

### *B. Self-Regulatory Organization's Statement on Burden on Competition*

CBOE does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of purposes of the Act.

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

No written comments were solicited or received with respect to the proposed rule change.

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

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>8</sup> and subparagraph (f)(2) of Rule 19b-4<sup>9</sup> thereunder. At any time within 60 days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

### **IV. Solicitation of Comments**

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

#### *Electronic Comments*

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to [rule-comments@sec.gov](mailto:rule-comments@sec.gov). Please include File Number SR-CBOE-2010-066 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-CBOE-2010-066. 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](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 Number SR-CBOE-2010-066 and should be submitted on or before August 9, 2010.

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

**Elizabeth M. Murphy,**

*Secretary.*

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### **SECURITIES AND EXCHANGE COMMISSION**

[Release No. 34-62434; File No. SR-FINRA-2009-089]

#### **Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Order Approving Proposed FINRA Rule 6490 (Processing of Company-Related Actions) To Clarify the Scope of FINRA's Authority When Processing Documents Related to Announcements for Company-Related Actions for Non-Exchange Listed Securities and To Implement Fees for Such Services**

July 1, 2010.

### **I. Introduction**

On December 7, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("Commission"), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934

("Act"),<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> proposed FINRA Rule 6490 (Processing of Company-Related Actions), to clarify the scope of FINRA's regulatory authority and discretionary power when processing documents relating to announcements for company-related actions for non-exchange listed equity and debt securities (collectively "OTC Securities") and to implement fees for such services. The proposed rule change was published for comment in the **Federal Register** on December 28, 2009.<sup>3</sup> The Commission received two comment letters on the proposed rule change,<sup>4</sup> and a letter from FINRA responding to the comment letters.<sup>5</sup> This order approves the proposed rule change.

### **II. Background**

FINRA performs several critical functions in the over-the-counter ("OTC") market. FINRA currently operates the OTC Bulletin Board ("OTCBB"), which provides a mechanism for FINRA members to quote certain registered OTC equity securities. FINRA also operates the OTC Reporting Facility, which provides a mechanism for FINRA members to report, for both regulatory and dissemination purposes, transactions in OTC equity securities. More broadly, FINRA also oversees the activities of broker-dealer member firms, and their associated persons, that quote and trade OTC Securities to ensure their compliance with the Federal securities laws and FINRA rules.

In addition to these functions, FINRA reviews and processes requests to announce or publish certain actions taken by issuers of OTC Securities. FINRA performs other more limited functions relating to the processing of certain actions by non-exchange listed companies whose securities are traded in the OTC market. In this regard, FINRA reviews and processes documents relating to announcements for company-related actions pursuant to Rule 10b-17 under the Act ("Rule 10b-

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

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

<sup>3</sup> See Securities Exchange Act Release No. 61189 (December 17, 2009), 74 FR 68648 ("Notice").

<sup>4</sup> See Letter to Elizabeth M. Murphy, Secretary, Commission, from Liz Heese, Managing Director, Issuer Services, Pink OTC Markets, Inc. ("Pink OTC"), dated January 20, 2010 ("Pink OTC Letter"), and Letter to Elizabeth M. Murphy, Secretary, Commission, from Stephen J. Nelson, The Nelson Law Firm, LLC ("Nelson Law Firm"), dated February 18, 2010 ("Nelson Law Firm Letter").

<sup>5</sup> See Letter from Kosha K. Dalal, Associate Vice President and Associate General Counsel, FINRA, to Elizabeth M. Murphy, Secretary, Commission, dated April 30, 2010 ("FINRA Response Letter").

<sup>8</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>9</sup> 17 CFR 240.19b-4(f)(2).

<sup>10</sup> 17 CFR 200.30-3(a)(12).

17 Actions”).<sup>6</sup> These documents include announcements of dividends or other distributions in cash or in kind, stock splits or reverse stock splits, or rights or other subscriptions offerings. FINRA also reviews requests to process documents relating to other company actions (“Other Company-Related Actions”), including the issuance or change to a trading symbol or company name, merger, acquisition, dissolution or other company control transactions, bankruptcy or liquidation.<sup>7</sup> In addition, FINRA maintains the symbols database for OTC Securities. Based on information it receives regarding Company-Related Actions, FINRA, in turn, provides notice to the marketplace of such events and adjusts names, symbols, and the issuers’ stock prices, if necessary. According to FINRA, these functions are important both to the trading of securities in the OTC marketplace and to the settlement of transactions involving OTC Securities. FINRA notes that the issuer-related services it performs are aimed not only at facilitating trading and settlement, but also at promoting investor protection and market integrity.

