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 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–Phlx–2011–57 and should be submitted on or before May 31, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[16]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–11193 Filed 5–6–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64386; File No. SR–FINRA–2011–018]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change and Amendment No. 1 to Adopt NASD Rule 2830 as FINRA Rule 2341 (Investment Company Securities) in the Consolidated FINRA Rulebook

May 3, 2011.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act") [1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 19, 2011, 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 as described in Items I and II below, which Items have been prepared by FINRA. On May 3, 2011, FINRA filed Amendment No. 1. The Commission is publishing this notice to solicit comments on the proposed rule change, as amended, from interested persons.

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

FINRA is proposing to adopt NASD Rule 2830 (Investment Company Securities) as FINRA Rule 2341 (Investment Company Securities) in the consolidated FINRA rulebook with significant changes. 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 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"),[3] FINRA is proposing to adopt NASD Rule 2830 (Investment Company Securities) as FINRA Rule 2341 (Investment Company Securities) in the Consolidated FINRA Rulebook with significant changes, as discussed below. NASD Rule 2830 regulates members' activities in connection with the sale and distribution of securities of companies registered under the Investment Company Act of 1940 ("investment company securities").[4]

NASD Rule 2830

In connection with the distribution and sale of investment company securities, NASD Rule 2830 limits the sales charges members may receive, prohibits directed brokerage arrangements, limits the payment and receipt of cash and non-cash compensation, sets conditions on discounts to dealers, and addresses other issues such as members' purchases and sales of investment company securities as principal.

Proposed FINRA Rule 2341 would revise the provisions of NASD Rule 2830 in four areas. First, Rule 2341 would require a member to make new disclosures to investors regarding its receipt of or its entering into an arrangement to receive, cash compensation. Second, Rule 2341 would make a minor change to the recordkeeping requirements for non-cash compensation. Third, Rule 2341 would eliminate a condition regarding discounted sales of investment company securities to dealers. Fourth, Rule 2341 would codify past FINRA staff interpretations regarding the purchases and sales of exchange-traded funds ("ETFs"). These proposed changes are discussed in more detail below.

Proposed Changes to the Cash Compensation Disclosure Requirements

NASD Rule 2830(l) governs the payment and acceptance of cash and non-cash compensation in connection with the sale of investment company securities. Among other things, NASD Rule 2830(l)(4) prohibits members from accepting cash compensation from an "offeror" (generally an investment company and its affiliates) unless the compensation is described in the fund's current prospectus. If a member enters into a "special cash compensation" arrangement with an offeror, and the offeror does not make the arrangement available on the same terms to all members that sell the fund's shares, the member's name and the details of the arrangement must be disclosed in the prospectus.[5]

The proposed rule change would modify the disclosure requirements for cash compensation arrangements. As proposed, it would no longer require disclosure of cash compensation arrangements in an investment company's prospectus or SAI. Instead, if within the previous calendar year a member received, or entered into an arrangement to receive, from an offeror any cash compensation other than sales charges and service fees disclosed in the prospectus fee tables of investment

[16] 17 CFR 200.30–3(a)(12).

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

[2] 17 CFR 240.19b–4.

[3] 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).

[4] As with NASD Rule 2830, FINRA Rule 2341 would not regulate members' activities in connection with variable insurance contracts, which are regulated by FINRA Rule 2320 (Variable Contracts of an Insurance Company).

[5] FINRA staff has interpreted this provision as permitting disclosure in a fund's statement of additional information ("SAI"). *See Notice to Members* 99–55 (July 1999) (Questions and Answers Relating to Non-Cash Compensation Rules), Question #18.

companies sold by the member ("additional cash compensation"), the member would have to make certain disclosures.[6]

FINRA believes that the proposed amendments to the rule would strengthen the rule's requirements regarding cash compensation disclosure and would further inform investors of the potential conflicts that can arise from the sale of investment company securities when a member receives cash compensation other than sales charges and service fees disclosed in the prospectus fee tables of such investment companies.[7] While the current rule prohibits members from selling investment company shares unless certain information regarding cash compensation arrangements is disclosed either in an investment company's prospectus or SAI, it does not impose any disclosure requirements on the member itself. Requiring disclosure of these arrangements, in the detail described below, by the member would enable investors to better evaluate whether a member's particular product recommendation was influenced by these arrangements, and would be an important adjunct to existing suitability, sales practice and disclosure requirements.

First, the member would have to prominently disclose that it has received, or has entered into an arrangement to receive, cash compensation from investment companies and their affiliates, in addition to the sales charges and service fees disclosed in the prospectus fee table. In this context, "cash compensation" would include fees received from an offeror in return for services provided to the offeror, such as sub-administrative and sub-transfer agency fees. Second, the member would have to prominently disclose that this additional cash compensation may influence the selection of investment company securities that the member and its associated persons offer or recommend to investors. Third, the member would have to provide a prominent reference (or in the case of electronically delivered documents, a hyperlink) to a web page or toll-free telephone number where the investor could obtain additional information concerning these arrangements.

For new customers on or after the effective date of the proposed rule change, the member would have to provide these disclosures in paper or electronic form[8] to each such customer prior to the time that the customer first purchases shares of an investment company through the member. For existing customers at the time the proposed rule change becomes effective, the member would have to provide these disclosures in paper or electronic form to each such customer by the later of either: (a) 90 days after the effective date of the proposed rule change, or (b) prior to the time the customer first purchases shares of an investment company through the member after the effective date (other than purchases through reinvestment of dividends or capital distributions or through automatic investment plans).

