

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56279; File No. SR-NASD-2007-047]

### Self-Regulatory Organizations: National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Amendments to Certain Rules in Light of Amendments to SEC Rule 10a-1 and Regulation SHO

August 17, 2007.

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> notice is hereby given that on July 5, 2007, the National Association of Securities Dealers, Inc. (n/k/a 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 and II below, which Items have been substantially prepared by FINRA. FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>3</sup> which renders the proposal effective upon receipt of this filing by the Commission. 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 amend certain rules and repeal Rule 5100 and IM-5100 in light of the elimination of SEC Rule 10a-1 of the Act and the amendments to Regulation SHO under the Act.

The text of the proposed rule change is available at FINRA, the Commission's Public Reference Room, and <http://www.finra.org>.

#### 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

##### Background and Discussion

On June 13, 2007, the Commission voted to adopt certain amendments to SEC Rule 10a-1 and Regulation SHO under the Act. The amendments, among other things: (1) Eliminate the short sale price test contained in SEC Rule 10a-1; (2) add Rule 201(a) of Regulation SHO to provide that no price test, including any price test of any self-regulatory organization ("SRO"), shall apply to short sales in any security; (3) add Rule 201(b) of Regulation SHO to prohibit any SRO from having a price test; and (4) amend Rule 200(g) of Regulation SHO to remove the requirement that a broker-dealer mark a sell order of an equity security as "short exempt" if the seller is relying on an exception from the price test of Rule 10a-1, or any price test of any exchange or national securities association. The amendments to SEC Rule 10a-1 and Regulation SHO became effective on July 3, 2007.<sup>4</sup> However, the compliance date of the amendments was July 6, 2007.

The purpose of this proposed rule change is to make conforming changes to FINRA rules to reflect the elimination of SEC Rule 10a-1 and other amendments to Regulation SHO by: (1) Eliminating references to SEC Rule 10a-1 in FINRA rules; (2) repealing FINRA's short sale rule contained in Rule 5100 and IM-5100, as well as amending FINRA rules that reference Rule 5100 or IM-5100; and (3) removing any "short exempt" marking requirements in FINRA rules.

##### Elimination of References to SEC Rule 10a-1 in FINRA Rules

Currently, Rule 3360 (Short-Interest Reporting) requires members to record and report short interest information to FINRA. Reportable short positions are those resulting from "short sales" as the term is defined in SEC Rule 200 of Regulation SHO, with the exception of positions that meet the requirements of subsections (e)(1), (6), (7), (8), and (10) of Rule 10a-1 of the Act.<sup>5</sup> As a result of the repeal of SEC Rule 10a-1, these subsections will no longer exist. Therefore, FINRA is proposing a

technical change to Rule 3360 to replace the references to these exceptions to SEC Rule 10a-1 with the underlying rule text of each provision.<sup>6</sup> FINRA also is proposing to make conforming amendments to IM-6130, IM-6130C, IM-6130D, IM-6130E to remove references to SEC Rule 10a-1.

##### Repeal of FINRA's Short Sale Rule

As noted above, the Commission has removed the restrictions on the execution prices of short sales and prohibited SROs from having price tests. Rule 5100 governs short sales of over-the-counter ("OTC") transactions reported to the Alternative Display Facility or a Trade Reporting Facility. More specifically, Rule 5100 generally prohibits a member from effecting short sales in NASDAQ Global Market securities otherwise than on an exchange for a customer account, or the member's own account, at or below the current national best (inside) bid, when the current national best (inside) bid is below the preceding national best (inside) bid. As an SRO, FINRA now is prohibited from having such a short sale price test under newly adopted SEC Rule 201.

Accordingly, FINRA is proposing to repeal its short sale rule contained in Rule 5100 and the related interpretive material in IM-5100 and is proposing conforming changes to IM-6130, IM-6130C, IM-6130D, IM-6130E and Rule 9610 to delete references to Rule 5100 in such rules.

##### Removal of Short Exempt Marking Requirements

Currently, Rule 200(g)(2) of Regulation SHO provides that a short sale order must be marked short exempt if relying on an exception from the short sale price test in SEC Rule 10a-1 or any short sale price test of an exchange or national securities association.

