

the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer to File Number SR-BSE-2008-34 and should be submitted on or before August 4, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>19</sup>

**Florence E. Harmon,**

*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58103; File No. SR-FINRA-2008-036]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change Relating to the Incorporated NYSE Rules

July 3, 2008.

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 3, 2008, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared substantially 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 proposes to amend certain rules of the New York Stock Exchange LLC ("NYSE") to reduce regulatory duplication and relieve firms that are members of both FINRA and the NYSE ("Dual Members") of conflicting or unnecessary regulatory burdens in the interim period before a consolidated FINRA rulebook is completed.<sup>3</sup> The text

of the proposed rule change is available at <http://www.finra.org>, the principal offices of FINRA, and 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

###### Background

On July 30, 2007, FINRA was formed through the consolidation of NASD and the member regulation, enforcement and arbitration operations of NYSE. As part of the consolidation, FINRA incorporated into its rulebook certain NYSE rules related to member firm conduct ("Incorporated NYSE Rules"). As a result, the current FINRA rulebook consists of two sets of rules: (1) NASD Rules and (2) Incorporated NYSE Rules (together referred to herein as the "Transitional Rulebook"). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to Dual Members. FINRA is developing a new consolidated rulebook ("Consolidated FINRA Rulebook"), which, upon completion, will consist only of FINRA Rules.

In the interim period before the Consolidated FINRA Rulebook is completed, FINRA is proposing amendments to certain Incorporated NYSE Rules to reduce regulatory disparities and to relieve Dual Members of conflicting or unnecessary regulatory burdens. The proposed rule change includes those rule changes proposed in the NYSE's Omnibus filing that would reach an interim solution to an unnecessary regulatory burden or to an inconsistent standard between the Incorporated NYSE Rules and NASD

Rules.<sup>4</sup> Additionally, this proposal would rescind certain Incorporated NYSE Rules in substantive areas that are sufficiently addressed by NASD Rules.

FINRA believes that the proposed rule change will provide a timely solution to achieve greater harmonization between Incorporated NYSE Rules and NASD Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for Dual Members. The proposed rule change would affect the Transitional Rulebook in its application to Dual Members only and does not necessarily reflect FINRA's intent or conclusion as to the ultimate rule text that will populate the Consolidated FINRA Rulebook.

##### Proposed Amendments

###### Allied Member

The proposed rule change would delete the term "allied member" from the Incorporated NYSE Rules. The "allied member" designation is a regulatory category based on a person's "control" over a member organization.<sup>5</sup> Allied membership, as currently administered, has no direct analogue under the FINRA membership scheme.

NYSE Rule 2(c) currently defines the term "allied member" as a natural person who is a general partner of a member organization or other employee of a member organization who controls,<sup>6</sup> or is a principal executive officer of, such member organization, and who has been approved by the NYSE as an allied member. In instances where the term "allied member" appears in a rule to denote an individual's status as a member organization "control person," FINRA is proposing to substitute, for the term "allied member," the newly defined category of "principal executive" (see proposed NYSE Rule 311.17). The proposed definition for "principal executive" is identical to the current definition of "principal executive officer" in NYSE Rule 311(b)(5) with additional language to clarify that the functional equivalents of such persons would also be included in this category. As such, FINRA is proposing to replace "principal executive officer" with "principal executive."

A "principal executive" would be defined to include: An employee of a member organization designated to exercise senior principal executive

<sup>4</sup> See Securities Exchange Act Release No. 56142 (July 26, 2007), 72 FR 42195 (August 1, 2007) (SR-NYSE-2007-22).

<sup>5</sup> See NYSE Rule 304(b) (Allied Members and Approved Persons). FINRA did not incorporate NYSE Rule 304.

<sup>6</sup> See NYSE Rule 2(f) for the definition of "control."

<sup>19</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> This proposal is an extension of the SRO Rule Harmonization Initiative, which compared NYSE regulatory requirements to corresponding NASD regulatory provisions. The purpose of the process

was to achieve, to the extent practicable, substantive harmonization of the two regulatory schemes.

responsibility over the various areas of the business of the member organization including: Operations, compliance with rules and regulations of regulatory bodies, finances and credit, sales, underwriting, research and administration; and any employee of a member organization who is a functional equivalent of such person. Thus, the “principal executive” designation would encompass each Chief Executive Officer, Chief Financial Officer, Chief Operations Officer, Chief Compliance Officer, Chief Legal Officer or any person assigned comparable functions or responsibilities (e.g., a person in a Limited Liability Company with principal executive responsibilities but with other than a principal executive title).