As discussed above, if a member has received, or entered into an arrangement to receive, additional cash compensation, the member would have to establish a web page or toll-free telephone number through which a customer could obtain additional information concerning the member's cash compensation arrangements. The web page or toll-free telephone number would have to provide:

- A narrative description of the additional cash compensation received from offerors, or to be received pursuant to an arrangement entered into with an offeror, and any services provided, or to be provided, by the member to the offeror or its affiliates for this additional cash compensation;
- If applicable, a narrative description of any preferred list of investment companies to be recommended to customers that the member has adopted as a result of the receipt of additional cash compensation, including the names of the investment companies on this list; and
- The names of the offerors that have paid, or entered into an arrangement with the member to pay, this additional cash compensation to the member.

The member would be required to update this information annually within 90 days after the calendar year end. If this information becomes materially inaccurate between annual updates, the member would have to update it promptly. Also, if a customer specifically requests paper-based disclosure of the information provided through a web page or toll-free telephone number, the member would have to deliver this information to the customer in paper form promptly.

The proposal also would add supplementary material that would clarify the definition of "cash compensation," which would supersede all prior guidance with respect to this definition.[9] The supplementary material would provide that "cash compensation" includes, among other things, revenue sharing paid in connection with the sale and distribution of investment company securities.[10] The supplementary material would specify that "cash compensation" includes revenue sharing payments regardless of whether they are based upon the amount of investment

[6] The terms "sales charge" and "service fees" are defined in NASD Rule 2830 and would retain the same definitions in FINRA Rule 2341. "Sales charge" means "all charges or fees that are paid to finance sales or sales promotion expenses, including front-end, deferred and asset-based sales charges, excluding charges and fees for ministerial, recordkeeping or administrative activities and investment management fees." *See* NASD Rule 2830(b)(8). "Service fees" mean "payments by an investment company for personal service and/or the maintenance of shareholder accounts." *See* NASD Rule 2830(b)(9).

[7] FINRA further notes that, in October 2010, it published a *Regulatory Notice* requesting comment on a concept proposal to require members, at or prior to commencing a business relationship with a retail customer, to provide a written statement to the customer describing the types of accounts and services it provides, as well as conflicts associated with such services and any limitations on the duties the member otherwise owes to retail customers. *See Regulatory Notice* 10–54 (October 2010) (Disclosure of Services, Conflicts and Duties). FINRA staff conceives that the document would include, in the case of investment company securities, the information required by proposed FINRA Rule 2341, but also would include disclosures more broadly as to financial or other incentives, conflicts and limitations on duties, as described in *Regulatory Notice* 10–54.

[8] *See Notice to Members* 98–3 (January 1998) (Electronic Delivery of Information Between Members and Their Customers). This *Notice to Members* provides that members may electronically transmit documents that they are required or permitted to furnish to customers under FINRA rules provided that the members adhere to standards contained in 1995 and 1996 SEC Releases. *See* Securities Act Release No. 7233 (October 6, 1995), 60 FR 53458 (October 13, 1995); Securities Act Release No. 7288 (May 9, 1996), 61 FR 24644 (May 15, 1996). The *Notice to Members* urges members to review these SEC Releases in their entirety to ensure compliance with all aspects of the SEC's electronic delivery requirements.

[9] *See, e.g.,* Securities Exchange Act Release No. 37374 (June 26, 1996), 61 FR 35822 (July 8, 1996) (File No. SR–NASD–95–61; Proposed Rule Change by NASD Relating to the Regulation of Cash and Non-Cash Compensation In Connection With the Sale of Investment Company Securities and Variable Contracts); *Notice to Members* 97–50 (August 1997) (NASD Regulation Requests Comment On Regulation Of Payment And Receipt Of Cash Compensation Incentives) and *Dep't. of Enforcement* v. *Respondent,* Decision No. E8A2003062001, June 28, 2007 (redacted decision) (noting administrative history of current rule).

[10] Revenue sharing payments can take many different forms. For example, an offeror may make a year-end payment to a broker-dealer based on the amount the broker-dealer's customers currently hold in the offeror's funds, or based on the broker-dealer's total sales of the offeror's funds in the previous year. Additionally, revenue sharing payments can take the form of other cash payments, such as a payment by an offeror to help pay the costs of a broker-dealer's annual sales meeting. *See, e.g.,* Securities Act Release No. 8358 (January 24, 2004) [sic], 69 FR 6438 (February 10, 2004) (Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds) at note 17.

company assets that a member's customers hold, the amount of investment company securities that the member has sold, or any other amount if the payment is related to the sale and distribution of the investment company's securities. As cash compensation, members would be required to disclose such revenue sharing arrangements.

These disclosure requirements would apply only to members that receive or enter into an arrangement to receive additional cash compensation from an offeror. Thus, if a member sells a mutual fund's shares and receives only the sales load and distribution or service fees described in the fund's prospectus fee tables, and does not receive or enter into an arrangement to receive revenue sharing or other additional cash compensation from an offeror, the member would not be required to make the disclosures specified in proposed FINRA Rule 2341(l)(4). Likewise, a principal underwriter of a no-load mutual fund that sells shares directly to investors, and does not receive or enter into an arrangement to receive any cash compensation beyond what is described in the fund's prospectus fee table, would not be subject to the disclosure requirements of paragraph (l)(4).

Proposed Changes to the Non-Cash Compensation Provisions

NASD Rule 2830(l)(5) generally prohibits members and their associated persons from accepting or making payments of non-cash compensation in connection with the sale of investment company securities, subject to certain exceptions. These exceptions allow gifts of under $100, entertainment that does not raise questions of propriety, certain training or education meetings, and sales contests that do not favor particular products.

NASD Rule 2830(l)(3) requires members to keep records of all compensation received by the member or its associated persons from offerors, other than small gifts and entertainment permitted by the rule. Currently, this provision requires the records to include the nature of, and "if known," the value of any non-cash compensation received. FINRA proposes to modify this requirement by deleting the phrase "if known" regarding the value of non-cash compensation. This change would make the provision more consistent with the non-cash compensation recordkeeping requirements in other FINRA rules.[11] The proposal also would add supplementary material that would clarify that, if a member or associated person receives non-cash compensation from an offeror for which a receipt or other documentation of value is unavailable, the member may estimate in good faith the value of such compensation.