Historically, FINRA has viewed its role in performing issuer-related functions as primarily ministerial, due in large part to its limited jurisdictional reach. FINRA does not impose listing standards for securities and maintains no formal relationship with, or direct jurisdiction over, issuers. FINRA’s authority to perform issuer-related functions flows primarily from two sources: Rule 10b–17 under the Act and FINRA’s Uniform Practice Code (NASD Rule 11000 Series) (“UPC”).<sup>8</sup> Recently,

there has been growing concern that FINRA’s Company-Related Action processing services may potentially be used by certain parties to further fraudulent activities.<sup>9</sup> Accordingly, in furtherance of its authority to adopt rules to prevent fraudulent and manipulative acts and practices, promote just and equitable principles of trade, and protect investors and the public interest, FINRA proposes Rule 6490 to clarify the scope of its regulatory authority and to codify procedures that it will apply when reviewing requests to process Company-Related Actions. FINRA also proposes to establish fees for its review and processing of documentation relating to Rule 10b–17 Actions and Other Company-Related Actions, as well as a fee for appealing FINRA staff determinations.

### III. Description of the Proposal

#### A. Processing Announcements of Company Related Actions

Rule 6490 would codify the authority of FINRA’s Department of Operations (“Department”) to conduct in-depth reviews of requests to process Company-Related Actions and to provide FINRA staff the discretion not to process incomplete requests and requests for which there are certain indicators of potential fraud. Specifically, the proposed rule would establish procedures for the submission, review, and determination of the sufficiency of requests made to FINRA to process Company-Related Actions. The proposed rule would permit the Department to prescribe the forms, supporting documentation and procedures necessary to conduct more in-depth reviews of requests to process Company-Related Actions. The proposed rule would require that an issuer or other duly authorized representative of the issuer (“Requesting

Party”) submit a request for FINRA to review and process documentation related to a Rule 10b–17 Action or Other Company-Related Action within the time frames specified by either Rule 10b–17, in the event of a Rule 10b–17 Action, or no later than ten calendar days prior to the effective date of the Company-Related Action in the event of Other Company-Related Actions. The proposed rule would require all such requests to be accompanied by proof of payment of a non-refundable fee specified in the fee table that would be included in Rule 6490, as more fully described below. In addition, the proposed rule would provide that initial symbol set up requests may be submitted by FINRA members or their associated persons in order to comply with regulatory reporting requirements.

In recognition of FINRA’s lack of privity with issuers of OTC Securities, FINRA is proposing to adopt Supplementary Material .02 (Requests by Third-Parties) to Rule 6490, which would permit FINRA, in its discretion, to announce a Company-Related Action when it is contacted by a third party, such as The Depository Trust & Clearing Corporation (“DTC”), foreign exchanges or regulators, or members or associated persons. FINRA would request that the third party contact the issuer in question regarding the issuer’s obligations under Rule 10b–17 or other rules and regulations, as applicable, and instruct the issuer to contact FINRA directly to provide notice and complete the requisite forms. However, FINRA would, in its discretion, be permitted to review and process a Company-Related Action based on information from a third party when it believes that such action is necessary for the protection of investors and the public interest and to maintain fair and orderly markets, and/or FINRA has been unable to obtain notification of the Company-Related Action from the issuer.

The proposed rule would permit the Department to request additional information or documentation as may be necessary for the Department to verify the accuracy of the information submitted by the Requesting Party. If the Requesting Party does not sufficiently respond within 90 calendar days of the date the Department requests additional information or documentation, the request would be deemed “lapsed” and then closed. The proposed rule also would provide that if a request to process a Company-Related Action is deficient, and the Department determines that it is necessary for the protection of investors and the public interest and to maintain fair and orderly markets, the Department may determine

<sup>6</sup> 17 CFR 240.10b–17. Rule 10b–17 requires issuers to give FINRA, in a timely fashion, information relating to: (1) A dividend or other distribution in cash or in kind; (2) a stock split or reverse split; and (3) a rights or other subscription offering. Under Rule 10b–17, the issuer is required to provide this information to FINRA no later than 10 days prior to the record date or, in case of a rights subscription or other offering if such 10 days advance notice is not practical, on or before the record date, and in no event later than the effective date of the registration statement to which the offer relates. Pursuant to Rule 10b–17(b)(3), comparable notice given by the issuer of an exchange-listed security in accordance with the procedures of the national securities exchange upon which a security of such issuer is registered satisfies this requirement.