<sup>6</sup> As part of the Commission's approval of amendments to expand Rule 3360 to OTC equity securities, the Commission urged FINRA to review the exceptions to short interest reporting to determine whether further rulemaking is appropriate. See Securities Exchange Act Release No. 53224 (February 3, 2006), 71 FR 7101 (February 10, 2006) (order approving SR-NASD-2005-112). Additionally, as part of the Commission's approval of rule changes by FINRA, Amex, and the NYSE to increase the frequency of short interest reporting to twice per month, the Commission instructed FINRA, among other SROs, to review the exceptions to short interest reporting to determine whether further rulemaking is appropriate. FINRA, together with the other SROs, is currently conducting such a review. If, based on this review, a determination is made that further rulemaking is warranted, FINRA will file a separate rule change with the Commission. See Securities Exchange Act Release No. 55406 (March 6, 2007), 72 FR 11071 (March 12, 2007) (order approving SR-NASD-2006-131; SR-NYSE-2006-111; SR-Amex-2007-05).

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

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

<sup>3</sup> 17 CFR 240.19b-4(f)(6).

<sup>4</sup> See Securities Exchange Act Release No. 55970 (June 28, 2007), 72 FR 36348 (July 3, 2007).

<sup>5</sup> See Rule 3360(b)(1).

Likewise, certain FINRA rules require members to indicate on their transaction reports whether a transaction is a short exempt transaction, in conformance with SEC Rule 200(g)(2). In light of the Commission's recent amendments to delete the short exempt marking requirement from its rule, FINRA is proposing conforming changes to delete any references to that requirement in its rules. As such, FINRA proposes to amend Rules 4632, 4632A, 4632C, 4632D, 4632E, 6130, 6130C, 6130D, 6130E, and IM-6130, IM-6130C, IM-6130D, IM-6130E to remove the short exempt marking requirements.

#### Technical Changes

FINRA also is proposing to make certain technical changes to the text of Rule 3360. Specifically, Rule 3360(b) provides that, subject to certain limited exceptions, short positions required to be reported under the rule are those resulting from short sales as the term is defined in Rule 200 of Regulation SHO. The term "short sale" is actually defined in Rule 200(a) of Regulation SHO. Therefore, FINRA is proposing to amend the text of Rule 3360 to reference Rule 200(a) of Regulation SHO, not Rule 200 of Regulation SHO to eliminate any confusion.

Additionally, FINRA is proposing to amend the definition of "OTC equity security" in Rule 3360 to delete the specific reference to The Nasdaq Stock Market, Inc. as it is now covered under the term "national securities exchange."

#### Implementation

As noted above, FINRA has filed the proposed rule change for immediate effectiveness. FINRA proposes July 6, 2007 as the compliance date of the proposed rule change, to coincide with the compliance date of the amendments to SEC Rule 10a-1 and Regulation SHO. However, with respect to the repeal of the short sale exempt marking requirements, firms are permitted to continue to mark transactions as "short exempt" for a ninety-day transitional period after the July 6, 2007 compliance date in accordance with the SEC No-Action relief relating to the "short exempt" marking requirement of Rule 200(g) of Regulation SHO.

#### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,<sup>7</sup> 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 is necessary and appropriate to comply with the amendments to SEC Rule 10a-1 and Regulation SHO.

#### 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)<sup>8</sup> of the Act and Rule 19b-4(f)(6) thereunder.<sup>9</sup>

FINRA has asked the Commission to waive the 30-day operative delay. The Commission believes such waiver is consistent with the protection of investors and the public interest because it would allow the proposed rule change to be effective on July 6, 2007, the compliance date for the amendments to Rule 10a-1 and Regulation SHO.<sup>10</sup> For this reason, the Commission designates the proposal to be operative upon filing with the Commission.

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-NASD-2007-047 on the subject line.

#### Paper Comments

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

All submissions should refer to File Number SR-NASD-2007-047. 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-NASD-2007-047 and should be submitted on or before September 14, 2007.

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

<sup>9</sup> 17 CFR 240.19b-4(f)(6).

<sup>10</sup> For purposes only of waiving the 30-day pre-operative period, the Commission has considered the proposed rule change's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

<sup>7</sup> 15 U.S.C. 78o-3(b)(6).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.<sup>11</sup>

**Florence E. Harmon,**  
Deputy Secretary.

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-56285; File No. SR-NASD-2007-049]

### Self-Regulatory Organizations; National Association of Securities Dealers, Inc. (n/k/a Financial Industry Regulatory Authority, Inc.); Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to NASD Rule 3013 and Accompanying Interpretive Material 3013

August 17, 2007.

