

The proposed rule change also would make certain technical amendments to the rule text, namely to correct punctuation in FINRA Rule 9556 and update FINRA Rule 9810 to reflect a change in FINRA style convention when referencing the federal securities laws.

FINRA has filed the proposed rule change to extend FINRA's authority under its cease and desist pilot program for immediate effectiveness. The implementation date will be June 23, 2009. The pilot program will remain in effect until the SEC approves FINRA's proposed rule change to make the pilot permanent¹⁰ and such rule change becomes effective or the SEC disapproves such proposed rule change.

2. Statutory Basis

The proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,¹¹ which requires, among other things, that FINRA's 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. The proposed rule change also is consistent with the provisions of Section 15A(b)(7) of the Act,¹² which provides that FINRA members, or persons associated with its members, must be appropriately disciplined for violations of any provisions of the Act or FINRA's rules. Extending the pilot program is consistent with FINRA's obligations under the Act because cease and desist orders are designed to stop violative conduct that is likely to cause dissipation or conversion of assets or other significant harm to investors.

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

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

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

Written comments were neither solicited nor received.

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

Because the foregoing proposed rule change does not: (i) significantly affect

the protection of investors or the public interest; (ii) impose any significant burden on competition; and (iii) become operative for 30 days from the date on which it was filed, or such shorter time as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act¹³ and Rule 19b-4(f)(6) thereunder.¹⁴

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. Please include File Number SR-FINRA-2009-034 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-2009-034. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying 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-2009-034 and should be submitted on or before June 30, 2009.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹⁵

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60022; File No. SR-FINRA-2009-031]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change Relating to the Reporting of Over-the-Counter Transactions in Equity Securities Executed Outside Normal Market Hours

June 1, 2009.

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 May 8, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by FINRA. On May 29, 2009, FINRA filed Amendment No. 1 to the proposed rule change. 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 amend FINRA trade reporting rules relating to over-the-counter transactions in equity securities executed outside normal market hours to (1) require that any

¹⁰ See *supra*, note 8.

¹¹ 15 U.S.C. 78o-3(b)(6).

¹² 15 U.S.C. 78o-3(b)(7).

¹³ 15 U.S.C. 78s(b)(3)(A).

¹⁴ 17 CFR 240.19b-4(f)(6).

¹⁵ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

trades executed during the hours that a FINRA Facility (the Alternative Display Facility ("ADF"), a Trade Reporting Facility ("TRF") or the OTC Reporting Facility ("ORF")) is closed be reported within 15 minutes of the opening of the Facility, *i.e.*, 8:15 a.m. Eastern Time; and (2) conform the trade reporting requirements applicable to "outside normal market hours" transactions across FINRA Facilities.

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

FINRA rules prescribe special requirements applicable to the reporting of trades executed outside normal market hours (*i.e.*, trades executed outside the hours of 9:30 a.m. to 4 p.m. Eastern Time), and the rules distinguish between such trades that are executed during the hours a FINRA Facility is open and trades that are executed during the hours the facility is closed.³ Specifically, trades that are executed outside normal market hours and during the hours that the FINRA Facility to which the member is reporting is open must be reported within 90 seconds of execution.⁴ Thus, for example, a trade executed at 9 a.m. or a trade executed at 5 p.m. must be reported within 90 seconds. Trades that are executed outside normal market hours and during the hours that the FINRA Facility is closed are not subject to 90-second reporting, since the facility is not open to facilitate the reporting of the trade. Rather, such trades are reported as

follows: (1) trades executed between midnight and 8 a.m. must be reported on trade date; and (2) trades executed between the close of the facility (*i.e.*, either 6:30 p.m. or 8 p.m.) and midnight must be reported on an "as/of" basis the following business day.⁵ "Outside normal market hours" trades are designated with a unique trade report modifier, as specified by FINRA.

Proposed Amendments To Require Reporting Within 15 Minutes of Opening of Facility

FINRA is proposing to amend the trade reporting rules⁶ to require that trades executed during the hours that the FINRA Facility is closed be reported within 15 minutes of the opening of the facility (*i.e.*, 8:15 a.m. Eastern Time for all FINRA Facilities). Specifically, members would be required to report as follows: (1) trades executed between midnight and 8 a.m. must be reported by 8:15 a.m. on trade date, and (2) trades executed between the close of the FINRA Facility (*i.e.*, either 6:30 p.m. or 8 p.m.) and midnight must be reported on an "as/of" basis the following business day by 8:15 a.m. These trades would be designated with the unique trade report modifier to denote their execution outside normal market hours. Any such trades not reported by 8:15 a.m. would be marked with the "outside normal market hours trade reported late" modifier.

