficient time to comply with the proposal if it is approved. FINRA discusses its responses to these comments below.

a. General

Three commenters questioned the value of customer account statements generally and stated that the significance of customer account statements has diminished in recent

<sup>7</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE ("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>8</sup> See *supra* note 4.

<sup>9</sup> See *supra* note 5.

<sup>10</sup> See *supra* note 6.

<sup>11</sup> FINRA is proposing to add new Supplementary Material .01 (Compliance with SEA Rule 10b-10) as part of this Amendment No. 1 and has therefore renumbered the other proposed Supplementary Material items.

<sup>12</sup> FINRA is proposing to adopt FINRA Rule 3210 (Personal Securities Transactions for or by Associated Persons), which combines and streamlines certain provisions of NASD Rule 3050 and Incorporated NYSE Rule 407. See *Regulatory Notice* 09-22 (April 2009).

<sup>13</sup> See Securities Exchange Act Release No. 34962 (November 10, 1994); 59 FR 59612 (November 17, 1994) (Confirmation of Transactions).

<sup>14</sup> See *supra* note 4.

years.<sup>15</sup> Several commenters argue that customer account statements are outdated the day after they are generated and customers now routinely use other up-to-date mediums to review current account activities such as on-line account access, automated phone systems and call centers.<sup>16</sup> In addition, several commenters expressed concern that customer account statements are less effective at helping customers' spot errors, identify theft or other potential problems than these more timely alternatives.<sup>17</sup> One commenter urged FINRA to encourage firms to include disclosure on customer account statements apprising customers of available alternatives for obtaining the most current information.<sup>18</sup> FINRA, however, disagrees with the notion that customer account statements have little or limited utility. FINRA believes that customer account statements continue to serve a significant regulatory purpose and that customers benefit from the receipt of periodic customer account statements.

Several commenters also raised concerns regarding the environmental impact of the proposal.<sup>19</sup> One commenter estimates the proposal will generate 60 million additional pages each year. The commenter estimates that this would be the equivalent of 7,200 trees or 300 tons of paper annually—almost a half of it destined for landfills.<sup>20</sup> While FINRA is mindful of the potential impact of its rulemaking on the environment and related burdens on its members, FINRA believes customer account statements serve a significant purpose in protecting customers and enhancing the overall integrity of the securities market. Moreover, consistent with current guidance, FINRA is proposing to adopt Supplementary Material .03 (Use of Electronic Media to Satisfy Delivery Obligations) which allows a firm to provide electronic delivery of customer statements upon affirmative consent of the customer.<sup>21</sup>

<sup>15</sup> See SIFMA Letter, TIAA-CREF June Letter and Schwab Letter.

<sup>16</sup> See TD Ameritrade Letter, TIAA-CREF June Letter and First Southwest Company Letter.

<sup>17</sup> See FSI Letter, TIAA-CREF June Letter and First Southwest Company Letter.

<sup>18</sup> See TIAA-CREF June Letter.

<sup>19</sup> See TIAA-CREF June Letter and First Southwest Company Letter.

<sup>20</sup> See TIAA-CREF June Letter.

<sup>21</sup> SEC guidance to date on the use of electronic media continues to require the affirmative consent of the investor/customer, and FINRA believes such consent should be required for electronic delivery of customer account statements. See *Notice to Members* 98-3 (January 1998). See also Securities Exchange Act Release No. 42728 (April 28, 2000); 65 FR 25843 (May 4, 2000).

## b. Proposed Monthly Account Statement Delivery Requirement

### 1. Monthly Delivery Is Not Industry Standard

As set forth in the Proposing Release, paragraph (a) of the proposed rule would impose a new requirement that each general securities member firm send a customer account statement not less than once every calendar month to each customer whose account had account activity during the period since the last statement, and continue to require that such firms send customer account statements not less than once every calendar quarter to each customer whose account had a security position or money balance during the period since the last statement. All 12 commenters objected to the scope of the proposed monthly delivery requirement.<sup>22</sup>

Several commenters state that current industry practice continues to be providing customers with account statements on a quarterly-basis, not monthly.<sup>23</sup> They contend that FINRA offers little support for the statement that requiring monthly account statements for customer accounts with account activity "better reflects current industry practice."<sup>24</sup> Another commenter notes that quarterly reporting is the retirement plan industry legal standard and monthly reporting would be at odds with other rules governing the retirement plan industry, including laws enacted by Congress.<sup>25</sup>

Another commenter notes that although a majority of its customers already receive monthly account statements, some customers have expressed a desire to receive them quarterly and mandatory monthly delivery would be costly.<sup>26</sup> Several commenters project that the cost to comply with the new requirement, e.g., to produce, print, stuff and mail additional statements, plus train personnel, would be in the millions.<sup>27</sup> One commenter argues that "[s]caling up the member's compliance systems, training programs, personnel, policies

<sup>22</sup> See *supra* note 6.