Proposed Changes Regarding Conditions for Discounts to Dealers

NASD Rule 2830(c) currently prohibits investment company underwriters from selling the fund's shares to a broker-dealer at a price other than the public offering price unless they meet two requirements:

- The sale must be in conformance with NASD Rule 2420; and
- for certain investment company securities, a sales agreement must be in place that sets forth the concessions paid to the broker-dealer.

The requirement that the sale be in conformance with NASD Rule 2420 is based on historical concerns that both underwriters and dealers of investment company securities be FINRA members. Since the time this provision was adopted, the laws governing broker-dealers have changed, and today virtually all broker-dealers doing business with the public are FINRA members. As a result of this change, the proposal would eliminate the requirement that the sale be in conformance with NASD Rule 2420.[12]

Proposed Changes Regarding Sales of Shares of ETFs

In recent years, members have bought and sold shares of ETFs, which are open-end management investment companies or unit investment trusts ("UITs") that differ from traditional mutual funds and UITs, since their shares typically are traded on securities exchanges. Because ETF shares are sometimes traded at prices that differ from the fund's current net asset value, ETFs can raise issues under both the Investment Company Act and NASD Rule 2830. For example, Section 22(d) of the Investment Company Act requires dealers to sell shares of an open-end investment company at the current public offering price described in the investment company's prospectus (*i.e.,* the fund's net asset value plus any applicable sales load). Similarly, NASD Rule 2830(i) generally prohibits members from purchasing fund shares at a price lower than the bid price next quoted by or for the issuer (for traditional mutual funds, this price is the fund's next quoted net asset value).

To address these issues, the SEC has issued a series of exemptive orders that allow ETFs to trade on exchanges at prices that differ from the fund's public offering price. The SEC also has proposed a rule that generally would codify the exemptive relief provided by its orders.[13] Similarly, FINRA staff has issued letters interpreting NASD Rule 2830 that allow members to purchase and sell shares of ETFs at prices other than the current net asset value consistent with SEC exemptive orders.[14] The proposal would add a new paragraph, FINRA Rule 2341(o), to codify earlier FINRA staff interpretive letters that permit the trading of ETF shares at prices other than the current net asset value consistent with applicable SEC rules or exemptive orders.

Technical Changes

Paragraph (b)(10) of NASD Rule 2830 incorporates by reference several definitions under the Investment Company Act, including "open-end management investment company." The Investment Company Act does not define the term "open-end management investment company," but does define "management company," and divides this term into two sub-classifications, "open-end company" and "closed-end company."[15]

NASD Rule 2830 employs the terms "open-end investment company" and "open-end management investment company," as well as the term "closed-end investment company." These terms are intended to have the same meanings as "open-end company" and "closed-end company," respectively, under the Investment Company Act. Accordingly, paragraph (b)(10) of proposed FINRA Rule 2341 incorporates the definitions of "open-end company" and "closed-end company" from the Investment Company Act, rather than "open-end management investment company." Likewise, references to these terms within NASD Rule 2830 have been revised in proposed FINRA Rule 2341 to

[11] *See* recordkeeping requirements for non-cash compensation accepted or paid in connection with the distribution or sale of direct participation programs in FINRA Rule 2310(c)(2), variable insurance contracts in FINRA Rule 2320(g)(3), and public offerings of securities in FINRA Rule 5110(h)(2).

[12] FINRA is proposing to replace NASD Rule 2420 with FINRA Rule 2040. *See Regulatory Notice* 09–69 (December 2009) (Payments to Unregistered Persons).

[13] Securities Act Release No. 8901; Investment Company Act Release No. 28193 (March 11, 2008), 73 FR 14618 (March 18, 2008) (Exchange-Traded Funds ("ETFs")).

[14] *See, e.g.,* Letter from Joseph P. Savage, Counsel, Investment Companies Regulation, NASD, to Kathleen H. Moriarty, Esq., Carter, Ledyard & Milburn, dated October 30, 2002, available at *http://www.finra.org/Industry/Regulation/Guidance/InterpretiveLetters/P002680.*

[15] *See* Sections 4(3) and 5(a) of the Investment Company Act.

refer to "open-end companies" and "closed-end companies."

FINRA will announce the implementation date of the proposed rule change no later than 90 days following Commission approval. The implementation date will be no more 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,[16] 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 help ensure that investors are informed of potential conflicts of interest that can arise from arrangements related to the sale and distribution of investment company securities.

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

In June 2009, FINRA published *Regulatory Notice* 09–34 (the "*Notice*") requesting comment on the rule as proposed therein (the "*Notice* proposal"). A copy of the *Notice* is attached as Exhibit 2a. The comment period expired on August 3, 2009. FINRA received nine comments in response to the *Notice.* A list of the commenters in response to the *Notice* is attached as Exhibit 2b, and copies of the comment letters received in response to the *Notice* are attached as Exhibit 2c.[17] A summary of the comments and FINRA's response is provided below. Since almost all of the comments that FINRA received on the proposal concerned its provisions governing receipt of cash compensation, these comments and FINRA's responses thereto are further categorized by subject matter.