Unlike the “allied member” designation, “principal executive” would not require a registration process, approval by the NYSE or a particular qualification examination. However, each “principal executive” would be required to take and pass any qualification examinations necessary to perform his or her assigned functions.

#### *Buy-In Rules*

In an effort to harmonize and update the SRO Operational, Clearing and Settlement Rules (collectively referred to herein as the “Buy-In Rules”), FINRA is proposing to reposition NYSE Rules 283, 285, 286, 287, 288, 289, and 290 into NYSE Rule 282 so that NYSE Rule 282 would serve as a complete, central repository for all requirements and procedures related to transactions subject to the Buy-In Rules. The substance of the repositioned rules would not be altered by the proposed rule change. The proposed rule change would bring the NYSE Buy-In Rules closer to the format of NASD Rule 11810 (Buying-In).

Additionally, consistent with the NYSE’s Omnibus filing, FINRA is proposing to add the substance of NYSE Rule 140 to NYSE Rule 282.<sup>7</sup> Although FINRA did not incorporate NYSE Rule 140 into its rulebook, FINRA staff believes that the Omnibus proposal appropriately places the substance of NYSE Rule 140 into Rule 282. FINRA is also proposing amendments to the current text of NYSE Rule 282 to clarify that fails that are subject to the rules of a Qualified Clearing Agency must comply with the procedures or requirements of the Qualified Clearing Agency. This proposal harmonizes the scope of NYSE Rule 282 with the scope of NASD’s 11000 Rule Series.

Lastly, the proposed rule change would amend NYSE Rule 282 to adopt certain provisions of NASD Rule 11810 to further harmonize the requirements related to transactions subject to the Buy-In Rules. Specifically, FINRA proposes to add to the Supplementary Material of NYSE Rule 282 the following sections of NASD Rule 11810: (f) (Securities in Transit); (h) (“Close-Out” Under Committee or Exchange Rulings); (i) (Failure to Deliver and Liability Notice Procedures); (j) (Contracts Made for Cash); (l) (“Buy-In” Desk Required); and (m) (Buy-In of Accrued Securities).

#### *NYSE Rule 311 (Formation and Approval of Member Organizations) and Its Interpretation*

NYSE Rule 311 governs the formation and approval of member organizations. In addition to the “allied member” proposals to NYSE Rule 311 noted above, the proposed rule change would delete paragraph (h) of NYSE Rule 311, which prescribes the number of partners to be named in a member organization in order for it to conduct business. There is no equivalent NASD requirement. The proposed deletion recognizes that NYSE Rule 311(h) is outdated and no longer necessary in light of the current spectrum of member organizations’ business models.

#### *NYSE Rule 342.13 (Acceptability of Supervisors) and Its Interpretation*

NYSE Rule 342.13(a) currently requires that persons who are to be assigned certain prescribed supervisory responsibilities<sup>8</sup> have a creditable three-year record as a registered representative or have three years of equivalent experience before functioning as a supervisor.<sup>9</sup> FINRA is proposing to amend NYSE Rule 342.13(a) and its Interpretation to eliminate the prescribed three-year record requirement for supervisory personnel. Additionally, the proposal would conform NYSE Rule 342.13(a) to the standard outlined in NASD Rule 1014(a)(10)(D) with respect to firms that are submitting an application to become FINRA members. In such instances, supervisory candidates would be required to have one year of “direct

experience” or two years of “related experience” in the subject area to be supervised.

#### *NYSE Rule 345 (Employees—Registration, Approval, Records) and Its Interpretation*

NYSE Rule 345 and its Interpretation<sup>10</sup> currently provide that certain exam-qualified registered persons will not receive NYSE approval to perform functions pursuant to such qualifications without first completing certain prescribed training periods. To harmonize NYSE Rule 345 with NASD registration requirements, FINRA is proposing to eliminate the prescribed training periods in NYSE Rule 345 and its Interpretation. The proposed amendments would allow member organizations to determine, consistent with their overall supervisory obligations, the extent and duration of training for such registered persons before they are permitted to perform functions requiring registration.