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> notice is hereby given that on July 16, 2007, the National Association of Securities Dealers, Inc. ("NASD"), n/k/a 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 substantially prepared by FINRA.<sup>3</sup> FINRA has designated the proposed rule change as constituting a "non-controversial" rule change under paragraph (f)(6) of Rule 19b-4 under the Act,<sup>4</sup> which renders the proposal effective upon receipt of this filing by the Commission. 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 amend NASD Rule 3013 and accompanying Interpretive Material 3013 to permit members to designate co-chief executive officers and multiple chief compliance officers to discharge the requirements of

those rules. The text of the proposed rule change is available on FINRA's Web site (<http://www.finra.org>), at 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

NASD Rule 3013 (Annual Certification of Compliance and Supervisory Processes) is intended to bolster attention to members' compliance programs by requiring substantial and purposeful interaction between business and compliance officers throughout the member firm. To that end, Rule 3013(a) requires each member to designate and specifically identify on Schedule A of the Uniform Application for Broker-Dealer Registration ("Form BD") a principal to serve as chief compliance officer ("CCO"). Rule 3013(b) requires that the chief executive officer ("CEO") certify annually that the member has in place processes to establish, maintain, review, test and modify written policies and procedures reasonably designed to achieve compliance with applicable NASD rules, MSRB rules and federal securities laws and regulations.

The certification language and additional guidance are set forth in Interpretive Material ("IM") 3013. The certification includes not only a statement that the member has in place certain compliance processes, but also that the CEO has conducted one or more meetings with the CCO in the preceding 12 months to discuss those processes. The interpretive material explains that the mandated meetings between the CEO and CCO must include a discussion of the member's compliance efforts to date and identify and address significant compliance problems and plans for emerging business areas. The IM further sets forth the expertise that is expected of a CCO, including the

process of gaining an understanding of a member's products, services and line functions that need to be the subject of compliance policies and written supervisory procedures.

FINRA recognizes that such expertise may reside in more than one individual in firms with distinct business segments. In those circumstances, FINRA believes the purposes of the rule can be achieved with equal effect by dividing the responsibility of advising the member on its compliance scheme among those compliance experts within each distinct business unit.

Accordingly, the proposed rule change would permit a member to designate multiple chief compliance officers on Schedule A of Form BD, provided that (1) each designated CCO is a principal of the firm; (2) the member precisely defines and documents the areas of primary compliance responsibility assigned to each designated CCO and makes specific provisions for which of the designated CCOs has primary compliance responsibility in areas that can reasonably be expected to overlap; (3) each designated CCO satisfies all of the requirements of Rule 3013 and IM-3013 with respect to his or her defined area of primary compliance responsibility as if that individual was the member's only CCO; and (4) collectively, the designated CCOs have the responsibilities and expertise that enable them to consult with the CEO on the totality of the subject matters required to be addressed in the certification by the CEO under Rule 3013.

Thus, for example, IM-3013 explains that member must conduct one or more meetings annually between the CEO and CCO to (1) discuss and review the matters that are the subject of the certification; (2) discuss and review the member's compliance efforts as of the date of such meetings; and (3) identify and address significant compliance problems and plans for emerging business areas. A member that chooses to have multiple CCOs under the proposed rule change would be required to conduct one or more meetings annually between the CEO and each designated CCO, individually or collectively. And at each such meeting, the CEO would be required to discuss with each CCO the required topics, but only as it relates to the particular CCO's defined area of primary compliance responsibility. Similarly, the IM currently requires review by the CCO of the report evidencing a member's processes and consultation by the CEO with the CCO prior to execution of the certification. The proposed rule change

<sup>11</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.

<sup>3</sup> On July 26, 2007, the Commission approved a proposed rule change filed by NASD to amend NASD's Certificate of Incorporation to reflect its name change to Financial Industry Regulatory Authority, Inc., or FINRA, in connection with the consolidation of the member firm regulatory functions of NASD and NYSE Regulation, Inc. See Securities Exchange Act Release No. 56146 (July 26, 2007).

<sup>4</sup> 17 CFR 240.19b-4(f)(6).