<sup>23</sup> See TIAA-CREF July Letter, SIFMA Letter, TD Ameritrade Letter, FSI Letter and Schwab Letter and Sutherland Asbill & Brennan Letter.

<sup>24</sup> *Id.*

<sup>25</sup> See TIAA-CREF June Letter.

<sup>26</sup> See Schwab Letter.

<sup>27</sup> TD Ameritrade estimates the new requirement will increase costs by \$4-\$7 million annually and by tens of millions or more across the industry. TIAA-CREF estimates that the move to monthly statements will cost an additional \$16 million in printing and postage expenses per year, which would be passed on to customers. Edward Jones estimates the cost of monthly account statements in 2009 would have been \$1.5 million.

and procedures, and acquiring the resources necessary for such an undertaking, would impose immense administrative costs and burdens on these firms, and ultimately result in the imposition of increased costs on customers."<sup>28</sup> Commenters state that the practical benefits received by investors from monthly statements versus quarterly statements are substantially disproportionate to the inherent cost under a cost benefit analysis.<sup>29</sup>

One commenter further contends that the proposed move to monthly account statement delivery requirements contradicts the 2008 Rand Study and recent efforts by the SEC to streamline disclosures to investors to make them more user-friendly and readable.<sup>30</sup> Another commenter suggests that customers should be permitted to affirmatively elect quarterly delivery of customer account statements with the right to revert to monthly delivery anytime they choose.<sup>31</sup> Another commenter recommends that firms be able to condition the customer's right to receive monthly statements upon consent to electronic delivery.<sup>32</sup>

In light of the comments, FINRA is proposing to exclude certain account activities from the proposed monthly account statement delivery requirement. FINRA believes the proposed exclusions (outlined in detail below) strike the correct balance between investor protection and the concerns raised by the commenters.

### 2. Monthly Delivery Is Inconsistent With SEA Section 15A

One commenter asserts that the monthly statement requirement is inconsistent with the statutory requirements of Sections 6 and 15A of the SEA and therefore the proposal should not be approved by the SEC.<sup>33</sup> The commenter contends that FINRA's statement on burden on competition in the rule filing is cursory and falls short of satisfying the instructions in Form 19b-4 to provide detailed and specific statements.

FINRA has complied with all rulemaking obligations imposed by the SEA. As required under Section 19(b)(1)

<sup>28</sup> See Sutherland Asbill & Brennan LLP Letter.

<sup>29</sup> See Sterne Agee Letter, ICI Letter, Edward Jones Letter, FSI Letter, SIFMA Letter, TD Ameritrade Letter, Schwab Letter, First Southwest Company Letter, TIAA-CREF June Letter, Sutherland Asbill & Brennan Letter and TIAA-CREF July Letter.

<sup>30</sup> See FSI Letter.

<sup>31</sup> See Schwab Letter.

<sup>32</sup> See TIAA-CREF June Letter.

<sup>33</sup> See TIAA-CREF July Letter. FINRA notes that it is not a "national securities exchange" and therefore is not subject to the requirements of Section 6 of the SEA.

of the SEA, FINRA submitted to the SEC a concise general statement of the basis and purpose of the proposed rule. As stated in its rule filing, FINRA believes that the proposed rule change will provide customers with critical information regarding their accounts and will allow them to review their statements in a timely manner, while also clarifying and streamlining the customer account rules for adoption as FINRA rules in the Consolidated FINRA Rulebook. In addition, as also stated in the rule filing, the proposed rule change does not create “a burden on competition not necessary or appropriate in furtherance of the purposes of [the SEA].”<sup>34</sup> Further, FINRA tailors its proposed rule changes as narrowly as possible to achieve the intended and necessary regulatory benefit. In this regard, FINRA notes that, as further detailed below, in response to commenters’ concerns, it is proposing to exclude certain account activities from the proposed monthly account statement delivery requirement.

