of reasonable dues, fees and other charges among Exchange members and other persons using its facilities. The proposed rule change will allow the Exchange and its market makers to better compete for order flow since the Exchange will now collect the same amount of fee as PHLX in options classes that are subject to the PFOF fee. The Exchange believes that with this proposed rule change, market makers will have greater incentive to trade on ISE in the symbols that are subject to the PFOF fee and thus enhance competition.

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

The proposed rule change does not impose 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

The Exchange has not solicited, and does not intend to solicit, comments on this proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

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)(ii) of the Act [7] and subparagraph (f)(2) of Rule 19b–4 thereunder,[8] because it establishes a due, fee, or other charge imposed by ISE.

At any time within 60 days of the filing of such proposed rule change, the Commission summarily may temporarily suspend 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. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or 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 email to *rule-comments@sec.gov.* Please include File No. SR–ISE–2012–94 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–ISE–2012–94. This file number should be included on the subject line if email 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 Commissions Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room. Copies of such filing also will be available for inspection and copying at the principal office of the ISE. 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–ISE–2012–94 and should be submitted by January 3, 2013.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[9]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–30104 Filed 12–12–12; 8:45 am]

BILLING CODE 8011–01–P

[7] 15 U.S.C. 78s(b)(3)(A)(ii).

[8] 17 CFR 240.19b–4(f)(2).

[9] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68386; File No. SR–FINRA–2009–060]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Amendment Nos. 1 and 2, and Order Granting Accelerated Approval of a Proposed Rule Change, as Modified by Amendment Nos. 1 and 2, Relating to FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books)

December 7, 2012.

I. Introduction

On September 10, 2009, the Financial Industry Regulatory Authority, Inc. (''FINRA'') filed a proposed rule change with the Securities and Exchange Commission (''SEC'' or ''Commission'') pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 thereunder [2] to amend FINRA Rule 8210 (Provision of Information and Testimony and Inspection and Copying of Books). The proposed rule change was published for comment in the **Federal Register** on October 22, 2009.[3] The Commission received seven comment letters on the proposed rule change.[4] On December 22, 2009, FINRA filed a letter with the Commission responding to these comments,[5] and on

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

[2] 17 CFR 240.19b–4.

[3] *See* Exchange Act Release No. 60836 (Oct. 16, 2009), 74 FR 54614 (Oct. 22, 2009) (Notice of Filing of Proposed Rule Change; File No. SR–FINRA–2009–060) (''Notice'').

[4] *See* letters from BTUD, to Elizabeth Murphy, Secretary, SEC, dated October 29, 2009 (the ''BTUD Letter''); Frederick T. Greene, CIMA, Senior V.P., Portfolio Manager, Woodforest Financial Services, Inc., to Elizabeth M. Murphy, Secretary, SEC, dated October 29, 2009 (the ''Woodforest Letter''); Neal E. Nakagiri, President, CEO, CCO, NPB Financial Group, LLC, to Elizabeth Murphy, Secretary, SEC, dated October 29, 2009 (the ''NPB Letter''); Dale E. Brown, CAE, President & CEO, Financial Services Institute, Inc., to Elizabeth M. Murphy, Secretary, SEC, dated November 4, 2009 (the ''FSI Letter''); Bari Havlik, Chief Compliance Officer, Charles Schwab & Co., Inc., to Elizabeth M. Murphy, Secretary, SEC, dated November 12, 2009 (the ''Schwab Letter''); Ronald C. Long, Director, Regulatory Affairs, Wells Fargo Advisors, to Elizabeth M. Murphy, Secretary, SEC, dated November 12, 2009 (the ''Wells Fargo Letter''); and Ira D. Hammerman, Senior Managing Director and General Counsel, Securities Industry and Financial Markets Association, to Elizabeth M. Murphy, Secretary, SEC, dated December 16, 2009 (the ''SIFMA Letter''). These letters are available on the SEC's Web site at *http://www.sec.gov/comments/sr-finra-2009–060/finra2009060.shtml.*