<sup>7</sup> Rule 10b–17 Actions and Other Company-Related Actions collectively are referred to herein as “Company-Related Actions.” FINRA publishes Company-Related Actions pursuant to requests from issuers and their agents on its Web site in a document known as the “Daily List.” Publication of Company-Related Actions in the Daily List effectively announces the Company-Related Action to the OTC market.

<sup>8</sup> The UPC sets forth a basic framework of rules governing broker-dealers with respect to the settlement of OTC Securities.

<sup>9</sup> See, e.g., Commission Order of Suspension of Trading In the Matter of Andros Isle, Corporation, *et al.*, dated March 13, 2008 (File No. 500–1), in which the Commission suspended trading pursuant to Section 12(k) of the Act, 15 U.S.C. 78l(k), in the securities of approximately 26 Pink Sheet securities, stating “[c]ertain persons appear to have usurped the identity of a defunct or inactive publicly traded corporation, initially by incorporating a new entity using the same name, and then by obtaining a new CUSIP number and ticker symbol based on the apparently false representation that they were duly authorized officers, directors and/or agents of the original publicly traded corporation.” See also *SEC v. Irwin Boock, Stanton B.J. DeFreitas, Nicolette D. Loisel, Roger L. Shoss, and Jason C. Wong, Birte Boock, and 1621566 Ontario, Inc.*, Civil Action No. 09 CV 8261 (S.D.N.Y.) (DLC), Litigation Release No. 21243 (October 8, 2009) (Commission Charges Five With Dozens of Fraudulent Corporate Hijackings and Unregistered Offerings of Securities and Names Two Relief Defendants).

that documentation related to a Company-Related Action shall not be processed.

The proposal sets forth five factors that the Department can consider in determining whether a request to process documentation is deficient: (1) FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate or with proper authority; (2) the issuer is not current in its reporting obligations, if applicable, to the Commission or other regulatory authority; (3) FINRA has actual knowledge that parties related to the Company-Related Action are the subject of pending, adjudicated or settled regulatory action or investigation by a regulatory body, or civil or criminal action related to fraud or securities laws violations;<sup>10</sup> (4) a government authority or regulator has provided information to FINRA, or FINRA has actual knowledge, indicating that persons related to the Company-Related Action may be potentially involved in fraudulent activities related to the securities market and/or pose a threat to public investors; and/or (5) there is significant uncertainty in the settlement and clearance process for the security.

Following a Department determination that a request to process a Company-Related Action is deficient, the Department would be required to

provide written notice to the Requesting Party. Such written notice would be required to state the specific factor(s) that caused the request to be deemed deficient. The proposal permits a Requesting Party to appeal a deficiency determination to a three-member subcommittee comprised of current or former industry members of FINRA's UPC Committee in writing within seven calendar days after service of the notice. Any written request for an appeal would be required to: (1) Be accompanied by proof of payment of a non-refundable Action Determination Appeal Fee; and (2) specifically set forth any and all defenses to the Department's deficiency determination. Under the proposal, an appeal would stay the processing of the Company-Related Action (*i.e.*, the requested Company-Related Action would not be processed during the period that the Requesting Party requests an appeal or while any such appeal is pending).

Under the proposal, the subcommittee would convene once each calendar month to consider all appeals received during the prior month and would render a determination within three business days following the day the subcommittee considered the appeal. The subcommittee's determination would constitute final FINRA action. If a Requesting Party fails to file a written

request for an appeal within seven calendar days after service of notice, the Department's deficiency determination would constitute final FINRA action.

#### B. Fees

FINRA also proposes to establish fees in connection with its review and processing of Company-Related Actions. The proposed fees would include late fees for Requesting Parties that fail to provide timely notice of and requests to process Company-Related Actions. According to FINRA, the proposed late fees would help encourage issuers of OTC Securities to meet deadlines, including those associated with Rule 10b-17, which are critical to enabling FINRA to process such requests in a timely fashion in order to provide adequate notice to market participants. Further, FINRA states that the proposed fees would be beneficial because they would offset some of the significant costs that FINRA currently bears for the benefit of issuers of OTC Securities that are not otherwise paying to support the OTC symbol database and the processing of Company-Related Actions.