### 3. Monthly Delivery Creates Potential Conflict With SEA Rule 10b–10

All commenters contend that the adoption of a monthly delivery requirement for customer account statements would cause the proposed rule change to conflict with SEA Rule 10b–10 (Confirmation of Transactions) and its related interpretations and guidance.<sup>35</sup>

Several commenters note that SEA Rule 10b–10 generally requires that at, or before, the completion of a securities transaction for a customer, a broker-dealer must deliver to the customer written notification (a “confirmation”) that contains certain prescribed information about the transaction.<sup>36</sup> Commenters assert that the more immediate nature of transaction confirmations makes them a very effective tool for customers for identifying discrepancies in a customer’s account related to erroneous transactions, identity theft, or other potential problems.<sup>37</sup>

All commenters also emphasize that the Commission, through SEA Rule 10b–10(b), rule interpretations, no-action guidance and exemptive relief, has considered the disclosures appropriate for certain types of transactions, balanced risks to investor protection against cost savings for broker-dealers, and determined that it is unnecessary for broker-dealers to send

confirmations of certain transactions if certain information regarding the transactions is disclosed in a quarterly statement.<sup>38</sup> The commenters state that these transactions include, but are not limited to, transactions effected pursuant to a “periodic plan” or “investment company plan,” the automatic reinvestment of dividends in the shares of money market funds, other open-end investment companies and unit investment trusts and transactions in certain sorts of “wrap fee” or “payroll deduction” arrangements.<sup>39</sup>

In light of the comments, as further detailed below, FINRA is proposing to add new paragraph (c) to exclude certain account activities from the proposed monthly account statement delivery requirement.<sup>40</sup>

### 4. Monthly Delivery Creates Potential Conflict With ERISA and Rules Relating to Retirement Plans and MSRB Rules Relating to 529 College Savings Plans

Two commenters are concerned that the proposed monthly delivery requirement for customer account statements will conflict with current quarterly reporting standards in the retirement plan industry.<sup>41</sup> The commenters note that multiple service providers, including broker-dealers, banks and trust companies, offer services to retirement plan participants. These parties are subject to SEA Rule 10b–10, Section 105 of the Employee Retirement Income Securities Act of 1974, as amended (“ERISA”), and applicable banking regulations. The commenters state that these various regulations recognize quarterly statements and changing the requirement for broker-dealers would add confusion and place broker-dealers at a competitive disadvantage with few, if any, benefits.

Similarly, another commenter is concerned that the proposed monthly delivery requirement is at odds with Rule G–15 of the Municipal Securities Rulemaking Board (“MSRB”), which permits that confirmation of transaction in college savings plan transactions may be done on a quarterly basis provided

that they are part of a regular investment program meeting the definition of “periodic municipal fund security plan” under the applicable MSRB Rules.<sup>42</sup> The commenter states the proposed rule would create an anomaly because a broker-dealer would be required to provide a monthly statement under FINRA Rules, but would be permitted under MSRB Rules to provide a quarterly statement. Moreover, they argue that such periodic activity does not seem to be the sort that would lend itself to account security issues and/or identity theft concerns. FINRA notes that nothing in this rule proposal is intended to alter the balance of jurisdiction between FINRA and the MSRB and the continued application of MSRB Rules to municipal fund securities. Further, FINRA believes that proposed paragraph (c) that establishes exceptions from the proposed monthly delivery requirement would generally make the proposed rule consistent with the frequency of delivery requirements in MSRB Rule G–15.<sup>43</sup>

### 5. Carve-Outs From Monthly Delivery Recommended by Commenters

Several commenters recommend that FINRA should permit quarterly account reporting where the only activity in the customer’s account consists of (A) certain types of routine activity that does not involve the active participation of the customer (“Passive Activity”); (B) activity that the Commission has determined need only be reported on quarterly account statements rather than in Rule 10b–10 transaction confirmations (“10b–10 Exempt Activity”); and (C) occasional transactions in retirement accounts for which an immediate confirmation is sent to the customer when the predominant activities in such account are either Passive Activity or 10b–10 Exempt Activity.<sup>44</sup> In addition, one commenter notes that similar activity with respect to ERISA plans should be exempted as well from the monthly delivery requirements.<sup>45</sup> The commenters note that the activities described above are generally routine

<sup>38</sup> See *supra* note 6.