[5] *See* letter from Stan Macel, Assistant General Counsel, Regulatory Policy and Oversight, FINRA, to Elizabeth M. Murphy, Secretary, SEC, dated

Continued

December 21, 2011, FINRA filed Amendment No. 1 with the Commission to further respond to the comments and to propose amendments in response thereto.[6] On December 5, 2012, FINRA filed Amendment No. 2 with the Commission to modify a phrase that was included in Amendment No. 1.[7] The Commission is publishing this notice and order to solicit comments on Amendment Nos. 1 and 2 and to approve the proposed rule change, as modified by Amendment Nos.1 and 2, on an accelerated basis.

II. Description of the Proposal

FINRA has proposed to amend FINRA Rule 8210, which confers on FINRA staff the authority to compel a member, person associated with a member, or other person over whom FINRA has jurisdiction, to produce documents, provide testimony, or supply written responses or electronic data in connection with an investigation, complaint, examination or adjudicatory proceeding. The proposed rule change would clarify the scope of FINRA's authority under the rule to inspect and copy the books, records, and accounts of such member or person, specify the method of service for certain unregistered persons under the rule, and authorize service on attorneys who are representing clients.

FINRA Rule 8210 applies to all members, associated persons, and other persons over whom FINRA has jurisdiction, including former associated persons subject to FINRA's jurisdiction as described in the FINRA By-Laws.[8] FINRA Rule 8210(c) provides that a member's or associated person's failure to provide information or testimony or to permit an inspection and copying of books, records, or accounts is a violation of the rule.

Information in a Member's or Person's Possession, Custody or Control

FINRA Rule 8210(a)(2) currently provides that FINRA staff shall have the right to inspect and copy the books, records, and accounts of all applicable members and persons with respect to any matter involved in an investigation, complaint, examination or proceeding.[9] The proposed rule change would clarify that the information that FINRA staff shall have the right to inspect and copy must be in the member's or person's ''possession, custody or control.'' [10] This language parallels the Federal Rules of Civil Procedure regarding document requests and subpoenas for documents.[11]

Notice to Associated But Unregistered Persons

FINRA Rule 8210 addresses the legal concept of service of a written request by using the term ''notice'' of a request. Currently, FINRA Rule 8210(d) states that, with respect to members and associated persons, notice shall be deemed received by the member or associated person when a copy of the notice is mailed or otherwise transmitted to the last known relevant address of the member or associated person as reflected in the Central Registration Depository (''CRD''). The CRD system contains information concerning registered members and persons,[12] but in most instances it does not contain information concerning unregistered persons who are or were associated with a member.[13]

Although not routine, some investigations require FINRA examiners or investigators to request information from persons currently or formerly associated with a member in an unregistered capacity.[14] The current rule is unclear as to what would constitute proper notice on such persons for whom information is not available in CRD. The proposed rule change would explicitly address the methods by which notice would be deemed received by persons currently or formerly associated with a member in an unregistered capacity.

With respect to unregistered persons currently associated with a member, the proposed rule change would provide that notice shall be deemed received by mailing or otherwise transmitting the notice to the last known business address of the member as reflected in CRD. In addition, the proposed rule change would retain the provision that if FINRA staff responsible for transmitting the notice has actual knowledge that the member's address provided through CRD is out of date or inaccurate, then a copy of the notice must be transmitted to both the address provided through CRD, as well as any more current address known to FINRA staff.

With respect to unregistered persons formerly associated with a member, the proposed rule change would provide that notice shall be deemed received upon personal service, which is defined as set forth in FINRA Rule 9134(a)(1).[15] FINRA Rule 9134(a)(1) is based on traditional concepts for serving a summons under Rule 4 of the Federal Rules of Civil Procedure.

