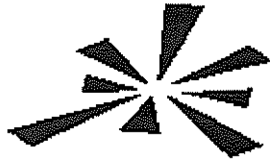

Office of the Corporate Secretary-Admin.

FEB 2 0 2009

FINRA
Notice to Members

VIA FEDERAL EXPRESS

Marcia E. Asquith
Office of the Corporate Secretary
FINRA
1735 K Street, NW
Washington, DC 20006-1506

Re: Regulatory Notice 09-06 (Retail Forex)

Dear Ms. Asquith:

thinkorswim, Inc. (the "thinkorswim" or the "Firm"), a registered broker-dealer based in Chicago, Illinois that conducts an online brokerage operation, including securities, futures and forex, is pleased to provide the following comments on proposed FINRA Rule 2380 (the "Rule"), which establishes limits on the leverage permitted for retail forex transactions. As described in Regulatory Notice 09-06 (the "Notice"), the Rule prohibits a FINRA member from permitting a retail customer: (i) to initiate any forex position with a leverage ratio greater than of 1.5 to 1; or (ii) to withdraw money from an open forex position that would cause the leverage ratio for such position to be greater than 1.5 to 1. thinkorswim strongly opposes adoption of the Rule as proposed.

The effect of the proposed Rule will be to prevent a FINRA member firm from conducting retail forex business. The Rule imposes a leverage limit that is arbitrary and far more restrictive than the leverage permitted for (i) forex trading offered through futures commission merchants ("FCMs") registered with the Commodity Futures Trading Commission ("CFTC") and through members of the National Futures Association ("NFA") and (ii) the trading of alternative products available in the marketplace, thereby providing a strong economic disincentive for customers to trade this product through a broker-dealer. As a result customers will likely migrate to CFTC/NFA regulated firms. Firms that offer retail forex through broker-dealers, which includes those that are dually registered as broker-dealers and FCMs, are disadvantaged relative to firms that offer forex through entities that are not broker-dealers. . The firm believes that FINRA has adopted a regulatory scheme with sufficient investor protection, which is set forth in Regulatory Notice 08-66. Finally, as explained in more detail below, the proposed Rule fails to provide added customer protection.

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I. The Rule does not improve investor protection. Instead, it inconveniences customers.

The Rule will substantially increase the capital commitment required to trade retail forex through broker-dealers. The customer's cost of trading retail forex at a broker-dealer will be much higher than the cost of trading retail forex at a FCM or an entity that is a materially associated person of a broker-dealer ("MAP"). Customers will naturally move their accounts to those firms that are not FINRA broker-dealers. However, the broker-dealers currently offering retail forex will not be willing to give up the business of retail forex trading. They will reorganize themselves to be able to continue to offer forex trading on a cost effective basis for their customers. Firms that are currently acting as counterparties to forex transactions will move their forex business FCMs or MAPs or reorganize as FCMs or MAPs. Firms that refer or introduce forex transactions to counterparties will either move their forex business to an FCM, an introducing broker ("IB") or an unregulated entity. Although firms that refer or introduce forex transactions are not required to be registered in any capacity under current NFA rules, a referring or introducing firm that is a registered broker-dealer is far more likely to have in place compliance policies and procedures designed to protect customers than one that is unregulated. This potential increase in unregulated entities offering retail forex will not increase investor protection.

FINRA's Regulatory Notice 08-66 expressed concern about counterparty risk in the forex marketplace. This risk will increase as a result of this Rule because more entities that are neither FCMs nor broker-dealers will offer forex. Unlike unregulated entities, both FCMs and broker-dealers have capital requirements to support their businesses.

The Rule also inconveniences customers. Instead of the convenience of having securities brokerage and forex trading accounts at one firm, customers will have to have accounts at multiple firms. This will make it more difficult and costly for customers to move money from securities to forex accounts and vice versa. Because forex is commonly used as a hedge for international securities positions, a Rule forcing customers to split their securities positions from their forex hedge into different firms will negatively impact customers.

Some customers may be forced out of the forex market altogether. If for some reason a customer cannot open a futures account and does not want to open an account at an unregistered introducing firm, and there are no broker-dealers offering retail forex, a customer that has real currency risks to hedge may be unable to engage in forex transactions.

II. The Rule treats FINRA member firms offering retail forex disparately depending upon their corporate structure and, in this respect, is anti-competitive.

The imposition of a leverage ratio limitation of 1.5 to 1 makes retail forex offered through broker-dealers uncompetitive. FCMs will continue to be able to offer forex traders leverage of 100 to 1 or more. The margin requirements for alternative products, such as currency futures contracts are approximately 4%. As indicated above, customers will move their forex business to FCMs or unregulated entities to take advantage of this increased leverage.

Today, firms that are registered as broker-dealers and firms that are registered as FCMs offer forex trading with similar leverage. However, firms that are broker-dealers without an affiliated FCM or that are structured as one firm that is registered as both a broker-dealer and a FCM ("Integrated Firms") will be disadvantaged by the Rule. Integrated Firms will be subject to the Rule even though they will also continue to be subject to regulation as FCMs. In order to continue offering retail forex, counterparties that are currently Integrated Firms will either have to separate their broker-dealer and FCM businesses or establish a MAP, which is not subject to regulation by FINRA or the NFA to conduct retail forex trading activities. Firms without affiliated FCMs will need to form FCMs or MAPs. Firms that introduce or refer forex transactions will form unregulated affiliates to offer retail forex. Firms that have separate affiliated broker-dealers and FCMs will continue to be able to act as counterparties for retail forex transactions through their FCMs without restructuring. Those firms will be able to offer the same leverage to forex customers they are offering today. The Rule gives these firms a clear advantage over the Integrated Firms for no legitimate reason.