Proposal is Premature and Duplicative

Several commenters argued that the proposal regarding cash compensation is premature and duplicative given other legislative and regulatory initiatives that deal with conflicts of interest that can arise in the sale of shares of mutual funds. Schwab noted that the SEC previously had proposed to require broker-dealers to disclose certain conflicts of interest at the point of sale when offering investment company securities.[18] Schwab also cited legislation in Congress that, among other things, would clarify the SEC's authority to promulgate rules requiring that certain information be disclosed prior to the sale of shares of a mutual fund.[19] GWFS and Sutherland cited proposals by the U.S. Department of Labor ("DOL") under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") to require broker-dealers and other service providers to make certain disclosures regarding conflicts of interest to employee benefit pension plans, and proposed regulations to require the disclosure of plan and investment-related information to participants and beneficiaries in participant-directed individual account plans, such as 401(k) plans.[20]

While FINRA is aware of the SEC and the DOL proposals and interim final rule that may address similar issues, FINRA does not believe that the cash compensation provisions are either premature or duplicative of these other rules and rule proposals. The SEC's point-of-sale proposal was initially published for comment in 2004, and re-published for comment in 2005; since then, the SEC has not taken any action on this proposal. Accordingly, FINRA believes that its proposal does not interfere with any recent SEC rulemaking in this area. The DOL proposals and interim final rule focus on disclosures required in connection with the sale of shares of mutual funds to retirement plans and their participants, rather than conflicts that can arise generally when firms sell shares of mutual funds. FINRA believes that the cash compensation provisions of proposed Rule 2341 will complement information that the DOL requires broker-dealers to disclose to plan sponsors and participants. Moreover, the DOL proposal would not cover sales of shares of mutual funds outside of employee pension benefit plans.

Section 919 of the Dodd-Frank Act clarifies the SEC's authority to issue rules that require broker-dealers to provide information to retail investors before purchasing an investment product or service from the broker-dealer.[21] Notwithstanding this provision, FINRA believes that it should proceed with its proposal. Section 919 is not specific to mutual funds, nor does it require the SEC to adopt rules similar to the cash compensation provisions of proposed FINRA Rule 2341. Moreover, FINRA believes its proposal is consistent with the goals of the Dodd-Frank Act to provide greater information concerning potential conflicts of interest to investors.

Proposed Disclosure Is Misleading to Investors

Schwab, GWFS and SIFMA commented that the cash compensation disclosure required by the *Notice* proposal would be misleading to investors. Under the *Notice* proposal, members would have had to disclose to investors, if applicable, that the firm receives cash payments from an offeror other than sales charges or service fees disclosed in the prospectus, the nature of any such cash payments received in the past 12 months, and the name of each offeror that made such payments listed in descending order based on the amount of compensation received from the offeror. These commenters noted that the dollar amounts received by a member would not provide meaningful information to investors absent further

[16] 15 U.S.C. 78*o*–3(b)(6).

[17] *See* Exhibit 2b for a list of abbreviations assigned to commenters. The Commission notes that these exhibits are part of the filing which is available on FINRA's website.

[18] *See* Securities Act Release No. 8358 (January 29, 2004), 69 FR 6438 (February 10, 2004) (Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds), and Securities Act Release No. 8544 (February 28, 2005), 70 FR 10521 (March 4, 2005) (reopening the comment period on proposed rules, published in January 2004, that would require broker-dealers to provide their customers with information regarding the costs and conflicts of interest that arise from the distribution of mutual fund shares, 529 college savings plan interests, and variable insurance products).

[19] *See* Section 914 of the Investor Protection Act of 2009. *See* U.S. Treasury press release of July 10, 2009, *http://www.treas.gov/press/releases/tg189.htm.* The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), which was signed into law in July 2010, included essentially the same provision cited by Schwab. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 919 (2010).

[20] *See* Reasonable Contract or Arrangement under Section 408(b)(2)—Fee Disclosure, 72 FR 70988 (December 13, 2007) (subsequently codified at 29 C.F.R. pt 2550) ("Reasonable Contract Proposal"), and Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 FR 43014 (July 23, 2008) (subsequently codified at 29 C.F.R. pt 2550). The DOL adopted the Reasonable Contract Proposal as an interim final rule, with request for comments, in July 2010. *See* Reasonable Contract or Arrangement Under Section 408(b)(2)—Fee Disclosure, 75 FR 41600 (July 16, 2010).

[21] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Public Law 111–203, § 919 (2010).

explanation, and that such amounts might not indicate that a cash compensation arrangement with one offeror would present greater conflicts than arrangements with other offerors.

Given these concerns, as described in this proposed rule change, FINRA has revised the *Notice* proposal to require what it believes is more meaningful disclosure. As revised, the proposed rule change would require a member to make certain disclosures to new customers in paper or electronic form prior to the time that the customer first purchases shares of an investment company through the member if, within the previous calendar year, it had received or entered into an arrangement to receive cash compensation from any offeror, in addition to sales charges and service fees disclosed in the prospectuses of the funds it sold. The proposed rule change would require that, for existing customers, the member provide these disclosures in paper or electronic form to each such customer by the later of either: (a) 90 days after the effective date of the proposed rule change, or (b) prior to the time the customer first purchases shares of an investment company through the member after the effective date of the proposed rule change (other than purchases through reinvestment of dividends or capital distributions or through automatic investment plans).

The member would have to: Prominently disclose that it receives (or has entered into an arrangement to receive) cash compensation in addition to sales charges and service fees disclosed in the prospectus; prominently disclose that this additional cash compensation may influence the selection of funds that the member and its associated persons offer or recommend; and provide a prominent reference to a web page or toll-free number that provides more information concerning these arrangements. The web page or toll-free number would have to provide a narrative description of the cash compensation the member receives (or will receive), in addition to sales charges and service fees described in the prospectus, and provide the names of offerors that have paid (or will pay) this additional cash compensation. The web page or toll-free number also would have to describe any services provided or to be provided by the member to the offeror or its affiliates for this additional cash compensation. If the member adopts a preferred list of funds to be recommended to customers as a result of the receipt of additional cash compensation, this fact and the names of the funds on the list also would have to be provided.