December 22, 2009 (''Response to Comments''). This letter is available on the SEC's Web site at *http://www.sec.gov/comments/sr-finra-2009–060/finra2009060.shtml.*

[6] *See* Amendment No. 1 dated December 21, 2011 (''Amendment No. 1''). Amendment No. 1 is described below in Section III.B., and the text of Amendment No. 1 is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[7] *See* Amendment No. 2 dated December 5, 2012 (''Amendment No. 2''). Amendment No. 2 is described below in Section III.B., and the text of Amendment No. 2 is available on FINRA's Web site at *http://www.finra.org,* at the principal office of FINRA, and on the Commission's Web site at *http://www.sec.gov/rules/sro.shtml.*

[8] *See* FINRA By-Laws, Article V, Section 4(a) (Retention of Jurisdiction).

[9] FINRA Rule 8210(a) provides FINRA adjudicators with the same rights as FINRA staff to request information. Although the proposed rule change would also clarify a FINRA adjudicator's authority, no commenters expressed any concerns that specifically addressed the powers of FINRA adjudicators.

[10] When filing the proposed rule change with the Commission, FINRA indicated that in using the word ''control,'' in addition to possession and custody, it intended to require members or persons covered by the rule to provide, for example, records that they have the legal right, authority, or ability to obtain upon demand. *See Camden Iron & Metal* v. *Marubeni Am. Corp.,* 138 F.R.D. 438, 441 (D.N.J. 1991) (''Federal courts construe 'control' very broadly under [Federal] Rule [of Civil Procedure] 34.''). Moreover, FINRA indicated that the proposed addition of ''possession, custody or control'' to Rule 8210(a)(2) would address questions that have arisen in litigation regarding the scope of the rule. *See, e.g., In re: Jay Alan Ochanpaugh,* Exchange Act Release No. 54363 (Aug. 25, 2006) (referred to hereafter as the ''*Jay Alan Ochanpaugh*'' decision or litigation).

[11] *See* Fed. R. Civ. P. 34.

[12] Members and registered persons have an affirmative duty to update CRD with their current address for at least two years after they have had their registration terminated. *See Notice to Members* 99–77 (noting that FINRA requests for information and disciplinary complaints issued during the period of FINRA's retained jurisdiction will be mailed to a person's last address in FINRA's records).

[13] In some limited instances, CRD may contain information concerning unregistered associated persons who were required to submit information, including fingerprint information, to CRD in connection with their employment.

[14] Persons associated with a member who are unregistered may include persons exempt from registration, *e.g.,* those whose functions are solely and exclusively clerical or ministerial; those whose functions are related solely and exclusively to the member's need for nominal corporate officers or for capital participation; and those whose functions are related solely and exclusively to transactions in municipal securities, transactions in commodities, or transactions in security futures (provided they are registered with a registered futures association). *See, e.g.,* NASD Rule 1060(a). For purposes of FINRA Rule 8210, unregistered persons associated with a member may also include direct owners and executive officers listed in Schedule A of Form BD of a member whose job functions do not otherwise require them to register with FINRA. *See* FINRA By-Laws, Article I(rr) (definition of ''person associated with a member'').

[15] FINRA Rule 9134(a)(1) provides as follows: ''Personal service may be accomplished by handing a copy of the papers to the person required to be served; leaving a copy at the person's office with an employee or other person in charge thereof; or leaving a copy at the person's dwelling or usual place of abode with a person of suitable age and discretion then residing therein[.]''

Notice to Members and Persons Represented By Counsel

The proposed rule change would amend FINRA Rule 8210(d) to explicitly address issues of service on members or persons that are known to be represented by counsel. Currently, the rule does not explicitly permit FINRA staff to serve notice on a member's or person's counsel in situations in which FINRA staff knows that the member or person is represented by counsel regarding the matter in question. The proposed rule change would allow FINRA staff to recognize that counsel can act as an authorized agent on behalf of a member or person. It would provide that, if FINRA staff knows that a member or person is represented by counsel regarding the matter in question, then notice shall be provided to counsel rather than to the member or person. The proposed rule change would harmonize FINRA's rule in this regard with Codes of Professional Conduct in many states regarding service on counsel.[16]

Effective Date

In its filing with the Commission, FINRA stated that it would announce the effective date of the proposed rule change in a *Regulatory Notice* to be published no later than 60 days following Commission approval. The effective date would be 30 days following publication of the *Regulatory Notice* announcing Commission approval.