FINRA believes that the proposed rule change will enhance market transparency by ensuring that these "outside normal market hours" trades are reported and disseminated closer to the actual execution time rather than reported at some later time during the trading day. As a result, market participants will have better information about the time of execution for such trades. For example, under current rules, a trade with the "outside normal market hours" modifier that is reported and disseminated at 9:20 a.m. could have been executed and reported real-time at 9:20 a.m., or it could have been executed at some point between midnight and the opening of the FINRA Facility at 8 a.m. There is currently nothing to distinguish a trade executed and reported at 9:20 a.m. from a trade executed between midnight and 8 a.m. and reported at 9:20 a.m. Under the proposed rule change, a trade executed between midnight and 8 a.m. that is reported at 9:20 a.m. would be marked late, thus distinguishing it from a trade

executed and reported real-time at 9:20 a.m.

Proposed Conforming Amendments

FINRA also is proposing certain amendments to conform the requirements for reporting "outside normal market hours" trades across FINRA Facilities. First, under current rules and system functionality, members are not permitted to submit to the FINRA/Nasdaq TRF and ORF a trade report with the "outside normal market hours" modifier during normal market hours. For example, if a member executes a trade at 9:29:00 a.m. and reports the trade at 9:30:15 a.m. (in compliance with the 90-second reporting requirement under FINRA rules), the FINRA/Nasdaq TRF and ORF will reject the trade report; the trade cannot be reported, and will not be disseminated, until after 4 p.m. By contrast, the ADF and FINRA/NYSE TRF permit the submission of trade reports with the "outside normal market hours" modifier throughout the day. Thus, the trade described in the example above can be reported to the ADF or FINRA/NYSE TRF and disseminated at 9:30:15 a.m.

Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(A) and (a)(2)(C) relating to the FINRA/Nasdaq TRF and Rules 6622(a)(3)(A) and (a)(3)(C)(i) relating to the ORF to delete the requirement that "outside normal market hours" transactions that are not reported by 9:30 a.m. be reported after 4 p.m. This will enhance market transparency by eliminating systematically imposed delays in the reporting of "outside normal market hours" trades to the FINRA/Nasdaq TRF and ORF. The proposed amendments are identical to the text of current Rules 6282(a)(2)(A) and (a)(2)(B)(i) relating to the ADF.

Additionally, FINRA is proposing conforming changes to Rules 6380B(a)(2)(A) and (C) relating to the FINRA/NYSE TRF. Today, members submit trade reports with the "outside normal market hours" modifier to the FINRA/NYSE TRF throughout the day. However, when the rules for this TRF were originally adopted, these provisions inadvertently were based on the rules relating to the FINRA/Nasdaq TRF, rather than the ADF. Thus, the proposed amendments for the FINRA/NYSE TRF do not represent a departure from current member reporting practices and systems functionality.

In this regard, FINRA also is proposing to amend Rules 6380A(a)(2)(D), 6380B(a)(2)(D) and 6622(a)(3)(C)(ii) to require expressly that "as/of" reports submitted pursuant to

³ The TRFs and ORF are open between 8 a.m. and 8 p.m. Eastern Time and the ADF is open between 8 a.m. and 6:30 p.m. Eastern Time.

⁴ See Rules 6282(a)(2)(A); 6380A(a)(2)(A) and (B); 6380B(a)(2)(A) and (B); and 6622(a)(3)(A) and (B).

⁵ See Rules 6282(a)(2)(B); 6380A(a)(2)(C) and (D); 6380B(a)(2)(C) and (D); and 6622(a)(3)(C).

⁶ See Rules 6282(a)(2)(B); 6380A(a)(2)(C) and (D); 6380B(a)(2)(C) and (D); and 6622(a)(3)(C).

these provisions include the unique trade report modifier, as specified by FINRA, to denote their execution outside normal market hours. The proposed amendments conform to the text of current Rule 6282(a)(2)(C)(ii).