FINRA believes that, by providing shortened disclosure at the times specified in the proposed rule, members would alert customers to these potential conflicts of interest prior to the time that they decide whether to buy investment company securities through the member. In addition, customers would have the ability to learn more detail about these cash compensation arrangements if they choose through the provided web page or toll-free number. The narrative disclosure provided on a member's web page or toll-free telephone number would disclose these potential conflicts in a more comprehensive and understandable manner. This disclosure would go beyond that proposed in the *Notice* proposal in that it would require members to disclose any arrangements to receive cash compensation in addition to the actual receipt of such compensation. FINRA believes that members subject to the rule's cash compensation disclosure requirements should provide the specified disclosures regarding such arrangements irrespective of whether they have received payment under the arrangement at the time of disclosure. FINRA has eliminated the requirement proposed in the *Notice* proposal to disclose the names of offerors in descending order based on the amount of cash compensation received.

GWFS commented that this disclosure only focuses on payments related to sales of shares of mutual funds, while ignoring conflicts that can arise in connection with the sale of other products, such as collective investment funds or other investments. LPL similarly expressed concern that the proposal discriminates against one product, mutual funds, since it does not require disclosure of cash compensation paid in connection with the sale of other products.

These comments are outside the scope of the proposed rule change. Proposed FINRA Rule 2341 and current NASD Rule 2830 by their terms only apply to the sale of investment company securities. To the extent FINRA should require similar disclosure in connection with the sale of other securities, such requirements would have to be included in rules governing the sale of these products.[22]

Opposition to Prospectus Level Disclosure

The *Notice* proposal would have prohibited members from receiving sales charges and service fees from an offeror unless such compensation is described in the current prospectus for the offeror's investment company. The *Notice* proposal also would have prohibited members from entering into "special sales charges or service fee arrangements" that are not made available on the same terms to all members that distribute the investment company securities of the offeror, unless the name of the member and the details of the arrangement are disclosed in the prospectus. The *Notice* proposal defined "special sales charge or service fee arrangement" as "an arrangement under which a member receives greater sales charges or service fees than other members selling the same investment company securities." The *Notice* proposal then gave examples of such arrangements. The proposed prospectus disclosure was in addition to requirements for members to disclose details about cash compensation arrangements when an account is opened.[23]

A number of commenters objected to the *Notice* proposal's prospectus disclosure requirements. Commenters argued that members will not know if the prospectus disclosure is accurate, since they will not be parties to arrangements between a fund complex and other broker-dealers.[24] ICI noted that investment companies should not be required to make these disclosures, since the information necessary for an investor to make an informed decision about a member's conflicts of interest resides with the member, not the investment company. Commenters also argued that requiring disclosure in a prospectus in addition to requiring a member to provide separate disclosure when an account is opened is fragmented and confusing to investors.[25] In addition, commenters argued that the SEC, rather than FINRA, should determine what information must be provided in an investment company prospectus.[26]

Based on these concerns, FINRA has determined to eliminate the prohibition on receiving cash compensation unless details regarding the arrangement are disclosed in the offeror's investment company prospectuses. As revised in this proposed rule change, the cash compensation disclosures would have to be delivered prior to the time a new customer first purchases investment

[22] *See also Regulatory Notice* 10–54 (Disclosure of Services, Conflicts and Duties), discussed *supra* at note 6.

[23] *See Regulatory Notice* 09–34 (June 2009) (Investment Company Securities).

[24] *See* comment letters from FSI, GWFS, LPL and SIFMA.

[25] *See* comment letters from SIFMA and USAA.

[26] *See* comment letters from LPL and SIFMA.

company securities through the member. The proposed rule change's provisions provide separate requirements for delivery of these disclosures to existing customers.

Burden on Members

Schwab and USAA argued that the cash compensation proposal should not be adopted because the burdens that the proposal imposes on members are not justified given the benefits to investors. FINRA disagrees. With respect to self-regulatory organization rulemaking, the appropriate standard, as stated in the Act, is that the rules do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. Moreover, FINRA tailors its proposed rule changes as narrowly as possible to achieve the intended and necessary regulatory benefit. As stated in Item 4 of the proposed rule change, 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. While FINRA recognizes that the proposed rule change may impose some additional burdens on members, FINRA continues to believe that such burdens are necessitated by the benefits to investors in receiving greater transparency as to the potential conflicts of interest that can arise from arrangements related to the sale and distribution of investment company securities.

FSI and SIFMA objected to the *Notice* proposal's requirement to update information contained on a member's web site or toll-free number on a semi-annual basis, arguing that it would be unnecessarily costly and provide little benefit over annual updating. FINRA believes it is important for customers to receive current, accurate disclosures about potential conflicts of interest related to the receipt of additional cash compensation. Accordingly, while FINRA has modified the proposed rule to require annual updating, it also believes that this information should be updated promptly if it becomes materially inaccurate. Thus, as modified, a member would be required to update the disclosures describing additional cash compensation arrangements annually within 90 days after the calendar year end. If this information becomes materially inaccurate between annual updates, it would have to be updated promptly.[27]

[27] FINRA notes that this revised updating requirement closely tracks the SEC's standards for updating the written disclosure statement that investment advisers must provide to clients. *See* Form ADV: General Instructions, Question #4.

Schwab argued the requirement to determine whether a member has received cash compensation other than the sales charges or service fees disclosed in the prospectus is burdensome, particularly if a member operates a mutual fund "supermarket" where payments may come from a combination of Rule 12b-1 fees, sub-administrative fees and advisory fees. FINRA disagrees. The sales charge and service fees amounts that are paid to members must be clearly disclosed in an investment company prospectus. If a member is or will be receiving cash compensation beyond the amounts disclosed in the prospectus fee table, the member must disclose information about these additional payments. FINRA believes that information concerning the pecuniary inducements that may create incentives for broker-dealers to offer or recommend particular investment company securities should be available to investors when making an investment decision and that the importance of this transparency cannot be offset by the number of different investment company securities that a member may choose to offer. If a member is uncertain as to the character of the payments it is or will be receiving, it should err on the side of disclosing the receipt or expected receipt of these payments.