Specifically, FINRA proposes to charge the following non-refundable fees for the review and processing of documentation related to Rule 10b-17 Actions and Other Company-Related Actions:

|                                                                                                          | Fee   |
|----------------------------------------------------------------------------------------------------------|-------|
| <b>Rule 10b-17 Action:</b>                                                                               |       |
| Timely Rule 10b-17 Notification .....                                                                    | \$200 |
| Late Rule 10b-17 Notification Submitted at least 5 calendar days prior to Corporate Action Date .....    | 1,000 |
| Late SEA Rule 10b-17 Notification Submitted at least 1 calendar day prior to Corporate Action Date ..... | 2,000 |
| Late SEA Rule 10b-17 Notification Submitted on or after Corporate Action Date .....                      | 5,000 |
| <b>Other Company-Related Action:</b>                                                                     |       |
| Voluntary Symbol Request Change .....                                                                    | 500   |
| Initial Symbol Set Up .....                                                                              | (*)   |
| Symbol Deletion .....                                                                                    | (*)   |
| <b>Appeals:</b>                                                                                          |       |
| Action Determination Appeal Fee .....                                                                    | 4,000 |

\* No charge.

FINRA also proposes Supplementary Material .01, which would permit FINRA to process documentation for Company-Related Actions, absent a determination that the action is deficient, even if the required fee is not paid. Proposed Supplementary Material .01 provides that unpaid Rule 10b-17 Action fees associated with a specific issuer would be accumulated, and further, that FINRA would not process Voluntary Symbol Request Changes until all accumulated fees are paid.

According to FINRA, this accumulation authority would create incentives for issuers that are not otherwise subject to FINRA's direct jurisdiction to comply with the proposed rule's requirements without compromising FINRA's investor protection mission. FINRA states further that acceptance and processing of untimely Company-Related Action requests and related fees by FINRA will not act to relieve an issuer of potential violations of Rule 10b-17 or other

Federal or State rules or self-regulatory organization rules.

In addition, the Voluntary Symbol Request Change Fee would not apply to mandatory symbol set ups or changes. Specifically, FINRA would not charge a Voluntary Symbol Request Change Fee in connection with a mandatory symbol change that results from a Rule 10b-17 Action (*i.e.*, a mandatory symbol change required because of a CUSIP number change or otherwise in direct connection with a Rule 10b-17 Action

<sup>10</sup> According to FINRA, this factor would include instances when FINRA has actual knowledge of a Commission Order pursuant to Section 12(k) of the

Act, 15 U.S.C. 78l(k), temporarily suspending the issuer's securities or pursuant to Section 12(j) of the

Act, 15 U.S.C. 78l(j), revoking registration of the issuer's securities.

would not require the payment of the Voluntary Symbol Request Change Fee). However, the request (and its granting, subject to symbol availability) of a specific symbol in connection with a Rule 10b-17 Action would result in assessment of such a fee in addition to the requisite Rule 10b-17 Action fee.

#### IV. Discussion and Commission's Findings

The Commission has reviewed carefully the proposed rule change, the comment letters received, and the FINRA Response Letter and finds that the proposal is consistent with the Act and the rules and regulations thereunder applicable to a national securities association, including the provisions of Section 15A(b)(6) of the Act,<sup>11</sup> which requires, among other things, that FINRA rules be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing transactions in securities, and, in general, to protect investors and the public interest; and Section 15A(b)(5) of the Act,<sup>12</sup> which requires, among other things, that FINRA rules provide for the equitable allocation of reasonable dues, fees and other charges among members and issuers and other persons using any facility or system that FINRA operates or controls.<sup>13</sup>

The Commission believes that FINRA's proposal to codify procedures for the submission, review, and determination of the sufficiency of requests to process Company-Related Actions will benefit the OTC marketplace and investors in OTC Securities. The proposal clarifies FINRA's authority to conduct reviews of requests to process Company-Related Actions and reserves to FINRA the right to process Rule 10b-17 Actions and Other Company-Related Actions when, notwithstanding the failure of an issuer to timely submit a notice or pay the applicable processing fee, such processing is necessary for the protection of investors and the public interest and to maintain fair and orderly markets. Accordingly, the Commission believes that the proposal is designed to encourage issuers and their agents to provide complete, accurate and timely information to FINRA concerning Company-Related Actions involving

OTC Securities, and thereby to prevent fraudulent and manipulative acts and practices with respect to these securities.