NYSE Rule 345(a) prohibits member organizations from permitting any natural person to perform regularly the duties customarily performed by a registered representative, a securities lending representative, a securities trader or a direct supervisor of such persons, unless such person shall have been registered with, qualified by and is acceptable to the NYSE. To reduce regulatory duplication and in furtherance of the SRO Rule Harmonization Initiative, the proposed rule change would limit the prohibition in paragraph (a) to securities lending representatives and their direct supervisors. The substance of NYSE Rule 345(a) with respect to registered representatives and their supervisors is effectively addressed by NASD Rule 1031. FINRA is proposing to delete the registration category of “securities trader” from the Incorporated NYSE Rules because it does not serve any regulatory purpose. Registration as a securities trader requires an individual to pass the Series 7 examination, which qualifies an individual as a general securities representative. FINRA understands that the securities trader registration category was created to avoid application of the four-month training requirement for a registered representative.<sup>11</sup> In view of the fact that the four-month training requirement in NYSE Rule 345 is being eliminated, there is no need for an additional registration category tied to the Series 7. However, if the NYSE wishes to retain

<sup>8</sup> In this regard, NYSE Rule 342.13(a) references NYSE Rule 342(d) which requires that “[q]ualified persons acceptable to the Exchange shall be in charge of: (1) Any office of a member or member organization, (2) any regional or other group of offices, (3) any sales department or activity.”

<sup>9</sup> NYSE Rule 342.13(a) also requires that persons assigned supervisory responsibility pursuant to NYSE Rule 342(d) must pass a qualification examination acceptable to the NYSE that demonstrates competence relevant to assigned responsibilities.

<sup>10</sup> See NYSE Rule Interpretation 345.15/01 and /02.

<sup>11</sup> See NYSE Rule 345.15(b)(2) and (5).

<sup>7</sup> See proposed Rule 282.15.

the securities trader registration category, it can do so in a unique NYSE rule.

NYSE Rule 345(b) currently prohibits any natural person, other than a member or allied member, to assume the duties of an officer with the power to legally bind such member or member organization unless such member or member organization has filed an application with and received the approval of the NYSE. The proposed rule change would delete NYSE Rule 345(b) in its entirety. There is no equivalent NASD rule.

*NYSE Rule 346 (Limitations—Employment and Association With Members and Member Organizations) and Its Interpretation*

NYSE Rule 346 sets forth limitations on the outside business activities of member organization employees. FINRA is proposing to delete NYSE Rule 346(c) which currently requires that prompt written notice be given to the NYSE whenever any member or member organization knows, or in the exercise of reasonable care should know, that any person, other than a member, allied member or employee, directly or indirectly, controls, is controlled by or is under common control with such member or member organization. FINRA believes that this provision is unnecessary as it is a requirement on Form BD that each broker-dealer disclose such control relationships.<sup>12</sup> The proposed rule change also harmonizes with the NASD regulatory structure as there is no corresponding NASD requirement.

NYSE Rule 407 (Transactions—Employees of Members, Member Organizations and the Exchange) provides, in part, that no employee of a member organization shall establish or maintain a securities or commodities account or enter into a private securities transaction without the prior written consent of his or her member organization. FINRA is proposing to reposition the requirements pertaining to “private securities transactions” (e.g., interests in oil or gas ventures, real estate syndications, tax shelters, etc.) from NYSE Rule 407<sup>13</sup> to NYSE Rule 346 since NYSE Rule 346 more directly addresses issues related to the outside activities of registered persons. Additionally, FINRA is proposing definitions of the terms “private securities transactions,” “selling compensation” and “immediate family members” that are substantially