Requests for Clarification

The *Notice* proposal would have required members to disclose the details of any "special sales charge or service fee arrangement" that was not made available on the same terms to all members that distribute an offeror's investment company securities. Schwab, LPL and SIFMA commented that "special sales charge or service fee arrangement," as defined in the *Notice* proposal, was unclear and confusing. The proposed rule change no longer uses this term and has eliminated its definition.

The *Notice* proposal would have required members that receive any form of cash compensation other than sales charges or service fees disclosed in the prospectus to disclose, among other things, that the member receives "cash payments" from an offeror other than such sales charges or service fees. FSI and SIFMA commented that the term "cash payments" is unclear, since it is not defined in the proposal. FINRA has revised this provision to use the defined term "cash compensation" in lieu of "cash payments."

In addition, the proposed rule change includes supplementary information that provides guidance with respect to the definition of "cash compensation." The guidance explains that "cash compensation" includes cash payments commonly known as "revenue sharing" which are typically paid by the investment company's adviser or another affiliate in connection with the distribution of investment company securities. The guidance notes that "cash compensation" includes these payments "whether they are based upon the amount of investment company assets that a member's customers hold, the amount of investment company securities that the member has sold, or any amount if the payment is related to the sale and distribution of the investment company's securities."[28]

The *Notice* stated that revenue sharing payments can take many forms, including an offeror's helping to pay the costs of a firm's annual sales meeting.[29] FSI, LPL and SIFMA all observed that NASD Rule 2830(l)(5)(E) (and proposed FINRA Rule 2341(l)(5)(E)) permit an offeror to contribute money toward a non-cash compensation arrangement between a member and its associated persons, provided that the arrangement meets the criteria in NASD Rule 2830(l)(5)(D) (and proposed FINRA Rule 2341(l)(5)(D)). This provision thus allows an offeror to contribute toward a member's annual sales meeting, provided the sales meeting is a permissible non-cash compensation arrangement, without having to disclose this contribution. These commenters argued that such contributions should not be treated as revenue sharing, given that the industry does not consider such payments to be revenue sharing. SIFMA also commented that the description of "revenue sharing" in the *Notice* conflicts with an SEC definition of the term, citing an SEC enforcement order.[30]

The fact that the Rule, both currently and as proposed, permits an offeror to contribute money toward a member's annual sales meeting (assuming the meeting complies with the requirements for an internal non-cash compensation arrangement) does not preclude the need for a member to disclose these payments as cash compensation. FINRA believes that such payments raise the same conflict-of-interest issues as other forms of revenue sharing, and thus should be disclosed.

FINRA also disagrees with SIFMA's assertion that its description of revenue sharing is inconsistent with the SEC's past definitions of that term. As far as FINRA is aware, the SEC has never defined the term "revenue sharing" in a

[28] *See* proposed FINRA Rule 2341.01.

[29] *See Regulatory Notice* 09–34, at note 8.

[30] *See In the Matter of OppenheimerFunds, Inc. and OppenheimerFunds Distributor, Inc.,* Securities Exchange Act Release No. 52420, 2005 SEC LEXIS 2350 (Sept. 14, 2005).

rule or proposed rule text. The definition cited by SIFMA is used solely in the context of a settled enforcement action between the SEC and a mutual fund investment adviser and its affiliated broker-dealer distributor and, as such, should be considered exclusive to the facts and circumstances discussed in that action. In fact, the SEC has stated separately in the context of its mutual fund point-of-sale disclosure proposal that revenue sharing "may encompass multiple revenue streams" that "not only pose potential conflicts of interest, but also may have the indirect effect of reducing investors' returns by increasing the distribution-related costs incurred by funds."[31] Accordingly, FINRA believes that it is appropriate to require members to disclose receipt of such payments.

As discussed above, the proposed rule change requires the cash compensation disclosures to be delivered prior to the time a new customer first purchases shares of an investment company through the member. The proposed rule change's provisions provide separate requirements for delivery of these disclosures to existing customers. GWFS expressed uncertainty as to whom FINRA considers to be a "customer," particularly where the member sells investment company securities to a retirement plan. FINRA intends that these disclosures be made to the person with whom the member has a customer relationship. If a member sells investment company securities to a retirement plan, the disclosure should be made to the retirement plan sponsor.

The *Notice* proposal would have required disclosure if a member had received additional cash compensation "within the previous 12 months." GWFS and LPL expressed uncertainty as to how this 12-month period would be calculated (*e.g.,* whether it would be a rolling period or based on the calendar year). FINRA has clarified the proposed rule change to require disclosure based on receiving or entering into an arrangement to receive additional cash compensation within the previous calendar year.

ICI and SIFMA inquired whether the cash compensation provisions would require disclosure of the receipt of payments for services, such as sub-administrative or sub-transfer agency fees. The term "cash compensation" is defined broadly to mean "any discount, concession, fee, service fee, commission, asset-based sales charge, loan, override or cash employee benefit received in connection with the sale and distribution of investment company securities." If a member is receiving fees from an offeror for services, such as sub-administrative or sub-transfer agency fees, in connection with the sale and distribution of investment company securities, then proposed FINRA Rule 2341(l)(4)(A) would require the member to disclose the receipt of these fees, since they fall within the definition of "cash compensation." In addition, proposed FINRA Rule 2341(l)(4)(C) would require the member to describe this additional cash compensation and the services provided or to be provided by the member for this additional cash compensation.

The *Notice* proposal would have required a member to disclose "the nature of any such cash payments received in the past 12 months." ICI commented that it is not clear what "the nature of any such payments" means. Schwab and SIFMA recommended that the proposal instead require firms to describe the nature of services they provide to offerors, and the nature of the compensation received.

