

SECURITIES AND EXCHANGE COMMISSION  
(Release No. 34-61513; File No. SR-FINRA-2010-008)

February 12, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend Incorporated NYSE Rule 312(g)(1)

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 February 4, 2010, 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 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 proposes to make a technical change to the FINRA rulebook. FINRA proposes to amend Incorporated NYSE Rule 312(g)(1) so as to delete certain provisions that are rendered obsolete by the adoption of new FINRA Rule 4110 in FINRA’s consolidated rulebook

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<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).

(“Consolidated FINRA Rulebook”).<sup>4</sup> Proposed new language is italicized; proposed deletions are in brackets:

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#### Rule 312. Changes Within Member Organizations

(a) through (f) No Change.

(g) A member corporation shall not without the prior written approval of the Exchange:

(1) [Reduce its capital or purchase or redeem any shares of any class of its stock or] [[i]n any way amend its charter, certificate of incorporation or by-laws[, and the Exchange may at any time in its discretion require the corporation to restore or increase capital or surplus, or both].

(2) through (3) No Change.

The Exchange will approve any action described in (1), (2) or (3) above unless it determines that such action will impair the financial responsibility or operational capability of the member corporation.

(h) through (j) No Change.

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

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<sup>4</sup> See Regulatory Notice 09-71 (December 2009) (SEC Approves Consolidated FINRA Rules Governing Financial Responsibility). FINRA announced in Regulatory Notice 09-71 that the new financial responsibility rules will be implemented on February 8, 2010. See also Securities Exchange Act Release No. 60933 (November 4, 2009), 74 FR 58334 (November 12, 2009) (Order Granting Approval to Proposed Rule Change; File No. SR-FINRA-2008-067); Securities Exchange Act Release No. 61408 (January 22, 2010), 75 FR 4596 (January 28, 2010) (Notice of Filing and Immediate Effectiveness of Proposed Rule Change; File No. SR-FINRA-2010-004).

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 proposes to make a technical change to the FINRA rulebook.<sup>5</sup> FINRA proposes to delete from Incorporated NYSE Rule 312(g)(1) the phrases that read “[r]educe its capital or purchase or redeem any shares of any class of its stock or” and “and the Exchange may at any time in its discretion require the corporation to restore or increase capital or surplus, or both.” FINRA is proposing the rule change because the Commission has approved for inclusion in the Consolidated FINRA Rulebook a set of new financial responsibility rules that, among other things, regulate withdrawals of equity capital by members. Accordingly, the new FINRA rules render the above-mentioned Incorporated NYSE rule provisions obsolete.<sup>6</sup> Specifically:

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<sup>5</sup> The current FINRA rulebook consists of (1) FINRA Rules; (2) NASD Rules; and (3) rules incorporated from NYSE (“Incorporated NYSE Rules”) (together, the NASD Rules and Incorporated NYSE Rules are referred to as the “Transitional Rulebook”). While the NASD Rules generally apply to all FINRA members, the Incorporated NYSE Rules apply only to those members of FINRA that are also members of the NYSE (“Dual Members”). The FINRA Rules apply to all FINRA members, unless such rules have a more limited application by their terms. For more information about the rulebook consolidation process, see Information Notice, March 12, 2008 (Rulebook Consolidation Process).

<sup>6</sup> See note 4.

- New FINRA Rule 4110(c)(1) prohibits a member from withdrawing equity capital for a period of one year from the date such equity capital is contributed, unless otherwise permitted by FINRA in writing. The rule provides that, subject to the requirements of FINRA Rule 4110(c)(2), members are not precluded from withdrawing profits earned. FINRA Rule 4110(c)(2) prohibits any carrying or clearing member,<sup>7</sup> without the prior written approval of FINRA, from withdrawing capital, paying a dividend or effecting a similar distribution that would reduce the member's equity, or making any unsecured advance or loan to a stockholder, partner, sole proprietor, employee or affiliate, where such withdrawals, payments, reductions, advances or loans in the aggregate, in any 35 rolling calendar day period, on a net basis, would exceed 10 percent of the member's excess net capital.
- New FINRA Rule 4110(a) provides that, when necessary for the protection of investors or in the public interest, FINRA may, at any time or from time to time with respect to a particular carrying or clearing member or all carrying or clearing members, pursuant to authority exercised by FINRA's Executive Vice President charged with oversight for financial responsibility, or his or her written officer delegate, prescribe greater net capital or net worth requirements than those otherwise applicable, including more stringent treatment of items in computing net capital or net worth, or require such member to restore or increase its net