identical to the NASD’s corresponding definitions.<sup>14</sup>

NYSE Rule 346(e) currently requires that persons who are assigned or delegated supervisory authority pursuant to NYSE Rule 342 devote their entire time during business hours to their member organization, unless otherwise permitted by the NYSE. FINRA is proposing amendments to NYSE Rule 346(e) and Supplementary Material section .10 that would eliminate the SRO approval requirement in order for supervisory persons to devote less than their entire time to the business of their member organization. In lieu thereof, the amended rule would require the prior written approval of the member organization, pursuant to the exercise of due diligence, for such arrangements. The proposed rule change would require the identification of any entity for which the supervisory person will be performing services during business hours and a description of such services. The member organization’s written approval would be required to set forth the approximate amount of time the supervisory person is expected to devote to each entity, with particular attention paid to the approximate time expected to be required for the person, based upon qualifications and experience, to effectively discharge his or her supervisory responsibilities on behalf of the member organization. In addition, the amendments would require documentation that the member organization has made a good faith determination that the arrangement will not compromise the protection of investors or the public interest, compromise the supervisor’s duties at the member organization, or give rise to a material conflict of interest. FINRA is also proposing, as conforming changes, to delete the NYSE Rule 346 Interpretation relating to the outside connections of supervisory persons<sup>15</sup> and to amend the Interpretation to NYSE Rule 311, which includes a reference to Rule 346(e).

*NYSE Rule 351 (Reporting Requirements)*

NYSE Rule 351(d) requires each member organization to report certain statistical information regarding customer complaints. The requirement currently extends to both oral and written complaints. The proposed rule change would adopt NYSE Rule 351.13 to limit the definition of the term

“customer complaint” to any written statement of a customer, or any person acting on behalf of a customer, other than a broker or dealer, alleging a grievance involving the activities of those persons under the control of a member organization. This proposed definition is substantially similar to the current definition in NASD Rule 3070(c).

*NYSE Rule 352 (Guarantees, Sharing in Accounts, and Loan Arrangements)*

NYSE Rule 352 restricts the extent to which member organization personnel may share in customer account profits or losses. NYSE Rule 352(b) generally prohibits member organizations, allied members and registered representatives from sharing profits or losses in any customer account. However, NYSE Rule 352(c) permits such sharing in proportion to financial contributions made to a joint account.

First, FINRA is proposing to amend NYSE Rule 352(c) to exempt, from the proportional contribution requirement, joint accounts with immediate family members held by principal executives or registered representatives of a member organization. This amendment would limit the regulation of accounts that may reasonably entail profit and loss participation on a disproportionate basis, as with joint accounts between husband and wife, while retaining coverage of the rule for other accounts. NASD Rule 2330(f)(1)(A) similarly addresses the circumstances under which a FINRA member or a person associated with a FINRA member may share in profits and losses with a customer, provided such sharing is proportionate to the financial contributions of each account holder; NASD Rule 2330(f)(1)(B) exempts from this proportionality requirement accounts shared between an associated person and a customer who is an immediate family member of such associated person.

Second, the proposed rule change would make clear that any sharing arrangement entered into pursuant to NYSE Rule 352(c) is subject to the NYSE Rule 352(a) provision that no member organization shall guarantee or in any way represent that it will guarantee any customer against loss in any account or on any transaction; and no employee of such member organization shall guarantee or in any way represent that either he or she, or his or her employer, will guarantee any customer against loss in any customer account or on any customer transaction.

Third, the proposed rule change would define the term “immediate family” in NYSE Rule 352(c) to include

<sup>12</sup> See Question 10 on Form BD.

<sup>13</sup> See NYSE Rule 407(b) and section .11 in the Supplementary Material.

<sup>14</sup> See proposed changes to NYSE Rule 346 Supplementary Material.

<sup>15</sup> See NYSE Rule Interpretation 346/03 (Outside Connections—Supervisory Persons).

parents, mother-in-law or father-in-law, husband or wife, children or any relative to whose support the principal executive or registered representative contributes directly or indirectly. This proposed definition would harmonize with the standard under NASD Rule 2330(f)(1)(B). The existing definition of "immediate family" in NYSE Rule 352(g) is retained for other provisions in the Rule, essentially allowing persons acting in the capacity of a registered representative or principal executive to lend to or borrow from a more extensive range of family members. The broader NYSE Rule 352(g) standard is also consistent with the corresponding NASD standard in connection with borrowing from or lending to customers.<sup>16</sup>

Lastly, FINRA is proposing amendments to NYSE Rule 352(d) to streamline the reference in the rule to Rule 205-3 of the Investment Advisers Act of 1940. Specifically, the revised provision would provide that, notwithstanding the general prohibition against sharing in profits under paragraph (b), a person acting as an investment adviser (whether or not registered as such) may receive compensation based on a share of profits or gains in an account if all of the conditions in Rule 205-3 of the Investment Advisers Act of 1940 are satisfied. This proposal better aligns NYSE Rule 352 with NASD Rule 2330(f).

