SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-62288; File No. SR-FINRA-2010-028)

June 11, 2010

Self-Regulatory Organizations; Financial Industry Regulatory Authority, Inc.; Notice of Filing of a Proposed Rule Change, as Modified by Amendment No. 1, to Adopt NASD Rule 3210 (Short Sale Delivery Requirements) as FINRA Rule 4320 in the Consolidated FINRA Rulebook

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 21, 2010, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) 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 June 11, 2010, FINRA filed Amendment No. 1 to the proposed rule change.[3] The Commission is publishing this notice to solicit comments on the proposed rule change, as modified by Amendment No. 1, from interested persons.

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

FINRA is proposing to adopt NASD Rule 3210 (Short Sale Delivery Requirements), with minor changes, as FINRA Rule 4320 in the consolidated FINRA rulebook.

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1 15 U.S.C. 78s(b)(1).

2 17 CFR 240.19b-4.

3 Amendment No. 1 was a partial amendment that makes minor clarifications, provides additional detail and makes technical edits to the purpose section of the proposed rule change.

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

As part of the process of developing a new consolidated rulebook ("Consolidated FINRA Rulebook"),[4] FINRA is proposing to adopt NASD Rule 3210 (Short Sale Delivery Requirements), with minor changes, as FINRA Rule 4320 in the Consolidated FINRA Rulebook.

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[4] 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).

On April 4, 2006, the SEC approved NASD Rule 3210, which applies short sale delivery requirements to those equity securities not otherwise covered by the close-out requirements of Regulation SHO. The Regulation SHO close-out requirements apply only to the equity securities of "reporting" issuers (i.e., issuers that are registered pursuant to Section 12 of the Act[5] or that are required to file reports pursuant to Section 15(d) of the Act[6]).

NASD Rule 3210, among other things, requires participants of registered clearing agencies to take action on failures to deliver that exist for 13 consecutive settlement days in certain non-reporting securities. In addition, if the fail to deliver position is not closed out in the requisite time period, a participant of a registered clearing agency or any broker-dealer for which it clears transactions is prohibited from effecting further short sales in the particular specified security without borrowing, or entering into a bona fide arrangement to borrow, the security until the fail to deliver position is closed out. Pursuant to NASD Rule 3210, FINRA publishes a daily "Threshold Security List."[7] The rule became effective on July 3, 2006. In adopting NASD Rule 3210, FINRA believed that the rule represented an important step in reducing long-term fails to deliver in this sector of the marketplace.

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5 15 U.S.C. 78l.

6 15 U.S.C. 78o(d).

7 For purposes of Rule 3210, a non-reporting threshold security is any equity security that is not a reporting security and, for five consecutive settlement days, has: (1) aggregate fails to deliver at a registered clearing agency of 10,000 shares or more; and (2) a reported last sale during normal market hours (9:30 a.m. to 4:00 p.m., Eastern Time (ET)) for the security on that settlement day that would value the aggregate fail to deliver position at $50,000 or more.

In July 2009, the SEC adopted the substance of temporary Rule 204T[8] under Regulation SHO as a permanent rule, Rule 204 of Regulation SHO.[9] This rule is intended to further the goal of reducing fails to deliver and addressing potentially abusive "naked" short selling in all equity securities by requiring the delivery of securities by settlement date or, in connection with a short sale, the immediate purchase or borrow of such securities to close out the fail to deliver position by no later than the beginning of regular trading hours on the following settlement day.[10] Notwithstanding the SEC's adoption of this new rule, proposed FINRA Rule 4320 continues to be necessary to provide regulatory coverage for fails to deliver in non-reporting over-the-counter equity securities that pre-exist the SEC's implementation of temporary Rule 204T in September 2008.[11]

Therefore, FINRA is proposing to adopt NASD Rule 3210 as FINRA Rule 4320 with minor changes to delete language that provided allowances for "grandfathered" securities during the initial implementation period of NASD Rule 3210 and that, therefore, is no longer relevant. The proposed rule change also clarifies, consistent with Regulation SHO, the borrowing requirements for clearing agency participants, including

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8 See Securities Exchange Act Release No. 58785 (Oct. 14, 2008), 73 FR 61678 (Oct. 17, 2008).

9 See Securities Exchange Act Release No. 60388 (July 27, 2009), 74 FR 38266 (July 31, 2009).

10 Rule 204 of Regulation SHO further provides that fails to deliver resulting from long sales or certain bona fide market making activity must be closed out by no later than the beginning of regular trading hours on the third settlement day after settlement date (i.e., T+6).

11 Likewise, the SEC is retaining Rule 203(b)(3) of Regulation SHO in order to cover pre-existing temporary Rule 204T fails in threshold securities as defined in Rule 203(c)(6) of Regulation SHO.

broker-dealers for which they clear transactions, that sell short non-reporting threshold securities for which a fail to deliver position has not been closed out in the requisite time. Specifically, if a fail to deliver position is not closed out in accordance with Rule 4320(a), the clearing agency participant and any broker-dealer for which it clears, including market makers otherwise entitled to rely on the Rule 203(b)(2)(iii) exception of Regulation SHO, would not be able to short sell the non-reporting threshold security either for itself or for the account of another, unless it has previously arranged to borrow or borrowed the security, until the participant closes out the fail to deliver position by purchasing securities of like kind and quantity and that purchase has cleared and settled at a registered clearing agency. In addition, the rule change makes certain technical amendments to the rule, including changing references to "NASD" to "FINRA."

FINRA will announce the implementation date of the proposed rule change in a Regulatory Notice to be published no later than 90 days following Commission approval. The implementation date will be no more than 180 days following 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,[12] 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 adopting the proposed rules as part of the Consolidated FINRA Rulebook continues to be necessary to provide regulatory coverage for fails to

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[12] 15 U.S.C. 78o–3(b)(6).

deliver in non-reporting over-the-counter equity securities and will continue to help reduce long-term fails to deliver in this sector of the marketplace.

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 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 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-2010-028 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-2010-028. 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 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-2010-028 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.[13]

Florence E. Harmon
Deputy Secretary

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[13] 17 CFR 200.30-3(a)(12).