The Commission notes that the proposal sets forth five factors that FINRA can look to as a basis for denying a request to process documentation concerning a Company-Related Action: (1) FINRA staff reasonably believes the forms and all supporting documentation, in whole or in part, may not be complete, accurate or with proper authority; (2) the issuer is not current in its reporting obligations, if applicable, to the Commission or other regulatory authority; (3) FINRA has actual knowledge that parties related to the Company-Related Action are the subject of pending, adjudicated or settled regulatory action or investigation by a regulatory body, or civil or criminal action related to fraud or securities laws violations;<sup>14</sup> (4) a government authority or regulator has provided information to FINRA, or FINRA has actual knowledge, indicating that persons related to the Company-Related Action may be potentially involved in fraudulent activities related to the securities market and/or pose a threat to public investors; and/or (5) there is significant uncertainty in the settlement and clearance process for the security. The Commission also notes that the proposal includes provisions pursuant to which an aggrieved party may appeal the denial of a request to process a Company-Related Action.

As noted above, the Commission received two comment letters in response to the proposal.<sup>15</sup> Both commenters generally supported the goals of the proposal, but questioned certain aspects of it. One commenter requested that FINRA provide additional guidance on two of the factors FINRA would consider when determining whether a request to process documentation related to a Company-Related Action is deficient, namely, whether an issuer is not current in its reporting obligations, if applicable, to the Commission or other regulatory authority, and whether there is significant uncertainty in the clearance and settlement process.<sup>16</sup> Specifically, this commenter inquired whether delinquent issuers would automatically have their requests to process a Company-Related Action determined to be deficient, and also whether issuers that are not designated as eligible for the DTC's FAST systems

would have their requests viewed as raising significant uncertainty in the clearance and settlement process.<sup>17</sup>

In response to this commenter, FINRA explained that when the Department reasonably believes that an issuer submitting a request to process documentation related to a Company-Related Action has triggered one of the explicitly enumerated factors, the Department would generally conduct an in-depth review of the Company-Related Action and seek additional information or documentation from the issuer.<sup>18</sup> FINRA noted that it would have the discretion not to process any such actions that are incomplete or when it determines that not processing such an action is necessary for the protection of investors and the public interest and to maintain fair and orderly markets.<sup>19</sup> FINRA stated that the failure of an issuer to remain current in its reporting obligations is one of five factors that FINRA "may" consider in making a deficiency determination.<sup>20</sup> FINRA further noted that the proposal does not mandate any particular mechanism of clearance and settlement for an issuer's securities, including FAST designation by DTC.<sup>21</sup>

The Commission believes that the proposed factors are reasonably designed to allow FINRA to deny a request to process a Company-Related Action based on the above-noted objective criteria. As FINRA pointed out, if FINRA believes that one of the enumerated factors has been triggered, FINRA staff would conduct an in depth review and follow up with the issuer to seek additional information or documentation. The Commission believes that the proposal furthers FINRA's goal to assure that documents supporting a request to process a Company-Related Action are complete and correct and that its facilities are not misused in furtherance of fraudulent or manipulative acts and practices. At the same time, the proposal recognizes the interests of a Requesting Party in receiving fair consideration from FINRA in connection with a request to process a Company-Related Action and in having a fair process for an appeal in the event a request to process a Company-Related Action is denied. The Commission therefore finds the proposal to be consistent with Section 15A(b)(6) of the Act.<sup>22</sup> The Commission

<sup>17</sup> *Id.*

<sup>18</sup> See FINRA Response Letter, *supra* note 5 at 3-4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> 15 U.S.C. 78o-3(b)(6).

<sup>11</sup> 15 U.S.C. 78o-3(b)(6).

<sup>12</sup> 15 U.S.C. 78o-3(b)(5).

<sup>13</sup> In approving the proposed rule change, the Commission notes that it has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

<sup>14</sup> See *supra* note 10.

<sup>15</sup> See Pink OTC Letter and Nelson Law Firm Letter, *supra* note 4.

<sup>16</sup> See Pink OTC Letter.

notes that FINRA's administration of its proposed rule is subject to continuing Commission oversight, and that FINRA, as a registered national securities association, remains bound by its obligations as a self-regulatory organization under the Act and all relevant rules and regulations thereunder.