Based in part on these comments, FINRA revised the cash compensation disclosure provision in several respects. As described above, as proposed, the rule change would require a member that receives, or has entered into an arrangement to receive, cash compensation in addition to sales charges or service fees described in the prospectus within the previous calendar year, to disclose in paper or electronic form to a new customer prior to the time that the customer first purchases shares of an investment company through the member the fact that it receives (or will receive) such compensation. The member would also have to disclose that this additional cash compensation may influence the selection of investment company securities that the member and its associated persons offer or recommend to investors. Further, the member would have to provide a reference to a web page or toll-free telephone number through which a customer could obtain more information concerning the member's cash compensation arrangements. The proposed rule change would require that, for existing customers, the member provide these disclosures in paper or electronic form to each such customer by the later of either: (a) 90 days after the effective date of the proposed rule change, or (b) prior to the time the customer first purchases shares of an investment company through the member after the effective date of the proposed rule change (other than purchases through reinvestment of dividends or capital distributions or through automatic investment plans).

The web page or toll-free number must provide a narrative description of the additional cash compensation received from offerors and any services provided by the member to the offeror or affiliates for this additional compensation. Members will be allowed to use narrative disclosure to explain these arrangements. FINRA believes these revisions will make this provision clearer to members and will provide more meaningful disclosure to investors than that proposed in the *Notice.*

SIFMA inquired how the cash compensation disclosure requirements would apply in the situation in which an introducing broker-dealer and clearing firm share fees paid by an offeror. Assuming the introducing firm sold investment company securities to a customer, the introducing firm would be responsible for disclosing any additional cash compensation it receives from an offeror, even if it shares such additional compensation with a clearing firm. In such a situation, the clearing firm would not be required to make the disclosures under proposed FINRA Rule 2341 to the customer.

SIFMA and FSI also inquired as to the effect of the proposed disclosures on guidance that FINRA previously provided in *Notice to Members* 99–55, Question #15. In that guidance, FINRA addressed a situation in which an offeror reimburses a registered representative's prospecting trip expenses, such as travel, lodging and meals related to meetings with customers, stating that the reimbursement payment would have to be made through the member and disclosed as cash compensation in accordance with NASD Rule 2830(l)(4). Under the proposed rule change, FINRA would consider such payments from an offeror to be additional cash compensation that must be disclosed in accordance with proposed FINRA Rule 2341(l)(4).

Internet Disclosure

In the *Notice,* FINRA requested comment on how the required information should be disclosed to investors, particularly given the availability of the Internet. In particular, FINRA asked whether members should be permitted to deliver initial disclosure information to customers electronically, unless a customer specifically requested paper-based disclosure. Alternatively, FINRA asked whether the rule should

[31] *See* Securities Act Release No. 8358 (January 24, 2004), 69 FR 6438 (February 10, 2004) (Confirmation Requirements and Point of Sale Disclosure Requirements for Transactions in Certain Mutual Funds and Other Securities, and Other Confirmation Requirement Amendments, and Amendments to the Registration Form for Mutual Funds), at notes 17 & 21.

allow firms to provide generalized disclosure to investors when an account is opened regarding the receipt of cash compensation that refers the investor to a Web site address or toll-free telephone number that provides more information.

FSI, GWFS, ICI, LPL and SIFMA all supported revising the proposal to allow web-based disclosure, unless a customer specifically requests paper-based disclosure. FINRA has revised the proposal to allow members to utilize the Internet or a toll-free number to provide more detailed information concerning cash compensation arrangements to investors. FINRA has also specified that if a customer specifically requests paper-based disclosure, the member must deliver this information to the customer in paper form promptly.

Compliance Date

Schwab commented that, if the proposal is adopted, FINRA should give members at least 180 days following adoption to comply with its requirements. FSI and LPL argued for at least 24 months' lead time before requiring firms to comply with the proposal. As stated in Item 2 of the proposed rule change, 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. In establishing the effective date, FINRA will take into account that firms would need to modify their compliance systems in light of the new required disclosures.

Other Compensation Disclosure Comments

The *Notice* proposal would have required a member to disclose the names of each offeror that paid additional cash compensation, listed in descending order based on the amount of compensation received from each offeror. FSI recommended that the proposal be revised to permit listing offerors in alphabetical order instead. FINRA has revised this provision to eliminate the requirement to list offerors in descending order based on amounts of cash compensation received. As revised, the proposed rule change does not require that offerors be listed in a particular order, as long as the disclosure requirements are met.

ICI recommended that the cash compensation provisions have a *de minimis* threshold below which disclosure of cash compensation payments would not be required. ICI suggested that, if cash compensation payments from a single fund complex represent 1% or less of the aggregate cash compensation received by a member, no disclosure should be required. FINRA does not believe a *de minimis* disclosure threshold is appropriate. Whether particular cash compensation payments create potential conflicts of interest will depend on the surrounding facts and circumstances, and investors should be provided with the opportunity to evaluate the nature of any such conflicts. Accordingly, FINRA believes the rule should require members to disclose any amount of additional cash compensation received from an offeror.

The *Notice* proposal included a paragraph (l)(4)(E) that provided that the disclosure requirements of paragraph (l)(4)(B) of the *Notice* proposal would not apply to cash compensation in the form of sales charges and service fees disclosed in a fund's prospectus fee table.[32] ICI recommended that this paragraph be deleted as redundant given that language in paragraph (l)(4)(B) already excluded this compensation from the disclosure requirements. FINRA agrees and has deleted this paragraph in the proposed rule change.

USAA argued that the cash compensation provisions should exclude members that do not pay their registered representatives direct commissions. FINRA disagrees, since cash compensation arrangements can create potential conflicts of interest even in the absence of a commission-based compensation system for registered representatives. For example, a member may select investment companies to be included on its preferred list based in part on cash compensation received from offerors.