III. Summary of Comments, FINRA's Response, and Amendment Nos. 1 and 2

As stated above, the Commission received seven comment letters in response to the proposed rule change.[17] Three commenters supported the amendments as proposed [18] and four commenters expressed various concerns with different aspects of the proposal.[19] On December 22, 2009, FINRA filed a letter with the Commission responding to these comments,[20] and on December 21, 2011, FINRA filed Amendment No. 1 with the Commission to further respond to the comments and to propose amendments in response thereto.[21] On December 5, 2012, FINRA filed Amendment No. 2 with the Commission to modify a phrase that was included in Amendment No. 1.[22]

A. Summary of, and FINRA's Responses to, Comment Letters

1. Information in a Member's or Person's Possession, Custody or Control

Four commenters addressed FINRA's proposal to amend FINRA Rule 8210(a)(2).[23] FINRA Rule 8210(a)(2) currently provides that FINRA staff shall have the right to inspect and copy the books, records and accounts of all applicable members and persons ''with respect to any matter involved in the investigation, complaint, examination or proceeding.'' The proposed rule change would clarify that the information subject to FINRA inspection and copying must be in the member's or person's ''possession, custody or control.''

Three commenters expressed concern that FINRA's intent to clarify the scope of its authority regarding requests pursuant to FINRA Rule 8210 represented an expansion of the current rule without a meaningful discussion or consideration of the possible legal and practical implications and consequences for member firms, associated persons, and persons over whom FINRA has jurisdiction.[24] These commenters were particularly concerned that FINRA would be able to compel its members and persons over whom it has jurisdiction to provide FINRA with information within the member's or person's ''control.'' In its filing of the proposed rule change, FINRA stated that it intended for the word ''control,'' in addition to possession and custody, to require members or persons covered by the rule to provide, for example, records that they have the legal right, authority, or ability to obtain upon demand.[25] In support of their comments, two commenters cited to the Commission's *Jay Alan Ochanpaugh* decision, in which the Commission considered the authority of the NASD (now FINRA) under Rule 8210 in a litigation context and stated that a ''fuller exploration'' of the scope of Rule 8210 would be required by the NASD to support its view in the case that the rule authorized it to obtain information within a member's or person's possession or control.[26]

In its Response to Comments, FINRA stated that commenters were incorrect in their analysis of the *Jay Alan Ochanpaugh* litigation.[27] FINRA noted that although the Commission's decision in that case addressed both the legal argument that Rule 8210 did not include the concept of ''possession and control'' and the factual argument that the NASD failed to prove that the applicant had possession and control of the documents, the Commission's decision to set aside FINRA's action in the case was based on factual grounds.[28] FINRA also noted that the Exchange Act, not the decision in *Jay Alan Ochanpaugh,* provides the standard the Commission uses when analyzing a self-regulatory organization's proposed rule change.[29] FINRA further argued that the purpose of proposed FINRA Rule 8210 is to facilitate investigations and that the consequences or burdens of any particular request are factually specific to that investigation.[30]

2. Issues Regarding Access to Third-Party Documents and Procedural Protections

Three commenters raised concerns that the proposed rule change could permit FINRA to compel members or associated persons to produce documents that belong to a third party.[31] For example, two commenters expressed concern that FINRA would not be required to maintain confidentiality of third party documents it receives pursuant to a Rule 8210 request, which could be made public when attached to pleadings in court filings, when sought by another party pursuant to a subpoena, and when disclosed pursuant to Freedom of Information Act requests.[32] One of these commenters expressed further concern that public disclosure of confidential or proprietary third party documents as a result of the proposed rule change may result in the owner of the documents suffering material harm, which, in turn, could prompt the owner of the records

[16] *See, e.g.,* American Bar Association model Rule of Professional Conduct 4.2 (''ABA Rule 4.2''). ABA Rule 4.2 provides as follows: ''In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.'' Many states have rules regarding communication with a person represented by counsel that are based on ABA Rule 4.2.