Two commenters questioned the effects of the proposed fees.<sup>23</sup> Specifically, one commenter expressed concern that the proposal would permit FINRA to decline to set an ex-dividend date for distributions of "Liquidating OTC Securities" if an issuer failed to timely notify FINRA of an upcoming distribution, as required by Rule 10b-17, and pay the required processing fee.<sup>24</sup> According to this commenter, a failure by FINRA to set an ex-dividend date for these securities would "burden transactions in Liquidating OTC Securities with wholly unnecessary risks and transaction costs" and potentially permit FINRA to "escape from its responsibilities under Section 15A" of the Act when the required fee is not paid.<sup>25</sup>

In response to this concern, FINRA clarified that the proposal expressly permits FINRA to set ex-dividend dates, as well as process other Company-Related Actions, in certain circumstances even if FINRA fails to receive the required notice and accompanying fee from the issuer. In particular, FINRA noted that the text of proposed Supplementary Material .01 (SEA Rule 10b-17 Fee Accumulations) states that "notwithstanding the timeliness of the SEA Rule 10b-17 Action submission or the failure to pay applicable fees, FINRA will make its best efforts to process documentation related to SEA Rule 10b-17 Actions that are not otherwise deemed incomplete or otherwise deficient by FINRA because of the critical nature of this information to the marketplace."<sup>26</sup> Similarly, FINRA noted that the rule text of proposed Supplementary Material .02 (Requests by Third-Parties) provides that when FINRA is unable to obtain notification from an issuer, it may in its discretion review and process a Rule 10b-17 Action or Other Company-Related Action based on information from a third-party, such as DTC, foreign exchanges or regulators, or members or

associated persons, when it believes such action is necessary under its statutory obligations.<sup>27</sup>

One commenter noted that issuers of OTC Liquidating Securities may believe that they are not obligated to provide a Rule 10b-17 notice to FINRA, particularly, if, for example a bankruptcy trustee views its obligations to maximize the value of the issuer's estate to be in conflict with payment of processing fees to FINRA.<sup>28</sup> In response to this comment, FINRA remarked that an issuer that files for bankruptcy, or a trustee acting on its behalf, faces numerous fees and charges in an effort to discharge the issuer's obligations and stated that it saw no reason why its proposed fees should not apply to these issuers.<sup>29</sup>

The other commenter questioned whether the proposed fees for providing Company-Related Action processing services might cause issuers to effect corporate actions without notifying FINRA.<sup>30</sup> In response to this point, FINRA noted that an issuer that fails to notify FINRA of a proposed corporate action, as required by Rule 10b-17 is potentially violating an anti-fraud rule of the Federal securities laws and stated that where it has actual knowledge of issuer non-compliance with Rule 10b-17, FINRA will use its best efforts to notify the Commission.<sup>31</sup> According to FINRA, non-compliance with Rule 10b-17 has been an ongoing concern, and it suggested that heightened awareness of Rule 10b-17 that could result from adoption of the proposal, graduated fees for delayed compliance with Rule 10b-17, and the potential for referral to the Commission for non-compliance may lead issuers to proceed more cautiously in this area.<sup>32</sup>

The Commission finds that FINRA's proposed fees to review requests to process Company-Related Actions are consistent with the Act. The Commission believes that the proposed fees are reasonable because they are intended to offset some of the significant costs FINRA currently incurs in processing Company-Related Actions

and that they are equitably allocated because they apply to any Requesting Party that submits a request to process a Company-Related Action (other than those enumerated actions for which no fees would be charged). The Commission believes that FINRA has adequately responded to commenters' concerns about the impact of the proposed fees.

Finally, one commenter offered suggestions relating to the operation of the proposed rule.<sup>33</sup> In response to the comment that FINRA should limit intra-day processing of Company-Related Actions to emergency situations such as security revocations and quotation and trading halts, FINRA explained that, with the exception of security revocations, quotation and trading halts, and cancellation of securities pursuant to an effective bankruptcy court order, its general policy is to announce actions on the Daily List published on OTCBB.com with a future effective date, but that in some cases, often because of failure to receive timely notification, setting a future effective date is not possible.<sup>34</sup> This commenter also suggested that FINRA coordinate processing of Company-Related Actions across FINRA departments and ensure information regarding Company-Related Actions is disseminated accurately and consistently on the Daily List on the OTCBB.com and NasdaqTrader Web sites.<sup>35</sup> In response to these comments, FINRA noted that, although FINRA departments work closely in this regard, not all systems and platforms used by market participants to access such data are controlled by FINRA, and there could be a lag in the dissemination of certain information.<sup>36</sup> FINRA also noted that because the NasdaqTrader Web site simply provides a hyperlink to the OTCBB.com Daily List, there should be no inconsistencies in information on these two Web sites.<sup>37</sup> The Commission believes that FINRA has adequately responded to the commenters' suggestions relating to the operation of the proposed rule.