Warner Norcross recommended that the cash compensation provisions be revised to require disclosure at the point of sale of any cash compensation not disclosed in the prospectus. It also recommended that the rule prohibit recommended sales based on payouts and require members to put the interests of customers first. FINRA believes that the proposed rule's disclosure requirements strike a rational balance between providing access to customers of important compensation information that may in part underlie a broker-dealer's decision to offer investment company securities and the efficient delivery of services to customers. FINRA will continue to assess the best mode of all disclosure to customers including assessing whether information access or point of sale disclosure requirements result in greater utilization of disclosure information. With respect to firms' obligations regarding recommendations to customers, FINRA notes that the SEC recently approved new FINRA Rule 2111 (Suitability), which sets forth the basis for determining the suitability of a recommended transaction or investment strategy involving a security or securities.[33]

Non-Cash Compensation Provisions

NASD Rule 2830(l)(3) requires members to keep records of all compensation received by a member or its associated persons from offerors, except for gifts and entertainment permitted by paragraphs (l)(5)(A) and (l)(5)(B). The records must include the names of the offerors, the names of the associated persons, the amount of cash, and the nature and, if known, the value of non-cash compensation received. The *Notice* proposed to eliminate the "if known" qualification for the value of non-cash compensation received.

Schwab, FSI and SIFMA all urged FINRA to add language to the non-cash compensation provisions to expressly permit members to estimate the value of goods and services received for which a receipt or other documentation of value is unavailable. FINRA has added supplementary material to the rule which would expressly permit a member to estimate in good faith the value of non-cash compensation received when a receipt or other documentation of value is unavailable.

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 (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

[32] The disclosure requirements of paragraph (l)(4)(B) of the *Notice* proposal would now be set forth, as revised, in paragraph (l)(4)(A).

[33] *See Regulatory Notice* 11–02 (January 2011) (SEC Approves Consolidated FINRA Rules Governing Know-Your-Customer and Suitability Obligations). *See also* Securities Exchange Act Release No. 63325 (November 17, 2010), 75 FR 71479 (November 23, 2010) (File No. SR–FINRA–2010–039; Order Granting Accelerated Approval, As Modified by Amendment, to Proposed Rule Change to Adopt FINRA Rules 2090 (Know Your Customer) and 2111 (Suitability) in the Consolidated FINRA Rulebook); Securities Exchange Act Release No. 64260 (April 8, 2011), 76 FR 20759 (April 13, 2011) (File No. SR–FINRA–2011–016; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Delay the Implementation Date of FINRA Rule 2090 (Know Your Customer) and FINRA Rule 2111 (Suitability)).

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 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–FINRA–2011–018 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–2011–018. 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 website (*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 website 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 publicly available. All submissions should refer to File Number SR–FINRA–2011–018 and should be submitted on or before May 31, 2011.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[34]

Cathy H. Ahn,

Deputy Secretary.

[FR Doc. 2011–11190 Filed 5–6–11; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–64383; File No. 4–627]

Short Sale Reporting Study Required by Dodd-Frank Act Section 417(a)(2)

AGENCY: Securities and Exchange Commission.

ACTION: Request for comment.

SUMMARY: The Securities and Exchange Commission ("Commission"), on behalf of its Division of Risk, Strategy, and Financial Innovation ("Division"), is requesting public comment with regard to studies required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of the feasibility, benefits, and costs of requiring reporting in real time, either publicly or, in the alternative, only to the Commission and the Financial Industry Regulatory Authority ("FINRA"), of short sale positions of publicly listed securities, and of conducting a voluntary pilot program in which public companies would agree to have all trades of their shares marked "long," "short," "market maker short," "buy," or "buy-to-cover," and reported as such in real time through the Consolidated Tape.

DATES: Comments should be received on or before June 23, 2011.

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

• Use the Commission's Internet comment form (*http://www.sec.gov/rules/other.shtml*); or

• Send an e-mail to *rule-comments@sec.gov*. Please include File Number 4–627 on the subject line.

Paper Comments

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

All submissions should refer to File Number 4–627. To help us 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*). Comments will also 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. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

FOR FURTHER INFORMATION CONTACT: Amy Edwards, Assistant Director, Bruce Kraus, Co-Chief Counsel, Lillian Hagen, Special Counsel, Sandra Mortal, Financial Economist, Division of Risk, Strategy, and Financial Innovation, at (202) 551–6655, Securities and Exchange Commission, 100 F Street, NE., Washington, DC 20549–4977.

Discussion:

Under Section 417(a)(2) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act),[1] the Commission's Division of Risk, Strategy, and Financial Innovation is required to conduct studies of the feasibility, benefits, and costs of (A) requiring reporting in real time, publicly or, in the alternative, only to the Commission and the Financial Industry Regulatory Authority, short sale positions in publicly listed securities, and (B) conducting a voluntary pilot program in which public companies could agree to have sales of their shares marked "long," "short," or "market maker short," and purchases of their shares marked "buy" or "buy-to-cover," and reported as such in real time through the Consolidated Tape.[2]

In the Division's estimation, data made public by certain self-regulatory organizations ("SROs") indicate that orders marked "short" under current regulations account for nearly 50% of listed equity share volume.[3] Short

[34] 17 CFR 200.30–3(a)(12).

[1] Public Law 111–203 (July 21, 2010).

[2] The term "Consolidated Tape," as used throughout this release, refers to the current reporting systems for transactions in all exchange-listed stocks and ETFs. These systems include Tapes A and B of the Consolidated Tape Plan and Tape C of the Unlisted Trading Privileges or "UTP" Plan. Trades in New York Stock Exchange ("NYSE")-listed securities are reported to Tape A; trades in NYSE–Amex, NYSE–Arca, and regional exchange-listed securities are reported to Tape B; and trades in NASDAQ-listed securities are reported to Tape C. Transactions in unlisted equities, options, or non-equity securities are not currently reported to the Consolidated Tape. For more information *see http://www.nyxdata.com/cta* and *http://www.utpplan.com/*.

[3] This estimate was made by the Division based on short selling volume data for June 2010 made

Continued