[17] *See supra* note 4.

[18] *See* FSI Letter; NPB Letter; and Woodforest Letter.

[19] *See* BTUD Letter; Schwab Letter; SIFMA Letter; and Wells Fargo Letter.

[20] *See* Response to Comments, *supra* note 5.

[21] *See* Amendment No. 1, *supra* note 6.

[22] *See* Amendment No. 2, *supra* note 7.

[23] *See* BTUD Letter; Schwab Letter; SIFMA Letter; and Wells Fargo Letter.

[24] *See* Schwab Letter; SIFMA Letter; and Wells Fargo Letter.

[25] *See* Notice, *supra* note 3.

[26] *See* Schwab Letter and SIFMA Letter.

[27] *See* Response to Comments, *supra* note 5.

[28] *Id.*

[29] *Id. See also* Section 19(b)(2)(C) of the Exchange Act, which states that the Commission shall approve a proposed rule change of a self-regulatory organization ''if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations issued under this title that are applicable to such organization.''

[30] *See* Response to Comments, *supra* note 5.

[31] *See* Schwab Letter; SIFMA Letter; and Wells Fargo Letter.

[32] *See* Schwab Letter and SIFMA Letter.

to seek damages or other recourse from FINRA and the member firm for publicly disclosing the information.[33]

To address these concerns, one commenter recommended that FINRA's right to demand possession, custody, or control of third party records should be limited to when an associated person is acting in its capacity as an associated person.[34] This commenter also stated that FINRA should access documents of third parties through subpoenas to provide third parties with a means of addressing their issues against the production of their documents and to help protect member firms against claims of improper disclosure.[35]

One commenter stated that FINRA's proposal does not address issues relating to the ownership of records where FINRA is seeking records of a third party not within FINRA's jurisdiction.[36] For example, according to this commenter, an unrelated third party may own and have absolute control over the material requested, while the person or entity over whom FINRA has jurisdiction may have limited access to the documents or only the right to request the documents from the third party for a specific purpose consistent with their role in the organization or relationship with the third party.[37] The commenter believes that this may result in the member firm breaching contractual obligations owed to the third party and potentially result in a violation of Rule 8210.[38] Another commenter expressed concern that under the proposed rule change, regulators could rely on the subject of an investigation to supply information related to third parties as opposed to independently obtaining those records from the third party.[39]

Two commenters expressed concern about the procedural protections of which FINRA members may avail themselves when in receipt of a Rule 8210 request for information.[40] These commenters stated that, although the rule seeks to adopt the same standard found in the Federal Rules of Civil Procedure, FINRA members may not receive the same procedural protections as those found in federal court, such as the right to object to the production of requested documents.[41] These commenters also stated that if a FINRA member cannot comply with a request under Rule 8210, and the firm is found to have violated the rule, the procedural process to appeal to the SEC and federal courts is long and arduous.[42]

FINRA believes that the concerns described above relating to issues regarding access to third party documents and procedural protections incorrectly assume that FINRA's investigations into the conduct of its members and associated persons are strictly limited in scope to the FINRA members and associated persons under investigation.[43] FINRA stated that although it has jurisdiction to file an action against its members and associated persons (and those otherwise subject to its jurisdiction), its investigations can involve non-FINRA members, including customers, issuers, or foreign businesses.[44] Consequently, FINRA contends that third party documents within the ''possession, custody or control'' of the FINRA member or associated person that relate to the investigation should be produced pursuant to proposed FINRA Rule 8210 and concerns solely based on their status as third party documents should not prevent the Commission from approving the proposed rule change.[45]