<sup>39</sup> See SIFMA Letter.

<sup>40</sup> In proposing the exceptions in new paragraph (c), FINRA reminds firms that they remain subject to any conditions or requirements specified in any release, interpretation, “no-action” position or exemption issued by the SEC or its staff in the context of SEA Rule 10b–10 that a firm may rely on for relief from certain delivery obligations of trade confirmations as specified in such rule (e.g., the manner and frequency of delivering periodic account statements in lieu of immediate trade confirmations) and proposed FINRA Rule 2231 is not intended to alter any such conditions or requirements. See proposed FINRA Rule 2231.01.

<sup>41</sup> See TIAA–CREF June Letter and ICI Letter.

<sup>42</sup> See College Savings Foundation Letter.

<sup>43</sup> See MSRB Rule G–15(a) (Confirmation, Clearance, Settlement and Other Uniform Practice Requirements with Respect to Transactions with Customers), which provides in relevant part that “such broker, dealer or municipal securities dealer gives or sends to such customer within five business days after the end of each quarterly period, in the case of a customer participating in a periodic municipal fund security plan, or each monthly period, in the case of a customer participating in a non-periodic municipal fund security program, a written statement disclosing \* \* \*.”

<sup>44</sup> See SIFMA Letter, FSI Letter, Sutherland Asbill & Brennan Letter and TIAA–CREF June Letter.

<sup>45</sup> See TIAA–CREF June Letter.

<sup>34</sup> See 15 U.S.C. 78o–3(b)(9).

<sup>35</sup> See *supra* note 6.

<sup>36</sup> See Schwab Letter and SIFMA Letter.

<sup>37</sup> See Sutherland Asbill & Brennan Letter.

and recurring activities in a customer's account that are better suited to quarterly reporting. In addition, they state that these routine and regular activities in a customer's account are of the type that typically do not raise fraud and/or identity theft concerns.<sup>46</sup>

#### 6. FINRA Response to Monthly Delivery Comments

In response to the comments raised, FINRA is proposing to add new paragraph (c) to proposed FINRA Rule 2231. Proposed paragraph (c) would expressly exclude certain account activities from the monthly account statement delivery requirement. These activities would continue to require delivery of quarterly account statements, subject to new proposed Supplementary Material .01 (Compliance with SEA Rule 10b-10) that provides a general reminder that members remain subject to any conditions or requirements specified in any release, interpretation, "no-action" position or exemption issued by the SEC or its staff in the context of SEA Rule 10b-10 (Confirmation of Transactions) that a member may rely on for relief from certain delivery obligations of trade confirmations as specified in such rule (e.g., the manner and frequency of delivering periodic account statements in lieu of immediate trade confirmations) and FINRA Rule 2231 is not intended to alter any such conditions or requirements.

Specifically, subject to proposed Supplementary Material .01, a member could send quarterly account statements to customers instead of monthly account statements pursuant to paragraph (a) of the proposed rule if:

(1) The member relies on an appropriate rule, regulation, release, interpretation, "no-action" position or exemption issued by the SEC or its staff that (A) specifically applies to the fact situation of the activity; (B) provides relief from the immediate transaction confirmation delivery requirements of SEA Rule 10b-10; and (C) permits quarterly delivery of customer account statements; or

(2) The activity to the account consists only of the kind listed below:

(A) the receipt of funds in the account that are not directly from a purchase or sale transaction, including the receipt of interest and dividends;

(B) the automatic reinvestment of funds in the account pursuant to and in accordance with a customer's standing instructions (e.g., a dividend reinvestment plan);

(C) the transfer of uninvested customer credit balances into or out of money market mutual funds or bank deposits pursuant to a "sweep program" pursuant to consent of the customer and implemented consistent with applicable regulatory guidance, except where the customer's balance in the bank deposit "sweep program" during the period exceeds the amount insured by the FDIC coverage;

(D) all fees and charges to the account that have been fully disclosed to the customer and comply with all disclosure and applicable regulatory requirements (e.g., account fees, short position charges, interest on debit balances or charges for dividends on securities held short in the account).