## V. Conclusion

*It is therefore ordered*, pursuant to Section 19(b)(2) of the Act, that the proposed rule change (SR-FINRA-2009-89), be, and it hereby is, approved.

<sup>23</sup> See Pink OTC Letter and Nelson Law Firm Letter, *supra* note 4.

<sup>24</sup> See Nelson Law Firm Letter. This commenter defines "Liquidating OTC Securities" as securities whose issuers are "bankrupt, in liquidation, or involved in various forms of reorganization."

<sup>25</sup> *Id.*

<sup>26</sup> See FINRA Response Letter, *supra* note 5 at 2-3.

<sup>27</sup> *Id.*

<sup>28</sup> See Nelson Law Firm Letter *supra* note 4 at 3.

<sup>29</sup> See FINRA Response Letter, *supra* note 5 at 2.

<sup>30</sup> See Pink OTC Letter, *supra* note 4 at 2.

<sup>31</sup> See FINRA Response Letter, *supra* note 5 at 5.

<sup>32</sup> See *id.* at 6. FINRA also stated that if its proposal is approved, it (i) will notify issuers of the proposed rule and fees by issuing a Regulatory Notice, sending out alerts through electronic platforms used by market participants, and posting this information on its dedicated Web page for OTC Actions; (ii) will reach out to industry groups involved in issuer corporate actions to notify parties that will be impacted by the proposal; and (iii) expects the percentage of late notifications will decline over time.

<sup>33</sup> See Pink OTC Letter, *supra* note 4.

<sup>34</sup> See FINRA Response Letter, *supra* note 5.

<sup>35</sup> See Pink OTC Letter, *supra* note 4.

<sup>36</sup> See FINRA Response Letter, *supra* note 5.

<sup>37</sup> *Id.*

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>38</sup>

Elizabeth M. Murphy,

Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-62443; File No. SR-CBOE-2010-064]

### Self-Regulatory Organizations; Chicago Board Options Exchange, Incorporated; Notice of Filing and Immediate Effectiveness of Proposed Rule Change To Expand Its \$1 Strike Program

July 2, 2010.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the "Act")<sup>1</sup> and Rule 19b-4 thereunder,<sup>2</sup> notice is hereby given that, on July 1, 2010, the Chicago Board Options Exchange, Incorporated (the "Exchange" or "CBOE") 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 the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

CBOE proposes to amend Rule 5.5.01 to expand the Exchange's \$1 Strike Price Program (the "\$1 Strike Program" or "Program") to allow the Exchange to select 150 individual stocks on which options may be listed at \$1 strike price intervals. The text of the rule proposal is available on the Exchange's website (<http://www.cboe.org/legal>), at the Exchange's principal office, 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, the self-regulatory organization 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 those statements may be examined at the places specified in Item IV below.

The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant parts of such statements.

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

##### 1. Purpose

The purpose of this proposed rule change is to expand the \$1 Strike Program.<sup>3</sup>

The \$1 Strike Program currently allows CBOE to select a total of 55 individual stocks on which option series may be listed at \$1 strike price intervals. In order to be eligible for selection into the Program, the underlying stock must close below \$50 in its primary market on the previous trading day. If selected for the Program, the Exchange may list strike prices at \$1 intervals from \$1 to \$50, but no \$1 strike price may be listed that is greater than \$5 from the underlying stock's closing price in its primary market on the previous day. The Exchange may also list \$1 strikes on any other option class designated by another securities exchange that employs a similar Program under their respective rules. The Exchange may not list long-term option series ("LEAPS")<sup>4</sup> at \$1 strike price intervals for any class selected for the Program, except as specified in subparagraph (2) to Interpretation and Policy .01 to Rule 5.5.<sup>5</sup> The Exchange is also restricted from listing series with \$1 intervals within \$0.50 of an existing strike price in the same series, except that strike prices of \$2, \$3, and \$4 shall

be permitted within \$0.50 of an existing strike price for classes also selected to participate in the \$0.50 Strike Program.<sup>6</sup>

The Exchange now proposes to expand the Program to allow CBOE to select a total of 150 individual stocks on which option series may be listed at \$1 strike price intervals. The existing restrictions on listing \$1 strikes would continue, *i.e.*, no \$1 strike price may be listed that is greater than \$5 from the underlying stock's closing price in its primary market on the previous day, and CBOE is restricted from listing any series that would result in strike prices being \$0.50 apart (unless an option class is selected to participate in both the \$1 Strike Program and the \$0.50 Strike Program).