FINRA agrees in part that its authority to request documents is contractual. However, FINRA notes that its authority is also based on its rules applying to all members and their associated persons.[46] FINRA states that, in light of these relationships, its investigations are based on a model of implied cooperation as opposed to the adversarial system that is governed by the Federal Rules of Civil Procedure.[47] Specifically, FINRA's members and persons subject to its jurisdiction have already agreed, either explicitly or implicitly, to supply FINRA with information during its investigations.[48] FINRA notes that once an investigation has matured into the filing of a complaint, the FINRA Code of Procedure affords a respondent several procedural rights and that its investigatory process should not be fundamentally altered as a result of the proposed rule change.[49] FINRA also notes that the current rule provides FINRA staff with the right to inspect and copy books, records, and accounts of members, associated persons and others subject to FINRA's jurisdiction ''with respect to any matter involved in the investigation, complaint, examination or proceeding,'' and because the rule is purposefully designed to cover a broad range of activities, concerns about limiting the scope of the rule are misplaced.[50]

3. Participation in Charitable, Non-Profit, and Board Service

Three commenters indicated that FINRA Rule 8210(a)(2), as proposed to be amended, may inhibit or discourage individuals in the securities industry from participating in charitable, non-profit, and board service due to the potential for third party organizations to have to provide private or confidential documents owned by the organization to FINRA.[51] FINRA responded that it did not find merit in the suggestion by these commenters that adopting the ''possession, custody or control'' language in FINRA Rule 8210(a)(2) would chill the likelihood of associated persons participating in non-profit entities due to fear by those entities that their documents would be disclosed during FINRA investigations.[52] FINRA stated further that in as much as board members of non-profit organizations often are employed in a for-profit industry, FINRA found no greater likelihood that a non-profit corporation's confidential information would be disclosed because they have associated persons as board members than if their board members were not associated with the securities industry.[53]

4. Additional Analysis and Consideration of the Proposed Rule Change

Two commenters recommended that FINRA engage in additional analysis and consideration with respect to the proposed rule change and the process and protections afforded to members, associated persons, and others over whom FINRA has jurisdiction.[54] FINRA did not directly respond to these recommendations; however, FINRA's Response to Comments and its filing of Amendment Nos. 1 and 2, which, as discussed below, limit the scope of the proposed rule change, reflect FINRA's efforts to engage in such additional analysis and consideration of the proposed rule change.

[33] *See* Schwab Letter.
[34] *See* Wells Fargo Letter.
[35] *Id.*
[36] *See* Schwab Letter.
[37] *Id.*
[38] *Id.*
[39] *See* Wells Fargo Letter.
[40] *See* Schwab Letter and SIFMA Letter.
[41] *Id.*
[42] *Id.*
[43] *See* Response to Comments, *supra* note 5.
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See* Schwab Letter; SIFMA Letter; and Wells Fargo Letter.
[52] *See* Response to Comments, *supra* note 5.
[53] *Id.*
[54] *See* Schwab Letter and SIFMA Letter.

5. Notice to Unregistered Persons and Members and Persons Represented by Counsel

FINRA did not receive any specific comments on its proposals under Rule 8210(d) to specify the method of service for certain unregistered persons and to authorize service on members or persons that are known to be represented by counsel.

6. Comment Outside the Scope of the Proposed Rule Change

One commenter expressed concern regarding a witness's ability to access a written transcript of on-the-record testimony in a FINRA proceeding.[55] FINRA responded that this comment is outside the scope of the proposed rule change.[56]

B. Description of Amendment Nos. 1 and 2

After further consideration and analysis of the proposed rule change and the comments thereon, on December 21, 2011, FINRA filed Amendment No. 1, in which it proposed to add Supplementary Material limiting the scope of its proposal.[57] On December 5, 2012, FINRA filed Amendment No. 2 to modify a phrase in the proposed Supplementary Material.[58]