(3) A member may rely on an exclusion under this paragraph (c) only if customers are provided access to current information on their accounts via the Internet and by telephone.

FINRA believes the proposed exclusions for these types of account activities are appropriate as they strike the correct balance between investor protection and the concerns raised by the commenters.

#### c. Proposed Supplementary Material .02 (Transmission of Customer Account Statements to Other Persons or Entities)

Proposed Supplementary Material .02 would require written instructions from the customer to address and/or send customer statements or other communications relating to the customer's account to other persons or entities. One commenter contends that this requirement would conflict with Incorporated NYSE Rule 407 and NASD Rule 3050.<sup>47</sup> As further detailed therein, these rules generally address the obligation of a member carrying an account in which an associated person of another member has an interest to send duplicate confirmations and accounts statements to such other member. The commenter seeks clarification that members are not required to obtain the written consent of the customer before sending duplicate statements, confirmations or other communications pursuant to NYSE Rule 407 or NASD Rule 3050. FINRA agrees that compliance with such rules should not be deemed a violation of this provision and is proposing to revise the proposed rule text to make this clear.

Two commenters assert that the proposed rule should allow a customer's oral consent to be sufficient to send a duplicate account statement, confirmation, or other communication, provided that the customer also receives

such account statement, confirmation or other communication and the member relying on such oral consent lists on the customer's (quarterly or monthly) account statement the names of any other persons to whom duplicate communications are being sent.<sup>48</sup> One of these commenters notes that firms are permitted to accept oral instructions for a variety of customer transactions and contends that customers should be afforded the same level of convenience in this regard so long as the firm has adequate controls in place.<sup>49</sup> FINRA does not believe that oral instructions are sufficient in this context. Due to several concerns (e.g., identify theft, privacy concerns, etc.), FINRA believes firms must be able to document and record customer consent to send customer account statements to third parties. FINRA has permitted firms to act on oral instructions from customers in other contexts (e.g., trading instructions) largely to allow customer and firms to act expeditiously to execute securities transactions that are time-sensitive in nature. However, the delivery of customer account statements presents no such concerns and therefore should require written customer consent.

Accordingly, in response to comments, FINRA is proposing to amend proposed Supplementary Material .02 to: (1) Clarify that members are not required to obtain prior written consent to send duplicate account statements or other communications for accounts of associated persons of another member to such other member in complying with NASD Rule 3050 and Incorporated NYSE Rule 407; (2) clarify (consistent with any SEC release, interpretation, "no-action" position or exemption issued by the SEC or its staff in the context of SEA Rule 10b-10 that have established the policy that customers should continue to receive periodic account statements when not receiving immediate trade confirmations under SEA Rule 10b-10) that members must continue to deliver customer account statements to customers as provided in the proposed Rule even when directed by the customer in writing to send duplicates to a third party;<sup>50</sup> and (3) delete the term "confirmation," from the proposed rule text as delivery requirements for confirmations are governed by SEA Rule 10b-10 and FINRA Rule 2232.<sup>51</sup>

<sup>48</sup> See SIFMA Letter and Schwab Letter.

<sup>49</sup> See Schwab Letter.

<sup>50</sup> See *supra* note 13.

<sup>51</sup> See *supra* note 4.

<sup>46</sup> See *supra* note 44.

<sup>47</sup> See SIFMA Letter. See also *supra* note 12.

d. Proposed Supplementary Material .03  
(Use of Electronic Media To Satisfy  
Delivery Obligations)

One commenter urges FINRA to adopt electronic delivery of customer account statements as the default delivery mechanism.<sup>52</sup> The commenter argues that electronic delivery provides more timely information to customers and a cost savings to firms. However, another commenter is concerned that requiring individual customers to affirmatively opt for electronic delivery will act to negate these benefits, but notes that further use of electronic delivery methods raises larger issues that FINRA should consider on a more global basis, rather than solely in the context of periodic customer account statements.<sup>53</sup> FINRA believes that proposed Supplementary Material .03 is consistent with current SEC guidance on the use of electronic media which, among other things, requires affirmative consent of the customer for electronic delivery of certain documents.<sup>54</sup>

e. Proposed Supplementary Material .04  
(Information To Be Disclosed on  
Statement)