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<sup>7</sup> FINRA Rule 4110.02 provides that, for purposes of the rule, all requirements that apply to a member that clears or carries customer accounts also apply to any member that, operating pursuant to the exemptive provisions of SEA Rule 15c3-3(k)(2)(i), either clears customer transactions pursuant to such exemptive provisions or holds customer funds in a bank account established thereunder.

worth. The rule provides that, in any such instance, FINRA shall issue a notice pursuant to new FINRA Rule 9557.

FINRA has filed the proposed rule change for immediate effectiveness and has requested that the SEC waive the requirement that the proposed rule change not become operative for 30 days after the date of the filing, such that FINRA can implement the proposed rule change on February 8, 2010.

## 2. Statutory Basis

FINRA believes that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act,<sup>8</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 consistent with the purposes of the Act because it will provide greater clarity to members and the public regarding FINRA's rules.

### 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

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<sup>8</sup> 15 U.S.C. 78q-3(b)(6).

as the Commission may designate, it has become effective pursuant to Section 19(b)(3)(A) of the Act<sup>9</sup> and Rule 19b-4(f)(6) thereunder.<sup>10</sup>

A proposed rule change filed under 19b-4(f)(6) normally does not become operative prior to 30 days after the date of filing. However, Rule 19b-4(f)(6)(iii)<sup>11</sup> permits the Commission to designate a shorter time if such action is consistent with the protection of investors and the public interest. As noted above, the Commission approved FINRA 4110 as part of a new, consolidated set of financial responsibility rules, which, among other things, regulates withdrawals of equity capital.<sup>12</sup> FINRA has requested that the Commission waive the 30-day operative delay set forth in Rule 19b-4(f)(6)(iii) under the Act<sup>13</sup> in order for the rule to become operative upon filing. The Commission notes that the proposed rule changes render the above-mentioned Incorporated NYSE rule provisions obsolete. The Commission further notes that the operative date of FINRA 4110 was February 8, 2009.<sup>14</sup> The Commission believes that the earlier operative date is consistent with the protection of investors and the public interest because it permits FINRA to

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<sup>9</sup> 15 U.S.C. 78s(b)(3)(A).

<sup>10</sup> 17 CFR 240.19b-4(f)(6).

<sup>11</sup> 17 CFR 240.19b-4(f)(6). In addition, Rule 19b-4(f)(6)(iii) requires that a self-regulatory organization submit to the Commission written notice of its intent to file the proposed rule change, along with a brief description and text of the proposed rule change, at least five business days prior to the date of filing of the proposed rule change, or such shorter time as designated by the Commission. The Commission notes that FINRA has satisfied the five-day pre-filing notice requirement.

<sup>12</sup> See notes 4 and 5.

<sup>13</sup> 17 CFR 240.19b-4(f)(6)(iii).

<sup>14</sup> See FINRA Regulatory Notice 09-71 (December 2009).

implement the rule without further delay and in recognition of the operative date of the financial responsibility rules was February 8, 2010.<sup>15</sup>

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-FINRA-2010-008 on the subject line.

##### Paper Comments:

- Send paper comments in triplicate 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-2010-008. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your

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

comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet Web site (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for Web site viewing and printing in the Commission's Public Reference Room, 100 F Street, NE., Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of such filing also will be available for inspection and copying at the principal office of FINRA. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information



that you wish to make available publicly. All submissions should refer to File Number SR-FINRA-2010-008 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.<sup>16</sup>

Florence E. Harmon  
Deputy Secretary

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<sup>16</sup> 17 CFR 200.30-3(a)(12).