#### *NYSE Rule 404 (Individual Members Not to Carry Accounts)*

A FINRA Letter of Approval that details the scope of approved activities is sent to new FINRA members. The requirements of NYSE Rule 404 are duplicative of this Letter. Therefore, FINRA is proposing to rescind NYSE Rule 404.

#### *NYSE Rule 408 (Discretionary Power in Customers' Accounts)*

NYSE Rule 408 provides, in part, that no employee of a member organization shall exercise discretionary power in any customer's account or accept orders for an account from a person other than the customer without first obtaining written authorization from the customer. FINRA is proposing amendments to NYSE Rule 408(a) that would require member organizations to obtain the signature of any person or persons authorized to exercise discretion in such accounts, of any substitute so authorized, and the date such discretionary authority was

granted. The proposed amendment would conform NYSE Rule 408(a) to corresponding requirements in NASD Rule 3110(c)(3).

#### *NYSE Rule 412 (Customer Account Transfer Contracts) and Its Interpretation*

NYSE Rule 412 governs the transfer of customer accounts from one member to another. This rule is duplicative of NASD Rule 11870 (Customer Account Transfer Contracts). Thus, FINRA is proposing to rescind NYSE Rule 412 and its Interpretation.

#### *NYSE Rule 436 (Interest on Credit Balances) and Its Interpretation*

FINRA is proposing to rescind NYSE Rule 436 and its Interpretation as it has become outdated and is no longer applicable to the current business models of members. There is no comparable NASD Rule.

#### *NYSE Rule 446 (Business Continuity and Contingency Plans)*

NYSE Rule 446 is nearly identical to NASD Rules 3510 (Business Continuity Plans) and 3520 (Emergency Contact Information). To reduce regulatory duplication in these areas and to advance the efforts to create a Consolidated FINRA Rulebook, FINRA is proposing to delete NYSE Rule 446 because NASD Rules sufficiently address this area.

Following Commission approval of the proposed rule change, FINRA will publish a *Regulatory Notice(s)* setting forth the effective date(s) of the proposals.

#### 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of section 15A(b)(6) of the Act,<sup>17</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 will provide greater harmonization between Incorporated NYSE Rules and NASD Rules of similar purpose, resulting in less burdensome and more efficient regulatory compliance for Dual Members. Where proposed amendments do not entirely conform to existing NASD rules or address a provision without a direct NASD Rule counterpart, FINRA believes the standards they would establish otherwise further the objectives of the

Act by providing greater regulatory clarity and practicality and relieving unnecessary regulatory burdens in the interim period until a Consolidated FINRA Rulebook is completed.

#### *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**

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 FINRA 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 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-FINRA-2008-036 on the subject line.

##### *Paper Comments*

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, Station Place, 100 F Street, NE., Washington, DC 20549-1090. All submissions should refer to File Number SR-FINRA-2008-036. 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

<sup>16</sup> See NASD Rule 2370(c) (Borrowing From or Lending To Customers).

<sup>17</sup> 15 U.S.C. 78o-3(b)(6).

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 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 publicly available. All submissions should refer to File Number SR-FINRA-2008-036 and should be submitted on or before August 4, 2008.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>18</sup>

**Florence E. Harmon,**  
*Acting Secretary.*

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## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-58114; File No. SR-NASD-2007-041]

### Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc. (f/k/a National Association of Securities Dealers, Inc.); Notice of Filing of Amendment No. 2 to Proposed Rule Change To Amend the Minimum Price-Improvement Standards Set Forth in NASD Interpretive Material (IM) 2110-2

July 7, 2008.

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 June 26, 2008, the Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD"))<sup>3</sup> filed with the

Securities and Exchange Commission ("SEC" or "Commission") Amendment No. 2 to SR-NASD-2007-041 as described in Items I, II, and III below, which Items have been substantially prepared by FINRA.<sup>4</sup> The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 2, from interested parties.