One commenter seeks clarification of the requirements in paragraphs (a) and (b) and contends that the requirements are in conflict.<sup>55</sup> Proposed paragraph (a) requires disclosure of the identity of the introducing firm and the clearing firm, if different, and their respective contact information on the front of the statement, but allows the identity and contact information of the clearing firm to be appear on the back of the statement so long as it is bold and prominent. Proposed paragraph (b) requires that the front of the statement must clearly disclose that the clearing firm is a member of SIPC. FINRA believes the two provisions are not inconsistent. Proposed paragraph (a) gives firms the option to provide the identity and contact information of the clearing firm on the back of the statement if the firm chooses; it does not require such placement. Proposed paragraph (b) simply requires SIPC disclosure, which can be accomplished either by a general statement or by identifying the clearing firm by name. FINRA believes these provisions allow firms some flexibility in providing this information, while also ensuring that the SIPC status of the clearing firm is disclosed on the front of the statement.

<sup>52</sup> See TIAA-CREF June Letter.

<sup>53</sup> See Sutherland Asbill & Brennan Letter.

<sup>54</sup> See *supra* note 21.

<sup>55</sup> See SIFMA Letter.

f. Proposed Supplementary Material .07  
(Use of Summary Statements)

One commenter objects to proposed Supplementary Material .07 (as renumbered in this Amendment No. 1) on the Use of Summary Statements.<sup>56</sup> The supplementary material would require, among other things, that the “beginning and end of each separate statement (e.g., summary, brokerage, mutual fund, banking, insurance, etc.) be clearly distinguishable by color, pagination or other distinct form of demarcation.” The commenter asks FINRA to “clarify that the use of prominent disclosure within summary statements that aggregate accounts held or serviced by multiple parties is adequate to satisfy, or may be used in lieu of, [the above set forth requirement].” FINRA believes the term “other distinct form of demarcation,” provides firms the flexibility to format summary statements. Firms are not required to place separate statements on separate pages, but are required to format the statements in such a manner as to make them distinguishable on their face. The use of prominent disclosure with footnotes or other distinct forms of demarcation can be sufficient so long as accounts held or serviced by multiple parties are clearly distinguishable. FINRA believes these guidelines are beneficial because they establish standards to provide clarity and reduce confusion to customers when receiving summary statements.

g. Miscellaneous Comments

One commenter seeks clarification on what constitutes a “general securities business” for purposes of triggering the customer account statement delivery requirement.<sup>57</sup> They argue that a firm that has multiple business lines which include varied brokerage and securities products and services may carry customer accounts or receive or hold customer funds or securities in connection with one business line or product or service but not another. They seek clarification that the rule will apply only to those portions of a firm’s business which triggers the classification—not all lines or services. Another commenter requests clarification that a “general securities member” does not include members that are relying on an SEC Exemptive Order relating to FINRA Rule 2330 (formerly NASD Rule 2821), which established sales practice standards regarding recommended purchases and

<sup>56</sup> See TIAA-CREF June Letter.

<sup>57</sup> *Id.*

exchanges of deferred variable annuities.<sup>58</sup>

In defining the term “general securities member,” current NASD Rule 2340 and proposed FINRA Rule 2231 provide that a member that does not carry customer accounts and does not hold customer funds or securities is exempt from the provisions of this rule. FINRA notes that the proposed rule change does not amend the current definition of “general securities member” as set forth in NASD Rule 2340 and nothing in this proposal is intended to alter the obligations between clearing firms and introducing firms. If the commenter or others have concerns about the application of the rule in particular situations based on the structure of the firm, FINRA believes that such questions can be best resolved through its interpretative letter process.