Second, FINRA is proposing to amend Rules 6282(a), 6380A(a), 6380B(a) and 6622(a) to consolidate the provisions relating to late trade reporting and make clear the requirement that trades that are required to be reported on trade date, but are not reported on trade date, must be reported on an "as/of" basis on a subsequent date (T+N) and shall be designated as late. This requirement applies to trades executed during normal market hours, as well as those "outside normal market hours" trades that are required by rule to be reported on trade date (*i.e.*, trades executed between midnight and 9:30 a.m. and between 4 p.m. and the close of the Facility at either 6:30 or 8 p.m.). The proposed amendments also would make clear the requirement that "outside normal market hours" trades that are required to be reported on an "as/of" basis the following business day (T+1), but are not reported T+1, must be reported on a subsequent date (T+N) and shall be designated as late.⁷ Accordingly, FINRA is proposing to amend Rules 6380A(a)(2)(B), 6380B(a)(2)(B) and 6622(a)(3)(B) to delete the duplicative requirement that transactions not reported by 8:00 p.m. on trade date must be reported on an "as/of" basis the following business day (T+1).

Third, FINRA is proposing certain technical, non-material changes to conform the text of the rules relating to the reporting of trades executed outside normal market hours across FINRA Facilities. For example, FINRA is proposing to amend Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to delete the specific references to the ".T" trade report modifier. This conforms to the trade reporting rules relating to the TRFs, as well as the other provisions of the ADF trade reporting rules, which do not refer to specific trade report modifier labels.⁸ Additionally, FINRA is proposing to renumber the subparagraphs in Rule 6282(a)(2) relating to the ADF and Rule 6622(a)(3) relating to the ORF to conform to the numbering of the subparagraphs in Rules 6380A(a)(2) and 6380B(a)(2) relating to the TRFs.

FINRA believes that by conforming the reporting requirements and systems functionality with respect to "outside normal market hours" trades across FINRA Facilities, the proposed rule change will promote more consistent trade reporting by members and a more complete and accurate audit trail.⁹

FINRA will announce the effective date of the proposed rule change in a *Regulatory Notice*. The effective date will be no earlier than 120 days and no later than 180 days from the date of 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,¹⁰ 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 enhance market transparency and promote more consistent trade reporting by members and a more complete and accurate audit trail.

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.

⁹ The Commission notes that in connection with these changes to the trade reporting rules FINRA is also moving language from Rule 6282(a)(1) to Rule 6282(a)(6) concerning patterns or practices of late trade reporting. Rule 6282(a)(1) currently states that "[a] pattern or practice of late trade reporting without exceptional circumstances shall be considered conduct inconsistent with high standards of commercial honor and just equitable principles of trade violation of Rule 2010." The change FINRA is proposing would replace the word "shall" with "may," and applies the lower standard not only to a pattern or practice of late trade reporting outside of normal market hours, but to a pattern or practice of late trade reporting during normal market hours. Rule 6282 concerns transactions reported only to TRACS, and FINRA has told Commission staff that the change is to make the rule consistent with the FINRA/NASDAQ, FINRA/NYSE, and OTC Trade Reporting Facilities, all of which currently have the identical language to proposed Rule 6282(a)(6). See telephone call between Stephanie Dumont, Senior Vice President and Director of Capital Markets Policy, FINRA, and Kathy England, Assistant Director, Commission, May 29, 2009. The Commission notes that it has routinely upheld appeals from FINRA disciplinary actions when FINRA has charged respondents with violations of Rule 2010 (Standards of Commercial Honor and Principles of Trade) based solely on an underlying violation of another SRO rule. See *e.g.*, Stephen J. Gluckman, 54 S.E.C. 175, 185 (1999), Exchange Act Release No. 41628 (July 20, 1999).

¹⁰ 15 U.S.C. 78o-3(b)(6).

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

Written comments were neither solicited nor received.

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

Within 35 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 organization consents, the Commission will:

(A) By order approve 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, as amended, 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-2009-031 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-2009-031. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than

⁷ FINRA is proposing to amend paragraph (a)(1) and adopt new paragraph (a)(6) of Rule 6282 to conform to Rules 6380A(a)(4), 6380B(a)(4) and 6622(a)(5).

⁸ See, *e.g.*, Rules 6282(a)(4), 6380A(a)(2) and (5) and 6380B(a)(2) and (5).

those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying 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-2009-031 and should be submitted on or before June 30, 2009.