First, the proposed Supplementary Material would provide that books, records and accounts of a broker-dealer, associated person or person subject to FINRA's jurisdiction (as referenced in Rule 8210(a)), would include those books, records and accounts that the broker-dealer or its associated persons would make or keep relating to its operation as a broker-dealer or relating to the person's association with the member.[59] This would include, but not be limited to, investigations of outside business activities, private securities transactions, or possible violations of just and equitable principles of trade, as well as other FINRA rules, MSRB rules, and the federal securities laws.[60]

The proposed Supplementary Material also would clarify that books, records and accounts of a broker-dealer, associated person or person subject to FINRA's jurisdiction would not ordinarily include books and records that are in the possession, custody or control of a member or associated person, but whose bona fide ownership is held by an independent third party and the records are unrelated to the business of the member.[61]

Finally, the proposed Supplementary Material would provide that a FINRA member, associated person, or person subject to FINRA's jurisdiction must make available its books, records or accounts when these books, records or accounts are in the possession of another person or entity, such as an attorney, accountant, or other professional service provider, but the FINRA member, associated person, or person subject to FINRA's jurisdiction controls or has a right to demand them.[62]

IV. Discussion and Commission Findings

The Commission has carefully considered the proposed rule change, as modified by Amendment Nos. 1 and 2, the comment letters received, and FINRA's response and finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with the requirements of the Exchange Act and the rules and regulations thereunder that are applicable to a national securities association.[63] In particular, the Commission finds that the proposed rule change, as modified by Amendment Nos. 1 and 2, is consistent with Section 15A(b)(6) of the Exchange Act, which requires, among other things, that the rules of a national securities association be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, protect investors and the public interest.[64] The Commission believes that FINRA, in its Response to Comments and Amendment Nos. 1 and 2, adequately addressed the comments raised in response to the Notice.

Current FINRA Rule 8210 confers on FINRA staff authority to compel a member, person associated with a member, or other person subject to FINRA's jurisdiction, to produce documents, provide testimony, or supply written responses or electronic data in connection with an investigation, complaint, examination or adjudicatory proceeding. Additionally, the current rule provides FINRA with the authority to inspect and copy the books, records, and accounts of all applicable members and persons with respect to any matter involved in the investigation, complaint, examination, or proceeding. FINRA's proposed rule, as modified by Amendment Nos. 1 and 2, clarifies that information subject to a FINRA Rule 8210 request must be in the member's or person's ''possession, custody or control'' and explicitly provides the methods by which certain types of notice must be made. These changes will help eliminate existing confusion with respect to the scope of FINRA Rule 8210. The proposed rule change, as modified by Amendment Nos. 1 and 2, also will further the purposes of the Exchange Act by, among other things, clarifying and streamlining the requirements surrounding providing information and testimony and inspecting and copying books and records. The clarifying nature of the proposed rule, as modified by Amendment Nos. 1 and 2, will be helpful to FINRA members in understanding the scope of, and notice requirements under, Rule 8210, and will assist FINRA in facilitating investigations and fulfilling its responsibilities as a self-regulatory organization under the Exchange Act.

V. Accelerated Approval

The Commission finds goods cause, pursuant to Section 19(b)(2) of the Act,[65] for approving the proposed rule change, as modified by Amendment Nos. 1 and 2, prior to the 30th day after publication of Amendment Nos. 1 and 2 in the **Federal Register**. The changes proposed in Amendment Nos. 1 and 2 respond to specific concerns raised by commenters and do not raise novel regulatory concerns. In particular, Amendment Nos. 1 and 2 clarify the scope of FINRA Rule 8210 and FINRA's authority to inspect and copy the books, records and accounts of members and persons with respect to any matter involved in an investigation, complaint, examination, or proceeding. The proposed rule, as modified by Amendment Nos. 1 and 2, also furthers FINRA's investor protection mandate.