One commenter seeks confirmation that the proposal is not intended to require members to send account statements to other broker-dealers.<sup>59</sup> The commenter notes that NASD Rule 0120(g) defines the term “customer” to exclude a broker or dealer. The commenter seeks clarification because NASD Rule 0120(g) has not been adopted into the Consolidated FINRA Rulebook at this time. NASD Rule 2340 and NYSE 409 have not required firms to send account statements to other broker-dealers, and FINRA does not intend to broaden the scope of the rules.<sup>60</sup>

Another commenter expressed support of proposed Supplementary Material .05 (as renumbered in this Amendment No. 1) (Assets Externally Held and Included on Statements Solely as a Service to Customers), which adopts Incorporated NYSE Rule Interpretation 409(a)/04, as appropriately recognizing the responsibilities of member firms.<sup>61</sup>

<sup>58</sup> See Sutherland Asbill & Brennan Letter. See also Securities Exchange Act Release No. 56376 (September 7, 2007) (“Exemptive Order”). The Exemptive Order issued in conjunction with the approval of FINRA Rule 2330 provides that a broker-dealer will not be “deemed” to hold customer funds for purposes of SEA Rule 15c3-1 and SEA Rule 15c3-3 if, among other things, the transaction to which the check relates is subject to the registered principal requirement of the Rule and the broker-dealer promptly transmits the check after the principal’s review has been completed.

<sup>59</sup> See SIFMA Letter.

<sup>60</sup> See SR-FINRA-2008-021 (Proposed Rule Change Relating to the Adoption of NASD Rules 4000 through 10000 Series and the 12000 through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook) (discussing “Rules of General Applicability,” including NASD Rule 0120); Securities Exchange Act Release No. 58176 (July 16, 2008); 73 FR 42844 (July 23, 2008).

<sup>61</sup> See Sutherland Asbill & Brennan Letter.

#### h. Implementation Timeframe

Assuming the SEC approves the proposal, several commenters requested additional time to comply with the proposed requirements, particularly if the monthly delivery obligations remain as originally proposed.<sup>62</sup> FINRA appreciates these factors and notes that in response to commenters' concerns, it is proposing to exclude certain activities from the monthly account statement requirement. Such change should significantly reduce the potential costs and burdens on firms. Nonetheless, FINRA intends to give firms sufficient time to comply with new FINRA Rule 2231.

As noted above, FINRA will announce the implementation date of the proposed rule change in a *Regulatory Notice* to be published no later than 90 days following Commission approval. The implementation date will be no later than 365 days following Commission approval.

#### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>63</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 the proposed rule change will provide customers with critical information regarding their accounts and will allow them to review their statements in a timely manner, while also clarifying and streamlining the customer account rules for adoption as FINRA Rules in the Consolidated FINRA Rulebook.

#### 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 on the proposed rule change were solicited by the Commission in response to the publication of SR-FINRA-2009-028.<sup>64</sup> The SEC received 12 comment letters. The comments are summarized above.

FINRA is submitting its response to comments on the original filing contemporaneously with this Amendment No. 1.

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

Within 45 days of the date of publication of this notice in the **Federal Register** or within such longer period up to 90 days (i) as the Commission may designate if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve or disapprove such proposed rule change, or

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

#### IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning Amendment No. 1, 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-2009-028 on the subject line.

##### *Paper Comments*

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

All submissions should refer to File Number SR-FINRA-2009-028. 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 Web site viewing and

printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 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-2009-028 and should be submitted on or before August 23, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>65</sup>

**Elizabeth M. Murphy,**  
*Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-64973; File No. SR-OCC-2011-09]

### Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Allow for the Clearing of Real Estate Index Futures Contracts

July 27, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934,<sup>1</sup> notice is hereby given that on July 19, 2011, The Options Clearing Corporation ("OCC") filed with the Securities and Exchange Commission the proposed rule change as described in Items I and II below, which items have been prepared primarily by OCC. OCC filed the proposed rule change pursuant to Section 19(b)(3)(A)(iii) of the Act<sup>2</sup> and Rule 19b-4(f)(4) thereunder<sup>3</sup> so that the proposal was effective upon filing with the Commission. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

#### I. Self-Regulatory Organization's Statement of Terms of Substance of the Proposed Rule Change

The proposed rule change would accommodate the clearing and settling of certain futures on real estate indexes ("Real Estate Index Futures") proposed

<sup>62</sup> See Sutherland Asbill & Brennan Letter, TIAA-CREF June Letter and SIFMA Letter.

<sup>63</sup> 15 U.S.C. 78o-3(b)(6).

<sup>64</sup> See Proposing Release.

<sup>65</sup> 17 CFR 200.30-3(a)(12).

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

<sup>2</sup> 15 U.S.C. 78s(b)(3)(A)(iii).

<sup>3</sup> 17 CFR 240.19b-4(f)(4).