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

Florence E. Harmon,

Deputy Secretary.

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-60028; File No. SR-FINRA-2009-035]

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of Proposed Rule Change To Adopt a Temporary and Permanent Cease and Desist Authority Pilot Program on a Permanent Basis

June 2, 2009.

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 May 18, 2009, Financial Industry Regulatory Authority, Inc. ("FINRA") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by FINRA. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

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

FINRA is proposing to adopt the temporary and permanent cease and desist authority pilot program on a

permanent basis without any substantive changes to the terms of the existing program.

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

In May 2003, the Commission approved, on a two-year pilot basis, a rule change that gave FINRA authority to issue temporary cease and desist orders ("TCDOs")³ and made explicit FINRA's ability to impose permanent cease and desist orders as a remedy in disciplinary cases.⁴ The pilot program also gave FINRA authority to enforce cease and desist orders. In June 2005 and June 2007, the SEC approved [sic] two-year extensions of the pilot program.⁵ The current two-year pilot expires on June 23, 2009.⁶

FINRA is proposing to make the pilot program permanent without any substantive changes to the terms of the existing program.⁷ The proposed action

³ A TCDO is a preliminary order issued in connection with an underlying disciplinary proceeding that has been initiated or will be initiated immediately.

⁴ See Securities Exchange Act Release No. 47925 (May 23, 2003), 68 FR 33548 (June 4, 2003) (Order Approving File No. SR-NASD-98-80).

⁵ See Securities Exchange Act Release No. 51860 (June 16, 2005), 70 FR 36427 (June 23, 2005) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2005-061); Securities Exchange Act Release No. 55819 (May 25, 2007), 72 FR 30895 (June 4, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-033). The Commission notes that it did not approve these filings.

⁶ See Securities Exchange Act Release No. 55819 (May 25, 2007), 72 FR 30895 (June 4, 2007) (Notice of Filing and Immediate Effectiveness of File No. SR-NASD-2007-033).

⁷ In a companion rule filing filed with the SEC today, FINRA seeks to extend the pilot until the SEC approves or disapproves the proposal to make

would enable FINRA to continue to issue TCDOs and impose permanent cease and desist orders as a remedy in disciplinary cases. The proposed action also would give FINRA authority to continue to initiate expedited proceedings when respondents violate temporary or permanent cease and desist orders.

When it first sought cease and desist authority, FINRA stated that it would use the authority sparingly. That has been the case. Since the pilot program was first approved in 2003, FINRA has issued only one TCDO and one permanent cease and desist order (both in the same case, which is described below). If adopted on a permanent basis, the cease and desist rules would continue to be used judiciously. There are times, however, when their use is crucial.

In the one case initiated under the pilot program, FINRA's Department of Enforcement ("Enforcement") alleged that the member in question was engaged in widespread fraud that included, among other things, making material misrepresentations and omissions in connection with the private offering of its own stock, effecting unauthorized transactions and using customer funds improperly.⁸ Enforcement showed that not only was the member attempting to continue the fraudulent offering, it also was funneling money and assets to a non-member affiliate. Enforcement alleged, and a hearing panel found, that a TCDO was necessary because the member's continuation of the misconduct was likely to result in further dissipation or conversion of assets and other significant harm to investors before the completion of the underlying disciplinary proceeding. After the hearing panel issued a permanent cease and desist order following a full disciplinary hearing, the parties settled the case, resulting in the expulsion of the member, the bar of its owner and the imposition of almost \$12 million in fines and restitution.

The proposed permanent adoption of the pilot program will provide FINRA with a mechanism to continue to take appropriate remedial action against a

the pilot permanent so that the cease and desist authority does not lapse while the proposal is pending at the SEC. See SR-FINRA-2009-034. The companion rule filing proposed certain technical amendments to the rule text, namely to correct punctuation in FINRA Rule 9556 and update FINRA Rule 9810 to reflect a change in FINRA style convention when referencing the federal securities laws. The companion rule filing does not proposal [sic] any substantive changes to the existing pilot.

⁸ See *L.H. Ross & Company*, Securities Exchange Act Release No. 51270, 2005 SEC LEXIS 452 (February 28, 2005).

¹¹ 17 CFR 200.30-3(a)(12).

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.