Accordingly, the Commission finds that good cause exists to approve the

[55] *See* BTUD Letter.

[56] *See* Response to Comments, *supra* note 5.

[57] *See* Amendment No. 1, *supra* note 6.

[58] *See* Amendment No. 2, *supra* note 7.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.* Amendment No. 1 also makes a technical change to the text of Rule 8210 to reflect the addition of paragraph (g) to the Rule, which was added through a separate and unrelated intervening proposed rule change that was submitted and became effective subsequent to the filing of this proposal. *See* Exchange Act Release No. 63016 (Sep. 29, 2010), 75 FR 61793 (Oct. 6, 2010) (Order Approving Proposed Rule Change; File No. SR–FINRA–2010–021). This change has no effect on the text of Rule 8210(g), which requires the encryption of certain information provided via portable media device. *Id.*

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

[64] 15 U.S.C. 78*o*–3(b)(6).

[65] 15 U.S.C. 78s(b)(2).

proposal, as modified by Amendment Nos. 1 and 2, on an accelerated basis.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether Amendment Nos. 1 and 2 to the proposed rule change are consistent with the Exchange 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 email to *rule-comments@sec.gov*. Please include File Number SR–FINRA–2009–060 on the subject line.

Paper Comments

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

All submissions should refer to File Number SR–FINRA–2009–060. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (*http://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR–FINRA–2009–060 and should be submitted on or before January 3, 2013.

VII. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[66] that the proposed rule change (SR–FINRA–2009–060), as modified by Amendment Nos. 1 and 2, be, and hereby is, approved on an accelerated basis.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[67]

Kevin M. O'Neill,

Deputy Secretary.

[FR Doc. 2012–30049 Filed 12–12–12; 8:45 am]

BILLING CODE 8011–01–P

[66] 15 U.S.C. 78(b)(2).

[67] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–68383; File No. SR–NYSEMKT–2012–72]

Self-Regulatory Organizations; NYSE MKT LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Amending Exchange Rule 952NY With Respect to Opening Trading in an Options Series

December 7, 2012.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that, on November 26, 2012, NYSE MKT LLC (the ''Exchange'' or ''NYSE MKT'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the self-regulatory organization. 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

The Exchange proposes to amend Exchange Rule 952NY (Trading Auctions) with respect to opening trading in an options series. The text of the proposed rule change is available on the Exchange's Web site at *www.nyse.com,* at the principal office of the Exchange, 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 Exchange proposes to amend Rule 952NY to provide for how the System[3] may open an options series for trading when there are no executable orders and/or quotes and the bid-ask differential of the NBBO disseminated by Options Price Reporting Authority (''OPRA'') or a Market Maker quote does not exceed the bid-ask differential specified under Rule 925NY(b)(4). The Exchange's Rules are currently silent on how the System opens an options series when it does not conduct an auction. Specifically, the proposed rule change (i) will codify that the Exchange opens an option series when there are no executable orders and/or quotes to match up in the System (''open a series on a quote''), which is currently based on the bid-ask differentials that are within the acceptable range defined in Rule 925NY(b)(4); and (ii) will also amend the current process to provide that the bid-ask differential to allow for the System to open a series on a quote would be based on the bid-ask differentials specified in Rule 925NY(b)(5), which are wider than the bid-ask differential that allows for the System to open via an auction during the Auction Process.

Current Opening Process

Currently, Rule 952NY describes the process pursuant to which the System opens an option series. Pursuant to the procedures described in Rule 952NY(b) and (c), after the primary market for the underlying security disseminates the opening trade or opening quote, the System conducts an ''Auction Process'' to open a series whereby the System determines a single price at which a series may be opened by looking either to: (i) the midpoint of the initial uncrossed NBBO disseminated by the Options Price Reporting Authority

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

[2] 17 CFR 240.19b–4.

[3] The term ''System'' refers to the Exchange's electronic order delivery, execution and reporting system through which orders and quotes for listed options are consolidated for execution and/or display.