III. The leverage restriction of 1.5 to 1 for initiating a forex transaction is arbitrary.

The Notice states that the currency markets are extremely volatile. It is widely known that currencies are generally less volatile than equities. However, the initial margin requirement for equity positions is 50% and maintenance margin is 30%. Further, pattern day traders can trade securities with 4 to 1 leverage. The marketplace seems to increasingly be moving towards a margining system that does not impose bright line restrictions. For example, portfolio margining recognizes that margin should be based on the actual risk of the positions and therefore permits much greater leverage than conventional margining. Portfolio margining is based upon margining concepts that have existed in the futures industry for years. Futures margin ranges from 2% to 15% for initial margin, and there are generally lower requirements for maintenance margin.

The leverage restriction the Rule imposes on retail forex transactions is materially stricter than for any other financial instrument. Furthermore, the Rule does not even address maintenance margin which is an apparent oversight. If the value of a particular currency does fluctuate wildly, the Rule does nothing to protect the position by imposing a maintenance margin requirement.

IV. The Rule does not take into account real time risk management systems.

The Background and Discussion section of the Proposal states that retail forex activities have historically been concentrated in the FCM world and that leverage ratios for retail forex by futures intermediaries were set to be comparable to the leverage ratios for currency futures trading on futures exchanges. As a result, retail forex contracts in the FCM arena commonly have leverage ratios of 100 to 1. The Notice also states that, in the retail forex market, there is no margin call mechanism or any way to give notice to an investor to deposit additional funds to maintain his or her position. As a result, even small intra-day swings in currency rates have the potential to close out investors on either side of the market. The Notice asserts that retail forex activity is speculative and volatile. By restricting the leverage ratio to 1.5 to 1, FINRA believes that it will reduce the risks of excessive speculation and will substantially reduce the likelihood that any small adverse percentage change in the exchange rate of a foreign currency will cause an investor's funds to be wiped out.

The Rule does not seem to recognize the reality that broker-dealers conduct risk management in real time. Not only do broker-dealers have real time risk management systems, broker-dealers commonly reserve the right to change margin requirements and liquidate margined securities without prior notice. The broker-dealer's rights in the event of a margin deficiency are the same for a securities account as for a forex account. Moreover, in the Firm's experience, self-directed retail forex customers are likely to be traders that keep apprised of their positions on an ongoing basis.

Additionally, as FINRA noted, forex is generally traded through electronic systems. In this regard, the NFA has indicated in its publication "Forex Transactions, A Regulatory Guide," dated October 2008, that:

> "[a]n electronic trading system should be designed to allow the Member to set limits for each customer based on the amount of equity in the account or the currency, quantity, and type of order, and the Member should utilize these controls.....If the trading platform automatically liquidates positions, the forex dealer member should set the liquidation levels high enough so that the positions will be closed out at prices that will prevent the account from going into a deficit position under all but the most extraordinary market conditions.....An electronic trading platform that does not

automatically liquidate positions should generate an immediate alert when an account is in danger of going into a deficit position."

FINRA should consider mandating risk management guidelines that, in combination with a more lenient leverage ratio, would result in a better balance between its legitimate interest in limiting excessive speculation and frequent customer liquidations and its obligation to maintain a competitive marketplace. If a consequence of the Rule is that forex trading will simply migrate to different firms where customers have more competitive leveraging abilities, FINRA will have failed in accomplishing its goals of reducing speculation and liquidations or increasing customer protection.

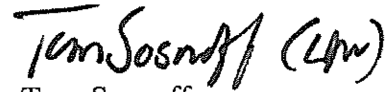
V. FINRA should consider alternatives to its current proposal.

There are a number of less draconian measures FINRA could take that would increase customer protection, while permitting broker-dealers to continue offering forex trading to retail customers. FINRA could impose special capital requirements for broker-dealers that offer retail forex. Those capital requirements could mirror those imposed by the CFTC/NFA on FCMs that are forex counterparties. FINRA could adopt policies regarding risk management similar to those of the NFA and permit customers to be given margin calls electronically. FINRA also could adopt leverage restrictions, but such restrictions should be competitive with forex trading offered by FCMs and the alternative products offered in the marketplace.

Finally, FINRA's Regulatory Notice 08-66 outlines the customer protection rules applicable to remember firms that offer retail forex. Those rules include the requirement to comply with high standards of commercial honor and just and equitable principles of trade, regulation over communications with the public and treat forex accounts the same as commodity accounts with respect to the applicability of the customer reserve formula. Regulatory Notice 08-66 demonstrates that FINRA's existing regulatory regime provides forex traders with adequate protections and limits the need to resort to the unnecessary and anti-competitive measures contemplated by the Rule, which fail to take into account the sophisticated real time risk management systems that most firms in this area of trading have operated for some time.

If the Staff has questions regarding these comments, please contact the undersigned at (773) 435-3274 or Peter Santori, general counsel, at (773) 244-6841.

Very truly yours,



Tom Sosnoff
President
thinkorswim, Inc.