As stated in the Commission order that initially approved CBOE's Program and in subsequent extensions and expansions of the Program,<sup>7</sup> CBOE believes that \$1 strike price intervals provide investors with greater flexibility in the trading of equity options that overlie lower price stocks by allowing investors to establish equity options positions that are better tailored to meet their investment objectives.

During the time that the \$1 Strike Program was a pilot, the Exchange submitted three pilot reports to the Commission in which the Exchange discussed, among other things, the strength and efficacy of the Program based upon the steady increase in volume and open interest of options traded on the Exchange at \$1 strike price intervals; and that the Program had not and, in the future, should not create capacity problems for CBOE or the Options Price Reporting Authority ("OPRA") systems.<sup>8</sup> This has not changed. Moreover, the number of \$1 strike options traded on the Exchange has continued to increase since the inception of the Program such that these options are now among some of the

<sup>3</sup> The Commission approved the Program as a pilot on June 5, 2003. See Securities Exchange Act Release No. 47991 (June 5, 2003), 68 FR 35243 (June 12, 2003). The Program was subsequently extended through June 5, 2008. See Securities Exchange Act Release No. 49799 (June 3, 2004), 69 FR 32642 (June 10, 2004) (SR-CBOE-2004-34); SEC Release No. 51771 (May 31, 2005), 70 FR 33228 (June 7, 2005) (SR-CBOE-2005-37); SEC Release No. 53805 (May 15, 2006), 71 FR 29690 (May 23, 2006) (SR-CBOE-2006-31); and SEC Release No. 55673 (April 26, 2007), 72 FR 24646 (May 3, 2007) (SR-CBOE-2007-38). The Program was subsequently expanded and permanently approved in 2007. See Exchange Act Release No. 57049 (December 27, 2007), 73 FR 528 (January 3, 2008) (SR-CBOE-2007-125). The Program was last expanded in 2009. See Securities Exchange Act Release No. 59587 (March 17, 2009), 74 FR 12414 (March 24, 2009) (SR-CBOE-2009-01).

<sup>4</sup> LEAPS are long-term options that generally have up to thirty-nine months from the time they are listed until expiration. See Rule 5.8, *Long-Term Equity Option Series (LEAPS®)*. Long-term FLEX options and index options are considered separately in Rules 24A.4, 24B.4 and 24.9(b), respectively.

<sup>5</sup> Interpretation and Policy .01(a)(3) states that the Exchange may list \$1 strike prices up to \$5 in LEAPS in up to 200 option classes in individual stocks. See Securities Exchange Act Release No. 60978 (November 10, 2009), 74 FR 59296 (November 17, 2009) (SR-CBOE-2009-068).

<sup>6</sup> Regarding the \$0.50 Strike Program, which allows \$0.50 strike price intervals for options on stocks trading at or below \$3.00, see Interpretation and Policy .01(b) to Rule 5.5 and Securities Exchange Act Release No. 60695 (September 18, 2009), 74 FR 49055 (September 25, 2009) (SR-CBOE-2009-069). See also Securities Exchange Act Release No. 61331 (January 12, 2010), 75 FR 2911 (January 19, 2010) (SR-CBOE-2010-002) (allowing concurrent listing of \$3.50 and \$4 strikes for classes that participate in both the \$0.50 Strike Program and the \$1 Strike Program).

<sup>7</sup> See *supra* note 1.

<sup>8</sup> See Securities Exchange Act Release Nos. 49799 (June 3, 2004), 69 FR 32642 (June 10, 2004) (SR-CBOE-2004-34); 51771 (May 31, 2005), 70 FR 33228 (June 7, 2005) (SR-CBOE-2005-37); 53805 (May 15, 2006), 71 FR 29690 (May 23, 2006) (SR-CBOE-2006-31); and 55673 (April 26, 2007), 72 FR 24646 (May 3, 2007) (SR-CBOE-2007-38).

<sup>38</sup> 17 CFR 200.30-3(a)(12).

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

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