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

FINRA proposes to amend the proposed rule change to address an inconsistency in the application of the proposed minimum price-improvement standards. The text of the proposed rule change is available on FINRA's Web site (<http://www.finra.org>), at FINRA's principal office, and at the Commission's Public Reference Room.

#### II. Self-Regulatory Organization's Statement of the Purpose of the Proposed Rule Change

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

##### 1. Purpose

On June 27, 2007, FINRA filed with the Commission SR-NASD-2007-041, proposing amendments to the minimum price-improvement provisions in IM-2110-2 ("original proposal"). On August 28, 2007, the Commission published for comment the proposed rule change in the **Federal Register**.<sup>5</sup> The Commission received one commenter letter on the proposed rule change.<sup>6</sup> On November 1, 2007, FINRA submitted a response letter to the Commission.<sup>7</sup> On May 20, 2008, FINRA filed with the Commission Amendment No. 1 to the proposed rule change. FINRA is filing this Amendment No. 2, which replaces and supersedes

the 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), 72 FR 42190 (August 1, 2007) (SR-NASD-2007-053).

<sup>4</sup> FINRA filed the original proposed rule change on June 27, 2007. FINRA filed Amendment No. 1 to the proposed rule change on May 20, 2008. Amendment No. 2 supersedes and replaces Amendment No. 1.

<sup>5</sup> See Securities Exchange Act Release No. 56297 (August 21, 2007), 72 FR 49337 (August 28, 2007) (notice of filing of SR-NASD-2007-041).

<sup>6</sup> See Letter to Secretary, Commission, from Jess Haberman, Compliance Director, Fidessa Corp., dated September 5, 2007.

<sup>7</sup> See Letter from Andrea Orr, FINRA, to Nancy M. Morris, Secretary, Commission, dated November 1, 2007 ("FINRA Response Letter").

Amendment No. 1 to SR-NASD-2007-041, to amend the proposed rule change to address an inconsistency in the application of the proposed minimum price improvement standards as discussed herein.

On February 26, 2007, the Commission approved SR-NASD-2005-146, which, among other things, expanded the scope of IM-2110-2<sup>8</sup> to apply to over-the-counter ("OTC") equity securities and amended the minimum level of price-improvement that a member must provide to trade ahead of an unexecuted customer limit order ("price-improvement standards"). The rule changes in SR-NASD-2005-146 were initially scheduled to become effective on July 26, 2007.<sup>9</sup>

Following Commission approval of SR-NASD-2005-146, several firms raised concerns regarding the timing of the implementation of the proposed rule change and the application of the approved minimum price-improvement standards. In response to these concerns, FINRA filed a proposed rule change to delay the effective date of the changes in SR-NASD-2005-146 pending its review of the amended price-improvement standards.<sup>10</sup>

Subsequently, FINRA filed SR-NASD-2007-041 with the Commission to further amend the price-improvement standards in IM-2110-2 based on new tiered standards that varied according to the price of the customer limit order. In response to the publication of the proposed rule change in the **Federal Register**, the Commission received one comment letter on the proposal.<sup>11</sup>

As further detailed in the FINRA Response Letter, the commenter noted an inconsistency in the application of proposed minimum price-improvement standards in low-priced securities when the customer limit order and the proprietary trade fall into different minimum price improvement tiers (e.g., a customer limit order to sell is priced

<sup>8</sup> Currently, IM-2110-2 generally prohibits a member from trading for its own account in an exchange-listed security at a price that is equal to or better than an unexecuted customer limit order in that security, unless the member immediately thereafter executes the customer limit order at the price at which it traded for its own account or better.

<sup>9</sup> See NASD Notice to Members 07-19 (April 2007).

<sup>10</sup> See Securities Exchange Act Release No. 56103 (July 19, 2007), 72 FR 40918 (July 25, 2007) (notice of filing and immediate effectiveness of SR-NASD-2007-039). See also Securities Exchange Act Release No. 56822 (November 20, 2007), 72 FR 67326 (November 28, 2007) (notice of filing and immediate effectiveness of SR-FINRA-2007-023); and Securities Exchange Act Release No. 57133 (January 11, 2008), 73 FR 3500 (January 18, 2008) (notice of filing and immediate effectiveness of SR-FINRA-2007-038).

<sup>11</sup> See *supra* note 6.

<sup>18</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 the NASD to amend